June 11, 1979 SECY-79-383

COMMISSIONER ACTION

FOR: The Commissioners

FROM: Harold R. Denton, Director, Office of Nuclear Reactor Regulation

THRU: Lee V. Gossick, Executive Director for Operations

SUBJECT: REQUEST FOR HEARING REGARDING NIAGARA MOHAWK'S PROPOSED INSTALLATION OF AN INCINERATOR FOR RADWASTE VOLUME REDUCTION AT NINE MILE POINT UNIT 1.

PURPOSE:

(1) To request that the Commission consider convening a Hearing Board to consider a proposal by Niagara Mohawk Power Corporation to install and operate an incinerator for radwaste volume reduction at Nine Mile Point Unit 1; and

(2) To inform the Commission of potential policy implications associated with the subject proposal as well as the staff plans for conducting its review of the proposal.

CATEGORY: This paper covers a policy question.

ISSUES:

(1) Whether to direct the holding of a public hearing on the Nine Mile Point incinerator approval request.

(2) Whether the licensing and use of reduction of low level radioactive wastes processes at nuclear power plant sites should proceed on an individual case basis pending completion of the NMSS work described in SECY-78-256.

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DISCUSSION: There is a pending action before the staff on Niagara Mohawk Power Corporation's application for authority to construct a radwaste building and to install and operate a radwaste incineration system, as well as other processing/storage auxiliaries at the Nine Mile Point Facility.

Presently, the staff is conducting an evaluation of the application which includes review of the safety aspects and an appraisal of the environmental impacts. The staff will need additional time to obtain sufficient technical information to determine whether the proposal involves a significant hazards consideration. Upon completion of the environmental review, a decision will be made, in accordance with 10 CFR 51.5 and 40 CFR 1501.4, on whether an Environmental Impact Statement (EIS) should be issued. Should an EIS not be issued, a Negative Declaration accompanied by an Environmental Impact Appraisal will be issued with our Safety Evaluation Report on this matter.

Pending resolution of these questions, there are several issues associated with this proposal that should be brought to the Commission's attention.

QUESTION 1: Should a hearing be granted?

To date, neither a notice of hearing pursuant to 10 CFR §2.104 nor a notice of proposed action pursuant to 10 CFR 2.105 has been issued in connection with the Niagara Mohawk application. Nevertheless, despite the absence of a formal public notice, various interested organizations (Natural Resources Defense Council, the State of New York Energy Office, the Oswego County Planning Board, Ecology Action of Oswego, Town of Scriba, Sierra Club, etc.) have requested that the Commission provide opportunity for intervention in a public hearing on the proposal.

Under these circumstances, the Executive Legal Director has indicated that the better legal view is that these interested organizations have a statutory right to a hearing if they are able to meet the statutory requirement of standing (i.e., show that they have an interest that may be affected by the proceeding) and that this right is not contingent on a determination that the proposal involves a significant hazards consideration (see attachment A).

There appears to be merit from the standpoint of the public interest in holding a public hearing on Niagara Mohawk's proposal quite apart from the pending hearing requests.

QUESTION 2: What is the impact of a hearing on the timing of the completion of the licensing action?

A decision to hold a public hearing on this matter raises a related question--whether, upon a determination that there are no significant hazards considerations, an amendment to Niagara Mohawk's operating license could be issued prior to completion of the public hearing.

This question is a close one, not easily resolved in the absence of clear precedent and prior Commission guidance. As indicated in the attached ELD memorandum, (attachment A) the better legal view seems to be that issuance of the license amendment prior to completion of the public hearing would be permissible if a showing was made that the amendment involved no significant hazards considerations and if the amendment, by its terms, stated that it was issued subject to such conditions subsequent as might be needed to reflect the findings and conclusions of the hearing. However, the legal issue is a close one, and ELD does not believe that this controversial case presents a good "test case" for resolving this issue. Consequently ELD believes that, in the circumstances of this case, no amendment should be issued prior to completion of a hearing and initial decision.

QUESTION 3: What are the implications of this licensing action when viewed in a broader context?

From the early days of the U. S. nuclear power industry, electric utilities have solidified radwaste and have shipped these materials to off-site burial grounds. Since adequate burial capacity existed and economics favored packaging and shipping offsite in lieu of additional processing to minimize waste volumes, little attention was paid to minimizing reactor-generated low level waste volumes.

With respect to LLW storage capacity, recent developments (within the past 3 years) at the six commercial radioactive waste burial sites have raised the question of whether adequate disposal capacity will be available in the relatively near future. Two of the six licensed commercial burial sites (West Valley, New York, and Maxey

Flats, Kentucky) are closed; a third site (Sheffield, Illinois) is filled to its licensed capacity. The State of South Carolina has placed a limit on the volume of waste that may be buried at a fourth site (Barnwell, South Carolina). Adequate disposal capacity at the Barnwell, South Carolina; Beatty, Nevada; and Hanford, Washington sites will exist until the mid-1980's assuming no additional restrictions are imposed, but a regional imbalance of storage capacity exists. (See SECY-78-256 for a detailed discussion on low-level waste disposal capacity and NRC's plans to assure adequate future capacity).

The present situation regarding LLW volume reduction at reactor sites appears to be analogous to the problem of spent fuel storage capacity and individual licensing actions to allow spent fuel pool modifications which increased storage capacity. This fuel storage capacity issue resulted in the Commission's Federal Register Notice (40 FR 42801) of September 16, 1975, which supported the consideration of individual licensing actions on a case basis under existing regulations, and directed NMSS to develop an EIS on the generic issue of adequate storage capacity of reactor spent fuel.

