



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

January 23, 1989

MEMORANDUM FOR: William C. Parler
General Counsel

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

SUBJECT: DRAFT COMMISSION PAPER ON FURTHER
REVISIONS TO THE RULES OF PRACTICE TO
STREAMLINE THE HLW LICENSING PROCESS

This response to subject paper received January 18, 1989, is necessarily brief because of my obligations to the St. Lucie spent fuel pool hearing the week of January 23, 1989. In addition, because I believe that the successful completion of any high level waste proceeding conducted in the future depends on actions taken by the Commission now, I am setting out my views on what needs to be done as it relates to both the LSS and rules of procedure.

I endorse John Frye's suggestions addressing details of the paper in his January 19, 1989 note to Chip Cameron, and I am in general agreement, with one notable exception, with the contents of Chairman Kohl's response of the same date. That exception is that I strongly support Option 2 of your paper.

My reasons for supporting Option 2 are based, in part, on my view of the three interdependent actions that must be taken if the HLW facility is ever to be licensed. They are:

1. Establishment of the LSS.
2. Establishment of and experience with a comprehensive set of rules of procedure capable (like the Federal Rules of Civil Procedure) of dealing with complex litigation in the most efficient manner.
3. Rule making to narrow and define the subject matter of the HLW proceeding.

I firmly believe that all three are absolutely necessary if there is to be even the remotest likelihood of completing the HLW proceeding in the statutory time period prescribed.

A. The LSS

It is undisputed that work on the LSS itself should proceed immediately. There are still many purely technical problems in the LSS concept to be resolved before it will be usefully operational. An operational LSS is essential to the timely completion of the HLW application by DOE and the timely completion of the review of that application by NMSS. The HLW application's data base must be available through the LSS system as soon as possible. Only the LSS is capable of enabling the Staffs of both agencies to deal with the extraordinary amount of documentation required. Consequently, the LSS portion of the rule making should proceed.

(I suggest in this regard and in connection with my comments on the need for a comprehensive set of Rules of Procedure for complex litigation below, that the LSS application should not be considered docketed until the Staff Safety Evaluation Report on the LSS is issued. Such a provision would eliminate the repeated necessity to retry issues that has plagued our hearings for the last ten years as well as eliminating virtually all the debate and problems associated with late filed contentions.)

B. Rules of Procedure

1. The Problem

Historically, the NRC's rules of procedure were written by Herzel Plaine in the late 1950s, and although they have been revised innumerable times, they have never been comprehensively updated since then. In addition to periodical patchwork on Part 2, on several occasions in the last six years the Commission has adopted special rules for perceived "special situations" so that NRC now has multiple rules of procedure. Judge Plaine's rules did not contemplate the complex litigation that has dominated the 1980s, now epitomized in the High Level Waste proceeding scheduled to commence in 1995 (it also hardly seems likely that Congress anticipated the complexity and size of the HLW proceeding when it set the current statutory time limits for completing it). The Licensing Boards have responded to the situation by adopting, under their case management authority and where useful, most of the currently accepted practices in complex litigation, starting with Judge Smith's work in the TMI Restart case (See the Kohl memo, p. 5). Few if any of these procedural devices are set out in Part 2.

Many of the changes suggested for the HLW case are good (and, I like to think, drawn from the Licensing Panel's 1984 "Plain English Rewrite"). Nevertheless, any rules drafted now will be used for the first time no sooner than 1995 without benefit of experience in their use or interpretation by case law.

It seems to me imprudent to seek now to procedurally bind a case not yet defined that is to be litigated by people not yet identified (it also seems to me highly likely that not more than one out of 20 current NRC and DOE employees will actually be involved in the HLW proceeding six years from now). To set in concrete now such things as detailed "model" schedules for completing the case, or subjects to be litigated is, at the least, highly presumptuous. Such rule making assumes that there will be no developments in the next six years in managing complex litigation (not unlike the 10,000 year technical standard governing the HLW repository that outrageously assumes there will be no technological developments in that time period). I note, for example, that the American Law Institute has a major Complex Litigation Project currently underway. See Council Draft No. 1 (November 23, 1988).

2. The Solution

Because the HLW proceeding is simply the latest "special situation" deemed to warrant a special set of rules of procedure and because the commencement of that proceeding is at least six years away, the Commission should take the opportunity to revise Part 2 now, obtain some experience and case law in the use of the revised rules, and defer specialized rule making for the HLW proceeding until at least 1993 when the shape, size, and parties to the HLW proceeding are better known and understood.

