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UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

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March 28, 1980

MEMORANDUM FOR: Chairman Ahearne
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Hendrie
Commissioner Bradford
Robert M. Lazo
FROM: Robert M. Lazo, Acting Chairman
Atomic Safety and Licensing Board Panel
SUBJECT: SEPARATION OF FUNCTIONS AND EX PARTE RULES

This is to comment on the General Counsel's memorandum to you of March 11 on the above subject (SECY-80-130). Because of the importance of the separation of functions rule to the fair and impartial conduct of hearings by licensing boards, this office is very much concerned with possible modifications of that rule.

In order to properly evaluate the options identified in the General Counsel's paper on the separation of functions and ex parte rules, it is helpful to start with an examination of the proceedings which are likely to be conducted in the future.

Only construction permit applications entail mandatory hearings; in all other cases a hearing is held only if requested by a person with standing (or if a determination to hold a hearing is made on public interest grounds). A few construction permit applications are pending, but only one is forecast for the future. Thus, because almost all future applications will result in a hearing only on request of an interested person, it is safe to assume that almost all proceedings conducted in the future will be contested.

How many of these proceedings are accusatory will depend on how many enforcement proceedings are initiated. While it is theoretically possible that the staff might seek to establish that past culpable conduct on the part of a license applicant requires a denial of the application, this does not seem likely. Further, it is unlikely that an applicant would press its application in such circumstances.

As we understand the General Counsel's conclusions, the Commission is free to relax its separation of functions and ex parte rules in all licensing cases except proceedings on Orders for Modification of License because these are

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initiated by the staff. Further, the Commission must retain the rule in almost all enforcement proceedings because these generally involve allegations of past culpable conduct. Where an enforcement proceeding does not involve such allegations (i.e., an Order to Show Cause based on new information, such as the discovery of a geologic fault) apparently the rules could be relaxed.

Some of the factors relevant to a consideration of possible modifications to the rules concern the nature of NRC licensing proceedings. NRC licensing proceedings basically require that certain predictions be made concerning the safety and environmental impact of specific nuclear power plants. In order to make these predictions, a record is compiled. This record consists of the opinions and conclusions of various technical experts who have examined the specific proposal.

The first steps in compiling this record are detailed safety analyses and environmental reports which elaborate specifically what the applicant seeks permission to do and embody the opinions and conclusions of the applicant's experts as to its safety and environmental impact. These reports are reviewed and analyzed by NRC staff experts, who then report their opinions and conclusions.

If no one successfully requests a hearing, this record is the record on which a decision is based. If a hearing is requested and ordered, this record is supplemented by a hearing record and an initial decision.

It is important, for purposes of this consideration, to focus on the content and purpose of the hearing record and decision. This can be best understood by contrasting it to the construction permit hearing and initial decision. The mandatory construction permit hearing must address not only issues in controversy, it must also review the staff's work on matters not in controversy to ensure that the staff's review of the application has been adequate. The initial decision must make all of the findings required by the Atomic Energy Act and NEPA and authorize or deny a construction permit.

In the proceedings which may reasonably be anticipated in the future, the content and purpose of the hearing record and initial decision is more narrow. In these proceedings, the hearing is "optional" and is primarily to focus on the issues which the person who has requested the hearing has placed in controversy. To these issues, the hearing board may add matters which it considers significant. The initial decision is limited to deciding these matters, it does not otherwise address the staff's review. Further, the initial decision cannot direct the issuance of a license or amendment, it can only authorize the appropriate staff office to issue the license or amendment based on a favorable resolution of the issues in controversy. It remains for the director of the staff office concerned to make all the other findings required by the Atomic Energy Act and NEPA as a prerequisite to the issuance of the license or amendment.

Thus, it is probable that those licensing proceedings for which the rules could be modified will be ones which are limited in scope and which do not raise the full range of safety and environmental issues encompassed in a mandatory construction permit hearing.

