

SEP 8 1977

Docket No. 50-320

The Honorable Richard S. Schweiker
United States Senate
Washington, D. C. 20510

Dear Senator Schweiker.

This is in response to your request for our views regarding the concerns expressed by one of your constituents, Mr. Carl J. Jarboe, in his letter to you of August 4, 1977. Mr. Jarboe has raised several matters particularly arising in connection with the Commission's proceeding in regard to the licensing of Three Mile Island Nuclear Station, Unit 2, located near Harrisburg, Pennsylvania.

Mr. Jarboe's concerns, which were fully set out in his letter to the Honorable William Goodling, dated August 3, 1977, a copy of which was attached to his letter to you, appear to bear on two distinct matters -- (1) the time available to prepare material for presentation to a meeting of the Commission's Advisory Committee on Reactor Safeguards (ACRS), and (2) the opportunity for participation in NRC evidentiary proceedings by way of a limited appearance pursuant to the Commission's Rules of Practice, specifically section 2.715 of 10 CFR Part 2.

At the outset, it should be stressed that the two proceedings identified above, the meeting of the ACRS and the evidentiary hearing before the Atomic Safety and Licensing Board designated to preside in this particular case, are completely separate activities. Under the Atomic Energy Act of 1954, as amended, all applications for either construction permits or operating licenses are referred to the ACRS for its review. The ACRS is an independent advisory committee composed of 15 members appointed by the Commission from the academic and nuclear industry communities to advise the Commission regarding, among other things, the hazards of proposed reactor facilities and the adequacy of proposed reactor safety standards on the basis of its review of applications referred to it. This review is separate from the review of an application performed by the NRC Staff. The conduct of meetings of the ACRS and its subcommittees is governed by the Federal Advisory Committee Act and the Commission's implementing

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regulations found in 10 CFR Part 7. Pursuant to section 7.11(b) of Part 7, notice must be published in the Federal Register at least 15 days in advance of any meeting, except in emergency situations when shorter notice may be given. Additionally, section 7.11(c) suggests that other forms of notice, such as public releases should be used. In accordance with the regulations, timely notice was published in the Federal Register on September 9, 1976 (41 F.R. 38223) and, as indicated by Mr. Jarboe, a notice was published in a local newspaper. The Federal Register notice provided that an individual could provide 15 copies of any written statement at the meeting itself or could mail a copy to the ACRS. The date suggested for mailing material, September 17, 1976, was selected to allow for mailing time and allowed eight days after the notice was published for mailing such statements. However, as Mr. Jarboe points out, publication of notice in the local newspaper on September 16, 1976, unfortunately left only one day before the suggested mailing date. However, this date, September 17, 1976, was not a mandatory cut off for the submission of statements nor did it preclude the presentation of statements on the day of the meeting.

The seemingly greater concern expressed by Mr. Jarboe bears on notification of the evidentiary hearing in this proceeding and participation by way of a limited appearance. This limited type of participation is provided by the Commission's Rules of Practice, specifically, 10 CFR § 2.715. Regarding the question of notification, a notice scheduling the hearing was published in the Federal Register on March 24, 1977 (42 F. R. 15984) and a press release was issued on March 25, 1977, each indicating that the hearing would commence on April 5, 1977. As noted by Mr. Jarboe, his letter seeking information on the hearing had been referred by Mr. Muller of the ACRS to Mr. H. Silver, the Staff's Licensing Project Manager for the Three Mile Island, Unit 2 project. We regret any inconvenience the lack of reply may have caused, however, in the days immediately preceding the hearing, Mr. Silver was deeply involved in the preparation of the Staff's testimony.

Mr. Jarboe correctly states that persons who wish to make a limited appearance statement are not required to give notice to the presiding Board; the Notice of Hearing initially published does, however, suggest that prior notice of intent to make a limited appearance statement be given. This permits the presiding Board to better schedule a proceeding to allow all such statements to be given without undue delay in the evidentiary hearing.

With respect to the need to provide copies of written statements, another matter Mr. Jarboe raises, this requirement is imposed also for the purpose of assuring the conduct of an orderly proceeding. Since there are often many persons who wish to make limited appearance statements, Boards usually impose some reasonable time constraint on the presentation of oral statements. Persons are free, however, to submit copies of written statements without limitation on length for inclusion in the record; they are bound in the transcript, and, for that reason, sufficient copies must be provided to the reporter by the person making the statement. The policy behind the Commission's regulation providing for participation by way of limited appearance is set out in Appendix A to 10 CFR Part 2, specifically in section III(b) and V(a)(4)-(6). As set forth in these provisions, limited appearance statements are subject to the discretion of the Board. Relevant to its exercise of this discretion, the Board must consider the conduct of the evidentiary hearing and the rights of the parties thereto. Thus, it is sometimes not possible to accommodate or schedule limited appearance statements at certain times, to allow more than one statement by the same person or to allow oral statements of extreme length to be made. The record in this proceeding indicates that the Board was most liberal in exercising its discretion; it allowed one oral statement to be made which took more than one hour to present and afforded Mr. Jarboe an opportunity to make two statements. Mr. Jarboe has expressed concern about a statement attributed to the Chairman of the presiding Board in response to a question he raised. Unfortunately, Mr. Jarboe appears to have misunderstood the import of the Chairman's reply. Mr. Jarboe had inquired: "Is the granting of a license for Unit 2 contingent upon a satisfactory response to any or all of my questions?" The Chairman replied: "...nothing stated by way of limited appearance constitutes evidence. It is not in any manner material on which we can base our decision on these cases." (Emphasis added; Tr. 2756) The significance of the Chairman's statement should be amplified. Commission proceedings such as that pertaining to Three Mile Island, Unit 2, are quasi-judicial, adversary proceedings although such proceedings are not bound by strict application of the rules of evidence applicable in a court. Any decision rendered must, nevertheless, be based on relevant, competent and material evidence of record including the oral testimony of individuals under oath. Such evidence can be presented only by a party to the proceeding. A person making a limited appearance statement is not a party to the proceeding and such a statement is not made under oath nor is it subject to cross-examination by the parties to the proceeding; any decisional weight given to such a statement would be violative of the due process rights of the parties. Nonetheless, such statements do serve a most valuable purpose; they allow any and all members of the public an opportunity

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con, and to have their relevant questions answered. Frequently, because of the number of such statements made, oral and written, and their complexity, replies to questions raised in the statements cannot be made at the hearing but must await review and preparation subsequently. In the case of this proceeding, in which the record was closed July 5, 1977, the Staff is now undertaking to prepare responses to all relevant questions raised in the limited appearance statements made.

While it is our opinion that the existing regulations adequately provide for limited appearance statements, Mr. Jarboe is free to seek a change in these provisions. This could be accomplished in accordance with 10 CFR Part 2, section 2.800 et seq. through a petition to initiate a rulemaking proceeding.

I trust that our views and comments will satisfy the concerns expressed by Mr. Jarboe. If I can be of any further assistance, please do not hesitate to call on me.

Sincerely,

William J. Dircks
Assistant Executive Director
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Enclosures:

- Incoming letter from Mr. Jarboe
- Copy of letter from Mr. Jarboe to Representative Goodling

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