

NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

In the Matter of: DISCUSSION AND POSSIBLE VOTE ON REVISED
LICENSING PROCEDURES, PROPOSED RULE
CHANGE TO PART 2

DATE: November 5, 1981 PAGES: 1 - 68
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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 DISCUSSION AND POSSIBLE VOTE ON REVISED LICENSING
5 PROCEDURES, PROPOSED RULE CHANGE TO PART 2
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Room 1130,
1717 H Street Northwest,
Washington, D.C.

Thursday, November 5, 1981

The Commission met at 10:00 a.m., pursuant to
notice.

BEFORE:

NUNZIO PALLADINO, Chairman of the Commission.
JOHN AHEARNE, Commissioner.
VICTOR GILINSKY, Commissioner.
PETER BRADFORD, Commissioner.
THOMAS ROBERTS, Commissioner.

PRESENT FOR THE NRC STAFF:

Alan Rosenthal
Howard Shapar
Tony Cotter
Forrest Remick
Guy Cunningham
William Parler

1 Present for the Office of General Counsel:

2 Leonard Bickwit

3 Present for the Office of the Secretary:

4 Samuel Chilk

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P R O C E E D I N G S

CHAIRMAN PALLADINO: The meeting will please come to order.

The subject of this morning's meeting is discussion and possible vote on revised licensing procedures, proposed rule change to Part 2, and we have had proposed papers from the respective authors, and Mr. Cotter, I believe, is going to walk us through the documents.

MR. COTTER: Thank you, Mr. Chairman.

This proposal relates to amendments governing the discovery practice at the Commission, and those amendments may be generally divided into two subject matters; one dealing with the authority of the presiding officer at hearings to control and otherwise manage discovery in the interest of expediting the proceeding.

The second general portion relates specifically to the discovery practice in the use of interrogatories.

With respect to the amendments as a whole, as you know, and as this paper outlines, there have been two proposed rulemakings published; one in March of 1981 and one in June of 1981, which address the general subject of discovery, and there have been extensive comments in response to those proposed rulemakings, and I won't go through and repeat all the summary of the comment response.

With respect to that portion of these discovery rule

1 amendments pertaining to the authority of the presiding officers
2 to manage discovery affirmatively, the proposal has two elements:

3 One is to make it explicit in the regulations that
4 the presiding officers do have affirmative authority to manage
5 discovery in the interest of expediting the proceeding.

6 And the second is an affirmative statement of the
7 presiding officer's authority to impose sanctions in the event
8 that the discovery rules are not complied with, or are otherwise
9 violated by the parties to the proceeding.

10 COMMISSIONER AHEARNE: Do you have in mind what
11 sanctions those might be?

12 MR. COTTER: There are two or three typical kinds.
13 One would be that in the event of a violation of discovery or
14 refusal to comply with the discovery order, the designated facts
15 may be taken as established by the party which is seeking the
16 sanction, and against the party which has committed the violation.

17 A second one typically used would be to bar a party
18 from opposing some element that is in dispute in the proceeding,
19 or from introducing designated evidence that might controvert
20 the element that --

21 COMMISSIONER AHEARNE: And you would see those as
22 sanctions the Board would take if the interrogatory was not
23 certified?

24 MR. COTTER: No, I wouldn't, off the top of my head,
25 expect that in the case an interrogatory was not certified, but

1 it is certainly an available possibility.

2 COMMISSIONER AHEARNE: Yes, I understand. I was speak-
3 ing specifically to the issue of certification where, as I
4 understand, in this rule change that's what sanction is brought
5 in.

6 MR. COTTER: Certification is only one area in
7 which sanctions could be imposed for refusal to comply with the
8 discovery rules of the Commission.

9 COMMISSIONER AHEARNE: Yes, I understand that. I'm
10 talking about specifically in your proposed rule change, at
11 least it seems the sanction discussion is linked to the
12 certification, as far as asking what sanctions did you have in
13 mind with respect to the rule change.

14 MR. COTTER: Those sanctions, two which I just
15 mentioned, and a third, which would be either barring a party
16 or their attorney from the proceeding, are certainly possible
17 sanctions for failing to comply with the certification require-
18 ment. But I would not expect them to be applied except in
19 situations where following a failure to certify a discovery
20 request, the party had been directed to do so, and had refused.

21 COMMISSIONER AHEARNE: So what would you see as the
22 sanction for failure to certify?

23 MR. COTTER: Well, there's an affirmative sanction
24 and a negative sanction. The negative sanction is that the
25 failure to certify the discovery request means that it can be

1 simply ignored, and so it's of no effect. I would categorize
2 that as a negative sanction, and I would expect that that would be
3 perhaps the most frequent that you would run into.

4 COMMISSIONER AHEARNE: But don't you already say
5 that if it's not certified, it doesn't have to be followed?

6 MR. COTTER: Yes.

7 COMMISSIONER AHEARNE: So that's not part of the sanction.

8 MR. COTTER: You're talking about an affirmative
9 sanction imposed by a presiding officer.

10 COMMISSIONER AHEARNE: The sanction you have put
11 in says if a discovery action is not certified, or if a
12 certification is made in violation of this subsection, the
13 presiding officer -- and then, where appropriate shall impose
14 upon the person an appropriate sanction.

15 I was trying to understand what that sanction would
16 be. So far I don't find any.

17 MR. BICKWIT: In the typical situation where he
18 fails to certify, you would tell him to certify and warn him
19 and reprimand him for not having certified. Then put that
20 together with other violations to compose a more forceful sanction
21 in the future.

22 COMMISSIONER AHEARNE: By that reprimand, you mean
23 he's been a bad guy or a bad woman, et cetera?

24 MR. BICKWIT: That's right.

25 COMMISSIONER GILINSKY: Bad woman. I like that.

(Laughter.)

COMMISSIONER AHEARNE: But that's the statement?

MR. BICKWIT: I think that would be the typical sanction for failure to certify in the first instance. If he fails to certify the second time, you'd say, "Look, that's too much."

COMMISSIONER AHEARNE: I gather by the way lawyers normally write to each other, that intemperate language is normally common, but that kind of chastisement would not necessarily be very severe; is that correct?

MR. BICKWIT: It's not just a lawyer writing to a lawyer. It's a judge saying, "This is a sanction."

MR. SHAPAR: Of course, one has to remember that the one asking for discovery wants something, and if he doesn't certify, he doesn't get it.

COMMISSIONER AHEARNE: Yeah, I know, but it already says if it's not certified, it doesn't have to be answered. I'm trying to figure out what the sanction is.

MR. SHAPAR: Reprimand censure.

MR. BICKWIT: I think the first time he fails to certify, you wouldn't want to go beyond that as a sanction. The second time he fails, you might want to.

COMMISSIONER AHEARNE: My understanding is, at least in the federal court system, one of the things that happens when you don't do what you're supposed to do, is they make the

1 lawyer pay for it.

2 MR. COTTER: That's correct. And as originally
3 proposed, I did put that in there and was caught up. We do not
4 have the authority, which has to be contained by statute.

5 COMMISSIONER AHEARNE: I see.

6 MR. SHAPAR: Would you like us to relegislate?

7 (Laughter.)

8 COMMISSIONER AHEARNE: No, I think you're busy enough.

9 MR. COTTER: The ultimate answer to your question is
10 that failure to certify, if not corrected, and if the failure
11 continues after they have been directed to certify, can then
12 result, if appropriate -- and the operative words are "if
13 appropriate" -- in the sanctions that I started to describe
14 earlier.

15 COMMISSIONER BRADFORD: Maybe I missed something, but
16 is there the slightest likelihood of this? Why wouldn't the
17 parties certify?

18 MR. COTTER: I think the likelihood is very slim.

19 COMMISSIONER BRADFORD: The more serious question is
20 what happens if they certify falsely. But I should think
21 failure to certify would at most be an oversight and would be
22 corrected.

23 COMMISSIONER AHEARNE: I would think so.

24 MR. SHAPAR: In most cases; not necessarily in all.

25 MR. BICKWIT: But even in those cases where there

1 was some sinister intent at work, I suppose they would still
2 certify on demand or else they wouldn't have an effective
3 interrogatory. Are you thinking they might withdraw it at that
4 point?

5 MR. SHAPAR: I'm thinking they might test the rule.
6 They might just be particularly obdurate. We've had examples
7 of this in the past.

8 COMMISSIONER GILINSKY: I wonder if we could back
9 out of this rabbit hole.

10 (Laughter.)

11 MR. SHAPAR: Full bore.

12 COMMISSIONER AHEARNE: We've already gone down a
13 couple of sweeping changes we made earlier this year.

14 CHAIRMAN PALLADINO: Tony, there is a fair question:
15 What do you see as the benefit of this proposal, this
16 particular feature of the proposal?

17 MR. COTTER: The ability of the presiding officer
18 to impose a sanction for failure to certify.

19 CHAIRMAN PALLADINO: Why do you view
20 certification as the important feature of this?

21 MR. COTTER: It's the certification requirement.

22 CHAIRMAN PALLADINO: The certification itself.

23 MR. COTTER: It imposes an affirmative obligation
24 on the parties to the proceeding at the outset not to abuse
25 the discovery process.

1 MR. SHAPAR: The more gullible and naive lawyer will
2 think it means something.

3 (Laughter.)