The grant of a hearing in this case is likely to result in the raising of a number of policy questions regarding LLW and the proposed use of volume reduction techniques at LWR sites to extend the life of existing LLW disposal sites. The issues could include: site-specific use vs. national/regional use; incineration vs. compaction; and the merits of specific systems types. Examination of these issues on an ad hoc basis prior to Commission consideration and adoption of an overall policy on low level waste disposal and storage, perhaps including interim guidelines on factors to be considered in individual approvals similar to those developed for consideration of individual spent fuel storage pool expansions, may present some difficulties.

A study of volume reduction techniques and their cost effectiveness is planned for FY 1980. Results of this study will be used to develop policies regarding the extent volume reduction should be required by low level waste producers. In the interim it is our view that the matter can be addressed

on a case-by-case basis within the context of individual licensing reviews. Thus, due to the licensee's scheduling considerations, the licensing review of the Nine Mile proposal is proceeding on an ad hoc basis under existing regulations and we are processing the application for the proposed installation under Part 50 licensing procedures. However, it is anticipated that similar requests for approval of incineration at other sites will follow. Therefore, the potential exists for establishing a policy regarding LLW volume reduction in this case and follow-on cases which could prejudice generic consideration of the issue by the Commission.

(During the preparation of this paper a letter was received from Paul A. Giardina of EPA requesting that an environmental assessment be made and a Negative Declaration (with EIA) or Impact Statement by issued in conjunction with the review of the Newport News topical report. We have concluded that the environmental assessment would be more appropriately conducted in conjunction with proposed use of such a design at a particular site.)

RECOMMENDATION: It is recommended that the Commission:

(1) Authorize the preparation by OELD and NRR and publication of a notice of hearing on Niagara Mohawk's proposed modification, providing an opportunity for persons whose interest may be affected to intervene. The notice should provide for issuance of a license amendment only based upon a favorable initial decision, after hearing.

(2) Give consideration to developing a policy statement on low-level waste volume reduction which would endorse licensing on a case-by-case basis and continue the work on waste reduction presently in process as described in SECY-78-256.

(3) Note the present staff intention to review the Niagara Mohawk Power Corporation proposal on an ad hoc basis; and

(4) Note that the staff will respond to the EPA letter by indicating that an environmental assessment is being performed in conjunction with the first use of the incinerator at a facility (Nine Mile Point), that EPA's detailed questions will be taken into account in that review, and that no separate environmental assessment will be performed in conjunction with the topical review.

COORDINATION: This paper has been coordinated with the Office of Executive Legal Director and Office of Nuclear Material Safety and Safeguards. Office of Nuclear Material Safety and Safeguards concurs in the recommendations of this paper.

ELD prepared Enclosure A and concurs in the recommendation that a public hearing be held, and that no license amendment be issued except based upon a favorable initial decision after hearing.

Harold R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosure: — UNDER
ELD Views & Analysis

Commissioners' comments should be provided directly to the Office of the Secretary by close of business Monday, June 25, 1979.

commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 19, 1979, 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 1B
SECY-79-382,
6/11/79

Enclosure A

OELD Views And Analysis

Niagara Mohawk's pending request for an amendment to its operating license to operate a radwaste incinerator system, and the pending requests by interested groups for a hearing on the amendment, raise three separate but related legal questions: (1) do interested persons have a statutory right to obtain a hearing on the amendment even if the amendment presents no "significant hazards consideration"; (2) if interested persons do have a right to a hearing, may the NRC, in its discretion, direct that an amendment not involving any "significant hazards consideration" be issued prior to completion of the hearing, and (3) what type of public participation, if any, does the statute require on the "no significant hazards consideration" question. The statutory scheme for processing operating license amendments in the Atomic Energy Act of 1954, as amended ("AEA") has been unchanged for the past 17 years. Nevertheless, these three legal issues have never been definitively resolved and there are no judicial or NRC (or AEC) adjudicatory decisions that offer firm guidance.

The better legal view, as explained more fully below, is that: (1) interested persons (persons with standing to intervene) do have a statutory right to a hearing in a proceeding for the issuance of an amendment even if the amendment presents "no significant hazards consideration"; (2) such a hearing may, at the Commission's discretion, be held after issuance of the license amendment, provided that the amendment involves no significant hazards consideration, although the legal issue is an extremely close one

and judicial attitudes are hard to predict, and (3) no hearing need necessarily be offered on the "no significant hazards consideration" question.

If the Commission agrees with these legal conclusions, two related policy questions will remain: (1) should the NRC direct the holding of a hearing on its own initiative, and (2) should the NRC exercise its discretion to permit the amendments to issue following a favorable Staff review but before completion of the hearing. In ELD's view, the NRC should direct the holding of a hearing in view of the high level of public interest and controversy associated with the licensee's proposal.*/ For the same reasons, ELD does not believe that this would be a good case to litigate the legal issue whether the amendment may issue pending completion of the hearing. There is a legal maxim that "hard cases make bad law." In this case the "no significant hazards consideration" issue is a close question, and if such a determination is made it will be strongly contested. Consequently, on judicial review the legal issue regarding the timing of the hearing will likely be clouded with safety and environmental issues associated with the merits of the amendment. A Court that is concerned about the merits of the amendment may be reluctant to conclude that the amendment may properly be issued prior to full resolution of safety and environmental issues after hearing. Thus ELD recommends that in this particular case the NRC direct that no amendment issue pending an NRC decision after hearing.

