

February 17, 1981

SECY-81-111



RULEMAKING ISSUE
(Notation Vote)



For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: INTERVENTION IN NRC ADJUDICATORY PROCEEDINGS

Purpose: To offer for Commission consideration a draft rule that would raise the threshold for contentions.

Discussion: At the Chairman's request, we are forwarding for your consideration a draft rule that would raise the threshold for the admissibility of intervenor contentions in NRC adjudicatory proceedings. At present, a person petitioning to intervene in a formal NRC proceeding must file "a list of the contentions which petitioner seeks to have litigated in the matter and the bases for each contention set forth with reasonable specificity." 10 CFR 2.714(b). This requirement serves the threefold purpose of (1) notifying the applicant and NRC staff, at least generally, as to what they will have to defend against or oppose, (2) limiting the scope of subsequent stages of the proceeding including discovery, and (3) assuring, to a degree, that the issues which petitioner seeks to raise are cognizable in an individual licensing proceeding. If a would-be intervenor fails to raise at least one litigable contention, he may not participate in the proceeding as a party. 10 CFR 2.714(b). The contention requirement was upheld in BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

The draft rule now offered for your consideration would also require the person petitioning for intervention (1) to identify for each contention the material facts in dispute which warrant an adjudicatory hearing, and (2) to submit the documents and other information relied on to show the existence of such facts. If the applicant or NRC staff contested the existence of such an issue, the contention would not be admitted for

CONTACT:
C.W. Reamer, OGC
634-1493

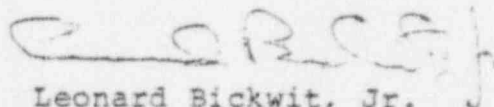
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hearing if the documents and other information submitted showed that there was no genuine issue of material fact and no reasonable likelihood that additional facts could be developed which would show the existence of a genuine issue to be heard.

NRC rules providing for summary disposition on pleadings (10 CFR 2.749) recognize the general principle that an adjudicatory hearing is not required for matters as to which there is no genuine dispute. The draft rule seeks to integrate that general principle into the contention stage of a proceeding. In practice, however, a would-be intervenor will be less prepared to fend off summary disposition at this early stage; thus, the rule change could significantly affect public participation in licensing proceedings. The short timeframe for drafting the rule has permitted no real study of this and other questions about the workability and possible consequences of the rule change.

Recommendation:

Approve the draft rule as a subject for further study by OGC and direct OGC, after consultation with the staff and the adjudicatory boards, to report its conclusions and recommendations as to whether the draft rule should be the subject of rulemaking.


Leonard Bickwit, Jr.
General Counsel

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Tuesday, March 3, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT February 24, 1981, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATTACHMENT 1

1. Amend 10 CFR 2.714(b) by inserting after the first sentence thereof the following new sentence:

The supplement must set forth a concise statement of the facts supporting each contention together with references to the written documents and other information relied upon to show the existence of such facts. If an answer filed under subsection (d) of this section contests the existence of an issue of material fact with respect to any contention petitioner shall be afforded a reasonable opportunity to submit additional written documents or other information to show either an issue of material fact or a reasonable likelihood that such an issue may be developed in the course of the proceeding.

2. Amend 10 CFR 2.714(c) by inserting at the end thereof the following new sentence:

If a party states in its answer that, as to a particular contention of a petitioner, there exist no material facts as to which there is a genuine issue to be heard, it shall submit a concise statement of the material facts not in dispute, together with references to the written documents and other information upon which it relies.

3. Amend 10 CFR 2.714(d) by inserting at the end thereof the following new sentence:

No contention shall be admitted for hearing if the documents and other information submitted show that there is no genuine issue of material fact to be heard and that there is no reasonable likelihood that additional facts can be developed in the proceeding which will show the existence of such an issue.