4 CHAIRMAN PALLADINO: It's the other lawyers that
5 I'm worried about.

6 COMMISSIONER BRADFORD: It's the gullible and naive
7 Commissioners that concern me.

8 CHAIRMAN PALLADINO: I would be very careful on what
9 I certified, but then I'm not a lawyer. But lawyers would be
10 equally careful.

11 COMMISSIONER BRADFORD: Actually, then, there is a
12 point hidden in that one, which is the business of certifying
13 that something is not unduly burdensome is tricky, because you
14 don't really know what the burden on the recipient is going to
15 be.

16 You can argue that the burden, whatever it is, isn't
17 undue because your question is so important, but the fact is --

18 MR. COTTER: In that vein, it addresses the element
19 of where you have done something a number of times. You have
20 built up an expertise in it, and where you have conducted
21 discovery in these kinds of proceedings for a number of times,
22 you have a file probably about three or four inches thick of
23 standard questions that you can simply take out, Xerox, change
24 the heading and send it in, and this certification makes it a
25 lot more difficult to do that.

1 MR. SHAPAR: I might also add this doesn't come
2 full blown out of somebody's mind here at the NRC. It represents
3 a proposal by the august body, the Committee of the Judicial
4 Conference of the United States, based on a wealth of experience
5 and a wide variety of proceedings.

6 COMMISSIONER AHEARNE: Yes, but were they speaking
7 to federal courts or our kinds of courts?

8 MR. SHAPAR: They were speaking to federal courts.

9 COMMISSIONER AHEARNE: Where they can put on the
10 sanctions pay.

11 MR. SHAPAR: Sure. But I don't think that's enough
12 of a distinction to illustrate a big chasm between the two
13 processes.

14 COMMISSIONER AHEARNE: I notice our -- I guess the
15 excitement of the hearing was too much for the television men.

16 (Laughter.)

17 COMMISSIONER BRADFORD: They made clear at the outset
18 that they were seeking file footage, and I think that's exactly
19 what they got.

20 (Laughter.)

21 CHAIRMAN PALLADINO: They already took five minutes
22 worth of film, and they can't show more than about 30 seconds.

23 COMMISSIONER AHEARNE: Particularly of this subject.

24 (Laughter.)

25 CHAIRMAN PALLADINO: Do you have more questions on this,

1 or do you want to go on?

2 All right, why don't we go on.

3 MR. COTTER: The first category I just discussed was
4 the affirmative authority placed explicitly on the presiding
5 officer to manage discovery in the particular case.

6 The second general category is more narrow, and
7 that is the amendment of the rules addressing the use of
8 interrogatories, and that essentially -- this proposal has two
9 elements to it:

10 The first is to establish in the rules the general
11 principal relating to the use of interrogatories where they
12 address mixed questions of fact and law, and the purpose of
13 putting that in here, in my mind, is twofold:

14 One, to make clear what in fact has been the practice
15 of the Commission, which is to follow the practice in the federal
16 courts, as stated in the Federal Rules of Civil Procedure, and
17 then tested through a variety of cases under those rules.

18 That establishes the context for the second portion
19 of the proposed amendment respecting interrogatories, which is
20 to limit the use of interrogatories against the Staff to make
21 it explicit that the Staff should not be required to perform
22 additional work in response to interrogatories.

23 I should give credit where credit is due. That
24 proposal and the introductory language to it were conceived and
25 crafted by the Office of the Executive Legal Director.

1 MR. SHAPAR: As a fall-back position.

2 MR. COTTER: I think that essentially is an outline
3 of the proposal.

4 CHAIRMAN PALLADINO: We are only dealing on the one
5 that you prepared and not the other one that came in?

6 MR. COTTER: No, both.

7 COMMISSIONER AHEARNE: What was the other one?

8 CHAIRMAN PALLADINO: On express mail.

9 MR. BICKWIT: We weren't intending you to deal with
10 that one.

11 CHAIRMAN PALLADINO: You weren't intending for us to
12 deal with that today. Okay.

13 Questions? John?

14 COMMISSIONER AHEARNE: First, Tony, I gather that in
15 looking through here, the sections you have underlined don't
16 necessarily indicate all the changes.

17 MR. COTTER: The section in the back showing the new
18 language is supposed to show all the changes.

19 COMMISSIONER AHEARNE: It may just be minor other
20 changes, but when I checked with the current version of the
21 book that I have, at least, I only found in just doing a sample
22 check on page 22 at the top where you are making the -- talking
23 about the changes in 2.740(b), you have added the phrase the
24 third line down "other member or officer."

25 So I wasn't sure how many other places there were.

1 MR. COTTER: That's the only one I know of, and I
2 think I was doing that in the course of conforming it to the
3 language at present.

4 COMMISSIONER AHEARNE: My first question is how many
5 other changes might there be.

6 MR. COTTER: None that I know of.

7 COMMISSIONER AHEARNE: Well, then I find on page 18
8 in Section (iv) -- at least my book doesn't have any .740(b)(c).

9 MR. BICKWIT: I think that's an error. It's a .740B
10 without parentheses.

11 MR. COTTER: No, there is a new section (c), isn't
12 there?

13 MR. BICKWIT: Yes, but I think what's meant there is
14 .740B without parentheses and then (c) in parentheses, and that
15 is the new section.

16 COMMISSIONER AHEARNE: All I'm pointing out is there
17 are a few places where it wasn't clear what was addressed.
18 So you're saying this is a -- 2.740, no paren B, section (c)?

19 MR. BICKWIT: That's right, and that section is on
20 page 21.

21 MR. COTTER: That's my favorite section .740B(c).

22 MR. BICKWIT: On 22.

23 COMMISSIONER AHEARNE: Now if you have if I could
24 address -- you say that at the top of page 4 in your introductory
25 section, "The rule adds elements in the discovery process of

1 affirmative responsibility to eliminate that which is unduly
2 burdensome or expensive."

3 Expensive, meaning?

4 MR. COTTER: That the cost of responding to the
5 request exceeds the value of the response.

6 COMMISSIONER AHEARNE: It's a dollar value?

7 MR. COTTER: Yes.

8 COMMISSIONER AHEARNE: How is that supposed to be
9 judged?

10 MR. COTTER: There is some case law on it that I
11 can't recite to you, but the combination is unduly and expensive.
12 I presume the presiding officers would refer to that kind of
13 case law.

14 COMMISSIONER AHEARNE: Do you expect that to be used
15 often?

16 MR. COTTER: I have no way of responding to it. No,
17 I would not, generally.

18 MR. SHAPAR: I think maybe the intervenors with
19 the least resources might resort to that.

20 COMMISSIONER AHEARNE: You mean as a --

21 MR. SHAPAR: Yeah.

22 COMMISSIONER AHEARNE: I was having difficulty
23 understanding the difference between burdensome and expensive.

24 MR. SHAPAR: What is unduly burdensome to the
25 Commission Staff is not necessarily unduly expensive. The

1 considerations may be the availability of the Staff to respond
2 to it. But what the Staff would find unduly burdensome because
3 of limited resources could be both unduly burdensome and
4 primarily unduly expensive for an intervenor with more limited
5 resources.

6 COMMISSIONER AHEARNE: On page 11, you were using
7 this -- and I gather this becomes a fundamental support for one
8 of your proposals -- a district court rule.

9 MR. COTTER: Yes.

10 COMMISSIONER AHEARNE: And since I find myself
11 substantially in disagreement with this statement because I
12 think it is greatly open-ended, namely the practical test is
13 the questions -- would an answer serve any substantial purpose.
14 That seems to be so extremely subjective, and also probably
15 not really able to be answered until you see the answer, to
16 have wondered whether there was any extensive further court
17 decisions going up farther where that issue had been argued
18 out.

19 MR. COTTER: I think this is a standard reference
20 and it has been used as a standard in a number of cases since.
21 I could give you chapter and verse on it, but I don't have it now.

22 MR. SHAPAR: It's not really the court, if you
23 look at it carefully it's the expert's side, it's J.W. Moore,
24 who is recognized as the greatest authority in the United States.

25 COMMISSIONER GILINSKY: Why don't we bring him in?

1 MR. SHAPAR: This court just happened to cite him,
2 but any other court could cite him and frequently does.

3 He's from Yale Law School.

4 COMMISSIONER AHEARNE: This causes you no concern?

5 MR. SHAPAR: He taught me procedure, so I buy this
6 quote.

7 COMMISSIONER BRADFORD: No showing off.

8 COMMISSIONER AHEARNE: That's a non sequitur.

9 COMMISSIONER GILINSKY: Did you pass that one?

10 COMMISSIONER AHEARNE: That doesn't follow, because
11 he taught you procedure, you accept his position.

12 MR. SHAPAR: No, because of his reputation.

13 COMMISSIONER AHEARNE: My problem is when you say
14 would an answer serve a substantial purpose, obviously anybody
15 is going to argue they're asking the question because it's going
16 to serve a substantial purpose, and it doesn't seem to me that's
17 any kind of test that you can apply to discard any answer.

18 In fact, it seems to be a test to almost any
19 question.

20 (Commissioner Gilinsky left at 10:25 a.m.)

21 MR. SHAPAR: But it has to be ruled on.

22 COMMISSIONER AHEARNE: Yes, but later on a proposal
23 goes on to say that challenges can be deferred.

24 MR. BICKWIT: What you're asking in essence is for
25 the adjudicator to make a judgment about whether he sees the

1 discovery going anywhere. If he does, he lets it go.

