

UNITED STATES
NUCLEAR REGULATORY COMMISSION
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POLICY SESSION ITEM

For: The Commissioners

From: Leonard Bickwit, Jr., General Counsel

Subject: Indian Point -- Analysis of comments received and of options available to the Commission

Purpose: To forward to the Commission an analysis of the comments received on the Director's decision on Indian Point, and of the major procedural options now available to the Commission with respect to that decision.

Discussion: On February 11, 1980, the Director, NRR, denied the Union of Concerned Scientists' petition requesting shutdown of Indian Point Units 2 and 3. On February 15, the Commission approved a Federal Register notice which solicited the views of the public on the merits of the Director's decision, and on the form which further Commission review (if any) should take. The Federal Register notice, which included the separate views of Commissioners Gilinsky and Bradford, presented five options for Commission action with respect to the decision, and noted that the list was not exhaustive, nor were the five options necessarily mutually exclusive.

You have already received copies of those comments, together with a table summarizing their contents. The purpose of this paper is to outline the advantages and disadvantages of the various procedural options available to the Commission, both as viewed by the commenters and by OGC. This paper does not attempt to recommend a course of action to the Commission. Any such action will of course be dictated in part by the Commission's reaction to the merits of the safety and other substantive arguments presented prior to the Director's denial and in the comments received.

SECY NOTE: This paper is scheduled to be discussed at an Open Commission meeting on Monday, April 14, 1980.

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I. Option 1. Review Director's Denial.

A. Views of the Commenters

None of the commenters favored this option. The comments of the Union of Concerned Scientists (Comment #85) criticized this option, stating that it gave excessive discretion to the Director, did not permit public participation, and -- though perhaps appropriate for run-of-the-mill 2.206 denials -- was inappropriate for a case in which the Commission must decide such fundamental policy issues of first impression as the level of risk which can be permitted for nuclear plans operating in high-population areas.

B. Pros and Cons (as viewed by OGC)

Pro:

- conforms to standard agency practice
- permits expedited resolution by Commission

Con:

- no apparent public support for this option
- no opportunity for public participation
- Commission review, if "abuse of discretion" standard is followed, may be perceived as quite limited in scope.

II. Option 2. No review of Director's denial.

A. Views of the Commenters

This option was favored by Con Ed, PASNY, Westinghouse, Scientists & Engineers for Secure Energy (Miro Todorovich), the New York State Building and Construction Trades Council, and the New York State Committee for Jobs and Energy Independence. PASNY (commenter #66) is representative of this group's views. It points to the Commission's 1975 Indian Point decision, 2 NRC 173, and the narrow abuse of discretion standard set forth in that ruling for determining when the Commission will take review of a 2.206 denial. Here (says PASNY) the Director's

action meets the test of that decision: it "permits a rational understanding of the basis for the decision;" shows that "the Director has correctly understood governing laws, regulations, and policy;" shows that "all necessary factors [have been] considered and extraneous factors excluded;" and, on the basis of all the above, is not "demonstrably untenable."

The UCS petition (according to PASNY) raises matters which have already been decided and remedied by the Commission, such as fire protection, or which are under appropriate review at this time, such as emergency planning and unresolved generic safety issues. The Commission does not have the time or the expertise to act as the ultimate technical reviewer of the staff's technical decisions regarding every operating nuclear plant.

The Commission should decline to review the Director's denial (says PASNY), partly because the present level of safety of the Indian Point plants is high, and partly because the cost to society of a shutdown, whether permanent or for a period during adjudication, would be severe. Indian Point was designed with an appreciation of its proximity to high population areas, and contains a number of safety features (twelve are listed, including the containment weld channel and weld channel pressurization system, penetration pressurization system, and isolation valve seal water system) which are not found in the average PWR. PASNY's analysis indicates that the NRC staff has been unduly conservative, and that the risk from Indian Point is in fact less than that from other reactors, even taking into account the high population density.

