



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 8, 1999

OFFICE OF THE
GENERAL COUNSEL

MEMORANDUM TO: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen D. Cyr *Karen D. Cyr*
General Counsel

SUBJECT: ASLBP COMMENTS ON OCTOBER 30, 1998
DRAFT OF PAPER ON "RE-EXAMINATION OF
THE NRC HEARING PROCESS"

Pursuant to the Atomic Safety and Licensing Board Panel's (ASLBP) request, I have attached for your information, a copy of the ASLBP's comments on the October 30, 1998 draft of our paper on "RE-EXAMINATION OF THE NRC HEARING PROCESS." I believe that, in general but without specific reference to particular comments, the Panel's comments have been addressed in the final version of our paper submitted to the Commission today.

Attachment: As stated

cc w/attachment: ASLBP
EDO
SECY
OCAA
CFO
CIO

NOTE:

[Handwritten signature]
ATTORNEY-CLIENT INFORMATION LIMITED TO NRC
UNLESS THE COMMISSION DETERMINES OTHERWISE

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

December 17, 1998

MEMORANDUM TO: Karen D. Cyr
General Counsel
Office of the General Counsel

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

SUBJECT: COMMENTS ON OCTOBER 30, 1998 DRAFT SECY
PAPER ON NRC HEARING PROCESS
RE-EXAMINATION

We have reviewed the October 30, 1998 draft of the OGC SECY paper concerning the agency's hearing process. Overall, we found the draft a balanced attempt to outline the legal and policy options available to the Commission in making a choice about the procedures that will be utilized for conducting adjudicatory hearings. We do not, however, concur with all the conclusions drawn in the draft. Our major disagreements are set forth below.

I. STATUTORY INTERPRETATION

The analysis in the draft paper advances the view that Atomic Energy Act (AEA) section 189a, 42 U.S.C. § 2239(a), does not mandate formal adjudicatory procedures in any instance. We believe the better legal view of the meaning of section 189a vis a vis formal hearings in power reactor licensing cases is presented in the January 1989 OGC memorandum included as attachment 2 to the draft paper.¹ See Attach. 2, at 37 (section 189a legislative history suggests formal hearing are required for power reactor licensing cases).

We will not revisit that debate in this memorandum, other than to observe we find misplaced the OGC draft's attempt to discount the import of the "notwithstanding" provision of AEA section 191 as "faulty drafting." See Draft at 2 n.4. As far as we are aware, there is no rule of statutory construction that sanctions disregarding a legislative provision because it is perceived to be badly drafted. See 73 Am. Jur. 2d § 203, at 397 (1974) (courts will not correct legislative mistakes despite extraneous circumstances indicating legislature intended to enact something different). In any event, as the analysis in the 1989 memorandum indicates, see Attach. 2, at 32, the "notwithstanding"

¹ In this regard, we find particularly compelling the careful analysis of the complete legislative history of AEA section 189a found in this memorandum and the two additional OGC memoranda it cites.

provision of AEA section 191 is a clear expression of congressional intent that section 189a requires formal proceedings. As such, it should be accorded substantial deference. See Loving v. United States, 517 U.S. 748, 770 (1996) (subsequent legislation declaring the intent of an earlier statute entitled to great weight in statutory construction).

II. "USEFULNESS" OF THE FORMAL ADJUDICATION IN THE LICENSING PROCESS

A major premise of the OGC draft is that for the licensing process, the formal adjudicatory hearing has outlived whatever usefulness it may once have had. The draft suggests that for scientific questions it probably was a bad idea ab initio because technical issues are not readily resolvable in an adjudicatory forum, particularly one that is encumbered with formal procedures. See Draft at 4. It also asserts both the statutory and administrative trend is toward the use of more informal processes. See Draft at 8-9. Further, the paper suggests the formal hearing process adds nothing to, and in fact may be detrimental to, public confidence in the agency's regulatory process. According to the paper, the era of public desire to take part in the "winner-take all courtroom model" of adjudication has passed. Instead, in this "talk show and Internet" age, what people want is simply an opportunity to "ask their own questions and get them answered" without having to rely on legal intermediaries or be burdened by procedural impediments. OGC's conclusion thus is that "nothing . . . in recent years indicates that the formality of NRC licensing hearings gives any stakeholders, including the public at large, particular confidence in the overall soundness of NRC processes." Draft at 10-11 (footnote omitted).