2 COMMISSIONER AHEARNE: It says on page 22, which
3 Tony says is his favorite section --

4 MR. COTTER: No, .740B(c).

5 COMMISSIONER AHEARNE: It says, "An interrogatory
6 otherwise proper is not necessarily objectionable merely because
7 an answer to the interrogatory involves an opinion. However,
8 the presiding officer may order that such an interrogatory need
9 not be answered until after designated discovery has been
10 completed."

11 MR. COTTER: If you'll excuse me, I think that's a
12 non sequitur. The fact that the presiding officer can interrupt
13 the interrogatory process and direct some other approach be
14 taken has nothing to do with whether or not answering the
15 interrogatory would serve a substantial purpose.

16 COMMISSIONER AHEARNE: But your conclusion is that
17 this is not going to lead to postponing the day of reckoning
18 on whether that was a proper issue to be raised?

1 MR. COTTER: I'm not sure I understand what you're
2 saying.

3 MR. SHAPAR: I didn't either.

4 COMMISSIONER AHEARNE: Where I thought we were
5 coming out originally is that you cannot challenge the staff
6 and ask them about their matters of opinion. And at least I
7 see underlined here the idea that yes, you can ask them
8 about matters of opinion, is that not correct?

9 MR. COTTER: That's correct. But I don't
10 understand your problem.

11 COMMISSIONER AHEARNE: You can ask them.

12 MR. COTTER: You can ask them about matters of
13 opinion on which they have done some work to form an opinion.

14 MR. SHAPAR: In other words, do you have an
15 opinion, staff? The staff says yes. The next question is
16 what is it, and the staff would answer in accordance with
17 this rule.

18 CHAIRMAN PALLADINO: But I think one of the items
19 we had concern about, our concern was expressed about, was
20 probing the thought process. This does not suggest that you
21 can probe the thought process.

22 MR. SHAPAR: That was a very inexact way of
23 describing a general result that we wanted. In a sense they
24 can probe the staff's mental processes to the extent the
25 staff has already done the work and reached the conclusion

1 and has a conclusion.

2 COMMISSIONER AHEARNE: Good. I would have thought
3 when you asked for an opinion you're asking for more than
4 the conclusion, is that not true?

5 MR. SHAPAR: The rule says you can also ask for
6 the analytical methods that the staff used to reach its
7 conclusion, but you could not ask under the rule well, why
8 didn't you do it a different way.

9 COMMISSIONER AHEARNE: I gather this is now taking
10 language out of one of the Federal Rules of Practice.

11 MR. COTTER: How has that been interpreted in the
12 courts? Or let me ask a more direct question. What
13 difference do you expect this would make, the presence of
14 this in our rules, what difference do you see that making in
15 our proceedings?

16 MR. COTTER: It affirmatively puts in the rule
17 what had only been previously adverted to in the appendices
18 described in the application for operation of the rules. It
19 puts everyone on notice that in dealing with questions such
20 as these that they and the presiding officer can and will
21 look to the case law interpreting this rule and applying it.

22 COMMISSIONER AHEARNE: Does the case law in the
23 federal court system really apply to the kinds of cases we
24 have? I'm not sure what that answer means.

25 MR. COTTER: If you're talking about subject

1 matters, a generalization, no. But if you're talking about
2 the principle of questions being asked that --

3 COMMISSIONER AHEARNE: My concern was I thought
4 underlying all this was that one of the parties in our
5 proceeding, namely the staff, was going to be treated
6 differently.

7 MR. COTTER: They are.

8 COMMISSIONER AHEARNE: And is it therefore true
9 that when you go out and look at how has this rule been
10 applied in federal courts where there isn't such separate
11 parties, is that application in the federal court tradition
12 going to help or harm this underlying theme which at least
13 some of us were trying to push, namely to treat the staff
14 differently?

15 MR. COTTER: The treatment of the staff
16 differently is contained in a separate section which is more
17 specific than this rule of general application.

18 COMMISSIONER AHEARNE: You mean 20.

19 MR. COTTER: Yes.

20 COMMISSIONER AHEARNE: But if I look back on page
21 18, particularly now, as Leonard pointed out, for .740B(c)
22 it says that 740B(c) applies to the interrogatories served
23 pursuant to 720. So it would seem that this overrides
24 anything in 720 that protects the staff.

25 MR. BICKWIT: I don't think it's inconsistent in

1 anything that protects the staff.

2 MR. SHAPAR: This is general protection for
3 everybody, but the staff has further general protection.

4 MR. COTTER: The specific is controlling over the
5 general, and these are amendments to the general rules of
6 application which are then overridden to the extent that the
7 specific rule governing the discovery of the interrogatories
8 against the staff would override.

9 COMMISSIONER AHEARNE: Which takes precedence, 40
10 or 20?

11 MR. COTTER: Twenty.

12 COMMISSIONER AHEARNE: You're saying that when it
13 says the provisions of 40 apply to 20, that doesn't mean
14 that 40 overrides 20.

15 MR. COTTER: No. But it means that to the extent
16 that 20 does not give a specific protection to the staff on
17 a specific area that 40 applies to the staff.

18 COMMISSIONER AHEARNE: What about the other way
19 around? If 40 seems to weaken the protection of 20 --

20 MR. COTTER: That's not the relationship between
21 them.

22 COMMISSIONER AHEARNE: Except that 40 has this
23 phrase: "Discovery is allowable to the extent that an
24 answer would serve a substantial purpose."

25 MR. BICKWIT: Where is that?

1 COMMISSIONER AHEARNE: The same page, 18,
2 740(b)(2). And that seems to weaken the protection of the
3 staff, doesn't it?

4 MR. COTTER: It's like saying -- to give you an
5 example, everyone is required to go to the hearing, but the
6 government has to use Texas International Airlines out of
7 Baltimore, and the fact that everyone has to go to the
8 hearing does not change the narrower restriction that the
9 government has to use a particular airline from a particular
10 place.

11 MR. BICKWIT: I think your point is it could be
12 made clearer, and I agree with that point. What you want to
13 say is to the extent these are consistent with 720, they
14 apply; but if they could be read as inconsistent, they do
15 not apply. I don't see any conceptual difference.

16 COMMISSIONER AHEARNE: Yes.

17 MR. COTTER: That to me is redundant, because it's
18 very clear from the interpretation and application of rules
19 and procedures that it's not necessary.

20 MR. BICKWIT: It doesn't hurt.

21 MR. SHAPAR: If it gets you one vote, it's
22 necessary.

23 CHAIRMAN PALLADINO: We're used to redundancy.

24 (Laughter.)

25 MR. COTTER: That's why we end up with 740B(c).

1 MR. BICKWIT: I think it is susceptible to some
2 confusion, I really do. I hate to admit it.

3 (Laughter.)

4 COMMISSIONER BRADFORD: What you want then is a
5 clear statement that even if discovery will serve a
6 substantial purpose -- even if that will serve a substantial
7 purpose, it won't be permitted.

8 MR. BICKWIT: That's right.

9 COMMISSIONER AHEARNE: That's true, because
10 substantial purpose is open -- at least I believe that
11 substantial purpose is the kind of standard which it is so
12 hard to tell whether it's met or not. In the practice
13 what's going to happen is our boards will say well, we're
14 not really sure, but it probably could be shown to meet
15 substantial purpose so we'll allow it, because it will be so
16 hard to prove that it wouldn't meet a substantial purpose.

17 MR. BICKWIT: You are reining in the discretion to
18 find substantial purpose, and the way you've phrased it is
19 unfortunate.

20 COMMISSIONER BRADFORD: I think it's entirely
21 accurate. You're stating one half of the case which is the
22 reining in of discretion. But the fact is even when there is
23 clearly a substantial purpose --

24 MR. BICKWIT: If in the opinion of the
25 administrative judge there is substantial purpose but it

1 violates the constraints of that section, he can't allow the
2 discovery.

3 COMMISSIONER BRADFORD: That's my point. It's not
4 just the case where he is in doubt that it's discretionary.

5 MR. BICKWIT: He's a judge; he's not a
6 legislator. This is the legislative body.

7 COMMISSIONER BRADFORD: Right. That's why I'm
8 saying you may be losing a vote here. You may have gained
9 three but --

10 (Laughter.)

11 CHAIRMAN PALLADINO: Do you know how to fix it up?

12 MR. BICKWIT: Yes.

13 COMMISSIONER BRADFORD: "Fix it up" isn't quite
14 the right word.

15 (Laughter.)

16 COMMISSIONER AHEARNE: Of course, 720 does go on
17 to say that in a proceeding NRC staff will make available
18 for items which are relevant to the issues in the proceeding.

19 MR. SHAPAR: But there's another section in the
20 existing rule that says right right now they can only get
21 interrogatories from the staff if it's necessary for proper
22 decision in the case and it's not reasonably obtainable
23 elsewhere. And on top of that there's the additional
24 restriction imposed by this rule. One covers the general
25 area; one covers the specific area. There's really no

1 conflict. But to the extent your thought can be
2 implemented, it's easy to implement.

3 COMMISSIONER AHEARNE: And now can I get back,
4 though, where I'm still obviously having difficulty with
5 B(c). Tell me a little bit more, or Howard, you tell me.
6 Do you see it having any effect on proceedings, and if so,
7 what would it be?

8 MR. SHAPAR: In this whole general thing of giving
9 the boards the initiative to control discovery, I am on
10 record as saying that I think it has potential for being
11 mildly beneficial.

12 (Laughter.)

