UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

October 7, 1986

MEMORANDUM FOR: William J. Olmstead
Assistant General Counsel for Rulemaking and Fuel Cycle

FROM: B. Paul Cotter, Jr.
Chief Administrative Judge

SUBJECT: ALTERNATIVE APPROACHES TO LICENSING A GEOLOGIC REPOSITORY

I. INTRODUCTION

The Licensing Panel endorses subject draft memorandum (the Cameron draft) as a thoughtful approach to the DOE High Level Waste Repository license application, a first time case that may well be the largest administrative proceeding ever conducted.[1] The Cameron draft addresses virtually all of the Panel's concerns. Generally, we find the analysis thorough and agree wholeheartedly with the basic premise that strong, innovative procedures are required.

This memorandum offers some comments on the Cameron draft after first expressing our great concern over the sheer magnitude of the proceeding and the need for a structured, Commission level management organization to be put in place immediately. If the hearing process is to be completed in less than several years (regardless of statutory time frames), we see the need to:

1. Emphasize the size and complexity of the proceeding;

2. Create an NRC HLW licensing and hearing management organization and establish specific, detailed schedules for the entire NRC HLW effort;

3. Obtain an early application from DOE;

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[1] By way of comparison, the Rail Reorganization Act cases arising out of the creation of Conrail involved over 10 years of litigation before a specially created court despite the fact that 98% of the cases were settled before trial. Those cases involved property valued at less than $10 billion in contrast to the $25-35 billion cost of the HLW Repository. The proceeding was computerized.

4. Use multiple ASLBs or Special Masters under an "umbrella", or Managing Board; and

5. Use pretrial complex case management techniques available under existing authority.

II. BACKGROUND

1. Proceeding Magnitude

In comparison to the last 25 contested OL proceedings (which averaged 5 years to complete), the size of the HLW proceeding beggars the imagination. In relation to prior NRC proceedings: (a) the estimated cost of the facility and proceeding of $25-$35 billion is 4 to 6 times greater; (b) the 16 million or more documents expected is 30 to 40 times larger; (c) the number of fully funded prospective parties is 10 to 30 times greater (Just one fully funded party has stopped Shoreham and another seems to be on the same track in Seabrook); (d) the HLW repository is of national, rather than regional or local political significance; and (e) the length of the license time period is 10,000 years rather than 40.

Most significantly this massive body of information and pleadings must be funneled through, digested, and decided by the individual members of a licensing board or boards. The sheer magnitude of that task will require a variety of innovative case management techniques, many of which are described in the Cameron draft.[2]

Completion of the HLW licensing proceeding is first and foremost an NRC management problem. Time is now of the essence.

2. Licensing Management Organization

To complete the HLW license proceeding in any reasonable length of time, the primary requirement is a strong management organization within NRC. We agree with the NARUC testimony before the Commission last April that emphasized management responsibility at the Commission level.

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[2]References to the time line of the hearing process (Cameron Draft Enclosure 4) are extremely misleading and should be made only to emphasize the quantitative differences presented by the HLW proceeding. The time line itself came into existence piecemeal over the years prior to the TMI accident, was not intentionally established as a rational length of time in which proceedings should be completed, and has been

(Footnote Continued)

Accordingly, we propose that a two-part HLW Task Force be established which would report to a "Lead Commissioner". The first part of the task force would manage all the pre-application issues. The second part of the task force would manage all the hearing issues. Representatives of each part of the task force would meet bi-weekly to update the other. The two heads of the task force should meet with the Lead Commissioner monthly. Each task force head should meet monthly with Mr. Rusche and/or representatives of the DOE Office of Civilian Radioactive Waste Management.

Each task force would be responsible for developing a detailed schedule with completion dates for each step required to complete its responsibilities. It may well be advisable to create a PERT chart for this purpose.

At present there is contact among NMSS, OGC (Rules and High Level Waste), and the Licensing Panel, but the contact, as it relates to the post-application proceeding, is somewhat intermittent. Decisions made relating to the pre-application period could very possibly create serious, even insurmountable delays in the post-application hearing phase. Regular, orderly coordination among all affected elements could eliminate many problems within NRC and could give DOE a grasp of the licensing problems that they now apparently do not have.

One of the most significant factors apparent now is the slippage that DOE is experiencing in its Project Decision Schedule. Those slippages have the potential to create enormous pressure from all quarters on NRC as the original statutory date for completing repository licensing approaches. Strong emphasis now on scheduling specific steps, with the ability to adjust for schedule slippages that the PERT chart technique allows, could substantially ease time pressures and insure that NRC can do a thorough job in licensing the facility.

