

March 30, 1981



SECY-81-202

**POLICY ISSUE**  
(Commission Meeting)



To: The Commission  
From: Leonard Bickwit, Jr., General Counsel  
Subject: Draft Policy Statement on the Efficient Conduct of Licensing Proceedings

Discussion: OGC has prepared the attached draft policy statement which is intended to combine elements of the draft statement submitted to the Commission by the Licensing Board Chairman and the alternative draft letter prepared by the Executive Legal Director. The ASLAP, ASLBP, and OELD have provided us with comments on the draft, which we have incorporated. OGC, the ASLBP, and OELD recommend that the Commission issue the attached statement. The ASLAP has no objection to its issuance. This revised draft differs from the earlier versions in one major respect -- it does not address scheduling. There is no reference to how quickly the hearing should commence after issuance of the staff SSER or how quickly Board decisions should be issued after the record is closed. Those matters were addressed in the Statement of Considerations accompanying the proposed procedural rules that have been published in the Federal Register for comment. We suggest that

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SECY NOTE: This paper, which is identical to advance copies which were distributed to Commission offices on March 30, 1981, may be the subject of discussion among other related items at the open Commission meeting on Revised Licensing Procedures on Tuesday, March 31, 1981.

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decisions on those matters should await comments on the rules but that the Commission's action on the attached statement should not. One issue that the Commission may wish to add to the draft policy statement is a statement on when the Boards may raise issues sua sponte. OGC understands that this issue will be discussed at Tuesday's meeting. The Commission may also want to discuss or mark up the attachment at that time.



Leonard Bickwit, Jr.  
General Counsel

Attachment: Draft Policy Statement

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## U.S. NUCLEAR REGULATORY COMMISSION

### COMMISSION STATEMENT OF POLICY ON EFFICIENT CONDUCT OF LICENSING PROCEEDINGS

#### I. BACKGROUND

Several times in recent years the Commission has stated that its reactor licensing proceedings should be conducted in a timely fashion. In The Statement of Considerations which accompanied major revisions to its Rules of Practice, 10 CFR Part 2, that were adopted in 1972 the Commission said (37 Fed. Reg. 15127, July 28, 1972):

"The Commission is concerned not only with its obligation to the segment of the public participating in licensing proceedings but also with a responsibility to the general public -- a responsibility to arrive at sound decisions, whether favorable or unfavorable to any particular party, in a timely fashion. The Commission expressly recognizes the positive necessity for expediting the decisionmaking process and avoiding undue delays. It expects that its responsibilities under the Atomic Energy Act of 1954, as amended, the National Environmental Policy Act of 1969, and other applicable statutes, will be carried out in a manner consistent with this policy in the overall public interest."

The Statement of General Policy and Procedure (10 CFR Part 2, Appendix A) on the conduct of hearings for the licensing of nuclear power plants which the Commission issued in 1972 states:

"The Statement [of General Policy and Procedure] reflects the Commission's intent that such proceedings be conducted expeditiously and its concern that its procedures maintain sufficient flexibility to accommodate that objective. This position is founded upon the recognition that fairness to all the parties in such cases and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delay."

More recently, the Commission has noted (Miscellaneous Amendments to its Rules of Practice, 43 F.R. 17798 and 17801, April 27, 1978) that it is "committed to developing a hearing process which will produce decisions in a timely fashion"

and referred to its "responsibility to the general public to arrive at sound licensing decisions in a timely fashion."

Conducting licensing proceedings in a timely fashion is even more important now. In the past, the scheduling and processing of licensing reviews has typically provided sufficient time so that the hearings would be completed and the license issued by the time the nuclear plant is completed and ready to operate. For the first time, however, these hearings on a number of new operating license applications may not be completed prior to the time that construction is completed. This situation is an indirect consequence of the Three Mile Island (TMI) accident, which required a reexamination of the entire regulatory structure. After TMI, for a period of over a year and a half, the Commission's attention and resources were focused on plants which were already licensed to operate and to the preparation of an action plan which specified a discrete set of TMI-related requirements for operating reactors.

Although staff review of pending license applications was delayed during this period, utilities which had received construction permits continued to build the authorized plants. The staff is now expediting its review of the applications, and an unprecedented number of board proceedings are scheduled for hearing in the next 24 months. At least half of these proceedings concern applications for construction permits and operating licenses pursuant to the Atomic Energy Act, as amended. These circumstances will severely strain the existing resources of the Commission and have the potential to delay operation of qualified power plants. The potential cost of such delays to consumers is clearly of great consequence.

The Commission therefore is issuing this policy statement on the need for the efficient conduct of all phases of the hearing process as part of its ongoing effort to expedite its licensing proceedings. Individual adjudicatory boards are encouraged to expedite all phases of the hearing process by using those management methods which presently exist in Part 2 of the Commission's Rules and Regulations. Virtually all of the procedural devices discussed in this Statement are currently being employed by sitting boards to varying degrees. The Commission's reemphasis of the use of such tools is intended to reduce the time for completing licensing proceedings. The guidelines set forth below are not to be considered inclusive, but rather are to be considered illustrative of the actions that can be taken by individual Boards. The Commission wishes to emphasize though that in expediting the hearings the Board should ensure that the hearings are fair, and produce a record which leads to high quality decisions that adequately protect the environment and the public health and safety.

## II. GENERAL GUIDANCE

The Commission's Rules of Practice provide the Board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace consistent with the demands of fairness.