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*/ In Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), the last licensing proceeding where NRC (AEC) directed that a hearing be held apart from a hearing request, the Commission simply concluded that a hearing "should be held in view of the substantial public interest expressed". Notice of Hearing, March 9, 1970.

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Analysis

A. Right to a Hearing

The first legal issue is whether interested persons have a right to a hearing on an amendment if the amendment presents no significant hazards consideration.[1/]

1. The Language of the Statute

The relevant portion of the AEA is §189a. which reads as follows:

> "Sec. 189. Hearings and Judicial Review.--
> "a. In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration." [Empnasis added]

1/ Throughout the analysis the term "mandatory hearing" will be used only to refer to the hearing which the AEA requires be held in certain CP cases even though no hearing is requested. The term as used here does not include a hearing which is held only upon request by an interested person.

Several things are clear from a reading of the section. First, the right of interested persons to request a hearing under the first sentence extends generally to proceedings on amendments to all licenses, including materials licenses and facility construction permits and operating licenses, as well as to proceedings on the initial permits licenses. Second, the so-called mandatory hearing requirement in the second sentence--the requirement that a hearing be held even if not requested--applies only to certain initial construction permit proceedings, and does not apply to proceedings on operating licenses or amendments. Third, under the third and fourth sentences an operating license or amendment presenting significant hazards consideration may issue without any mandatory hearing, but interested persons must be given at least 30 days notice of the NRC's intent to issue the license or amendment. Fourth, under the fourth sentence, no advance notice need be given with regard to amendments involving "no significant hazards consideration". While there is no express curtailment in the second, third, or fourth sentences of §189a. of the right to a hearing on proceedings on amendments extended by the first sentence of section 189a., the third and fourth sentences do clearly eliminate the requirement for mandatory hearings and advance notice in some proceedings.

2. Legislative History

The 1954 Act and the 1957 amendments

The AEA, as enacted in 1954,[2/] contained only the first sentence

2/ Pub. Law 83-703, 68 Stat. 919 (1954).

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in §189a. In 1957 Congress added to §189a. a new sentence which required mandatory hearings on each application for a license for a large facility, such as a nuclear power reactor.[3/] This was the result of strong criticism of the AEC for issuing a construction permit for a fast breeder power reactor near Detroit, Michigan (the PRDC reactor) without any prior notice or prior public hearings.[4/] By its terms the new language had the effect of increasing public participation in licensing proceedings, and there is no indication in the legislative history that interested persons' right to a hearing under the first sentence of §189a. was intended to be affected.

The 1962 amendments

In 1962 the section was again amended to the form it is today.[5/] The 1962 amendments were the result of a JCAE Staff study of the regulatory process,[6/] and a series of JCAE hearings in June 1961[7/] and April 1962.[8/] The study and hearings evidence a concern that the regulatory process was being unnecessarily burdened with mandatory hearings. Indeed the whole premise for the discussion in the study and hearings was that intervention would seldom occur. During the April, 1962 hearings Mr. David Toll, JCAE Staff Counsel, stated to witness Professor Raoul Berger that "I think you are

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3/ Pub. Law 85-256, 71 Stat. 576 (1957).

4/ See "Study of AEC Procedures And Organization In the Licensing of Reactor Facilities", JCAE, April 1957.

5/ Pub. Law 87-615, 76 Stat. 409 (1962).

6/ "Improving the AEC Regulatory Process", JCAE, March 1961.

7/ "Radiation Safety and Regulation", June 12-15, 1961.

8/ "AEC Regulatory Problems", April 17, 1962.

absolutely correct that the difficulty, the background that led to the Joint Committee study and the bills, was the concern over the handling by AEC of uncontested cases".[9/] During the same hearings AEC Commissioner Olson spoke in favor of the draft bill pending before the Committee--a bill with language substantially identical to the language in the bill as enacted--because "it would reduce the number of hearings without prejudice to the public's access to information, and without prejudice to the right and opportunity of any interested party to demand a hearing."[10/] The JCAE report on the bill similarly indicates that the §189a. was proposed to be amended because the second mandatory hearing at the operating license stage was regarded as "unnecessary and burdensome in the absence of bona fide intervention".[11/] Finally, in describing the proposed amendments on the Senate and House floors prior to passage, JCAE Vice Chairman Pastore and Chairman Holifield stated that the amendments "in no way limit the right of an interested party to request a hearing at some later stage [subsequent to the CP stage]".[12/]

Conclusion

The legislative history of the 1962 amendments will not support any construction of the third and fourth sentences of §189a. as eliminating

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9/ April 1962 hearings at 70. See also April 1962 hearings at 45 (response by Professor David Cavers and William Mitchell), 61 (statement by Mr. Arthur Gehr), 67 (response by Professor Berger).

10/ April 1962 hearings at 28.

11/ S.Rep. No. 1677, 87th Cong., 2d Sess. (July 5, 1962).

12/ 108 Cong. Rec. 14727 (July 18, 1962); 108 Cong. Rec. 15514 (Aug. 15, 1962).

the right to a hearing afforded to interested persons under the first sentence of the section.