13 And I concur in this rule as proposed by Tony
14 Cotter.

15 COMMISSIONER AHEARNE: Could you explain to me
16 this mild beneficial effect?

17 MR. ROSENTHAL: Potential.

18 (Laughter.)

19 COMMISSIONER AHEARNE: What would it do?

20 MR. SHAPAR: The way the system now works, the
21 boards sort of sit back, or the rules encourage them in
22 effect to sit back and wait for the parties to scream about
23 abuses of discovery. This rule in effect tells the boards
24 you don't have to wait until the parties scream; kind of
25 monitor discovery on your own. If you think it's being

1 abused, stop it or control it.

2 Another reason I think it can be mildly beneficial
3 is because I think some boards are going to be aggressive
4 about it, and where the parties are not objecting on their
5 own, which can occur on rare occasions for special reasons --

6 COMMISSIONER BRADFORD: Vis-a-vis the staff now
7 given the various changes of the last six months or so, do
8 you think there are situations in which the staff is not
9 objecting to discovery that it feels is unduly burdensome?

10 MR. SHAPAR: Yes.

11 COMMISSIONER BRADFORD: Why is that?

12 MR. SHAPAR: I think this came out in a prior
13 discussion. I think what I said and believe is that what
14 the staff does is keeps its eye mainly or to a large extent
15 I should say on whether or not its action is going to hold
16 up a proceeding.

17 In other words, the staff in the past has not
18 objected even where it could under the present rule where it
19 thought well, is it worth it to maybe lose a week's time on
20 this case while it objects and waits for the board to rule
21 on it, and two or three weeks go by of legal squabbling of
22 whether or not it should answer the interrogatory. We'll go
23 back and check with Denton and see well, what's this going
24 to do to you if you answer the 70 interrogatories in the
25 seismic area, and he says --

1 COMMISSIONER BRADFORD: I might actually have to
2 look at the blueprints.

3 MR. SHAPAR: So it's a judgment call about whether
4 or not swallowing our rights, which we frequently do, would
5 be beneficial to the overall process or won't be, so it's
6 innately a judgment call. By going ahead and doing the work
7 even though we don't have to in theory, will that advance
8 the case and get it decided more quickly.

9 COMMISSIONER BRADFORD: How do those mathematics
10 change now? Instead of having the option of going ahead and
11 answering the interrogatories and saving the time, what
12 you've got is a situation in which the board members will
13 always use the time because they have to review all the
14 interrogatories, including the ones which are not being
15 objected to, so that the board will in all cases lose the
16 time that it now only loses in those cases where the parties
17 object.

18 MR. SHAPAR: I don't think that's right, because
19 you're dealing essentially with a period of "dead time."
20 Discovery is before you get to hearing. The boards will be
21 receiving copies of requests for the discovery, and they
22 will, I guess, see some cases where it looks funny.

23 Now, there are lots of ways they can handle it.
24 They can arrange a conference call and see what's going on
25 here.

1 COMMISSIONER BRADFORD: But if it's dead time,
2 then why is the staff shy about objecting?

3 MR. SHAPAR: Because it's not always dead time.
4 Sometimes you're going to have discovery which is getting
5 pretty close to the hearing process.

6 COMMISSIONER BRADFORD: And in that case it's live
7 time, and in that case the board reviewing the
8 interrogatories, you're going to always lose time, instead
9 of in those cases where a party under the present rule --

10 MR. SHAPAR: I would hope the boards would be just
11 as sensitive to the kind of practical considerations the
12 staff analyzes. To quote a case I think I have quoted
13 before, Illinois v. Noodleman, judges are not presuming more
14 interest than other people.

15 CHAIRMAN PALLADINO: I guess, Tony, I'm surprised
16 every time this point is made, it's dead time, that you
17 don't put in that it may be dead time in that particular
18 case; but the most of your board members in the period in
19 which there is a dead time in one case are really working on
20 another case, and so that it's not necessarily slack time
21 for them.

22 MR. COTTER: That's right.

23 MR. SHAPAR: It may or may not be slack time
24 depending on the circumstances.

25 COMMISSIONER AHEARNE: Let me try again and see if

1 I can get to another one of my concerns on that.

2 CHAIRMAN PALLADINO: Were you answered on the one
3 on page 22?

4 COMMISSIONER AHEARNE: I'm still on page 22. I
5 think what Howard is really saying is it's a possible mild
6 beneficial plus.

7 CHAIRMAN PALLADINO: This particular point?

8 COMMISSIONER AHEARNE: Yes.

9 MR. BICKWIT: I thought Howard's answer related to
10 the whole thing.

11 MR. SHAPAR: Right, it did.

12 COMMISSIONER AHEARNE: This particular section,
13 740B(c).

14 MR. SHAPAR: No. I was referring to the general
15 thing.

16 COMMISSIONER AHEARNE: I'm talking about this
17 particular piece. What is the impact of that piece on our
18 proceedings?

19 MR. SHAPAR: In the second half of page 22?

20 COMMISSIONER AHEARNE: Yes. I assume you've heard
21 it before.

22 MR. SHAPAR: Yes, I have, but I want to make sure
23 you get a responsive answer this time.

24 CHAIRMAN PALLADINO: Incidentally, this section
25 gave me the most trouble both with regard to its content and

1 with regard to my understanding.

2 MR. SHAPAR: I would not consider this provision
3 of much value.

4 COMMISSIONER AHEARNE: My question is what impact
5 would it have?

6 MR. SHAPAR: Very little, in my opinion.

7 COMMISSIONER AHEARNE: Are you saying that as far
8 as you can tell that this will not change the current
9 practice?

10 MR. SHAPAR: Yes. That particular provision.

11 MR. BICKWIT: It is a codification of the current
12 practice; therefore, it would not change the current
13 practice.

14 MR. SHAPAR: But you have to break it down. I
15 guess you have to look at the first sentence and then the
16 second sentence. The first sentence I could live without.
17 I don't think it's of much value.

18 COMMISSIONER AHEARNE: It's not objectionable
19 merely because it calls for an opinion.

20 MR. SHAPAR: I don't think it's going to do very
21 much.

22 CHAIRMAN PALLADINO: Is there a question now
23 whether or not you can ask a question that involves an
24 opinion?

25 MR. SHAPAR: No, I don't think so.

1 CHAIRMAN PALLADINO: So you're saying this isn't
2 necessary because it's understood.

3 MR. SHAPAR: That's correct.

4 CHAIRMAN PALLADINO: I didn't think it was so.

5 MR. SHAPAR: I believe it to be.

6 MR. COTTER: I think that's essentially correct.
7 This is, according to the rules, what is the practice.

8 COMMISSIONER AHEARNE: What you're saying is it's
9 not some questions would be disallowed because they're
10 asking for an opinion, but if they were to be disallowed it
11 would be because the subject matter on which the opinion was
12 asked --

13 MR. COTTER: Well, the history of this is that it
14 arose primarily in connection with a problem -- and I hate
15 to get into it -- of mixed questions of law and fact.

16 MR. BICKWIT: Whose problem was that?

17 MR. SHAPAR: That was your problem. No one else
18 raised it.

19 (Laughter.)

20 MR. COTTER: Well, to the extent that the term
21 "mental processes" was extremely vague, this serves to
22 establish a frame of reference by bringing in the history of
23 the mixture of questions of law and fact. And what is a
24 question of fact and what is a question of law is something
25 that defeats most law students and has been an extremely

1 difficult question to resolve.

2 MR. SHAPAR: The smarter ones have never had any
3 trouble with it, though.

4 MR. COTTER: Well, there aren't any of those here.

5 (Laughter.)

6 I thought it would be useful to bring in the body
7 of law explicitly that has addressed that question so that
8 there could be guidance available.

9 COMMISSIONER AHEARNE: Somehow I think you're
10 bringing in the camel's nose; that's the feeling I get.

11 COMMISSIONER BRADFORD: You're earlier memo on
12 this section says it's drawn from 33(b) of the Federal Rules
13 of Civil Procedure. It doesn't seem to have brought those
14 rules to any -- I guess if your question is what does it add
15 to current practice, maybe not very much, but I'm also not
16 sure it does any harm.

17 COMMISSIONER AHEARNE: Well, the reason I asked is
18 that at least the little backup reading I did on it -- I
19 tried to go back through the Federal Rules of Practice and
20 supporting explanations of that, and what was beginning to
21 bother me was that all of those seemed to be applicable to
22 problems that had come up prior to the '70s, and it came up
23 in cases which I didn't think really translated to our
24 situation unless you were assuming that the NRC staff is
25 just like all the other parties.

1 And since my approach, personal approach on a lot
2 of this had been to treat the NRC staff differently, I
3 wasn't really comfortable with the fact that there is a body
4 of federal tradition that now says how this is applied;
5 because I was afraid that if it were applied that way, you
6 would end up saying the staff isn't any different than any
7 other parties.

8 MR. BICKWIT: We solved that problem for you.
9 Didn't we solve that with this fix?

10 CHAIRMAN PALLADINO: Well, I think the important
11 part, at least in my mind, that helps us with the staff is
12 the last one; and it says that you can't ask them questions
13 of why didn't you do it with a different method. So I saw
14 two parts to this, one that says let's get a little more
15 discipline in the discovery process and give the presiding
16 officer a chance to do this; and the other that says look,
17 you can't examine why a person didn't do it by a different
18 method.

19 MR. SHAPAR: Yes, exactly.

20 CHAIRMAN PALLADINO: But getting back to page 22,
21 it's the second sentence I have trouble with just
22 understanding. Could you explain to me what it means?