In deciding what level of safety is appropriate, the Commission should (says PASNY) consider the economic and social dislocations which a permanent or interim shutdown would cause. The alternative to nuclear generation from Indian Point is oil-fueled generation; Indian Point Units 2 and 3 replace 20 million barrels of imported oil per year. The result of a shutdown would be calamitous: \$700 million a year additional cost on PASNY's and Con Ed's ratepayers, including \$100 million increase to Metropolitan Transit Authority that would jeopardize present mass transit fare levels.

If the Commission decides that further proceedings are necessary, there should be an informal presentation, in which the major parties in interest (PASNY, Con Ed, and UCS) could offer their views in writing and orally. If after that proceeding, the Commission decided that still further proceedings were necessary, the public would be best served by a generic rulemaking rather than a plant-specific adjudication, according to PASNY.

B. Pros and Cons (as viewed by OGC)

Pro:

- quick, allowing objectors immediate recourse to the courts
- does not exclude treating generic questions in a rulemaking

Con:

- ignores strong public desire for Commission involvement in Indian Point issues
- does not address policy question of Commission's approach to reactors sited in areas of dense population.

III. Option 3. Generic Rulemaking.

A. Views of the Commenters

This option was favored by Westinghouse and Con Ed (from the perspective of opposing a plant-specific adjudication) and also by persons stating agreement with Commissioner Gilinsky that plant-specific adjudication should be coupled with a generic proceeding that would establish the standard by which individual plants would be measured. This latter group included Brooklyn SHAD, Bernard Wolf, and Dean Corren.

Con Ed (#69, at pp. 14-26) states that there should be a generic demographic rulemaking, because it appears that there are "substantial questions about both the Staff's apparent goals

and its present assumptions as to risks at existing plants." The Staff's assumptions with regard to the societal risk posed by Indian Point were oversimplified and incomplete, reflecting the risk posed by a typical PWR rather than by Indian Point. The Commission (says Con Ed) should request the staff to perform analyses based on the actual risk posed by plants, since plants such as Indian Point include design features added just because of the high population density. The Commission must decide whether its objective is to equalize societal risk or individual risk, where demographics make the two objectives incompatible. The development of such an articulated safety objective was identified as a high priority by the NRC's TMI-2 Lessons Learned Task Force in its final report. The NRC would not be required to decide on its overall safety objective in this proceeding, however. It could (says Con Ed) simply presuppose the ultimate development of such an objective, and focus on the concepts of relative safety and residual risk for plants in areas of different population density.

Con Ed suggests that the issues to be considered in a rulemaking could include the following:

- (a) should the Commission set guidelines for distributing the "residual risk" posed by nuclear power plants on an equitable basis?
- (b) should risks be distributed on the basis of individual risk, societal risk, or some other basis?
- (c) if a decision is made to distribute risks on some equitable basis, how should this be done, and what types of risks (e.g., all societal risks, all risks from electrical generation sources) should be taken into account, and will the application of such criteria cause disproportionately high electricity rates for high-density population areas?
- (d) what is the applicability of the concept of "acceptable risk" for different areas of the country?
- (e) what are the actual risks of existing plants at sites of different population densities, taking into account existing designed safety features?

Con Ed suggests that the Commission should use this rulemaking, with full public and industry participation, to define its safety goals and articulate its standards before proceeding with implementation.

The comments of Dean Corren (#80) and Brooklyn SHAD (#63) endorse the views of Commissioner Gilinsky, and urge that a safety policy and objective should be developed for plants sited near high populations, such as Indian Point and Zion. They see such a proceeding as coupled with individual adjudication of the issues raised in the UCS petition. Both those commenters appear to view the individual proceeding on Indian Point as the forum for a generic decision on plants in high-density population areas. It is thus not clear whether they are in fact approving the rule-making approach, or are rather urging that issues of generic applicability be handled in the context of the Indian Point adjudication.