We disagree with a number of these points, as we discuss below.

A. Use of the Adjudicatory Process to Decide Scientific/Technical Disputes

It is often asserted that a trial-type setting is not an appropriate forum for resolving scientific and technical questions. This, however, does not account for what is adjudicated on a regular basis by judges and juries in state and federal courts all over the country. Scientific and technical issues do require special hearing management techniques. See Federal Judicial Center, Reference Manual on Scientific Evidence 1-2 (Matthew Bender & Co. 1995) (1994). There has not, however, been any concerted effort to remove such issues from the formal adjudicatory process in civil and criminal trials.

In fact, there is nothing inherent in the nature of scientific or technical disputes that makes these matters inappropriate for resolution in an adjudicatory proceeding, formal or otherwise. In the administrative context, often cited in support of such an exclusion is the Kenneth Culp Davis distinction between "legislative facts" — i.e., those that help resolve questions of law, policy, or discretion — and "adjudicative facts" — i.e., those that answer questions of who did what, where, when, how, why, and with what motive or intent. See Kenneth C. Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 199 (1956). According to this argument, the first category, which Davis asserts should be

handled via rulemaking or some other nonadjudicatory, nonadversary procedure, inevitably is where most scientific and technical matters fall. This fails to recognize, however, that disputes over science and technology in the context of administrative proceedings are not always of such a generalized law/policy/discretion ilk. Rather, they may involve questions about specific scientific or technical judgments that have been reached after an analysis of a particular set of factual circumstances. See Sidney A. Shapiro, Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry, 1986 Duke L.J. 288, 298. This, in fact, is an accurate description of what generally is in controversy in the context of this agency's licensing process.² As such, the adjudicatory process is an appropriate vehicle for resolving scientific and technical disputes that arise in these proceedings.³

B. Use of "Formal" Procedures

As the draft paper also points out, however, adjudications can be fashioned using a variety of procedures, the overall goal being to make the hearing a meaningful one. It further suggests that "formal" procedures do not necessarily make a hearing more meaningful for the participants. In making such a judgment, however, we think the paper should detail more fully what those procedures are intended to do and what, if anything, is lost when they are removed from the process.

We would suggest that in the context of this agency's licensing process, a meaningful hearing must, at a minimum, provide access to the applicant and staff judgments about the health, safety, and environmental implications of the requested authorization. These conclusions generally are found in the application and the staff's review documents, such as the Safety Evaluation Report (SER). Equally important to meaningful participation, however, is the opportunity to expose and explore the deductions and inferences applicant or staff scientific or technical experts use as a basis for their judgments (often expressed in conclusory terms) about health and safety or environmental issues as those are set forth in support of an application or a technical review document.

Relative to this agency's existing formal adjudications, two mechanisms are afforded to conduct this "inquiry" that are of particular significance. The first is the discovery process, which furthers the goal of providing meaningful participation by allowing the

² This is wholly consistent with the Administrative Procedure Act (APA) drafter's general view that the fact-specific nature of the licensing process places it in the "adjudicatory" category. See 5 U.S.C. § 551(6)-(8) (definitions of "order," "adjudication," and "license").