23 MR. COTTER: It means if the presiding officer
24 sees the parties are getting into some kind of protracted
25 impasse, he can intervene and say stop what you're doing now

1 and do it another way.

2 CHAIRMAN PALLADINO: Are we talking now
3 specifically on page 22, "However, the presiding officer may
4 order, pursuant to its powers to supervise discovery, that
5 such an interrogatory need not be answered until after
6 designated discovery has been completed," which doesn't make
7 sense to me. It says you don't have to answer it until
8 discovery has been completed, but I thought the reason it
9 was asked was because the person wanted to participate in
10 discovery.

11 MR. BICKWIT: Until some other designated
12 discovery has been completed.

13 MR. COTTER: Discovery is a generic term; an
14 interrogatory is one form of discovery.

15 MR. BICKWIT: And you don't have to answer that
16 question until you yourself have completed some discovery
17 that you're interested in.

18 COMMISSIONER AHEARNE: So, for example, if there's
19 a contention raised and the staff asks on what is that
20 contention based, what information do you have, and the
21 person raising the contention well, I don't want to answer
22 that until I've finished my discovery of the staff, then
23 it's possible the board would say all right, you don't have
24 to tell the staff on what you based your contention until
25 you've completed discovery of the staff.

1 MR. BICKWIT: Well, we have a contention rule that
2 we're considering and will probably relate to that kind of
3 question.

4 COMMISSIONER AHEARNE: No. But that provision
5 would enable this to happen, is that correct?

6 MR. BICKWIT: Yes.

7 MR. SHAPAR: That's highly unlikely.

8 CHAIRMAN PALLADINO: Your key word is
9 "designated." What does --

10 MR. BICKWIT: You're talking about an
11 interrogatory that Tony serves on me. The board says I
12 don't have to answer that interrogatory until I have a
13 chance to conduct some discovery of my own.

14 CHAIRMAN PALLADINO: Is that what "designated"
15 means?

16 MR. BICKWIT: That is one application of
17 "designated." It means a certain discovery that is singled
18 out by the board as a precondition for the requirement to
19 answer that question.

20 CHAIRMAN PALLADINO: Is it clear to all lawyers?
21 I mean, is it clear to the layperson? Is it clear enough to
22 lawyers?

23 MR. BICKWIT: That's clear. To me that's one of
24 the meanings.

25 CHAIRMAN PALLADINO: I don't mind words that are

1 understood by the people that ought to understand it, but I
2 am leery when I don't understand it.

3 MR. BICKWIT: I must say --

4 CHAIRMAN PALLADINO: Can this be fixed up or
5 clarified a little bit?

6 MR. BICKWIT: If the Commission doesn't understand
7 this language, I really don't see that anything is lost by
8 taking it out.

9 Now, Tony may want to dispute that. I think that
10 is a sufficient reason for dropping it.

11 CHAIRMAN PALLADINO: I wasn't asking you to drop
12 it. I was just trying to understand it.

13 MR. BICKWIT: The strongest argument for dropping
14 it is that we could then move the discussion on to something
15 else, because I don't regard this as an important part of
16 today's discussion.

17 COMMISSIONER AHEARNE: I have to exception that as
18 an operating theory, because otherwise we will eliminate all
19 technical rules.

20 MR. BICKWIT: Throughout this entire discussion
21 our office has regarded this provision as more trouble than
22 it's worth, and I have never been more convinced of that
23 than I am at this moment.

24 MR. COTTER: There may be particular words or
25 phrases in here that give you trouble in application, but I

1 have always felt that it was important because it gave an
2 affirmative ability or power in the presiding officer to
3 stop a discovery battle among the parties which had
4 degenerated into just that, a discovery battle.

5 COMMISSIONER AHEARNE: Wait a minute now. Howard
6 felt, as I say, at best very lukewarm support. Len felt
7 that this was more trouble than it was worth.

8 MR. BICKWIT: I would say opposition.

9 COMMISSIONER AHEARNE: Alan?

10 MR. ROSENTHAL: I felt from the outset that it had
11 precious little potential worth, and I now tend to agree
12 with Len that on a cost-benefit balance in terms of
13 Commission time if nothing else there's something to be said
14 for it going. I had no objection to it at the outset, but I
15 did not -- in agreement with Len I did not regard this as
16 being a key provision of the overall discovery amendments.

17 COMMISSIONER AHEARNE: So given that, Tony, would
18 you help me understand clearly then you believe --

19 MR. COTTER: Because I'm the only one here who is
20 a presiding officer --

21 COMMISSIONER AHEARNE: I understand that
22 situation. But could you explain again for me why you think
23 it would be really beneficial. What is the current problem
24 this is going to affect -- to use an approach that you have
25 challenged us with many times.

1 COMMISSIONER BRADFORD: I can tell you why I think
2 it's necessary. There aren't many sections in here that
3 give guidance as to what is not objectionable. The basic
4 purpose of this rule is to lay out areas in which we expect
5 the tree to be pruned back. I think without some sections
6 such as this, the boards may take it as guidance to cut back
7 on current practice. And by codifying this aspect of the
8 current practice we secure it against the time at which the
9 body of common law in this area is going to be substantially
10 revised by what the Commission puts out. So if you want to
11 salvage a particular piece of the current practice, it's
12 worth doing so explicitly.

13 MR. COTTER: I think you have to understand that a
14 piece of litigation largely belongs to the parties to it,
15 and that it is an effort by both parties coming from
16 opposite directions to state their side of an issue. And
17 that traditionally, particularly in this area of discovery,
18 the conduct of discovery has historically since the federal
19 rules were put in place been a matter for the parties
20 themselves to manage and conduct. And that the change that
21 this represents is to affirmatively say to the presiding
22 officers you now have not simply a responsibility but also
23 an authority in the interest of expediting the proceeding to
24 step in and manage discovery by whatever means you think is
25 proper and will add to the efficient and expeditious

1 consideration of the case.

2 And by saying that affirmatively to the board, you
3 are pointing them in a direction that they had not been
4 pointed in nor had they really been authorized to go in the
5 past. And as I understand it, you have been saying all
6 along that your concern is to tighten up these proceedings,
7 and I see this as one way of doing it.

8 MR. ROSENTHAL: Isn't it true that power of the
9 board -- we're now talking, I assume, about subsection (c),
10 are we not, and that's all.

11 Now, I go back and look at the bottom of 18 and
12 the top of 19, and I thought in terms of the powers of the
13 presiding officer in the control of discovery it was fairly
14 well spelled out there, so that I don't understand, Tony,
15 frankly why the subsection (c) is necessary in order to
16 reinforce the authority of a licensing board.

17 MR. COTTER: Because it's different. .740(b)(2)
18 talks about the discovery and the standards that will apply
19 to it. It does not talk about coming in and saying not
20 simply that you can't do this because it's duplicative or
21 expensive or what have you, not simply stopping it.
22 .740B(c) says you can come in and say do it's this way
23 because it's better or faster. That's quite different.

24 MR. SHAPAR: How about adding the word "manner?"

25 MR. BICKWIT: No. It does say you can do it.

1 MR. ROSENTHAL: It looks to me like (b)(2) is very
2 broad.

3 MR. BICKWIT: It says it may be limited by the
4 presiding officer if he determines that the discovery is
5 attainable from some other method that's more convenient.

6 MR. COTTER: That doesn't say to him affirmatively
7 go and do it that way.

8 MR. BICKWIT: I think it does.

9 MR. COTTER: That makes him simply say stop.

10 (Commissioner Roberts exited at 10:55 a.m.)

11 MR. BICKWIT: I think he can't very well say stop
12 doing it that way because this other way is more convenient
13 and not authorize the doing of it the other way.

14 CHAIRMAN PALLADINO: Let me ask a contrary
15 question. What's wrong with keeping this section (c) on
16 page 22 in?

17 MR. BICKWIT: I don't think there's anything wrong
18 with it.

19 CHAIRMAN PALLADINO: Because a layperson might --
20 well, my feeling after I read this whole document was that
21 it was a significant improvement in what we're doing, and my
22 problem was understanding the specific usage of language
23 such as the one in paragraph (c).

24 COMMISSIONER AHEARNE: Tony, another argument
25 against (c), at least for me, which I think would support

1 Peter --

2 MR. COTTER: It's the assumption the presiding
3 officer is going to come in and abuse the parties by
4 restricting their activities.

5 COMMISSIONER AHEARNE: No, no. One of the odd
6 pieces of literature I quickly scanned was something put
7 together I guess at least under the name of Howard's former
8 teacher, and some of the history of this seemed to be that
9 this was put in because the courts before had been too
10 rigid. And when this went into the Code of Federal
11 Regulations it was to provide some greater flexibility, to
12 point out that some of the questions that have been thrown
13 out shouldn't have been thrown out. And so from Peter's
14 point of view codifying this might be to prevent us from
15 becoming too rigid. I didn't think we were, so I'm uneasy
16 about it.

17 MR. COTTER: I don't think that follows, because
18 this doesn't say throw something out; it says consider an
19 alternative.

20 COMMISSIONER AHEARNE: That's right. It says what
21 could stay in. I'm just very uneasy about this, and I can't
22 vote for it at the moment. I would really have to think
23 more about this.

24 CHAIRMAN PALLADINO: We have had recommendations
25 that we --

1 COMMISSIONER BRADFORD: There are really a few
2 separate points, the one that applies to the second
3 sentence, of whether that really adds anything to the
4 earlier section.