B. Timing of the Hearing

The next legal issue goes to the timing of the hearing--if interested persons have a statutory right to a hearing and request one, may the NRC direct that the amendment be issued before the hearing is completed upon finding that the amendment does not involve any significant hazards consideration? The legal issue is an extremely close one and both sides are presented below.

The Argument In favor of Hearing Before Issuance

1. The Language of the Statute

The argument in favor of hearings before issuance of an amendment, and proscribing amendment issuance prior to completion of a requested hearing, would focus first on the opening sentence of §189a. The language here is in terms of a "proceeding ... for the ... amending of any license ...." The "proceeding" which is the subject of a hearing request under §189a. is a proceeding leading toward the issuance of an amendment. This can be taken as fairly implying that the proceeding, and therefore the hearing if requested, must be held before the amendment is issued. The last sentence of §189a. referring to "significant hazards consideration" would be read as referring only to the requirement for advance notice of the proposed action.

Clearly, the argument goes, if Congress had intended to dispense with both prior notice and prior hearing, it could have said so in the statute by adding "hearing" or "prior hearing" to the language of the last sentence. Finally, the argument would acknowledge that, from a logical standpoint, it makes little sense to provide for an opportunity for prior hearing without also providing for prior notice. However, for whatever reason, the language of the AEA does distinguish between rights to a hearing on the one hend, and rights to notice of the action on the other. There is no statutory requirement for notice of issuance of any materials license or small facility license, yet no one has seriously contended that a research reactor construction permit or a license for a high-level waste repository could be issued without any hearing if a hearing is requested. The argument would be made that a statutory deficiency with respect to notice should not necessarily lead to the conclusion that rights to a hearing before issuance of the amendment are limited.

2. Legislative History

The 1954 Act and the 1957 Amendments

As indicated above, the first sentence in §189a. is derived from the original 1954 AEA; the remainder of §189a. was added by the AEA amendments of 1957 and 1962. The bills reported by the JCAE in June (S. 3690) and July (H.R. 9757) of 1954 included a provision in §181 for a hearing upon request by any party "materially interested in any agency 'action'". At the time §189 simply provided for

judicial review of any proceedings "to enjoin, set aside, annul, or suspend any order of the Commission". There was immediate controversy over rights to a hearing, and the JCAE reports include dissenting views by Representatives Holifield and Price, who urged, among other things, that the bill be amended to "safeguard ... the right to public hearing in connection with any application, with specific provision for admission of interested States, State commissioners, muncipalities, representatives of interested consumers or competitors as parties."[13/] When the bills reached the House and Senate floors there were similar criticisms, and the hearing issue became enmeshed in a wide ranging debate on public versus private power.

On the House floor Representative Holifield renewed his criticism, and offered an amendment to the bill, as reported, that read as follows:

> "Amendment No. 30: On page 86, in line 21, add the following new sentences: "In case of protests or conflicting applications or requests for the establishment of special conditions in prospective licenses, the Commission shall, prior to issuance of any license, hold public hearings on such application or applications in general accordance with the procedures established in connection with consideration of applications for licenses under the Federal Power Act and interested parties shall have the same rights of intervention in such proceedings, application for rehearing, and appeal from decisions of the Commission as are provided in that act and in the Administrative Procedure Act. In any proceeding before it the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, public or cooperative electric system or any competitor of a party to such proceeding, or any other person whose participation may be in the public interest."[14/]

13/ I Leg. Hist. of the AEA of 1954 at 869. For some reason the controversy did not center around the adequacy of §181 which, on its face, arguably accomplished what Representatives Holifield and Price desired.

14/ III Leg. Hist. of the AEA of 1954 at 2848.

This amendment, by its terms, would have provided specifically for hearings prior to license issuance upon request. Five days after Representative Holifield offered his amendment, on July 24, 1951, JCAE Chairman Cole offered a JCAE amendment on the House floor which was agreed to without debate.[15/] The language of the amendment adopted was substantially identical to the language of §189, as enacted:

> "Sec. 189. Hearings and judicial review:
> "a. In any proceeding under this act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licenses, and in any proceeding brought under the provisions of section 152, and in any proceeding for the payment of compensation, an award or royalties under sections 156, 186c, or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.
>
> "b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an 'agency action' of the Commission shall be subject to judicial review in the manner prescribed in the act of December 29, 1950, as amended (ch. 1189 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended."

Unlike the earlier Holifield amendment, which was never acted on, the Cole amendment did not provide specifically for prior hearings, and there is no indication on the House side that the two amendments were intended to accomplish exactly the same purpose.

On the Senate side there was similar criticism of the bill as

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15/ III Leg. Hist. AEA of 1954 at 2935.

reported for failing to include adequate provision for hearings.[16] On July 16, 1954, JCAE Vice Chairman Hickenlooper offered a JCAE amendment to the bill identical to the one later offered by Chairman Cole. Like the Cole amendment, the Hickenlooper amendment was agreed to without debate. On July 21, 1954, Senator Humphrey offered an amendment to the bill as reported that was identical to the amendment offered by Representative Holifield providing for hearings prior to license issuance upon request.[17] The next day when the amendment came up for Senate consideration, the following discussion took place:

> "Mr. HUMPHREY. Mr. President, I modify my amendment, which is the pending amendment before the Senate, by striking out all of the amendment after line 5, on page 1, so that remaining portion of my amendment will read as follows:
>
> On page 85, line 18, after comma it is proposed to insert the following: "to municipalities, private utilities, public bodies, and cooperatives within transmission distance authorized to engage in the distribution of electric energy to the public."
>
> Mr. HICKENLOOPER. Mr. President, will the Senator yield?
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> Mr. HUMPHREY. I yield.
>
> Mr. HICKENLOOPER. Mr. President, the Senator from Minnesota and I and the staff have been working on this matter, and we believe that the amendment will be a beneficial addition to this particular subject under the notice of hearing section of the bill, and therefore I shall assume the responsibility of accepting the amendment, if it is agreeable to the Senator from Minnesota.