Chairman Zech has asked me to resubmit an updated revision of the Plain English Rewrite, and I intend to do so by mid-March, 1989. The revision will eliminate most, if not all, of the controversial provisions in the 1984 version and will be coordinated with all the General Counsel's Office. That effort could put in place a modern set of rules of procedure by the end of the year, thus giving the Commission up to four year's experience and case law by 1993. Consequently, I endorse Option 2 in subject paper.

C. Rule Making

I estimate that the HLW proceeding will take at least a year to hear. My estimate is based on the current experience in litigating the emergency planning issues in the Seabrook and Shoreham proceedings and the five years it took to complete the Sizewell B hearings in England. The issues to be litigated in the HLW proceeding are clearly not as well defined or understood as those in the Seabrook, Shoreham, and Sizewell proceedings, and the HLW parties may well be equally willing to take matters related to the HLW hearings to the courts and political forums (thereby eliminating the perceived "efficacy" of the proposed model schedule which is essentially meaningless because, at the least, it is unenforceable as against the public health and safety). Even if four Licensing Boards, under the management of a Supervising Licensing Board, held hearings simultaneously (for a total of 360 days), the issues are so intertwined that the success of even that approach is questionable under the current posture of the issues.

A preliminary list of those issues suggests the following two broad topical breakdowns:

Topic No. 1:

1. Surface Facility
 - Structure, Receiving and Handling, Nellis Airforce Base, Faults
2. Shafts
 - Ramps, Boreholes, etc.
3. Repository
 - Alternatives(?), Casks, Capacity, Engineered Barriers, Natural Barriers
4. Quality Assurance/Quality Control
5. Design
6. Management/Organization
7. Performance Assurance/Assessment

Topic No. 2:

1. Geology/Hydrology
2. Tectonics
3. Volcanology
4. Climatology
5. Environment
6. Human Interference

The foregoing list is clearly cursory but serves to illustrate the inextricable interrelationship between the subjects in the two categories of topics. Consequently, it would appear that the only way to position potential contention subject matter so that it could be handled by separate Licensing Boards holding simultaneous hearings is to use rule making to define the parameters of the underlying scientific issues as they apply to the HLW facility.

I believe the only form of rule making that will satisfy the public is to have Licensing Boards conduct legislative rule making proceedings. Those rulemakings should commence at least three years before the HLW application is due to be filed, that is by the first quarter of 1990. Consequently, I recommend that the Commission appoint a Special Task Force comprised of members of NMSS and the ASLBP to define such subjects for legislative rulemaking by Licensing Boards.

CONCLUSION

I recommend that the following actions be taken in connection with the LSS rule making and the HLW proceeding:

1. Issue the proposed LSS Rule after eliminating the portion dealing with rules of procedure.
2. Commence a comprehensive revision of the existing rules of procedure based on the "Plain English Rewrite" and defer addressing any specialized HLW proceeding procedural needs until 1993.
3. Appoint a Commission Task Force to identify subjects for legislative rule making to be conducted by Licensing Boards commencing in early 1990.

Encl: Note fr JFrye to CCameron
dtd 1/19/89

cc: Christine N. Kohl
Francis X. Cameron
William J. Olmstead
Robert M. Lazo
John H Frye, III
C. Sebastian Aloom

January 19, 1989

Note for: Chip Cameron
From: John Frye
Re: Comments on Final LSS Rule

The following represent my comments on the Final LSS Rule. I understand that Tony Cotter will be submitting comments in response to Bill Parler's memorandum of January 17 requesting comments on a draft Commission paper on further revisions to the Rules of Practice to accommodate the HLW proceeding, and expects a request for comments on the Final LSS Rule directly from the Commission. Thus my comments should not be viewed as those of the ASLBP.

- The SECY paper (p.2) and the FR Notice (p.2) each give three reasons why the LSS will provide for the timely review of the application. I believe that these could be expanded to include:

- providing a basis for more efficient staff review;

- providing a basis for more efficient and expeditious identification of litigable contentions;

- providing for the commencement of the discovery process before the application is filed and for its limitation afterwards; and

- providing for ready access to relevant information once the hearing begins.

- FR Notice (line 1, p.4), I suggest changing the language following the comma to read: "thus affording the participants who approved the final negotiating text a full opportunity to comment and respond...". Also, I suggest revising the date

- the LSS is expected to be available (par.1) to early 1993 (DOE comments, p.1). Finally, the last paragraph on p.4 appears to be a repeat of the last paragraph on p.3.
- SECY Paper (p.5) and FR Notice (p.5), would not it be a good idea to indicate which members of the negotiating team commented on the industry's views here, rather simple stating that their views are indicated infra without identifying them.
 - SECY Paper and FR Notice (both p.5 - Benefit-Cost paragraph), I would say that the industry "does not support the LSS" rather than the industry "would withhold their support for the LSS."
 - SECY Paper (p.7), delete "staff" in the 6th line of the first paragraph and add the following underlined text to that sentence: "...informal discovery, which, as indicated infra, is limited to such matters as the names of witnesses, have failed." (The second change also needs to be made in the corresponding paragraph on p.6 of the FR Notice.)
 - SECY Paper (p.8) and FR Notice (p.7), I suggest reworking the three reasons why we believe the LSS is a good thing as follows:

By providing for the compilation of millions of pages of relevant licensing material prior to the filing of the application and for the electronic full text search capability of not only that material, but the application and the NRC staff documents as well, the LSS will:

enable the NRC staff to complete a comprehensive, early, and timely review of the application prior to hearing;

permit the early and timely identification of litigable contentions;

eliminate time consuming document discovery and interrogatories following the filing of the application; and

facilitate the identification of issues which might benefit from rulemaking in advance of the hearing.

Moreover, by providing for the electronic full text search capability of the application as well as all other relevant licensing material during the hearing and for the electronic transmission of all filings both before and during the hearing, the LSS will speed the Commission's license review process.

- SECY Paper (p.9) and FR Notice (p.8), I suggest adding the following as the first full paragraph:

The Commission believes that the industry's comments ignore the important responsibilities related to issues which are not contested in the adjudicatory proceeding which the Commission relies upon its staff to fulfill. Just as the adjudication must be completed before licensing, so must the staff's review of the uncontested issues. The LSS furnishes an important tool for the staff to use to ensure that its review is both timely and comprehensive. Moreover, the Commission recognizes that the staff's review may have implications for the adjudication. The LSS will enable the Staff to complete its review without impacting the schedule of the adjudication.

- SECY Paper (p.9, last paragraph) and FR Notice (p.8, last paragraph) indicate that the DOE cost-benefit analysis states "that approximately \$200 million would be saved for each year of licensing delay eliminated due to the LSS." The DOE comments indicate that the availability of the LSS has slipped at least two years. We need to be sure that the LSS does not end up as a delaying factor instead of a time-saver. It might be advisable to note that the two-year slip will not compromise the benefits to be gained from the LSS. Also, the

last sentence of this paragraph indicates that the Commission is pursuing rulemaking as a means to resolve issues prior to the application. Should we acknowledge that industry suggested we do this (pp.17-18, EEI comments)?

- SECY Paper and FR Notice (first paragraph on pp. 13 and 11, respectively), add at end of concluding sentence: "and would contravene the policy expressed in the Administrative Procedure Act, which governs this proceeding."
- SECY Paper and FR Notice (carryover paragraph on pp. 14 and 12, respectively), add two new sentences at the end: "This provides a basis on which to reject clearly frivolous contentions. Moreover, contentions which rely on incorrect facts for their bases can be tested through existing summary disposition procedures at the outset. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC ____ (slip op. pp.3-4, January 3, 1989).
- SECY Paper and FR Notice - the second paragraph under "Discovery" (pp.15 and 13 respectively) concerns "informal discovery". There is no right to "informal discovery." Thus the industry is wrong in implying that DOE could be immersed in replying to such requests. DOE may simply ignore such requests. The requestor's remedy is to seek permission to pose interrogatories seeking the same information. See SECY Paper, p.7.
- SECY Paper and FR Notice (p.16 and 13, respectively), change last sentence in the paragraph headed "Intervention" to read

"Furthermore, discretionary intervention is not often sought and rarely permitted."

- SECY Paper and FR Notice (p.16 and 14, respectively), I suggest revising the paragraph headed "Affirmative case on contentions" following the citation to Limerick as follows:

Furthermore, in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986), the Commission rejected the proposition that an intervenor must provide an affirmative case for its contentions in order to have them admitted. Because the LSS provides for the early availability of information on which contentions may be based, the Staff does not believe that revising the standard to correspond with the industry recommendation is necessary. See the discussion in the paragraph headed "Establish a new threshold for contentions," supra. As noted in that discussion, the question of whether there is factual support for a contention may be raised at the outset by a motion for summary disposition.

- SECY Paper (p.20), "Compliance" paragraph. From the DOE comments, it appears that the participants will not have full access to the LSS until the first quarter of 1993, rather than 1991 as stated.
- SECY Paper (p.21) - first paragraph under heading "Access to the LSS". Change the sentence beginning in line 11 to read: "During that period, the NRC and DOE Public Document Rooms will provide access, as is currently provided, to the paper copy or microfiche of the public documents of that agency ~~before access to the LSS is available (currently projected for 1992).~~"
- FR Notice (p.23). Should last sentence of the second full paragraph be revised to read "In the period between publication of the proposed final rule and appointment...".