The boards are reminded that the failure of a party to comply with any obligation properly imposed in accordance with applicable law and Commission regulations, without a showing of good cause, may result in imposition of

appropriate sanctions. In extreme cases, such sanctions may include denial of the right to cross-examine or present evidence, dismissal of the offending party, or dismissal of one or more of its contentions.

### III. SPECIFIC GUIDANCE

#### A. Time

We note at the outset that the fundamental ingredient in managing licensing proceedings is setting appropriate time limits for required actions. The Boards should specify time frames for all actions where they deem such delineations of time will expedite proceedings. Concomitantly, the Boards are advised to satisfy themselves that the 10 CFR 2.711 "good cause" standard for adjusting times fixed by the Board or prescribed by Part 2 truly exists. Requests for extension of time should generally be in writing and should be received by the Board at least three working days before the time specified expires.

#### B. Consolidated Intervenor

In accordance with 10 CFR 2.715a, intervenors should be consolidated and a lead intervenor designated who has "substantially the same interest that may be affected by the proceedings and who raise[s] substantially the same questions . . . ." Obviously, no consolidation should be ordered that would prejudice the rights of any intervenor.

However, consonant with that condition, single, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument. Where such consolidation has taken place, those functions should not be

performed by other intervenors except upon a showing of prejudice to such other intervenors' interest or upon a showing to the satisfaction of the Board that the record would otherwise be incomplete.

#### C. Negotiation

The parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues. As appropriate, negotiations should be monitored by the board through written reports, prehearing conferences, and telephone conferences, but the boards should not become directly involved in the negotiations themselves.

#### D. Board Management of Discovery

The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that, inter alia, issues may be narrowed, stipulated, or eliminated and evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant. The Commission is concerned that discovery not delay hearing through abuse of discovery devices or their overuse, however well intentioned, by the parties.

Accordingly, the Boards should manage and supervise all discovery, including not only the initial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission reinforces the policy of voluntary discovery, and encourages the Boards, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery.

Each individual Board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone conference calls, and status report conferences on the record. In virtually all instances, individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

#### E. Settlement Conference

Licensing Boards are encouraged to hold settlement conferences with the parties. Such conferences are to serve the purpose of resolving as many contentions as possible by negotiation. The conference is intended to: (a) have the parties identify those contentions no longer considered valid or important by their sponsor as a result of information generated through discovery so that such contentions can be eliminated from the proceeding, and (b) to have the parties negotiate a resolution, wherever possible, of all or part of any contention still held valid and important. The settlement conference is not intended to replace the prehearing conferences provided by 10 CFR 2.751a and 2.752.

#### F. Timely Rulings on Prehearing Matters

The Licensing Board should issue timely rulings on all matters before it. In particular, timely rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding. Such rulings may eliminate the need to adjudicate one or more subsidiary issues. Any ruling which would affect the scope of an evidentiary presentation should be rendered promptly so that resources would not unnecessarily be used because



of the uncertainties regarding the definition of matters in controversy which would exist without the ruling. In other words, a board should issue timely rulings on questions of fact and law to define the issues in controversy in as narrow and specific a manner as is justified. Rulings on procedural matters to regulate the course of the hearing should also be rendered in a timely manner.

If a significant legal or policy question is presented on which Commission guidance is needed in order to prevent detriment to the public interest or expense, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission, as appropriate. The Appeal Board or the Commission will make its best effort to answer such questions promptly. A board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding.

#### G. Summary Disposition

In exercising its authority to regulate the course of a hearing, the Boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

#### H. Trial Briefs, Prefiled Testimony Outlines and Cross-Examination Plans

All or any combination of these devices should be required at the discretion of the Board to expedite the orderly presentation by each party of its case. The Commission believes that cross-examination plans, which are to be submitted to the Board alone, would be of benefit in most proceedings. Each Board must decide

which device or devices would be most fruitful in managing or expediting its proceeding by, inter alia, limiting repetitive and unnecessary direct oral testimony and cross-examination.

I. Combining Rebuttal and Surrebuttal Testimony

For particular, highly technical issues, Boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand at the same time so that each witness will be able to comment immediately on an opposing witness' answer to a question. Appendix A to 10 CFR Part 2 explicitly recognizes that a board may find it helpful to take expert testimony from witnesses on a roundtable basis after the receipt in evidence of prepared testimony.

J. Sua Sponte Raising of Issues by Boards

[To be prepared following Commission discussion.]

K. Filing of Proposed Findings of Fact and Conclusions of Law

Parties should be expected to file proposed findings of fact and conclusions of law on issues which they have raised. The Boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. In drafting initial decisions, Boards are encouraged to adopt proposed findings as frequently as they deem appropriate.

L. Initial Decisions

Licensing proceedings vary greatly in the difficulty and complexity of issues to be decided, the number of such issues, and the size of the record

compiled. These factors bear on the length of time it will take the Boards to issue initial decisions. The Commission expects that decisions not only will continue to be of high quality, but also that decisions <sup>would</sup> issue as soon as practicable after the submission of proposed findings of fact and conclusions of law to insure that facilities, if qualified, are licensed as soon as they are ready to operate.

Accordingly, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel should schedule all Board assignments so that after the record has been completed individual Board members are free to write Initial Decisions on those applications where construction has been completed. Issuance of such decisions should take precedence over other responsibilities.

#### IV. COMMISSION MONITORING

The Commission will closely monitor hearing proceedings in order to offer guidance on procedural and substantive matters, where appropriate, as part of its inherent supervisory authority over pending adjudications.

For the Commission

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SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.

this \_\_\_\_ day of \_\_\_\_\_, 1981.