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June 16, 1980

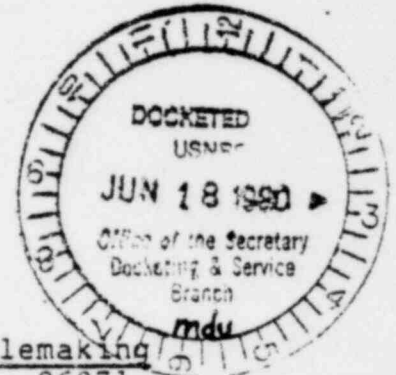
DOCKET NUMBER

PETITION RULE PRM-2-10 (3)  
(45 FR 26071)

Mr. Samuel J. Chilk  
Secretary  
United States Nuclear  
Regulatory Commission  
Washington, D.C. 20555

ATTN: Docketing and Service  
Branch

RE: Docket No. PRM-2-10, Petition For Rulemaking  
To Modify 10 CFR Part 2; 45 Fed. Reg. 26071,  
April 17, 1980



Dear Mr. Chilk:

By the captioned notice, the Nuclear Regulatory Commission ("NRC") requested comments on a petition for rulemaking filed before the Commission on March 13, 1980 by Alan H. Kirshen, Esq., on behalf of the Citizens Advisory Board of the Metropolitan Area Planning Agency, an official advisory board in the Omaha, Nebraska - Council Bluffs, Iowa area. This petition seeks to modify 10 CFR Part 2, "Rules of Practice For Domestic Licensing Proceedings," to require an informal public hearing in every instance of issuance, amendment, modification, suspension or revocation of a facility operating license. The petition also requested certain amendments to Part 2 designed, in petitioner's view, to permit interested persons to request a formal hearing without being required to intervene, to participate in a limited manner in all aspects of such proceedings, and to observe all aspects of a proceeding by scheduling all phases of the proceeding at a place reasonably proximate to the facility in question.

On behalf of Washington Public Power Supply System, we respectfully submit the following comments.

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We believe that the proposed changes in the manner of public participation in NRC proceedings are unnecessary, in part contrary to law, and detrimental to the efficiency and effectiveness of the licensing process. Since these changes would be contrary to the best interests of everyone involved in an NRC proceeding, the petition should be denied.

I. The Petition Should Be Denied

This petition must be denied because petitioner has not shown that the NRC's current procedures for public participation, as reflected in the regulations, are inadequate.

A. Petitioner Has Failed To Demonstrate Any Inadequacy In The Current Regulations

The regulations sought to be modified are entitled to a strong presumption of validity and effectiveness, Forester v. Consumer Product Safety Commission, 559 F.2d 774, 783 (D.C. Cir. 1977), and it is a fundamental requirement that any petition seeking to modify such regulations demonstrate both the manner in which they are deficient and how the proposed changes would correct these defects. This petition merely states that recent events have caused public concern about the safety and reliability of nuclear energy facilities and that public input into governmental decision-making processes is desirable. It does not discuss the current regulations concerning public participation, let alone demonstrate any way in which they fail to adequately address either or both of these concerns. Absolutely no basis is given upon which to judge the relative merits of the proposed regulations in relation to the current regulations. Since this petition has totally failed to meet the

threshold requirement of demonstrating why the present regulations need to be modified (10 CFR 2.802(c)) \*/, it should be dismissed forthwith.

B. The Current Regulations Have Been Held Valid  
And Adequate

Since the purpose of this petition for rulemaking is to change the manner of public participation in NRC proceedings, it must be noted that the current regulations implementing §189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a), have several times been judicially approved and found to be in accord with Congressional intent regarding the manner and extent of such participation. See, e.g., BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974), and the legislative history cited therein. The proposed regulations greatly alter the balance of rights and responsibilities as to public participation struck in the Act, and thus are contrary to the limits authorized by Congress. See Federal Maritime Commission v. Anglo-Canadian Shipping Company, Ltd., 335 F.2d 255, 258 (9th Cir. 1964).

