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

January 19, 1999

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

FROM: G. Paul Bollwerk, III
Acting Chief Administrative Judge

SUBJECT: ASLBP COMMENTS ON SECY-99-006, "RE-EXAMINATION OF THE NRC HEARING PROCESS"

The Atomic Safety and Licensing Board Panel (ASLBP) appreciates the opportunity to review and comment on SECY-99-006, an Office of the General Counsel (OGC) analysis of the legal and policy options available for utilizing adjudicatory hearing procedures for agency licensing and enforcement actions other than the formal, trial-type procedures that are provided for in 10 C.F.R. Part 2, Subpart G. The Licensing Board Panel was provided an opportunity to comment regarding an earlier and somewhat different draft of this SECY paper and a copy of our December 17, 1998 comments were forwarded to you by the General Counsel as an attachment to a January 8, 1999 memorandum. We would like to provide a few additional observations regarding the final paper.

I. STATUTORY INTERPRETATION

In our December 1998 memorandum, we expressed our belief that the "better legal view" on the meaning of Atomic Energy Act (AEA) section 189a, 42 U.S.C. § 2239(a), with regard to the type of hearing required for power reactor licensing cases was presented in a January 13, 1989 memorandum from then-General Counsel William C. Parler to the Executive Director for Operations, pertinent portions of which were attached to the October 1998 draft, as well as two additional OGC legal memoranda cited on page thirty-five of the January 1989 document. ASLBP December 17, 1998 Memorandum at 1 & n.1. We urge the Commission to review those documents as it considers the legal question of the meaning of section 189a.

Further regarding the matter of statutory interpretation, we observe the following:

1. SECY-99-006 places considerable reliance on "legislative history" as the basis for its apparent conclusion that section 189a does not mandate a formal hearing in reactor licensing cases. See SECY-99-006, at 3, 6-7. We note, however, that legislative history generally does not come fully into play until a court has addressed such constructional precepts as the need to avoid interpreting an act in a manner that would render one of its provisions meaningless. See 73 Am. Jur. 2d Statutes §§ 150, 250 (1974). SECY-99-006 now seeks to justify the presence of the "notwithstanding" clauses of AEA section 191, 42 U.S.C. § 2241, and section 304(c) of the Nuclear Non-Proliferation Act of 1978 (NNPA), 42 U.S.C. § 2155a, as precautionary. See SECY-99-006, at 5. We, however, continue to believe, in line with the reasoning put forth by General Counsel Parler, that their adoption constitutes a significant impediment to the judicial endorsement of the SECY-99-006 interpretation.

2. In the West Chicago proceeding, which produced what up to this point is the leading judicial decision on the type of adjudicatory hearing that must be provided under AEA section 189a, the question of how the "notwithstanding" language of AEA section 191 and NNPA section 304(c) impacts on the meaning of section 189a was not discussed by the court. See City of West Chicago v. NRC, 701 F.2d 632, 641-45 (7th Cir. 1983). How a court will view these "notwithstanding" clauses thus is an open issue.

3. What did constitute a significant basis for the Commission's West Chicago decision was a reliance on the lack of wide-ranging health and safety impacts as compared to reactor licensing cases. See Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 252-53, (1982). (A similar theme was used recently to explain the adoption of 10 C.F.R. Part 2, Subpart M, regarding license transfers. See 63 Fed. Reg. 66,721, 66,722 (1998)). What SECY-99-006 essentially suggests is that reliance on that practical distinction as support for parsing the terms of section 189a now should be discarded totally. This, however, creates the possibility that a court that disagrees with the current interpretation of section 189a as embodied in SECY-99-006 would, by logical extension, have grounds to reject the West Chicago analysis as well, thereby placing 10 C.F.R. Part 2, Subpart L, and the materials and reactor operator licensing cases litigated under its informal procedures, in legal jeopardy.

II. DISCOVERY

In SECY-99-006, it is suggested (as it was in the October 1998 draft) that a "minor change" in agency rules would be the abolition of discovery from Subpart G proceedings. Assuming the agency retains some formal proceedings, such a change could have a pronounced impact on the way licensing adjudications are conducted, to say nothing of the way the process is perceived by the litigants.

The discovery process undoubtedly can impose substantial resource burdens on those who participate, both in terms of time and costs. If properly conducted, however, it also can result in significant savings during the actual "trial," both in terms of the number of witnesses and documentary materials involved and the length of any examination of those witnesses. If parties have no opportunity for discovery, they are more likely to try to use the evidentiary hearing to ferret out information, including seeking to subpoena and present testimony and documents from those they believe may have relevant information and conducting more far reaching cross-examination of other parties' witnesses. Moreover, by eliminating direct access to applicant and NRC staff documents, abolishing discovery also may lead to an increase in Freedom of Information Act (FOIA) requests (and lawsuits if agency responses are untimely) in an effort to gain access to information held by the agency. Finally, unless a discovery recission is limited to licensing proceedings, it may impact on the way in which the staff conducts enforcement cases, because the staff now generally seeks extensive discovery in 10 C.F.R. Part 2, Subpart B proceedings.

We believe a preferable approach to curbing and eliminating discovery delays and costs is better hearing management. See CLI-98-12, 48 NRC 18, 23-24 (1998). If the Commission nonetheless wishes to consider eliminating discovery in Subpart G proceedings, notwithstanding the Administrative Procedure Act provision allowing agency procedural rules to be adopted without notice and comment, see 5 U.S.C. § 553(b)(A), we urge that any final action not be taken without providing interested persons an opportunity for comment on the loss of such a longstanding element of NRC adjudicatory practice.

cc: SECY
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