How do the separation of functions and ex parte rules impact these proceedings? At the outset, insofar as NRC adjudicators are concerned, it is important to recognize that the separation of functions rule applies only to "presiding officers". Section 2.704 indicates that presiding officers are officers who preside over the hearing, or evidentiary, portion of the proceeding as opposed to the appellate portion. Thus, the separation of functions rule, with its prohibition on certain contacts by adjudicators, does not apply to the Commission or the appeal boards so long as they are exercising appellate, rather than hearing, authority.

Similarly, the prohibitions of the ex parte rule are not applicable to members of the ASLBP or the ALJ, but are limited to the members of the ASLAP, the Commission, and their staffs, and thus applicable to the appellate, rather than hearing function.

Thus, to the extent that the General Counsel's study results from the perceived need to alter the rules to permit the Commission greater freedom to direct the staff, it should focus on possible modification of the present ex parte rule.

Lastly, there are some adverse aspects to a modification of the separation of functions rule. As noted, this rule currently applies only to hearing officers, so this discussion focuses on the effect of a relaxation on the conduct of hearings by ASLBs.

As noted above, hearings consist of the presentation and testing not of facts, but of expert opinion. A board is not called on to find facts which happened in the past (except, of course, in some enforcement proceedings). Rather, it is called upon to decide, by applying its own expert knowledge to the expert opinion in the record, what are the likely consequences to the public health and safety and the environment of permitting the applicant to engage in a particular course of conduct. The specific questions which call for such predictions are most often posed by intervenors who have initiated the proceeding for the sole purpose of airing these questions. While occasionally intervenors are able to produce an expert or experts to testify on such questions, they most often are limited to seeking to discredit the applicant's and staff's experts through cross-examination.

In these circumstances the Panel believes it unwise to relax the separation of functions rule so as to permit the staff to discuss pending cases with a presiding board. Regardless of how it is structured, this can only be viewed as permitting the staff an off-the-record opportunity to convince the board of the correctness of its experts' opinions. Permitting the staff to privately

advocate its positions which have been publicly questioned by intervenors can only be characterized as unfair. Intervenors already believe that the "deck is stacked against them" in NRC proceedings. If by this they mean that their resources are inadequate when compared to the staff's, they are right. Permitting such contacts between the staff and presiding boards would further exacerbate the disadvantage and create at least the appearance of unfair practices. The Panel believes the current prohibition on consultation between the staff and presiding boards should remain unchanged.

Consultation between presiding boards and other Panel members presents differing circumstances. Panel members have always considered such consultations appropriate so long as the specifics of a matter in issue were not discussed. In other words, only general discussions are deemed appropriate.

The Commission currently has pending a proposed rule which, if adopted, would recognize the propriety of off-the-record briefings of presiding boards by other Panel members on the general subject matter of an issue prior to the hearing on the issue. Further, the proposed rule would permit presiding boards to take advantage of the expert knowledge of other Panel members during and after the hearing, provided that such advice and assistance is rendered on the record. The Panel endorses these proposals. However, the Panel would oppose any effort to permit off-the-record assistance with regard to the specifics of an issue during or after hearing.

While such a practice does not present the same degree of unfairness as permitting off-the-record staff consultations with presiding boards, it does place the parties to a proceeding at a disadvantage in that they would not have the opportunity to respond to an expert's criticism of the content of the record. Fairness requires that those designated to make the decision actually make it and that any criticism or comment on the content of the record given to the decisionmakers similarly be on the record. Of course, presiding boards should be permitted to take advantage of appropriate assistance from their staff.

Similarly, we do not believe that permitting consultation among the Commissioners, Appeal Panel members, and Licensing Board Panel members is wise. Not only does it suffer from the same problems as consultations between Panel members and presiding boards, it could permit off-the-record explanations and justifications for particular decisions.

In sum, the Panel believes that the present separation of functions rule should be modified in accord with the proposed rule discussed above, but should otherwise remain unchanged. In the Panel's view any changes beyond those already proposed would only present problems without any accompanying benefits.

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