

May 8, 1979

UNITED STATES
NUCLEAR REGULATORY COMMISSION SECY-79-319

POLICY SESSION ITEM

For: The Commission

From: Leonard Bickwit, Jr., General Counsel
Al Kenneke, Acting Director, OPE

Subject: HEARING BOARD REPORT IN CLEARANCE RULE
PROCEEDING (RM 50-7)

Purpose: To present alternatives for Commission
consideration of the Report of the
Clearance Rule Hearing Board.

Discussion: The Clearance Rule Board submitted its
report to the Commission on April 2,
1979. The report is an eighty-eight
page document which recounts the origins
of the proceeding, summarizes the
written prehearing comments and written
and oral testimony of participants,
states the Board's recommendation on
the proposed rule, and analyzes the seven
issues identified by the Commission.*

As a bottom line, the Board has recom-
mended that the proposed rule not be
adopted.

The Board's recommendation is largely based
upon its view that the NRC Staff had not
provided record information sufficient to
show a need for the rule (i.e., that
there is "a serious risk to the defense
and security of the Nation or a signifi-
cant threat to the health or safety of
the general public ..."). Board's
Report at p. 32.

The Board also considers the proceeding
flawed by the Staff's view that it was
bound to accept DOE's clearance rule

CONTACTS:
Marjorie Nordlinger
OGC, 634-1465
Bernie Snyder
OPE, 634-3276

*SECY NOTE: Ref: Report of the Hearing Board, "In the Matter of Authority
for Access to or Control over Special Nuclear Material (RM 50-7),"
April 1979

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criteria as a matter of law. The Board finds that due to the constraints under which the Staff operated in this regard Staff "did not attempt to make a reasoned evaluation of whether the existing DOE program is better than the other alternatives presented by the participants in this proceeding." Board Report at pp. 47-48, citing Transcript at 537. The Board stated:

It is crucial for the Commission to understand that the staff apparently adopted a full-field background investigation program using the 10 CFR Part 10 criteria only because it was advised that as a matter of law the NRC was probably required so to do. Board's Report at 48.

Other comments in the report reflect the Board's view that the Staff should have presented more complete testimony. See e.g., p. 56, lines 11-15; p. 81, lines 14-18.

In light of these matters, we believe there are four basic alternatives that the Commission might consider in determining how to proceed with this rulemaking.

First, the Commission could proceed directly to its decision on the Clearance Rule, utilizing the record compiled by the Hearing Board and its Report, without calling for further submissions from the Staff or other parties. In our view, such an approach -- though appearing to offer the advantage of expedition -- would not be appropriate. The Board's Report notes that deficiencies in the record affected its decision. The Commission should receive additional information and advice from the Staff and participants for the purpose of supplementing the record or assisting the Commission in evaluating whether or not the record is sufficient.

A second alternative would be for the Commission to request additional information from Staff and comments from other participants prior to considering the full record and the merits of the proposed rule. The S-3 proceeding provides a recent precedent for inviting participants' comments on the Board's Report.

Under this alternative, the Commission would direct the Staff to provide comments on the Board's report within 21 days. The Staff could be requested to address specific issues, such as whether, in light of the Board's Report, the record supports a decision on the proposed rule. Staff could also be directed to provide the legal analysis on which it relied for the proposition that NRC must follow the standards regarding access to SNM promulgated by the Secretary of Energy. Other participants could be provided an opportunity to comment on both the Board's Report and the Staff Comments. By providing for an initial Staff comment, to be followed by submission by other participants, the Commission would facilitate its receiving meaningful response to the Board's Report without engaging in several rounds of comment.

A third alternative the Commission may wish to consider would be to call for comments on the Board's Report from the NRC Staff and the parties on a typical 30 day comment period. The disadvantage of this approach is that it would not permit other participants to frame their comments to take into account NRC Staff views. The Staff's comments will be of particular significance here, in view of the Hearing Board's criticism of the Staff's performance in its Report. It is also possible that Staff will wish to supplement the record. In either case, participants' comments would be much more meaningful following the Staff's submission.

A fourth alternative might be to request the Board to reopen the record before it to address deficiencies identified in the Report. It is unclear whether the Board would wish to proceed further in this matter in light of other obligations of its members. Those obligations were factors in the Board's delay in presenting its Report and might delay further a decision on the proposed rule, even were the Board willing to undertake the responsibility.

Recommendation:

We recommend that the Commission adopt alternative 2.

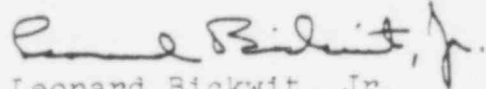
While this procedure alters the normal practice of permitting Staff additional time to file its submissions, requiring Staff to come first in this instance responds more realistically to the situation presented by the Board's Report. If such a course appears warranted, for instance by the presentation of new facts or argument in participants' comments, the Commission could provide an opportunity for additional Staff comment. We have attached a draft order which would implement this alternative. Bracketed portions indicate alternatives in soliciting participants' comments. One choice is to set a definite schedule, with the obvious benefit of certainty. The other choice is to indicate that a subsequent order will establish the schedule for receipt of further comments. The latter choice permits the Commission to undertake additional questioning of the Staff if that should be desirable, while delaying other comment until the completion of the Commission/Staff dialogue.

The Commission should further note that the Board has recommended that the Commission have "its own legal staff

make a determination as to whether the NRC is required by law to follow the standards for access to SNM already promulgated by the Secretary of Energy." Board Report at p. 48. OGC is examining this issue, and will provide its analysis to the Commission after having an opportunity to review whatever further submissions are received on this matter.

Scheduling:

To be scheduled for discussion at an Open Meeting.



Leonard Bickwit, Jr.
General Counsel

Albert P. Kenneke
Acting Director,
Policy Evaluation

Attachment: Draft order

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