II. The Proposed Informal Hearing Regulations  
Are Overbroad, Confusing And Wasteful

The petitioner proposes that an informal hearing be held in every instance of issuance, amendmenu, modification, suspension, or revocation of a faciliy operating license. In order to do this, petitioner proposes to modify 10 CFR §2.105. We note but will not dwell on the technical problems arising from petitioner's failure to mesh his proposal to the structure of the regulations, particularly §2.201 et seq. The regulation as proposed is unclear and unworkable.

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\*/ From the Commission's Rules, 10 CFR Part 2, §2.802(e) one might infer that it has been determined that this petition contains the information required by 10 CFR §2.802(c), since it has been assigned a docket number and published in the Federal Register. We contest any such determination. In our view, the petition fails to state adequate grounds for the action proposed, and lacks both a statement of the petitioner's arguments with respect to the issues and a discussion of specific instances in which the present rule is "burdensome, deficient, or needs to be strengthened."

One example of the detrimental effect of the proposed modifications to §2.105 can be seen in the ability of five or more persons to request that a hearing be held regarding the suspension, etc., of a facility's operating license. Under the provisions of Subpart B, it would be within the sound discretion of the appropriate NRC official whether there are grounds for such a proceeding to be initiated. That judgment is reviewable. However, under §2.105(a)(4) as proposed, the Commission would be required to publish notice of the requested action, and under the other provisions of §2.105, an informal hearing would be mandatory. The overall result of this proposal would be that the initiation of many proceedings which are now discretionary with the appropriate NRC officials would become mandatory upon receipt of a request for any such proceeding from five or more people. The convening of even a so-called "informal" hearing would entail a much greater expenditure of both licensee and NRC resources than the present procedure, with no assurance of an improvement in safety. Sound discretion is the essence of effective regulation and enforcement. The loss of this discretion could have very serious consequences for the ability of the NRC to effectively carry out its duties.

Even if the petition were limited to requiring informal hearings only in the cases of issuance or amendment of facility operating licenses, the practical effects of enacting these proposed changes would be extremely severe. Since informal hearings would be mandatory in every instance of amendment to an operating license, no matter how inconsequential the amendment might be, the effects of this proposal will be to dramatically increase the time and expense involved in the licensing process; to require a massive increase in both NRC manpower and funding levels to hold these additional hearings; and to require informal hearings even when there is absolutely no interest in the hearing on the part of anyone other than the Applicant and the NRC, thus rendering many, if not most, of these hearings a mere empty formality. The amendments would, without benefit of statutory authority, return the Commission to the era of "due process-itis" which prevailed prior to PL 87-615 (1962), which amended Section 189 of the Act to permit dispensing with unnecessary hearings on every minor license amendment.

The Commission has recently rejected a petition for rulemaking that had the potential for seriously delaying and disrupting the licensing process, noting that



It is well established that the adjudicatory process, whether before the courts or legislative tribunals, must be conducted in a manner to insure the integrity and orderly dispatch of the proceeding, to avoid undue delay or prejudice to the rights of existing parties and to permit finality in the process. Notice of Denial of Petition for Rulemaking of Wells Eddleman, Docket No. PRM-2-7, 45 Fed. Reg. 35345, 35346, May 27, 1980.

These same considerations, together with the other factors just noted, require that this portion of the petition for rulemaking be denied. These considerations are generally applicable to the other changes requested by petitioner, and are incorporated by reference in the discussions of those proposals.

### III. The Proposed Formal Hearing Regulations Duplicate The Proposed Informal Hearing Regulations

The petitioner seeks to amend the regulations so as to allow an interested person to request that a formal hearing be held once a notice of proposed action has been published, but "without being required to intervene and make formal showings." Petition at §4. The only real effect this proposed change would have is that the mere request for a formal hearing would mandate that an informal hearing be held regardless of the merits of the request for the formal hearing. (See proposed regulation §2.105(f)). This proposal is thus objectionable for all the reasons given in Section II above, and should be denied for the same reasons. In particular, it would change the balance of rights and responsibilities reflected in the statute, Sec. 189.a.

