



NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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MEMORANDUM FOR:

Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM:

RB Leonard Bickwit, Jr., General Counsel

SUBJECT:

COMMISSION PARTICIPATION IN LICENSE ISSUANCE

At the Commission's last meeting on "Deferral of Licenses," Commissioner Ahearne requested OGC to outline a possible temporary modification to the Commission's current procedures to permit increased Commission participation in power reactor license issuance decisions to ensure that TMI-related safety issues have been adequately considered before licenses are actually issued. We have considered a variety of options in which the Commission would act either in adjudicatory or in non-adjudicatory capacities. The criteria we used to analyze these options included: (1) the effectiveness of Commission participation; (2) the degree of direct delay or disruption such participation would have on the particular case involved; (3) the potential for future disruption in the case (in later appellate review for example); (4) the workload burden participation would impose on the Commission; and, of course, (5) compliance with the legal requirements of the Atomic Energy Act and the Administrative Procedure Act.

If the Commission were to decide that new licenses should be issued only with the approval of the Commission itself, we would recommend the following course of action for use in any proceedings in which an adjudicatory hearing is required, i.e., contested operating license proceedings and construction permit and limited work authorization proceedings, whether contested or uncontested. In the case of an uncontested operating license proceeding, the staff could communicate with the Commission informally prior to issuing any license in lieu of employing the more complex procedure discussed below.

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Proposed Procedure

1. Policy Statement

The first step would be issuance of a Commission policy statement.^{1/} The statement would set forth the Commission's belief that while the accident is still under investigation, the Commission itself should increase its involvement in license issuance since it has the ultimate authority within the agency and since it possesses the fullest information on all aspects of the accident. The statement would then list a number of subject areas (operator training and emergency planning are possible examples) which the Commission had determined were TMI-related. Licensing boards would be directed to consider whether to reopen the record in proceedings before them to take additional evidence on those subject areas.^{2/} The boards would decide whether to reopen the records on the basis of their determination whether, without reopening, the record was a fully adequate and current basis on which a decision in question could be made. This is a much more liberal standard than the Appeal Board would employ in determining whether to order a record reopened and it is essentially equivalent to the test each board should make on its own motion before closing the record on any issue before it.

2. Initial and Recommended Decision

The policy statement would provide that when a board is prepared to issue its decision in a case before it, it would issue a partial initial decision on all aspects of the proceeding except those which the Commission had determined to be TMI-related. The board would issue a recommended decision on those latter matters. That partial initial decision would be reviewed by an Appeal Board in the normal fashion with subsequent discretionary review by the Commission.

3. Commission Participation

The policy statement would further provide that the recommended decision would go directly to the Commission for its consideration, and that the parties would be given an appropriate time to

^{1/} Some might consider it more appropriate to communicate with the boards by a series of orders in lieu of a policy statement. For ease of discussion, this memorandum will assume that the policy statement approach is preferred.

^{2/} As the Commission was told on July 12 by NRR and the Chairman of the Atomic Safety and Licensing Board Panel, a number of boards have already received motions to reopen based on the TMI accident.

brief exceptions to that decision. The Commission would then have four options: (1) it could accept the recommended decision and make it final; (2) it could reverse the decision and deny issuance of the license; (3) it could remand the proceeding to the licensing board for the taking of further evidence; or (4) it could itself hear further evidence and then decide the matter.

4. Discussion

Under this procedure the Commission would be acting in a fully adjudicatory capacity and thus would be subject to the ex parte and separation of functions rules. Furthermore, if the Commission did choose to take evidence it would have to employ full adjudicatory procedures including a right to cross-examination (when appropriate) and application of the normal rules of evidence.

Since the licensing board would issue only a partial initial decision, the immediate effectiveness rule would not apply at that stage. The license would be issued only if and when the Commission issued the final decision on the TMI-related issues. Judicial review would be available after a Commission decision granting the license or denying it outright, although in the former case a reviewing court most likely would defer review until the Appeal Board decided any appeals taken on non-TMI issues.

We believe there is one potential problem with this procedure. The Commission's decision on factual matters would have to be based on the record compiled in the particular proceeding involved. This may create some difficulties since the Commission's information on TMI-related issues will be largely derived from such sources as the Lessons Learned task force, the Special Inquiry, and other investigations none of which will necessarily be "on the record" in each licensing action. This problem can be alleviated in two ways. First, in accordance with the policy statement, the boards can be expected to reopen some of the records to take evidence on TMI-related matters. It can be expected that the staff will develop and continuously update its evidence relating to TMI issues which it will tailor to each proceeding and enter into the record. Furthermore, the Commission itself can take any evidence it believes necessary to complete the record. Second, many of the decisions the Commission is likely to reach as a result of its consideration of the TMI accident can potentially be categorized as "policy" decisions rather than decisions on factual issues in controversy. The Commission is, of course, free to base its policy decisions on extra-record information.

Conclusion

We believe that the procedure outlined above provides a process by which the Commission could, if it chose to, involve itself directly in consideration of TMI-related matters as they affect the issuance of new reactor licenses. The procedure would limit the distortion of current licensing procedures to a minimum and would avoid the legal and practical problems that the Commission would encounter if it attempted to employ non-adjudicatory procedures. The Executive Legal Director's Office contributed substantially to this paper and concurs in the above discussion.

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