5 The first sentence was my main concern. The
6 second one, I think it's probably true that it can be
7 derived from the earlier section.

8 CHAIRMAN PALLADINO: When you say "concern," you
9 mean you don't want it in?

10 COMMISSIONER BRADFORD: No. I do want it in.

11 CHAIRMAN PALLADINO: You do want it in. That told
12 me something, the first sentence. The second sentence I had
13 great difficulty just understanding.

14 COMMISSIONER AHEARNE: My problem is I think they
15 both tell me something, and I'm not comfortable with what
16 they tell me.

17 CHAIRMAN PALLADINO: Further questions?

18 COMMISSIONER AHEARNE: I have just one other
19 question which wasn't related to that one. When you're
20 talking about the sanction section on page 21 where you talk
21 about an appropriate sanction pursuant to Section 2.707,
22 shouldn't have some kind of conforming change to 2.707 to
23 pick up this? And it's just a minor question.

24 MR. BICKWIT: I don't think it's really necessary.

25 COMMISSIONER AHEARNE: It's very minor.

1 MR. BICKWIT: I think 2.707 by its terms applies
2 to all discovery.

3 CHAIRMAN PALLADINO: Do you have questions?

4 COMMISSIONER BRADFORD: Just a couple. Most of
5 them have been at least discussed.

6 (Commissioner Roberts entered at 11:00 a.m.)

7 COMMISSIONER BRADFORD: What is the purpose for
8 exceptional circumstances as a test against the staff by way
9 of deposition? That's on page 24.

10 MR. SHAPAR: This is not a change. This is the
11 existing rule.

12 COMMISSIONER BRADFORD: Okay. Still, why is that
13 exceptional circumstance? An exceptional circumstance would
14 be an intervenor didn't have enough money to pay for a
15 deposition, but aside from that --

16 MR. SHAPAR: You're asking a factual question, and
17 I can answer it. The reason for that is the existing
18 restriction against discovery on the staff that its
19 resources were being tied up in discovery, an attempt was
20 made, I think, when the rules were restructured around that
21 time in 1972 to give the staff some protection against the
22 imposition of demands on its resources through discovery.
23 And since the staff put forward all these documents which it
24 put forward -- the SER, the EIS -- and the fact that its
25 testimony was made available prior to the hearing, it was

1 felt that balancing things out that staff people should not
2 be deposed unless there was first some justification for
3 it. And that rule has remained in effect in its present
4 form for about ten years.

5 COMMISSIONER BRADFORD: What do you make of the
6 fact that at least one intervenor commented that a more
7 efficient way to conduct discovery would be for the NRC to
8 sponsor a set of depositions at which instead of having so
9 much done through interrogatories back and forth in the
10 mails that the witnesses were essentially available for
11 depositions?

12 MR. SHAPAR: It would be an enormous drain on
13 resources.

14 COMMISSIONER BRADFORD: Are you saying it wouldn't
15 save any time in the sense of written interrogatories?

16 MR. SHAPAR: I think you can't treat intervenors
17 as fungible. I'm saying that there are some intervenors
18 where you might save time, although experience has shown
19 that when discovery is resorted to -- and Alan made this
20 point in the memorandum he sent up about three weeks ago --
21 experience has not shown that when discovery is freely given
22 that it saves time at the hearing. That's not been our
23 experience.

24 COMMISSIONER BRADFORD: I'm asking a different
25 question. I'm asking whether it's possible to save

1 interrogatory time through the use of depositions.

2 MR. ROSENTHAL: I think it depends upon what's
3 being sought by way of deposition. If the staff in order to
4 respond to questions at a deposition were required to
5 produce five or six or seven different people with expertise
6 in different areas who have to then sit around for the
7 length of the deposition waiting for questions that might
8 get into their specific area of expertise, I could envisage
9 a considerably greater time, staff time being consumed in
10 the deposition process than would be in interrogatories
11 which can be managed -- the answers to those.

12 On the other hand, I would suppose that if it
13 involved one staff person, it might well be that that one
14 individual's time would be less consumed at a deposition
15 taking in his office or somewhere within the Commission
16 territory than it would be his having to put on his green
17 eyeshade and write out lengthy answers to questions which
18 then would be reviewed by 75 different levels up the line.

19 So if you're looking at it from the standpoint of
20 time consumption, deposition versus response to
21 interrogatories, I don't think -- Howard or other members of
22 the staff may have a different view of this -- but I don't
23 think you can generalize. I think it would depend again
24 upon the nature of the inquiry and again how many
25 disciplines were involved and the like.

1 COMMISSIONER BRADFORD: I guess what I'm really
2 askig is whether there are ways that the presiding officers
3 could better use depositions as a technique in terms of
4 expediting the process. Should we be giving them more
5 discretion in that area to have depositions in place of
6 interrogatories?

7 MR. COTTER: The kind of thing you have in mind is
8 now being done in that presiding officers are much more
9 frequently saying to the parties sit down together and talk,
10 and it's not done through the formal depositions so that it
11 is discovery under oath. But there is, I believe, an
12 increase in communication that is proving very beneficial.

13 COMMISSIONER AHEARNE: Would we be legally able to
14 sponsor depositions?

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1 MR. BICKWIT: Yes, I think we would be.

2 COMMISSIONER AHEARNE: I thought part of the
3 argument on depositions and the reason they are not used
4 that much is they're very expensive.

5 MR. BICKWIT: Yes. Our view is if you provide
6 procedural assistance to all parties, which is what is being
7 suggested, you are consistent with the appropriations
8 limitation. That may not be the view of all involved here,
9 but that is our view.

10 CHAIRMAN PALLADINO: Well, that's certainly not my
11 view.

12 MR. BICKWIT: You're saying that's not your view
13 of the law or that's not your view of what should be done?

14 CHAIRMAN PALLADINO: Both.

15 MR. BICKWIT: Okay. Well, I'm not coming down on
16 the second question. On the first I disagree.

17 COMMISSIONER AHEARNE: And I guess I'm with Peter
18 on interest. Whether or not it would be -- my own personal
19 experience from a previous agency, in which I had to be
20 deposed several times, is I doubt whether it would save much
21 time. But nevertheless, if it would I would be in favor of
22 it. But I guess I am dubious on --

23 COMMISSIONER BRADFORD: Are you saying compared to
24 having to answer those same questions in writing?

25 COMMISSIONER AHEARNE: Oh, absolutely. It would

1 have been much easier to answer them in writing.

2 COMMISSIONER BRADFORD: I can't write faster than
3 I can talk.

4 COMMISSIONER AHEARNE: It's sort of the difference
5 between an oral exam and a take-home exam. On a take-home
6 exam you have to put the effort explicitly on those explicit
7 questions. An oral exam you have to prepare for how broad
8 that question can become. So I've found I had to spend
9 much more time preparing for the deposition than I would
10 have spent answering it in writing.

11 COMMISSIONER BRADFORD: What you also have to
12 know, though, is what happens then at the next stage, namely
13 the hearing itself, whether the witness responded to
14 interrogatories, then spends a lot more time --

15 COMMISSIONER AHEARNE: Absolutely. And the
16 difference also, as Alan pointed out, there is a multiple
17 layer review on the written answers.

18 CHAIRMAN PALLADINO: Pete, I don't understand the
19 focus of your question. Are you saying that --

20 COMMISSIONER BRADFORD: I started out talking
21 about the exceptional circumstance test, but what I was
22 really interested in light of some of the comments we
23 received, whether we could make more creative use of
24 depositions in ways that might save time and get to the
25 heart of issues faster in our proceedings.

1 Let me take issue with what I took to be your
2 concern there, which is if we had a deposition which we paid
3 for and that all the parties came, that that would violate
4 the law. I don't see a difference between that and the
5 hearing itself. That is, you make cross-examination
6 available to all parties.

7 CHAIRMAN PALLADINO: No, but we don't pay for
8 their staff time.

9 COMMISSIONER BRADFORD: Oh, I'm not suggesting we
10 pay the Intervenors to come to the deposition. I'm just
11 suggesting that we pay the court reporter and make our
12 people available.

13 CHAIRMAN PALLADINO: The only cost you're talking
14 about is the court reporter? Well, I'd rather, since that
15 isn't the subject at issue today, I'd rather defer further
16 consideration on it. And perhaps it is necessary for us to
17 define what we're talking about before I jump in. I just
18 didn't want to necessarily go along with saying we were
19 going to start to pay for depositions.

20 COMMISSIONER BRADFORD: No.

21 CHAIRMAN PALLADINO: But perhaps there is a place
22 where I would agree with the procedure. But I'd rather
23 defer that to where we have the facts before us, because I
24 don't think it's necessary as part of this, is it?

25 COMMISSIONER AHEARNE: No, but it might be useful

1 for that legal group to address that question.

2 MR. BICKWIT: Of whether it would be legal?

3 COMMISSIONER AHEARNE: First, whether it would be
4 useful.

5 COMMISSIONER BRADFORD: That's the more important
6 question.

7 MR. BICKWIT: Okay.

8 COMMISSIONER AHEARNE: If it's not useful, it's
9 irrelevant.

10 MR. BICKWIT: I'll be happy to address it.

11 CHAIRMAN PALLADINO: Do you have more, Peter?

12 COMMISSIONER BRADFORD: Yes. On the next page --
13 and of course it comes up earlier as well -- the standard of
14 reasons for not employing alternative data assumptions in
15 analyses. What happens when you get a line of questioning
16 that in effect says, why did you do it this way? Isn't the
17 staff as a practical matter going to have to respond to that
18 by saying, because it is better than the alternative ways of
19 doing it in many cases?