³ Although the draft seemingly reaches a different conclusion, see Draft at 9-10, the nature of the evidentiary disputes in this agency's licensing proceedings also provides a compelling reason why, notwithstanding the availability of the initial licensing exemption, the APA's separation of functions requirement should be applied in NRC formal licensing adjudications. See Harvey J. Shulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame Law. 351, 362 (1981).

participants, prior to any evidentiary presentations, to probe the bases upon which judgments about an application's scientific and technical adequacy rest. The other is cross-examination -- one of the hallmarks of the formal adjudication. Allowing cross-examination of witnesses, including scientific and technical witnesses, is intended to ensure that the bases of the witness' knowledge and conclusions, as well as his or her general veracity,⁴ can be thoroughly explored as part of the evidentiary record.⁵

A decision about what "inquiry" tools will be afforded as part of the hearing process denotes a measure of the significance placed on the interests that the process is intended to protect. It also represents a judgment about how effective (and efficient) those tools are. Both the discovery and cross-examination "inquiry" tools carry "costs" in terms of the expense for the participants and time involved in completing the adjudicatory process. These costs can be mitigated by hearing management techniques, such as the use of informal discovery, numerical and time limits on discovery requests, and using an inquisitorial (questioning by the presiding officer) rather than an advocacy (questioning by the litigants' lawyers or representative) approach to cross-examination; however, in the end those costs cannot be entirely eliminated.⁶ At the same time, the removal of either or both of these inquiry tools, and with them the opportunity to explore thoroughly the health, safety, and environmental judgments that are being made, arguably carries a cost in terms of the overall goal of providing a

⁴ In addition to providing an opportunity to test a witness' knowledge and veracity, the availability of cross-examination may also have the salutary effect of helping to ensure that any licensing documents, such as an environmental report or impact statement, for which a witness is responsible and may be called upon to defend, are prepared in a thorough, soundly reasoned manner.

⁵ The availability of cross-examination assumes that the process will include an opportunity to provide statements by individuals as evidence to support a party's position, whether in the form of oral testimony or a written submission. Generally such statements are required to be sworn, which is intended to ensure accuracy and candor.

We also would note that the opportunity for cross-examination arguably is even more important when witness direct testimony is in writing. Use of prefiled written testimony can result in enormous time savings; however, it is particularly susceptible to "tailoring" to obscure weaknesses in a witness' presentation.

⁶ It is also worth noting that the removal of the discovery inquiry tool may have cost consequences for the cross-examination inquiry tool. One of the draft's suggestions is to eliminate discovery even if the Commission decides to continue to provide formal hearings in reactor licensing proceedings. See Draft at 12 n.27. This, however, could have the effect of prolonging evidentiary hearings significantly. In the absence of discovery, counsel are more likely to try to use cross-examination as a general information-gathering device rather than just as a vehicle to probe the sufficiency of a witness' direct testimony. Such efforts can be controlled by the presiding officer, but may be difficult to eliminate entirely.

"meaningful" proceeding. This point, we think, is one that should be explored in more detail in any paper suggesting total elimination of the use of these formal hearing procedures.

C. "Trends" in Administrative Law

The draft also makes the point that in response to skepticism about the value of formal adjudications, agencies have turned to the use of alternative dispute resolution methods (ADR). We certainly support the use of ADR as a tool in resolving disputes. All Panel legal members have had training in ADR techniques. Moreover, for some time Panel presiding officers have made the offer to provide, or have other Panel members provide, ADR services a standard part of prehearing discussions with the parties.

The degree to which ADR can serve as an effective alternative to the adjudicatory process in reactor licensing cases is problematic, however. In contrast to agency enforcement cases, which often are amenable to settlement by compromising the duration of an enforcement action or the amount of a civil penalty, the matters at issue in licensing cases, and particularly reactor licensing cases, are the type the parties frequently are unwilling to compromise. If, for example, an intervenor's central interest is in denying authorization for reactor facility operation, finding grounds for settlement may be impossible.

D. Public Interest in Using Formal Procedures in Licensing Proceedings

We also find questionable that portion of the draft that attempts to characterize the attitude of the "public" toward the formal hearing process. There is little doubt the "industry" would prefer that the hearing process, formal or informal, be minimized to the extent possible. See infra note 13. What the public thinks is, we believe, considerably less clear.⁷

⁷ The one instance we are aware of in which there was an expression of disaffection with the agency hearing process by a member of the "public" was as part of the study on the possible external regulation of the Department of Energy. In that instance, a public interest group representative expressed concern about the utility of the NRC hearing process as a regulatory mechanism, suggesting that instead of agency hearings, members of the public be provided the right as "private attorneys general" challenge agency action or inaction by going directly into federal district court where, of course, as a matter of right they could use the full range of formal adjudicatory tools.