### IV. Proposed Regulations Regarding Limited Participation By Interested Persons In All Aspects Of A Proceeding

If promulgated as written, persons not parties to a proceeding would be "permitted to otherwise participate in the proceedings within such limits and on such conditions as may

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be fixed by the presiding officer." Petition at §5(a). Unless this section were to have no meaning, such persons would have to have some "limited" ability to cross-examine witnesses and/or present evidence and/or file proposed findings of fact and conclusions of law. However, since they would not be parties to the proceeding, no party would have been able to obtain discovery from them (some of whom may not have been known until the day of the hearing, prehearing conference, etc.), and the parties could thus be unprepared for and denied an adequate opportunity to refute such presentations. This would be a fundamental and exceedingly egregious violation of the parties' most basic due process rights to a fair hearing.

The proposed notice requirements and the requirement that copies of all pleadings and papers of record be furnished to any person who requests them, regardless of their proven interest in the proceeding, would lead to a number of unnecessary problems. First, such requirements would be an invitation to litigation by anyone who claimed that he or she did not receive the required notice of the conference, etc. or a copy of a paper and that some aspect of the proceeding thus violated his or her rights. Second, these provisions are also capable of massive abuse since it sets no requirements for or limitations on the number of persons who can request receipt of such notice and copies of all papers. Thus, every person in the country who desired to obstruct any or all NRC proceedings could request that a copy of all notices or pleadings be sent to him or her. The potential for mischief is virtually unlimited. Finally, the expense involved of sending notices and/or copies of pleadings and papers to unlimited numbers of people would be a severe strain upon the NRC's budgeted resources. No showing is made by petitioner as to why it is claimed, if it is so claimed, that the local public document rooms are not serving public needs in this regard.

We oppose the service of notice of forthcoming meetings between Staff and various other parties and the service of the minutes of those meetings upon non-parties. The Staff itself represents the public interest and thus service upon non-parties is unnecessary to protect whatever public interest exists in these meetings. This requirement also invites litigation over such things as what meetings must be included within the requirement and how complete the minutes must be to adequately apprise interested persons of what was

discussed at those meetings. The same potential for abuse described above is again present in this requirement. Here again, petitioner does not address any inadequacies in present methods of making information available to interested members of the public in the vicinity of the facility.

In sum, petitioner has not demonstrated any way in which current NRC procedures regarding limited participation and making available notice, documents, etc., to interested persons are deficient. For this reason and for the potential unwarranted expense and even harm which could result from adoption of the proposed regulations, this portion of the petition should be denied.

V. Proposed Regulation Concerning Holding All Hearings Near The Facility Site

The proposed requirement that most, if not all, hearings, conferences, and meetings be public and held at a location convenient to the site of the facility and at a time "reasonably calculated to make same reasonably accessible to the majority of persons affected by the action proposed" is objectionable for all of the reasons given in Sections I-IV, above. The heavy procedural burden of implementing this proposal could only result in drastically increasing the length of time and the amount of money involved in the licensing process. This is especially evident when one focuses on the phrase "meetings between Commission Staff and representatives. . . ." Thus, day-to-day interchanges between Applicants and the Staff, who are charged with representing the best interests of the public, would not only have to be public, but would have to take place at a location proximate to the site and at a time convenient for members of the public after the publication of appropriate notice. This is, in reality, a prescription for bringing the licensing process to a complete halt.

The NRC already has a policy of holding as many hearings and prehearings as feasible near the site of the facility and at times calculated to make these proceedings reasonably accessible to interested members of the public. It has also recently initiated a policy of allowing interested persons to be present at more informal meetings between members of the Staff and the Applicant. However, to require every meeting to be at a location proximate to the site would only have the detrimental effects stated above.

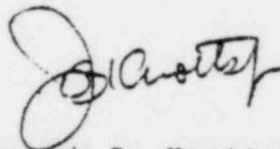
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For the reasons stated above, this portion of the proposed petition should also be denied.

VI. Conclusion

Petitioner has failed to demonstrate how the current regulations are inadequate for implementing the type of public participation Congress wished to have in NRC proceedings. The proposed modifications to the regulations are unneeded, detrimental to the efficiency and effectiveness of the licensing process, and, in some instances, contrary to the requirements of law. For all the foregoing reasons, we respectfully request that this petition for rulemaking be denied.

Respectfully submitted,



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