B. Pros and Cons (as viewed by OGC)

Pro:

- comes to grips with the generic issue of acceptable risks in densely populated areas
- allows public participation beyond the Indian Point area and its specific interests
- allows thorough exploration of fundamental policy issues, and permits Congress to judge acceptability of Commission policy

Con:

- time-consuming
- does not by itself resolve plant-specific questions
- unless coupled with plant-specific proceedings, will not satisfy most commenters' concerns

IV. Adjudication

A. Views of the Commenters

The great majority of those submitting comments favored an adjudicatory proceeding. Although the table breaks down the comments into those who favored adjudication by a licensing board, by the Commission, and by a combination of a

fact-finding licensing board and a decision-making Commission, the distinctions are not all that clear. Some of those listed as favoring adjudication by the Commission are arguably requesting that the Commission make the final decision, rather than that the Commission serve as its own hearing panel. On balance, however, it is clear that the preponderant view among the commenters favored the creation of an ASLB to take evidence and make findings of fact on issues in controversy, with the ultimate decision on the merits (and the decision on an interim shutdown) left to the Commission itself. It is noteworthy that although most of these commenters emphatically supported the UCS petition, the comments of UCS itself (#85 at p. 3) do not insist that all decisions be made by the Commission. On certain issues, where the question as framed by UCS is whether the two plants are in conformance with the regulations in effect at the time of their licensing, UCS suggests that the ASLB could be directed to issue an initial decision on the sufficiency of the Director's order as to these areas (subject to ultimate Commission authority to review).

UCS urges that a combination of ASLB factual findings and Commission decision are needed on six major questions: (1) consequences of a Class 9 accident at Indian Point; (2) emergency procedures, and their ability to mitigate the consequences of a Class 9 accident; (3) design changes capable of mitigating the effects of a Class 9 accident at Indian Point; (4) unresolved safety questions and compensating design features; (5) conformance with applicable Regulatory Guides for PWRs; and (6) safety-related design differences between Units 2 and 3.

UCS urges that this option accommodates the best features of the options proposed by the majority of the Commissioners in the Federal Register notice, while also providing for Commissioner Gilinsky's concern that the Commission itself confront the policy question of the proper approach to operating plants in highly populated areas.

Taking the contrary view, Con Ed (#69) argues that it would be extremely undesirable for the NRC to initiate an adjudicatory proceeding, which would, they say, be only the first of many adjudicatory proceedings dealing piecemeal with

an issue of general concern to all licensees and to the public in all parts of the country.

B. Pros and Cons (as viewed by OGC)

For clarity, we first list below the pros and cons, as we see them, of some form of adjudication in this matter. Then we list the pros and cons of each of three suboptions (adjudication by an ASLB, by the Commission, and by a fact-finding ASLB which would leave decisionmaking to the Commission).

Adjudication (of whatever type)

Pro:

- favored by most commenters
- allows full factual record to be developed with traditional tools for ascertaining facts, e.g., cross-examination
- permits full public participation, as parties and as spectators (since hearings are usually held in locality of plant)

Con:

- time-consuming, in part because of trial-type procedural requirements
- raises questions as to what plant operational posture is appropriate while lengthy adjudication is underway
- to the extent issues are generic, a plant-specific adjudication may not be the appropriate forum for resolving them, especially where questions are primarily those of policy
- ex parte barriers created

Suboption A (adjudication by an ASLB, reviewable by Commission in accord with usual procedures)

Pro:

- conforms to usual adjudicatory practice
- allows Commission to review portions of record to which exceptions are taken without having to review portions not in controversy
- Boards have experience in conducting hearings, writing decisions in adjudications

Con:

- time-consuming
- removes Commission from direct decisionmaking
- Boards lack guidance on underlying policy issue of operation in areas of high population

Suboption B (adjudication by the Commission itself)

Pro:

- fewer steps involved than in adjudication by an ASLB, in terms of obtaining a final agency decision
- places the Commission squarely in the decisional process
- familiarizes the Commission with the adjudicatory process

Con:

- great drain on Commission time
- Commission lacks expertise in conducting adjudications

Suboption C (fact-finding by an ASLB, decision by the Commission)

Pro:

- favored by a large portion of commenters
- saves Commission resources by allowing ASLB to conduct hearings
- allows key decisions to be made in first instance by the Commission

Con:

- requires review even of portions of record not in controversy
- less Commission involvement than in Suboption B

V. Option 5. Informal proceeding.

A. View of the Commenters

Only one commenter, Rep. Toby Moffett (#14), favored this option. He stated that, "to be quite blunt, one of the Commission's obvious difficulties is that it has considerable difficulty making decisions." He saw a tendency to overproceduralize issues to the extent that the resulting delay obscures the urgency of the matter at hand. Rep. Moffett strongly urged that options 3 and 4 be rejected for that reason. He stated the Commission should hold informal hearings in the vicinity of the plant, and should commit itself to a firm deadline for a final decision on the safety of Indian Point as a nuclear site. He stated that there has been enough material generated since the Three Mile Island accident, including the work of his subcommittee on emergency planning, to make a decision within a quite limited span of time.