3. Early DOE Application

Even if a central electronic discovery data base succeeds in reducing the time needed for discovery on 16 million documents, the sheer size of the case documentation, the number of parties, and the novelty of the issues has the potential to require a year or more of hearing. The only way to complete these hearings within the statutory time allowed is to conduct multiple, simultaneous hearings on discrete issues. All parties appear to have the resources to deal with overlapping proceedings. A multiple track hearing process will require

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(Footnote Continued)
only marginally relevant to the actual experience of operating license cases over the past seven or eight years.

an early DOE application so that issues can be heard as documentation is completed.

The mechanism for obtaining an early application would not appear too difficult. Either the Commission could specifically authorize it under the NWPA or, as soon as the first discrete segment of the application is completed by DOE (e.g., the waste package), an application could be filed which addressed that segment and merely listed all other matters with a note that complete information would be filed later. Thus, jurisdiction could be conferred to deal with legal and procedural issues as well as the first substantive issues. DOE and NRC could agree that for purposes of the statutory time limit for completing the licensing, the application would not be "filed" until all documentation is complete.

Thus, for example, the waste package or Environmental Impact Statement issues could be heard and decided early on. The decision on those issues would then become binding on related portions of the litigation. Any "interface" or "linking" issues not ready for decision could be identified and deferred.

A licensing board cannot exercise jurisdiction until an application is filed. It is essential when jurisdiction is activated that documentation of discrete subjects be complete. If documentation is incomplete, efficiency is lost, repetitiousness creeps in, and the result is delay. If careful attention is given to segmenting the application, discrete issues could be identified for hearing and decision on parallel, simultaneous tracks. Thus the pre-application licensing advice given DOE by NRC could help to structure the DOE application to enable multiple Licensing Panel boards to hear and decide the case expeditiously.

4. Multiple ASLBs Under a "Managing Board"

In recent years the Panel has found it necessary to establish two and even three boards in individual cases to expedite the process and complete the proceeding before construction is completed. That technique can be used in the HLW application with the addition of an "umbrella board" which would have both primary responsibility for the final Initial Decision and management responsibility for the overall case.

An umbrella, or Managing Board, could help define discrete segments of the proceeding and, in the appropriate circumstances and with the concurrence of the Chief Administrative Judge, could assign segments to separate boards to hear and decide. The Managing Board could act much like a judge using special masters, with the possible exception that the assigned licensing board could be authorized to issue a final decision

on the segmented issues that would not require de novo review by the Managing Board but could be treated as res judicata in its Final Initial Decision. The entire proceeding could thus be broken down into manageable size for all those issues that could not be disposed of by rulemaking at the pre-application stage. In my judgment, multiple boards are the only device that could enable the Panel to complete this licensing proceeding in a reasonable length of time.

5. Pretrial Complex Case Management Techniques

A great deal can be done under existing authority to eliminate substantive and procedural issues and steps that normally consume substantial amounts of time in the conventional hearing process. For example, pretrial orders could:

1. Define and redefine issues in detail and certify them as ready for hearing;

2. Establish lead counsel and liaison counsel;

3. Issue a confidentiality order and resolve privilege claims;

4. Obtain stipulations for, e.g.: (a) identifying and accepting expert witnesses and their qualifications; and (b) establishing uncontested facts;

5. Handle summary disposition;

6. Manage discovery by establishing schedules for, e.g., depositions, rules governing depositions, and special problems, e.g., computerized summaries and other computer evidence;

7. Rights and obligations of the parties and sanctions;

8. Filing proposed findings of fact before hearing; and

9. Certifying discrete issues as ready to go to hearing.

These and other pretrial management actions could reduce the hearing time to a bare minimum.

However, working out the details of such orders will require extensive pre-planning by the boards and extensive work by the boards with the parties to insure that the full benefit is obtained. Most of that pretrial work could be performed by the Hearing Management Board in advance if DOE were to file an early application.