In this connection, the question of the appropriate forum for judicial review in the event the agency moves toward the widespread use of less formal hearing procedures for reactor licensing cases is not addressed directly in the paper. See Draft at 7 n.19 (district court review unnecessary when agency record is adequately developed). We simply would note that a licensing process that, for whatever reason, is subjected to de novo district court review is probably not desirable from the agency's perspective.

Even if, as the paper asserts, the judicial process generally is not held in as high esteem as it once was, this does not mean there is a general desire on the part of the public to do away with the formal adjudicatory process for NRC licensing proceedings. Some members of the public may indeed want to forego participation in the current formal adjudicatory process because of monetary or other considerations.⁸ There clearly are, however, those who would not willingly give up the opportunity to participate in a formal adjudicatory process because they undoubtedly believe, for the reasons we have outlined above, it provides the best opportunity to participate in a meaningful way and obtain the relief they seek. For instance, we doubt the State of Utah or one of the other "public" parties to the Private Fuel Storage proceeding would be willing to forgo the opportunity for a formal hearing in that proceeding. So too, as the paper recognizes, offering only an informal hearing for licensing the proposed high level waste repository is unlikely to meet with the approval of the potential parties, including the State of Nevada.⁹ See Draft at 12 n.26.

⁸ The paper points to the purported popularity of several recent public meetings/question and answer sessions as demonstrating that a less formal process is preferable to the public. For a number of years, the agency has provided a number of mechanisms, including 10 C.F.R. § 2.206 petitions and 10 C.F.R. § 2.715 limited appearance statements, that permit the public to express its views and concerns outside the formal adjudicatory process. Ultimately, however, these mechanisms, like the public forum process, lack one or more of the fundamental attributes -- including effective opportunity to confront adverse information and provide rebuttal information; a decision providing reasons that is based solely on the record of the proceeding; an impartial decisionmaker; and the right to administrative and judicial review -- that have been recognized as necessary to provide a meaningful "hearing." See 1 Charles H. Koch, Jr., Administrative Law and Practice § 7.23, at 576 (1985).

The draft paper also seems to suggest that "legal technicalities" and lawyers are inextricably intertwined with the current formal adjudicatory process, thereby creating a significant impediment to its use by the general public. See Draft at 10-11 & n.26. Of course, an interested person need not have a lawyer to participate in a formal adjudication. But even a pro se intervenor must meet the legal requirements for such things as standing and contentions. To attack these "legal technicalities" as an impediment to participation, however, presents a classic "chicken or the egg" dichotomy. These requirements are indeed intended to limit participation by ensuring that anyone who has access to the panoply of formal hearing "inquiry" tools, with their attendant costs, is, in fact, a serious participant.

⁹ Nor is it likely that the elected representatives from any state affected by a major proposed agency licensing action would embrace the loss of the opportunity for a formal hearing for his or her constituents. Indeed, Congress appears to have recognized the continuing public desire for formal adjudications, as is evidenced by the most recent legislative action addressing the issue. See AEA § 193(b), 42 U.S.C. § 2243(b) (providing on the record hearing for uranium enrichment facility licensing).

Yet, even assuming some people would prefer to participate in a less formal adjudication, this is not a basis for excluding others from using the formal hearing process, especially if they are legally entitled to use that process. Nonetheless, if the Commission wants to address any perceived concern that access to a less formal process is needed to increase public willingness to participate in reactor licensing proceeding, rather than attempting the legally questionable approach of curtailing hearing procedures, the Commission should consider offering petitioners a choice between using formal or informal procedures in such proceedings.¹⁰

