NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER OSTENDORFF

SUBJECT: SECY-10-0082 – MANDATORY HEARING PROCESS FOR COMBINED LICENSE APPLICATION PROCEEDINGS UNDER 10 C.F.R. PART 52

Approved __X__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached __X__ None ___

SIGNATURE

9/1/10
DATE

Entered on "STARS" Yes __X__ No ___

Commissioner Ostendorff's Comments on SECY-10-0082
Mandatory Hearing Process for Combined License (COL) Application Proceedings

The subject of Commission-conducted mandatory hearings is challenging, so I appreciate the work done by the staff to present this issue to the Commission. I also am appreciative of the significant work done by past Commissions as well as the 2006 Combined License Review Task Force. I have looked closely at the record and it has been of great value in my consideration of the issues in SECY-10-0082.

During our deliberations on this matter, it is important not to lose sight of the original intent of the mandatory hearing requirement, and how our conception of that requirement has evolved since its current version found its way into the Atomic Energy Act in 1962. The mandatory hearing contemplated in Section 189 was intended to address public confidence issues of the Atomic Energy Commission *at that time*. Since the separation of the NRC's regulatory functions from the nuclear energy promotional functions now in the Department of Energy, and the addition of numerous transparency measures mandated by law and implemented by the NRC, the continuing necessity of the mandatory hearing requirement has been questioned. As noted by the Combined License Review Task Force in 2006, "the goals of the mandatory hearing requirement in section 189a. are being met in a variety of other ways under a variety of statutes that were not in existence when the requirement was enacted." In other words, the circumstances influencing the concept of a mandatory hearing have changed significantly since 1962, leaving reasonable persons to question the substantive need for such a hearing in addition to the vast array of processes that have since been implemented and which govern the licensing of a nuclear power plant. As poignantly observed by Commissioner McGaffigan in his vote on the Combined License Review Task Force Report, "it is never good law to solve the same problem in multiple ways, whether in procurement policy, personnel policy, or in this case, policy for administrative process. Doing so always leads to inefficiency without comparable benefit." Stated differently, the Commission must be sensitive to wasting scarce government resources by duplicating the NRC staff's review of the application.

However, the fact remains that mandatory hearings are still required by the Atomic Energy Act and they can still serve a valuable function, provided that they can be effectively scoped. In addition to giving the Commission the opportunity to oversee the staff's work, a mandatory hearing can be a valuable tool to provide the Commission with a final "wrap up" of all of the activities that have resulted in the staff's final recommendation on a combined operating license application. With this background, I have the following comments on each recommendation in SECY-10-0082.

Scope of the Review (Recommendation 1)

I approve the recommendation in SECY-10-0082 that the Commission conduct a sufficiency review for the purpose of determining whether the NRC staff's review of the

application has been adequate to support the Findings set forth in 10 CFR § 52.97 and 51.107. The Commission's focus should be on whether each of the staff's recommendations on the Findings has reasonable support in logic and fact. In my view, that is an easy thing to state, but understanding what that means practically proves more difficult. Properly defining the scope of the Commission's review is the most important, and possibly the most difficult aspect of establishing a mandatory hearing process that is effective, efficient, and fair. Without sufficient understanding of what the Commission's focus should be, there is a danger that, as cautioned by the Task Force, we "might become tempted to engage in resource-intensive reviews." Mere recitation of the Findings in § 52.97 and 51.107 is not necessarily helpful in providing clarity or focus. For example, in 10 CFR 52.97(a)(1)(i), the Commission is tasked with finding that "the applicable standards and requirements of the Act and the Commission's regulations have been met." Yet there are literally hundreds of regulations and statutory requirements that apply to a single combined operating license, so one might reasonably question how the Commission could conclude that this standard is met. The Commission owes it to its stakeholders to clearly define and describe in advance what the focus of its evaluation will be and how it will achieve the desired outcomes. This is not only a matter of regulatory predictability, but also common-sense good government.

To aid the Commission in conducting a hearing that is efficient, consistent, and fair, the staff's paper that will be provided to the Commission prior to the hearing as required by the current Internal Commission Procedures is essential. The staff must give thoughtful consideration to the structure of and analysis contained in this paper, as it will serve as the foundation for the conduct of the hearing. For each of the Findings in § 52.97(a) and § 51.107(a), the staff should provide an adequate basis for the Commission to conclude that each of these Findings can be made. I believe that the staff's Safety Evaluation Report and the Final Environmental Impact Statement issued in support of the requested license application are the principal documents for demonstrating to the Commission that such bases exist. Therefore, I would not suggest that the SECY paper recap all matters in the safety or environmental review process, particularly routine aspects of the review where there was no real complication or controversy. Rather, the SECY paper should be focused on non-routine matters.

In focusing on non-routine matters, I believe that areas of particular importance in supporting the Part 51 and 52 Findings would be any unique features of the facility or novel issues that arose as part of the review process. In doing so, the staff should be mindful of the need to exclude matters that were previously addressed and resolved in the context of the other reviews undertaken as part of the Part 52 process, e.g., as part of an earlier Early Site Permit (ESP) review, an earlier reference COL review, or have been (or are being) addressed in the context of a design certification rulemaking. The SECY paper should bring to the Commission's attention instances where the staff's established review processes (such as the Standard Review Plan) were not followed because of unaccounted for technical matters in the site-specific portions of the application, or where departures were requested from the certified design, or from the previously issued reference COL. Further, it is particularly important for the Commission to understand where the staff or applicants deviated from the Commission's regulations. At a minimum, the staff should summarize all requested exemptions from our

regulations, and significant areas where an applicant chose not to use the NRC's regulatory guidance. If the staff has found the applicant's bases for these deviations to be adequate, and has therefore approved them in recommending issuance of the license, it is imperative that the staff explain its bases for approving them.