20 MR. SHAPAR: I wouldn't say in many cases, if that
21 gives the impression of being the usual case. I think the
22 staff can say that it reached this conclusion and used this
23 code or this methodology, and the reasons why it reached the
24 conclusions. I don't think it necessarily follows it's
25 going to say as part of that answer, this is a better way

1 than any other way.

2 COMMISSIONER AHEARNE: Is your question asking the
3 staff why is their method correct?

4 COMMISSIONER BRADFORD: I'm really trying to get
5 at how workable this standard is. What I have in mind is --
6 what was the controversial statistical method that wound up
7 getting so heavily criticized in WASH-1400? Do you remember
8 offhand?

9 COMMISSIONER AHEARNE: The square root of the
10 product, I think.

11 COMMISSIONER BRADFORD: If that were the document
12 at issue that we were conducting an interrogatory against
13 for WASH-1400, and you asked why was that method used, I
14 don't see how that question could be answered without a
15 discussion of the relative merits of that method against the
16 other leading statistical contenders.

17 Now, I take it the staff is free under this
18 standard to offer such a suggestion?

19 MR. SHAPAR: Yes.

20 COMMISSIONER BRADFORD: Can they object to the
21 interrogatory on the basis that it necessarily calls for
22 comparison?

23 MR. SHAPAR: If they didn't do the comparison,
24 they don't have to do it, as I read this rule. In other
25 words, if they said this is the conclusion they reached and

1 this is why they did it and the interrogatory is why don't
2 you think this other method is better, I guess under this
3 they wouldn't have to answer that question.

4 MR. ROSENTHAL: We run into this all of the time,
5 particularly in the area of these probabilistic analyses,
6 where you frequently get three entirely different
7 approaches. Applicant has one, staff has a second, and
8 Intervenor, if he or it has affirmative evidence, may have a
9 third.

10 Now, it seems to me that the time for the
11 exploration of the comparative worth of methods A, B and C
12 is the hearing. It seems to me that in discovery, that the
13 only obligation that should be put upon the staff is to set
14 forth its methodology and the assumptions that were the
15 foundation of that methodology.

16 Then the other parties that got the facts as to
17 the way the staff went about this, they then have an
18 opportunity to come up with their ammunition to attack that
19 methodology if they see fit to do so at the hearing, and in
20 doing so endeavor to establish that some other methodology
21 is more appropriate. And they can ask the staff at the
22 hearing, why didn't they pursue that.

23 COMMISSIONER BRADFORD: What you're saying is, my
24 hypothetical interrogatory probably is objectionable?

25 MR. ROSENTHAL: Absolutely, as I see it.

1 Now, as you know, I have been, in a series of
2 these meetings, have been pushing for limitation of that,
3 and I've been up front about it.

4 CHAIRMAN PALLADINO: But it doesn't preclude
5 discussion of that issue in the hearing?

6 MR. ROSENTHAL: Absolutely not. That's a major --
7 where you have competing methodologies at the hearing,
8 that's a major question. Indeed, the Board is confronted
9 with the necessity of choosing frequently between contrary
10 methodologies or differing methodologies which may produce
11 widely varying results.

12 We are now talking simply about discovery, and it
13 seems to me again that staff is required to lay bare what
14 its methodology is, what were the assumptions that underlay
15 that methodology. That is fair in terms of giving the
16 opposition the opportunity to prepare its own case, to know
17 what it is going to be confronting in terms of the staff,
18 and go to their own expert and have him look over the
19 staff's methodology assumptions.

20 COMMISSIONER BRADFORD: But now come back to
21 John's point regarding the merits of being deposed as
22 against the merits of responding in writing. That is, under
23 the framework that I think Allen is propounding many of the
24 questions that were asked in deposition that you would
25 rather have answered in writing will in fact not get asked

1 until somebody gets you on a witness stand somewhere,
2 because to ask all of the types of questions -- all of this
3 type of question, you've got actually to go to the hearing
4 and wait your turn, and then be cross-examined.

5 The net result of this method, at least as to that
6 type of question, is not to give you the chance to answer
7 the way you'd like to, which is in response to
8 interrogatories, but to put you on a witness stand somewhere
9 where you don't know that it's going to be asked and will
10 have to come up with the answer out of your head in the
11 local courthouse.

12 CHAIRMAN PALLADINO: But I do feel that in the
13 discovery process it's quite a burden to have to respond to
14 every question on an alternative way of doing something,
15 because it does mean that in order to compare them you have
16 to go do them. And in the hearing process I think the
17 people that are saying there is a better method now propose
18 it, and they have to show why it's better. And I think
19 that's an important distinction.

20 COMMISSIONER BRADFORD: Yes, I agree with you.
21 I'm just trying to get at whether this way of limiting the
22 exploration of alternatives is the most effective one. It
23 certainly does cut it off right at the root and I'm just not
24 sure that's the best way to do it.

25 MR. SHAPAR: I think there's a larger point.

1 CHAIRMAN PALLADINO: I was going to ask, does this
2 preclude a question on the accuracy of your method? In
3 other words, suppose I ask you, how did you reach your
4 conclusion on the seismic capability of this particular
5 structure, and you say, I did it thus and so on, and I say,
6 can you demonstrate that that's an appropriate or accurate
7 or accepted way.

8 Would that be a proper question or is that
9 precluded?

10 MR. SHAPAR: I'm not sure it would be precluded,
11 but I think the answer would be: This is what we've done
12 and this is our opinion. We stand on it.

13 The larger point I was going to make is that the
14 basic purpose of discovery is to avoid surprise and the
15 system that's proposed here avoids surprises. That's the
16 traditional justification for discovery.

17 I think some of these things we have been
18 discussing go beyond the traditional purpose of discovery,
19 because there's no way, no reasonable way, with the
20 information that's now available and the information that
21 would be available by alternative means of discovery under
22 these rules, that any person stands a good chance of being
23 surprised at the hearing. The hearing takes over and
24 everybody's fair game for cross-examination.

25 COMMISSIONER AHEARNE: When you say the principal

1 purpose is to avoid surprise, surprise on whose side?

2 MR. SHAPAR: On anybody's side.

3 COMMISSIONER BRADFORD: I don't think Willie Moore
4 taught you that, Howard. I thought the principal purpose
5 was to save hearing time, through, among other things,
6 avoiding surprise.

7 MR. SHAPAR: I don't think so. That's not my
8 recollection.

9 COMMISSIONER BRADFORD: Incidentally, J. Willie
10 Moore, by the time I got to law school, was bankruptcy.

11 MR. SHAPAR: That was a later era.

12 CHAIRMAN PALLADINO: Again, in the interest of
13 saving time, I was wondering, did you have any more
14 questions, Pete?

15 Tom, did you have any?

16 Now, I gather that the Commissioners are not ready
17 to vote. For myself, I found this a rather good document,
18 except for the questions I had specifically on item C on
19 page 22. I could have lived with it.

20 I gather, however, that there are now some
21 suggested changes that the Commissioners have pointed to,
22 one being this general versus specific. I was told OGC
23 knows how to correct this. I am still not clear on the
24 thrust that the Commissioners would like to see in the
25 rewrite with regard to page 22, item C.

1 My impression at the moment is that at least one
2 of the Commissioners would like to change the first sentence
3 of that and would not object to throwing out the rest of it,
4 and two Commissioners, or at least one other Commissioner,
5 would throw out the whole thing, and one would try to
6 clarify the second sentence.

7 And Tom, I don't know if you have any view on
8 that?

9 COMMISSIONER AHEARNE: My point was, if I had to
10 vote right now I would vote to throw it out. I want to
11 think through it a little bit more.

12 COMMISSIONER ROBERTS: Are we going to get a vote
13 sheet and be able to make comments?

14 CHAIRMAN PALLADINO: Yes. I was hoping we could
15 identify the areas where we would like to see some
16 correction and ask the corrections be made, and then we see
17 them by vote sheet. So would it be acceptable, with regard
18 to paragraph C on 22, to keep it in with some attempt to
19 clarify that second sentence for those of us who don't know
20 what it means?

21 All right. Then at least that gives us maximum
22 flexibility. Okay.

23 MR. BICKWIT: Mr. Chairman.

24 CHAIRMAN PALLADINO: Yes?

25 MR. BICKWIT: I have a couple of policy issues

1 that I wanted to focus the Commission on. We can do it in a
2 memo or --

3 CHAIRMAN PALLADINO: With regard to this?

4 MR. BICKWIT: With respect to some of the
5 decisions that were made here. We concur --

6 COMMISSIONER AHEARNE: Decisions that were made?

7 MR. BICKWIT: Decisions that were made in putting
8 this document together. In a couple of cases I'm not clear
9 that's where the Commission is and I'd like the Commission
10 to focus on some of those points. And we can do it now or
11 we can do it in a memo, whatever you would like.

12 CHAIRMAN PALLADINO: How long do you think it
13 would take?

14 MR. BICKWIT: I could just raise them.

15 CHAIRMAN PALLADINO: Why don't you raise them and
16 we'll see.

17 MR. BICKWIT: On this matter that we have just
18 been discussing, the extent of the shield may be too narrow
19 for Commission preferences. It says that you don't have to
20 give reasons as to why you didn't use a method or an
21 alternative analysis that was not considered in the staff
22 review. We added that "not considered in the staff review"
23 and I'm not sure that's right.