16/ Floor remarks by Senators Lehman, Humphrey, Jackson, Gore, letters inserted into the record from National Rural Electric Cooperative Association and Public Power Association, III Leg. Hist. AEA of 1954 at 3219, 3373, 3420, 3454, 3385, 3448.

17/ III Leg. Hist. AEA of 1954 at 3373.

> The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Minnesota, as modified.
>
> Mr. LANGER. Mr. President, will the Senator yield?
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> Mr. HUMPHREY. I yield.
>
> Mr. LANGER. Will the Senator from Minnesota explain what the amendment does?
>
> Mr. HUMPHREY. First, I may say that the part I have stricken [a specific provision for hearings prior to license issuance upon request] appears to me to be already covered in the amendment that was previously adopted and in the body of the bill under the chapter known as 'Judicial Review and Administration Procedure,' by the definition of the term 'person,' which includes both public and private groups, individuals, corporations, utilities, municipalities, State agents, and others.
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> * * *
>
> The bill as it reads now provides that if any person wants to be heard by the Commission, if he believes that he has reason to come to the Commission on the basis of the license, he is authorized to do so, as I understand, under the language of the bill.
>
> Mr. HICKENLOOPER. That is correct. 18/

Thus, it was Senator Humphrey's understanding, and the understanding of JCAE Vice Chairman Hickenlooper, the sponsor of the §189a. language later enacted into law, that the deleted language of the Humphrey amendment providing for a right to request a public hearing before license issuance was no longer necessary because of the earlier adoption of the Hickenlooper amendment.

The matter of right to request a hearing prior to license issuance came up again on the Senate floor the next day. Senator Jackson

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18/ III Leg. Hist. AEA of 1954 at 3475. (Emphasis added)

spoke in favor of the earlier Humphrey amendment, and this provoked the following reply from JCAE Vice Chairman Hickenlooper:

> MR. HICKENLOOPER. The proposal to provide some clarification of the notice procedure [in the Humphrey amendment] was accepted. The portion of the amendment which provided for hearings was withdrawn after it became apparent, by explaining the provisions of the bill, that hearings were in fact provided for in the bill.
>
> I did not want to leave the connotation that the committee had failed to consider the question of notice and hearing and provide for it in the bill.19/

Again, the understanding seemed to be that the Hickenlooper amendment agreed to on July 16, 1954 made the Humphrey amendment unnecessary. There is no further helpful legislative history on the matter of prior hearings.

In summary, while the legislative history of §189a. is somewhat ambiguous--particularly with respect to when a required hearing is to take place--it does suggest that §189 called for hearings upon request prior to license issuance. This would appear to be the most logical explanation for the treatment accorded by Senator Hickenlooper, the sponsor of §189a., to the amendment offered by Senator Humphrey and supported by Senator Jackson providing for hearings upon request prior to license issuance.

It would be argued that the 1957 amendments, providing for mandatory hearings, merely added something above and beyond the right to request a hear-

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19/ III Leg. Hist. of AEA of 1954 at 3527 (Emphasis added).

ing provided in 1954, and do not add to the discussion here.[20/] However, the 1962 amendments warrant some discussion.

The 1962 Amendments

The 1962 amendments were the result of a March 1961 JCAE Staff study and the June 1961, and April 1962 JCAE hearings on regulatory procedures. As indicated above, the whole focus of the study and hearings was on uncontested hearings. There is very little discussion in the legislative history of problems associated with contested hearings. The origin of the "no significant hazards consideration" language is clear from the legislative history. However, knowledge of the origin sheds little light on what was intended. The JCAE report on the bill indicates that the significant hazards criterion "... is presently being applied by the Commission under the terms of an AEC regulation

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20/ It is interesting to note that the only rules of practice promulgated by AEC between 1954 and 1957 purported to give AEC discretion to "pre-notice" or "post-notice" issuance of nuclear power reactor licenses, but required AEC to hold hearings before taking action on an application in the event a hearing was requested by an applicant or intervenor before the action was taken. 10 CFR §2.102, Feb. 4, 1956. The CP in the PRDC case was "post-noticed" and requests for a hearing were not filed until after the CP had been issued. The 1957 JCAE Staff study of AEC procedures is ambiguous on whether the AEA required hearings prior to taking action under §189a. if hearings were requested. At one point the study states that the AEA "requires ... that there be provided an opportunity for a hearing ... before action is taken". Study at 17, but at a later point the study notes that in cases where notice of proposed action is published by AEC, "the status of the construction permit, in the event a hearing is requested and scheduled, has not yet been determined". Study at 19.

in 10 CFR §50.59." [21] That regulation was first published June 9, 1962 and made effective July 9, 1962. [22] Prior to the issuance of the Vallecitos and Yankee Atomic cases where the concept embodied in the regulation first appeared, every power reactor operating license included all the details of the license application. Consequently, even the smallest change in operating procedures required an amendment to the operating license. Since the AEC construed §189a. as it then stood (prior to the 1962 amendments) as requiring mandatory hearings on all power reactor license amendments, the result was a proliferation of mandatory hearings. Under the new §50.59 some changes could be made without Commission approval (those presenting no unreviewed safety questions), and other changes could be made with Commission approval but without ACRS review and a mandatory hearing if they involved "no significant new hazards considerations." If a change did involve a significant hazards consideration, amendment to the license, with prior mandatory public hearing and ACRS review, was required.