The SECY paper should also include other aspects of the staff's review that are important for the Commission to make its final decision, but are not necessarily tied to specific Findings. For instance, the paper should include the status of the contested proceedings, and a projection of its planned completion. If an applicable design certification rulemaking is currently ongoing, the SECY paper should include a brief summary of any significant technical or policy issues that the staff believes would be of significant Commission interest and an estimate of the completion date of that rulemaking.

Because of the importance of this SECY paper, the staff should begin development of a generic SECY paper template that could be used by the staff as a model for mandatory hearings. Though I recognize that it might be a challenge to provide enough detail generically to fully demonstrate the utility of the paper, I still see great value in such an effort. First, it begins a process of organizing the staff's thoughts now, rather than waiting until the first mandatory hearing is initiated. It also provides an opportunity for the staff to identify any areas of this process that may create particular challenges that the Commission or the staff did not anticipate. Finally, initiation of this process now while license application reviews are currently ongoing gives the staff an opportunity to consider whether any adjustments are needed currently to account for their obligations during these mandatory hearings. Once a template is developed, the staff should provide it to the Commission for information.

The Commission and the NRC staff have spent enormous resources and time carefully developing comprehensive processes for the staff's review of new reactor license applications. The purpose of developing these processes is to ensure the quality of the outcome and that the health and safety of the public will be adequately protected. Furthermore, the NRC staff has repeatedly demonstrated itself to be competent professionals and experts in their respective fields. The Commission is right to exercise a strong supervisory role over the NRC staff, but it should be careful not to use this opportunity to replicate the staff's work.

Participation in the Mandatory Hearing (Recommendation 2)

I approve of the recommendation to permit participation by interested state parties as reflected in Option 1 of Section 2.b. of the paper. I think it is important to hear from the state in which the reactor will be located and other states that may reasonably be affected by its operation. I also believe that local governments and federally-recognized Indian tribes affected by the facility should also be given the same opportunity as the state government to participate.

Timing and Schedule Considerations (Recommendations 3 and 4)

I approve a target schedule of the Commission issuing a final decision approximately 4 months after issuance of the final SER and EIS. I also approve commencing the mandatory hearing process before completion of a contested hearing or a Design Certification rulemaking. Regarding the contested hearings, I am convinced by the staff's arguments in SECY-10-0082 [redacted] that the Commission can adequately manage the mandatory hearing without creating a conflict with an ongoing contested proceeding. [redacted] With respect to the design certification rulemaking, because the Commission will review and approve the results of the design certifications through our rulemaking process, I do not see a need to duplicate review or revisit those issues in the mandatory hearing process. I believe that the Commission has the ability to clearly separate the two matters. However, I do not want to discount the possibility that there may be circumstances where it might be prudent for the Commission to delay a mandatory hearing. In these instances, the staff should notify the Commission of any unusual circumstances that may impact whether the Commission should proceed with a mandatory hearing. Such notification should be provided to the Commission with sufficient time prior to the issuance of the Notice of Hearing for Mandatory Hearing by SECY.

Commission Decision (Recommendation 5)

I approve that the decision document from the Commission mandatory hearing take the form of a Commission adjudicatory decision (a "CLI").

Other Matters

Though not discussed in SECY-10-0082, it has become clear to me during the course of my review of this matter that the Commission's policy decisions on mandatory hearing are not found in one authoritative document. Further, these policy decisions have not been clearly communicated to our stakeholders. The Commission currently has policy statements on the Conduct of Adjudicatory Proceedings as well as a Policy Statement on the Conduct of New Reactor Licensing Proceedings, so it makes sense that we should also have one for the conduct of Commission mandatory hearings. This will also give participants in these proceedings an opportunity to understand what is expected of them as part of these hearings.

OGC and OCAA should be directed to develop a Commission Policy Statement on the Conduct of Mandatory Hearings for Combined Operating Licenses that reflects the processes that I have outlined here, as well as those issues decided by the Commission in the past and reflected in the various decision documents issued since 2006. Once developed, the draft

policy statement should be returned to the Commission as a notation voting matter, and subsequently published for public comment. After evaluating the comments, OGC and OCAA should develop a final Commission policy statement and provide it to the Commission for approval. I recognize that this process may not be complete before the commencement of the initial mandatory hearings. However, I am confident that we can at least make available a draft policy statement that will provide notice to stakeholders on the processes the Commission intends to implement.

I do not doubt that there will be unanticipated challenges in the first few Commission-conducted mandatory hearings. It may be, for example, that the Commission determines that the process is inefficient and too cumbersome as currently structured. If this proves to be the case, we should keep in mind that the NRC has broad statutory discretion with regard to its interpretation of the Atomic Energy Act, particularly when it comes to interpretation of the Atomic Energy Act's adjudicatory hearing requirements. *Citizens Awareness Network v. NRC*, 391 F.3d 338, 349 (2004). Therefore, we should not discount the possibility that the Commission may need to revisit the mandatory hearing process and look to exercise our broad discretion after the Commission has gained some additional experience.

The conduct of Commission mandatory hearings should be included in the staff's efforts to apply lessons learned from the first round of applications to improve the licensing process. In this regard, within six months after the completion of the first mandatory hearing, the staff should provide the Commission with its recommendations for any revisions to the process, procedures, or regulations governing mandatory hearings in order to improve the Commission's effectiveness and efficiency in this area.