III. COMMENTS ON THE DRAFT MEMORANDUM

A. Streamlining the Hearing Process

1. Licensing Support System

The Panel agrees wholeheartedly with the proposals concerning electronic mail and a central discovery data base. We do not believe the licensing process could be completed in any reasonable time frame without this capability. We endorse the negotiated rulemaking approach with the caveat that the rulemaking should be conducted within a strictly limited time frame, ideally six months and certainly no more than a year. The reason for this is that a substantial amount of time will be required simply to enter the documentation once the terms of the central data base have been agreed to. Thus a rulemaking begun January 1, 1987 and completed a year later will leave only 3 1/2 years to establish the data base itself before the application is filed in 1991.[3]

We note also that even a central data base may not eliminate all discovery problems because of the various parties' concerns with proprietary information, attorney's work product, and other kinds of protected data. This kind of material will be the subject of cross-motions for discovery even after a central data base is created. Time will also be needed to take depositions. Detailed estimates of the extent of these discovery problems should be made with a careful estimate of the methods and time necessary to resolve them.

2. NEPA

We endorse the concept of adopting the DOE EIS as a means of expediting the proceeding but have some concerns as to whether the Calvert Cliffs decision may raise some problems.[4] There the Court expressed the view that precluding parties from raising environmental issues in Commission proceedings because of the findings of other agencies was not proper (440 F.2d at 1123). It also said that while avoiding duplication of effort is a valid goal (which Congress has mandated in this case), "independent review ... by hearing boards is hardly a duplicative function" (440 F.2d at 1118). Thus, a party could

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[3] A NARUC representative estimated at 1 minute per document that it would take 30 years just to enter the documents. The time needed to read that material would take several orders of magnitude longer.

[4] Calvert Cliffs Coordinating Committee v. AEC, 440 F.2d 1109 (D.C. Cir. 1971).

argue that they were still entitled to hearing on the DOE EIS even though it was adopted by NRC. The Staff may wish to review the proposal against Calvert Cliffs.

We are also concerned as to whether there will be time for rulemaking on such a controversial issue since the DOE Project Decision Schedule makes the DEIS due June 6/90, the FEIS 12/90, and the application 5/91. It might be more efficient for the Commission to begin a rulemaking now which would set out the guidance to be followed in deciding which portions of the DOE FEIS should be adopted and leave the decision to the adjudication.

3. Regulatory Reform

We concur in the recommendation that currently proposed amendments to the rules of practice, 51 Fed. Reg. 23465 (1986) be made applicable to the HLW proceeding with two caveats: (1) Mandatory cross-examination could prolong the hearing in some instances; and (2) admission of contentions standards that are too rigid could create delay through due process litigation. The Panel's Part 2 "Plain English Rewrite" should be re-examined for applicability to the HLW proceeding of all or some parts, e.g., adoption of the 1983 sanction provisions of the Federal Rules of Civil Procedure, the revision to the form and content of contentions, and the use of some variation of the FRCP Rule 12(b)(6) procedure. See SECY-85-290 (August 29, 1985).

We endorse the proposal to adopt the Federal Rules of Evidence with appropriate modifications.

4. Raising the Threshold for Certain Contentions

We do not see rulemaking as a viable option here because it is too time consuming. Nor do we see a unilateral Staff determination that an issue is closed withstanding an appeal to the Courts. Raising the threshold for contentions raises the spectre of delay from interlocutory appeals by well-funded lawyers.

We favor achieving the objective by: (1) requiring detailed fact pleadings; and (2) adopting some variation of Federal Rule 12(b)(6). See SECY-85-290, pp. 129-132, 137-140, 148-152 (August 29, 1985).

B. Early Identification and Closure of Issues

Prelicensing consultation should aid in resolving issues, and we endorse the concept. However, a mechanism is needed to make the issue

resolution binding on the parties. A Managing Board constituted pursuant to an early DOE application could enter binding orders.

We do not believe there will be enough time to dispose of issues through rulemaking.

We strongly endorse the use of pretrial initial decisions before and after the three-year decision period begins. See sections I.2. and 3., above.

C. Bifurcation of Licensing Decisions

We strongly endorse the concept of bifurcated or segmented hearing and decision on discrete issues. It may be possible through extensive analysis to identify families of issues that link discrete phases or segments of the facility. Such "linking" issues could be reserved for resolution when the final application is complete. In the meantime the discrete core issues could be addressed and resolved.

CONCLUSION

It is imperative that careful planning begin now with the goal that DOE file an early application, hopefully by the end of 1987, so that work can begin as early as possible on what may well be the largest administrative proceeding ever conducted. It appears now that DOE is the weak link in the HLW licensing process and that NRC will become the scapegoat for any slippages, inexperience, or delay in the DOE effort.

cc: Francis X. Cameron, OGC