21/ S. Rep. No. 1677, 87th Cong. 2d Sess. (July 5, 1962). Section 50.59 was a codification of the Commission's decision in General Electric Company (Vallecitos), 1 AEC 541 (1960); See 27 Fed. Reg. 5491 (June 9, 1962) and 26 Fed. Reg. 3030 (April 8, 1961). These provisions were also included in the Vermont Yankee technical specifications in the Commission's decision in Yankee Atomic Electric Company. 1 AEC 768 (1961).

22/ 27 Fed. Reg. 5491.

The difficulty is that under the regulation the "no significant new hazards considerations" finding was used to dispense with mandatory hearings. There is no clear indication in the public rulemaking record or in any AEC communications to JCAE that the finding eliminated the right to request a hearing prior to issuance of the Commission authorization for the change. Indeed, the position of the AEC in the June 1961 hearings, which followed the Vallecitos case, was that where an amendment presented no substantial safety question, the public interest would be protected by notice of proposed action and affording an opportunity to intervene, without the need for a mandatory hearing.[23/] Thus, the origin of the "no significant hazard consideration" language sheds little light on the intended effect of a "no significant hazards consideration" finding.

However, there is some other interesting material in the legislative history on the right to hearings. During the JCAE hearings, AEC Commissioner Olson stated that the bill was "without prejudice to the right and opportunity of any interested party to demand a hearing,"[24/] the JCAE report on the bill stated that the bill eliminated mandatory OL hearings because they were "unnecessary and burdensome in the absence of bona fide intervention,"[25/] and the JCAE Chairman and Vice Chairman indicated

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23/ JCAE hearings "Radiation Safety and Regulation," at 305.
24/ Supra note 10.
25/ Supra note 11.

on the House and Senate floors that the bills, as reported, "in no way limit the right of an interested party to request a hearing at some later stage."[26/] These may be construed as suggesting that the amendments were intended to leaveintact whatever right to request and obtain a hearing had been granted in the 1954 AEA and thus, it can be argued that if the 1954 AEA granted a right to a hearing prior to license issuance, that right was unaffected by the 1962 amendments. However, again there was no apparent focus on the precise question confronting us - must the required hearing take place prior to the issuance of the amendment.

3. Judicial Decisions

The only case in point is Brooks v. AEC.[27/] In Brooks the AEC issued an order extending the completion date on a CP without any prior notice to parties in a pending proceeding which had been instituted before AEC to determine whether the CP should be amended, suspended, or revoked on NEPA grounds. Petitioners sought summary reversal on the ground that that the AEA entitled them to advance notice and prior hearing. It was conceded in the case that the order extending the CP completion date was an amendment to the CP. The AEC argued in support of its action that the last two sentences of §189a. indicated Congressional intent to dispense with hearing in CP amendment proceedings if the amendment involved "no significant hazards consideration." The Court granted summary reversal on two grounds. It first held that

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26/ Supra note 12.

27/ 476 F.2d 924 (D.C. Cir. 1974).

the action was unlawful because the AEC had not provided any statement of reasons in support of its "no significant hazards consideration" determination. The Court stated that "the Commission must surely make the required significant hazards determination, and note such determination in its order, if it intends to put forward such determination as the basis for its denial of a hearing." The Court noted that such determinations require "close scrutiny".

Secondly and, "perhaps more to the point", the Court stated that the legislative history of the 1962 amendments to §189a. indicated that "it was Congress' intent to lessen the mandatory hearing requirement only when there was no request for a hearing." The Court concluded that where petitioners had already formally expressed interest in a proceeding "elementary fairness" as well as the "clear language of section 189(a)" demanded that notice and an opportunity for hearing be provided before taking the action.

Brooks' characterization of the legislative history of the 1962 amendments supports an interpretation of the statute that would regard the 1962 amendments as leaving unchanged the right to hearings prior to license issuance in §189a. However, the decision is difficult to interpret. The problem is that the Court held not only that a prior hearing must be afforded, but held also that prior

notice must be afforded. The notice holding runs clearly and directly contrary to the plain language of §189a. dispensing with 30 days' prior notice in the case of amendments involving "no significant hazards consideration." This leads to confusion whether the Court was assuming, for purposes of discussion, that the amendment did involve a significant hazards consideration. If such an assumption was made, then the holding of the Court was clearly correct, but not directly in point for purposes of this discussion.

NRC Decisions

There are no NRC or AEC decisions in point. However recently, in Portland General Electric Co. et al. (Trojan Nuclear Plant),___ NRC ___ (July 7, 1978) the Commission stated in dicta that "Section 189 does permit immediate effectiveness of operating license amendments upon a determination "that the amendment involves no significant hazards consideration". No further authority was cited for this proposition.