B. Pros and Cons (as viewed by OGC)

Pro:

- rapid decision possible
- overproceduralization is avoided

- proceedings easily tailored to Commission's needs

Con:

- little apparent public support
- adjudicatory tools (e.g., cross-examination) may be helpful in individual cases
- might not serve to assure optimum treatment of generic policy issues on which broad participation by public and industry would be desirable

Remaining Issues

In addition to choosing one or more of the procedural options described above, the Commission must address two further issues: interim operation, and the location of any further proceedings.

I. Interim Operation

A. Views of the Commenters

The majority of commenters favored an interim shutdown of Indian Point Units 2 and 3, on the grounds that since the Director's decision was incorrect or inadequate, the plants cannot be presumed to be safe and must be shut down, at least for the duration of further proceedings. Those who argued strenuously against an interim shutdown, such as Con Ed and PASNY, argued the need for the plant's power and the absence of good cause for a shutdown.

In addition to the obvious alternatives of interim shutdown and interim operation, a third possibility exists which was not discussed by any commenter. In the event that the Commission determined that the filings now before it did not permit a soundly based decision either for or against an interim shutdown, the Commission could appoint a task force, drawing on different parts of the NRC (and on the ACRS) for resources as needed. Such a group could report back to the Commission on an expedited basis with factual

findings (and if requested, a recommendation) on this question.

B. Pros and Cons of Task Force (as viewed by OGC)

Pro:

- permits sounder decision than filings by themselves permit
- offers possibility of soundly based decision on interim operation within a short period of time
- would permit utilization of expertise from different parts of the agency

Con:

- postpones decision on interim operation until task force reports
- adds further procedure to the decisionmaking process
- would entail staff input to review of a staff determination

II. Location of proceedings

A. Views of the Commenters

The majority of commenters either specifically called for hearings in the vicinity of the plant or appeared to assume that any hearings would be held in the affected area. No one argued explicitly against this proposal, although it is safe to assume that some of those persons who disapproved of holding any further hearings might well be unenthusiastic about the New York location for such hearings.

B. Pros and Cons (as viewed by OGC)

Pro:

- allows public to participate and attend
- consistent with usual NRC practice

-- serves the convenience of the parties

Con:

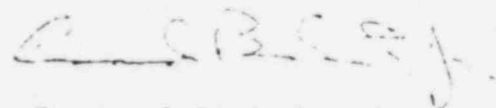
- if Commissioners are to take part in the proceedings, does not serve their convenience
- insofar as problems are generic and national, focuses attention predominantly on plant-specific issues

III. Questions to be Answered

In the event that the Commission decides to refer the matter to a Licensing Board, it will be extremely useful to set out with some specificity the questions that such a board should resolve (or if the board is to serve only as a fact-finder, to specify the questions on which it is to take evidence and develop a record). The following is a list, not necessarily exhaustive, of some of the issues which the Commission may wish to have addressed:

1. What is the current status and acceptability of emergency planning in the vicinity of Indian Point and what improvements in the level of emergency planning, and/or the understanding of the emergency planning problem, can be expected in the near future?
2. To what extent will the measures prescribed by the Director, NRR, in the confirmatory orders, increase the safety of the plants, and compensate for the high population density?
3. What is the risk of a Class 9 accident posed by operation of Units 2 and 3 pending and after improvements identified in (1) and (2) above?
4. How do the risks posed by these facilities compare with any general legal or policy criteria the Commission may have for determining what are acceptable risks?

5. What would be the consequences of a shutdown, interim or permanent, of Indian Point Units 2 and 3?



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