24 What if the staff did consider an alternative way
25 of going but didn't rely on that way of going? Do you want

1 the shield to cover that particular point? I just don't
2 know the answer to that question.

3 COMMISSIONER BRADFORD: You have a certain
4 instinct for self-destruction.

5 MR. COTTER: There may be a related issue there.
6 Does this policy, to that question -- does the section on
7 interrogatories in .720 mean that where the staff has not
8 done any analysis on a particular area that they do not have
9 to disclose that?

10 MR. SHAPAR: Disclose what, that they haven't done
11 any analysis? The answer will be, it's engineering
12 judgment, in the real world.

13 COMMISSIONER AHEARNE: Is there is a philosophy
14 that if there's no analysis you say it's engineering
15 judgment?

16 MR. SHAPAR: Some. Ask for an engineering
17 textbook.

18 MR. COTTER: I'm thinking in an area where the
19 staff decided not to analyze and simply to accept what they
20 read in the Applicant's submissions, whether or not the
21 staff should do analysis and whether this precludes even
22 their disclosing that they have not done it

23 MR. SHAPAR: It certainly does not preclude their
24 saying they have done no analysis. It precludes any
25 requirement that they go ahead and do that analysis.

1 MR. BICKWIT: And any requirement that they answer
2 why they haven't.

3 COMMISSIONER AHEARNE: It is clear, isn't it, that
4 what we're talking about is what is available under
5 discovery? A lot of these things we're saying are not
6 available under discovery are still fair game in the
7 hearing, right?

8 MR. COTTER: Yes..

9 MR. BICKWIT: I think to pose this question, just
10 consider whether you want "considered" in there or you want
11 "relied on" instead of "considered."

12 Then on page 8, at the bottom of the -- before you
13 get to the first full paragraph, the last sentence before
14 you get to the first full paragraph, the example given is an
15 example that would allow the Board to say, conduct informal
16 document exchanges and colloquies prior to using
17 interrogatories. Do you want to tell the Board that it can
18 have those document exchanges and colloquies as an
19 alternative to using interrogatories or as an alternative to
20 using any discovery, whatever?

21 This is an issue I raised at the end of the last
22 meeting.

23 COMMISSIONER AHEARNE: When you say it establishes
24 the Board's authority --

25 MR. BICKWIT: I think the Board has the authority

1 for the example that is in there. If you widen it to say
2 that the informal document exchanges and colloquies ought to
3 be the exclusive means of getting answers to questions prior
4 to the hearing, then you have changed the existing rule and
5 you've changed the existing authority and the Commission
6 ought to focus on whether they want to do that.

7 COMMISSIONER AHEARNE: And the change in authority
8 is --

9 MR. BICKWIT: I do not think that presently the
10 Board can say, instead of interrogatories and instead of
11 formal discovery, we want an informal colloquy. And if you
12 want the Board to be able to do that I think you have to say
13 so.

14 COMMISSIONER AHEARNE: But the Boards, can they
15 not --

16 MR. BICKWIT: They can say, let's have an exchange
17 and colloquy, but they cannot derogate from the discovery
18 rights that are in the rule. And if you want to allow them
19 to do that and to provide that this is the exclusive means
20 of obtaining information prior to hearing, then I think you
21 should say so in the example. I think the language of the
22 rule is broad enough to provide for that, but I just don't
23 know where the Commission is on that question.

24 CHAIRMAN PALLADINO: Well, I think we don't want
25 to.

1 MR. BICKWIT: Then I think that you ought to say
2 that they can't.

3 MR. SHAPAR: I think your conclusion, though, may
4 be a little stark, because of the Board orders an informal

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1 colloquy and it is held, on the basis of that the Board may
2 very well be able to say that further discovery under the
3 proposed rule would serve no substantial purpose and would
4 be unduly expensive. In other words, the informal colloquy
5 may bring into play some of the standards in the proposed
6 rule that would obviate further formal discovery.

7 MR. BICKWIT: My question is, is it the
8 Commission's intent that the Board could make that finding
9 at that time and preclude all further discovery? If it is,
10 I think as I said last time, I think it is really the most
11 controversial feature of this proposed proposal and the
12 Commission ought to focus hard on that.

13 MR. SHAPAR: Since this is copied from the
14 proposed Federal Rule, what is the result under the rule,
15 Tony?

16 MR. COTTER: I don't understand the question.

17 MR. BICKWIT: The question is, under this rule do
18 you want to provide that the Board can say, have an informal
19 exchange of documents, have a conference and ask your
20 questions at that informal conference, and after it's over
21 that we're satisfied that that does it in terms of what
22 parties are seeking prior to the trial, that's it?

23 COMMISSIONER BRADFORD: Tom, I thought I heard you
24 make a motion that I'd be glad to second.

25 COMMISSIONER ROBERTS: What's that?

1 COMMISSIONER BRADFORD: Didn't you say write the
2 memo after all?

3 COMMISSIONER ROBERTS: No, that was Chilk.

4 (Laughter.)

5 MR. BICKWIT: Thanks, Sam.

6 CHAIRMAN PALLADINO: I think that does bring up a
7 point, that we were just going to hear yours and not debate
8 it.

9 (Laughter.)

10 MR. BICKWIT: And then I have only one other, if I
11 can find it. On page 14, the last sentence in the first
12 paragraph says: "However, the Commission expects that
13 Licensing Boards will carefully scrutinize interrogatory
14 requests which are objected to by other parties in a timely
15 manner and may well impose numerical limits on
16 interrogatories in the appropriate circumstances."

17 I think it's the Commission's intent that, even in
18 the absence of any objections by the parties, numerical
19 limits may be imposed on interrogatories. And if that's the
20 case, then I think you want to put a period after "manner"
21 and strike "and" and have a new sentence that says, "Boards
22 may also impose numerical limits on interrogatories in the
23 appropriate circumstances."

24 But where the Commission is on that limitation on
25 interrogatories, I'm not entirely clear. So I think that's

1 another matter that has to be dealt with.

2 COMMISSIONER BRADFORD: Is the problem for the
3 rule as it stands now for the staff to require of other
4 parties to put interrogatories, to put interrogatories to
5 other parties?

6 MR. BICKWIT: The way the rule reads, the existing
7 law is not disturbed on that question. And our best reading
8 of the existing law is that, probably the staff cannot do
9 that.

10 COMMISSIONER BRADFORD: Cannot?

11 MR. BICKWIT: Yeah.

12 MR. SHAPAR: I bet you could go back and look for
13 ten years and you could never find an interrogatory like
14 that from the staff.

15 MR. ROSENTHAL: They would be very ill advised to
16 do that.

17 COMMISSIONER BRADFORD: To put it another way, can
18 the Applicant pose an interrogatory to an Intervenor or vice
19 versa that --

20 MR. BICKWIT: That asks, do an alternative
21 analysis? I don't think so.

22 MR. SHAPAR: He can't make him create work they
23 haven't done.

24 COMMISSIONER BRADFORD: How about the "why didn't
25 you" type?

1 MR. SHAPAR: I guess they can, and continue to do
2 so.

3 MR. COTTER: I think that's correct.

4 CHAIRMAN PALLADINO: You say they can ask the
5 question, why didn't you do so? And the answer might be
6 because they didn't think it was appropriate.

7 MR. COTTER: If it was objected to, it would be a
8 tough question for the presiding officer to look at. But we
9 specifically considered this, because when Harold put in his
10 proposal it was written as you see it now. And I for a time
11 considered putting it in the rules of general applicability
12 in the .740's, and then did not do so, on the theory that
13 the burden of proof -- the argument that was persuasive to
14 me was the burden of proof was on the Applicant and not the
15 staff.

16 COMMISSIONER BRADFORD: Will one effect of this if
17 it is approved be to derive those kind of interrogatories
18 from the staff to the Applicant?

19 COMMISSIONER AHEARNE: Frankly, for myself I'm not
20 concerned about that.

21 MR. COTTER: That's speculative, but I doubt it.

22 MR. SHAPAR: We'd have to wait and see.

23 MR. BICKWIT: The "why didn't you" question.

24 COMMISSIONER AHEARNE: My concern really goes to
25 the staff.

1 CHAIRMAN PALLADINO: May I make a suggestion on
2 your questions, Len? I think it would be worth writing a
3 memo, and I would think it would also be helpful if you
4 could indicate how the wording would be changed if we wanted
5 to go one way and how the wording would be if we wanted to
6 go the other way.

7 MR. BICKWIT: Fine.

8 CHAIRMAN PALLADINO: Otherwise, we might have to
9 go through two iterations. This way when the revised
10 version comes out those questions could be highlighted and
11 give us a choice.

12 MR. SHAPAR: And that'll teach you to raise points
13 like this at the last minute.

14 (Laughter.)

15 CHAIRMAN PALLADINO: Any other items on the
16 table?

17 (No response.)

18 Thank you, and we'll stand adjourned.

19 (Whereupon, at 11:35 a.m., the meeting was
20 adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
COMMISSION MEETING

in the matter of: Discussion and Possible Vote on Revised Licensing
Procedures, Proposed Rule Change to Part 2

Date of Proceeding: November 5, 1981

Docket Number: _____

Place of Proceeding: Washington, D. C.

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

Ann Riley

Official Reporter (Typed)



Official Reporter (Signature)