Argument In Favor of Commission Discretion to Issue An Amendment Involving No Significant Hazards Consideration Prior to Completion of a Requested Hearing

I. The Language of the Statute

Section 189a. does not, by its terms, specify that hearings are to be held prior to issuance of the license, permit, or amendment. The section merely states that in specified proceedings, or on specified applications, a hearing must either be held if requested or, in some cases, held even if not requested. The text of §189a. shows a logical

progression from the general right to request a hearing, to cases where a mandatory hearing is required, to cases where no mandatory hearing is required, to the requirements for notice. There is a logical tie between a person's right to a hearing on a licensing action and the same person's right to notice that the action is contemplated. After all, what is the sense of affording the public the right to request a hearing on a licensing action if there is no way for the public to learn that some licensing action is contemplated so that a hearing request can be filed? Logic dictates that the specific provision in the fourth sentence of §189a. permitting the Commission to dispense with prior notice of issuance of amendments involving no significant hazards consideration must also be read as dispensing with the requirement for hearings prior to issuance of the amendment.

2. The Legislative History

While the statute and legislative history are far from conclusive, the better view seems to be that the original AEA afforded interested persons the right to a prior hearing, but not prior notice, before effective licensing actions were taken. The 1957 amendments did not affect this. However, a persuasive argument can be made that the 1962 amendments, by dispensing with the requirement for prior notice of amendments not involving any significant hazards consideration, also dispensed with the requirement for prior hearing.

To be sure there are statements in the legislative history of the 1962 amendments to the effect that the amendments did not affect the right of interested persons to intervene and request a hearing. However, the statements do not speak to the timing of the hearing. It would be consistent with these statements to read the 1962 amendments as indicating that for amendments not involving any significant hazards consideration, there is still a statutory right to a hearing, but that hearing may be held after the amendment is issued. The amendment would be issued fully subject to the outcome of the hearing process.

Furthermore, one of the criticisms of AEC licensing precedures in the March, 1961 JCAE Staff study leading to the 1962 amendments was AEC's "failure to give reality to the right of intervention by providing adequate notice of the safety questions to be considered at public hearings."[28/] JCAE, and the Congress, must then have been aware that the right to intervene prior to agency action is only a reality where the interested person has knowledge that agency action is about to take place. By explicitly dispensing with prior notice, the JCAE and the Congress must also have intended to dispense with prior hearing. While the legislative history discussed above suggests that some hearing right must still be afforded, this can be easily accomplished by affording a right to a hearing after the license has been issued.

28/ Study at 48.

Conclusion

The strongest arguments that can be made on both sides of the question whether NRC may issue an amendment not involving any significant hazards consideration prior to completion of a requested hearing have been presented above. The legal question is a close one since persuasive arguments can be made on both sides. The legislative history, although ambiguous, seems to support the argument that such an amendment may not be issued prior to completion of a requested hearing. On the other hand, the plain fact that advance notice is a necessary prerequisite to any real opportunity to obtain a hearing prior to agency action argues for the proposition that where under the statute advance notice may be dispensed with, prior hearings may also be dispensed with. On balance, ELD favors the more logical view of the statute--that the right to hearings prior to amendment issuance follows the right to notice prior to license issuance. In ELD's view, amendments not involving any significant hazards consideration may be issued without prior notice and without completion of any required hearings.

Alternatively, it can be argued that the original AEA did not require hearings prior to license issuance. Under this legal theory the 1962 amendments simply recast facility license amendments not involving any significant hazards consideration back into the same procedural framework that existed between 1954 and 1957. While this argument is a

respectable one, for the reasons stated above, it does not appear to reflect the better legal view of the 1954 AEA.29/

C. Public Participation On the No Significant Hazards Consideration" Issue

The third legal issue deals with the type of public participation contemplated by Congress on the question whether, in a given case, a particular amendment involves a "significant hazards consideration". The issue presumes that the "significant hazards consideration" question controls the timing of the hearing--i.e., an amendment presenting no signigicant hazards consideration may be issued pending completion of the hearing.

1. Language of the Statute

The AEA itself includes no specific provision on the kind of public participation to be afforded on the no significant hazards consideration determination. The determination itself would seem to be a natural part of the "proceeding ... for the ... amending of any license" referred to in the first sentence of §189a. However, if the determination itself were to become subject to a full formal hearing if requested, this formal hearing would be practically indistinguishable in

29/ The law is clear that an agency may take summary enforcement action without prior hearing to protect the public safety or welfare even though a prior hearing would ordinarily be required. E.g., 10 CFR §§2.202(f), 2.204; Consumers Power Co. (Midland Plant, Units 1 & 2), 6 AEC 1082 (1973). This analysis assumes that the amendment does not constitute this type of summary enforcement action.

scope from a formal hearing on the merits of the amendment, since any issue that could be raised on whether the amendment presented undue risk to the public health and safety (the merits) could also be raised on whether the amendment presented significant hazards considerations. This would render the "no significant hazards consideration" determination a practical nullity in terms of authorizing amendment issuance prior to completion of a requested hearing, and could not have been intended by Congress.

2. Legislative History

The origin of the "no significant hazards consideration" language in §189a. has been described above. The theory underlying the Vallecitos decision and 10 CFR §50.59 as it stood prior to the 1962 amendments seems to have been that an authorization to a licensee to proceed with a change that presented "no significant new hazards considerations" did not constitute a license amendment. In this way the AEC was able to maintain its legal position that the 1957 amendments required mandatory hearings on license amendments, but still review and approve or disapprove some licensee proposed changes without subjecting them to a formal hearing. 30/

30/ This theory is not spelled out anywhere in the legislative history of the 1962 amendments or public rulemaking record associated with the promulgation of 10 CFR §50.59. However, the language of the regulations at the time seems to have treated the §50.59 authorizations as something different from license amendments. No one ever requested a hearing on a change not presenting any significant hazards consideration, so the effort to distinguish between "authorizations" for changes and amendments was never seriously tested. The 1962 amendments clearly had the effect of rejecting the legal theory underlying Vallecitos and 10 CFR §50.59 that AEC authorizations to proceed with changes not involving "significant new hazards considerations" were not license amendments, since the last sentence of §189a. added by the 1962 amendments clearly contemplates the existence of license amendments presenting no significant hazards considerations.