In this regard, given the additional "costs" that may be involved in utilizing formal procedures, the agency arguably is justified in setting a higher threshold for admission to a proceeding that will be conducted using such procedures. Thus, those who wish to exercise their AEA section 189a right to use the formal hearing mechanisms in 10 C.F.R. Part 2, Subpart G, including discovery and cross-examination, would have to meet the existing, more exacting standards for the admission of contentions set forth in Subpart G. In contrast, a less stringent issue admission standard, such as that in Subpart L, could be made applicable for those who, for financial or other reasons, are willing to forgo the formal process in favor of an informal hearing process like that in Subpart L.¹¹ Such an approach has the advantage of providing a participation incentive to the public that also may be less burdensome to the agency, but without curtailing the formal hearing rights afforded by AEA section 189a.¹²

¹⁰ In the past, concerns about increasing meaningful public access to the adjudicatory process have spawned suggestions such as the creation of a public counsel's office or providing funding for intervenors. See 1 Nuclear Regulatory Commission Special Inquiry Group, Three Mile Island Report to the Commissioners and to the Public 142-44 (Jan. 1980) (Rogovin Report). Our assumption is that these are not options the Commission currently is interested in considering.

¹¹ With one caveat, we would agree with the paper's suggestion that the agency's general policy regarding standing be reexamined, including the possible adoption of standing criteria based on generic presumptions about the potential "injury" that could arise from different kinds of licensing actions. See Draft at 11 n.24; Attach. 4 at unnumbered p. 3. The caveat is that if the agency wishes to lower its administrative standing requirement to the extent that some of those admitted as parties in the agency proceeding could face the serious possibility of dismissal on judicial review for lack of Article III standing -- a jurisdictional infirmity that can be interposed by any party or the reviewing court -- the agency should warn potential intervenors of that possibility.

¹² A potential problem with this approach is what to do in a proceeding in which there are multiple petitioners who request different procedural processes. To avoid adjudicating the same matter using more than one set of procedures, we would suggest that if there are multiple hearing requests and any petitioner asks for a formal hearing, all hearing requests would be adjudicated under the rules for formal proceedings. Those who requested informal hearings would, of course, be afforded an opportunity to conform
(continued...)

III. FORMAL ADJUDICATORY PROCEDURES FOR ENFORCEMENT PROCEEDINGS

The focus of the draft paper is on the type of hearings afforded in connection with the agency's reactor licensing process.¹³ Yet, the question of what hearing procedures should be provided has implications for the agency enforcement process as well. Currently, both reactor and materials licensees who are the subject of either agency-imposed license revocations, suspensions, and modifications or monetary civil penalties have the right to request a formal adjudication to contest that agency action. The draft does not directly address whether such hearings should continue to be provided. It should discuss that issue explicitly. Moreover, given the obvious importance of witness credibility in these proceedings, we believe they should remain as formal adjudications.¹⁴

We request that this memorandum accompany the final OGC paper that is submitted to the Commission.

¹²(...continued)

their filings to the requirements for formal proceedings.

¹³ We would also observe that, in the context of reactor licensing, a Commission decision to make more licensing actions the subject of informal hearings need not necessarily signal a wholesale retreat from the formal adjudicatory process. The heart of the Commission's West Chicago decision is its recognition that licensing proceedings are not necessarily all the same in terms of their health, safety, or environmental implications. The Commission itself recognized this in the context of that same proceeding when, in contrast to its earlier ruling subjecting a building demolition license amendment to an informal hearing, it provided a formal hearing to adjudicate the question of the adequacy of the overall plan for decommissioning the entire facility. See Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1299 (1984). By the same token, as the draft seems to suggest, some reactor licensing actions clearly are deserving of consideration in a formal adjudication. See Draft at 11-12 & nn. 25-26.

¹⁴ We also note it was reported in connection with the then-proposed 10 C.F.R. Part 2, Subpart M, that at least one power reactor commenter suggested that the use of informal procedures should be extended to all agency proceedings, including enforcement proceedings. See Industry Praises Streamlined License Transfer. Urges Expansion, Inside NRC, Oct. 26, 1998, at 15. We find this comment somewhat disingenuous. Over the last decade nuclear material licensees and individuals subjected to agency enforcement orders and civil penalties, not power reactor licensees, have been the ones utilizing the formal hearing process to challenge agency enforcement actions.