The 1961 JCAE Staff study characterized the dilemma that changes presented to AEC vary accurately:

> "(5) The lack of a technically qualified body to determine which applications present safety problems calling for ACRS review or public hearings.--As has been noted above, one of the difficulties which has been burdening the present regulatory process is the fact that it is not selective. Safety issues are submitted to the ACRS by the staff without an opportunity for review of the staff's determination as to the need for ACRS action. Similarly, proposals to amend licenses as well as questions whether conditions in permits and licenses have been satisfied are referred to the hearing process without review of the staff's determination as to the need for invoking the full and formal hearing procedure. Experience with the licensing of facilities demonstrates that frequent alterations in a construction permit will often be necessary after the permit has been issued. The same thing is true of operating licenses for experimental and test reactors and, to a less degree, of operating licenses for power reactors. An advancing art will usually require that changes be made in the technical specifications of a reactor as its construction progresses and as operating experience accumulates. Since these technical specifications must be incorporated in the reactor license, minor changes in them constitute, in a formal sense, amendment to the license. This has led to burdensome proceedings as exemplified in the Vallecitos and Yankee cases. The Commission has mitigated the problem by allowing technical specifications to be rewritten so as to eliminate some matters of detail, but this process could be carried to a point where the protective value of having the specifications in the license would be largely lost. Clearly there is need for some more discriminating way to differentiate between those changes which require the same review as the initial permit or operating license would entail, and those which do not raise sufficiently significant issues of safety to justify such time-consuming proceedings. The staff should be able to submit questions as to the need for ACRS review and referral to the formal hearing process, to a qualified body with the time to rule on such issues.
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> The present regulatory structure of the Commission makes it difficult to discriminate in this fashion. The Commission has been confronted by the dilemma of either (a) allowing the discharge of this "grave responsibility" to rest with the applicant alone or the applicant plus review by the staff, or

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> (b) of requiring formal proceedings in cases where a hearing might disclose that no substantial safety issue actually exists."31/

Thus it is quite clear that the JCAE was aware of the difficult position AEC found itself in. The JCAE Staff's recommended solution to the problem was spelled out in the study:

> Changes in a reactor's design or mode of operation involving changes in technical specifications and hence entailing changes in the construction permit or license should, if approved by the AEC staff, be submitted to the Board to determine whether a hearing should be held to consider them. If the Board concludes that no hearing is necessary, it should issue a notice of its proposed decision for publication in the Federal Register, to be effective not less than a specified period after publication. Changes not involving changes in technical specifications but reported by the staff to the Board as possibly having some important effect on health and safety, should be handled by the Board in the same way. Other changes (not changing the technical specifications or having an important bearing on safety) could be made by the licensee and reported to the staff.32/

Thus, as things stood in 1962, just prior to the 1962 amendments, the AEC had adopted a procedure for processing change requests that avoided some of the burden of mandatory hearings but gave rise to JCAE Staff concerns that the "no significant new hazards considerations" determination should be reviewed by some technically qualified body independent of the Staff. The bill, as enacted, did authorize the establishment of atomic safety and licensing boards by adding section 191 to the AEA. However there is no indication in the legislative history that these boards were necessarily to play a role in the "no significant hazards consideration" determination. Furthermore,

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31/ March 1961 study at 51-52. The "grave responsibility" referred to related to the AEC Staff determination whether a change presented significant new hazards consideration".

32/ March 1961 study at 73.

there is no indication in the legislative history of the kind of public participation, if any, expected on the determination.[33/]

Judicial Decisions

There are no judicial decisions directly in point. It is clear, however, from case law that a statutory requirement that an agency "determine" or "find" something before taking action does not, in itself, mean that a hearing is to be held prior to making the determination or finding.[34/]

Conclusion

The better legal view seems to be that the AEA does not require any hearing or other form of public participation on a "no significant hazards consideration" determination. However, should an NRC finding of "no significant hazards" consideration be challenged in court by a petitioner who raises before the court factual issues that cannot be resolved on the face of the NRC determination and supporting analyses, then remand back to the NRC will be required. In such a remand NRC will be required to consider petitioner's comments and provide a reasoned response to them.[35/]

33/ If the legal view were adopted that the "no significant hazards consideration" determination controlled only the timing of notice and not timing of the hearing, then the determination assumes less importance, and the need for independent review of the determination becomes less acute.

34/ Eastern Air Lines v. CAB, 185 F.2d 426 (D.C. Cir. 1950) vacated as moot, 341 U.S.901 (1951); American Airlines v. CAB, 231 F.2d 483 (D.C. Cir. 1956).

35/ E.g., Cable TV of Santa Barbara, Inc. v. FTC, 428 F.2d 672 (9th Cir. 1970). In Brooks v. AEC, note 27 supra, the Court stated that the "no significant hazards consideration" determination required "close scrutiny".