

ADJUDICATORY ITEM
POLICY SESSION

November 13, 1980

SECY-A-80-179

For: The Commissioners
From: Leonard Bickwit, Jr.
General Counsel
Subject: PROPOSED FOOTNOTE FOR ADDITION TO INDIAN
POINT INSTRUCTIONS TO BOARD

Discussion: During the Commission meeting of July 17, 1980, it was apparent that the somewhat novel nature of the planned Indian Point proceeding -- adjudicatory in format, but investigative in purpose -- posed some special problems which ought to be addressed in the order to prevent confusion. We have drafted a footnote that would deal with a series of these procedural issues, for insertion at the point at which the order states that the proceeding is to be adjudicatory, with discovery and cross-examination. Those issues and the suggested means of dealing with them, which in some cases reflect a Commission consensus and in others our own views, are as follows:

1. Is the proceeding "on the record" under the Administrative Procedure Act?
Answer: No, it is not a proceeding required by statute, and as such need not be and is not "on the record".
2. Does the proceeding follow the Commission's rules for adjudications?
Answer: Although the proceeding is adjudicatory, the Licensing Board, in the interest of expedition, will enjoy broad discretion with respect to the procedures governing the proceeding.

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SECY NOTE: This paper, which is identical to advance copies which were distributed to Commission offices early P.M. on November 13, 1980, is scheduled for discussion at an open meeting on Friday, November 14.

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3. Who will have the burden of going forward and the burden of persuasion?

Answer: The Board will have discretion to determine the order of presentation. No party will have the burden of persuasion, in the sense in which that term is normally used (i.e., who prevails when evidence is in equipoise); if evidence is evenly balanced, the Board's findings and recommendations will presumably reflect that.

4. Does the ex parte rule apply?

Answer: Yes with respect to the Licensing Board, but the Commission's ability to gather information from any source will not be limited.

The text of the proposed footnote is as follows:

Because of the investigative nature of this proceeding, further guidance is necessary with respect to certain procedural matters. Because the proceeding, although adjudicatory in form, is not mandated by the Atomic Energy Act, it is not an "on the record" proceeding within the meaning of the Atomic Energy Act. Although normal ex parte constraints will apply to communications to the Licensing Board, the Commission will not be limited in its ability to obtain information with respect to Indian Point from any source. While the Licensing Board is bound to the directives of this Order, it may depart from the provisions of 10 CFR Part 2 in the interest of accommodating the need both for a sound evidentiary base and for reasonable expedition, where such departure is not inconsistent with the terms of this Order. The Licensing Board is authorized to establish whatever order of presentation it deems best suited to the proceeding's investigative purposes, and shall not be bound in that regard by 10 CFR Part 2 or by past precedents. The Licensing Board shall not reach an initial decision, but as noted in the Order, shall instead formulate recommendations on the questions posed by the Commission. No party will have the "burden of persuasion" as

the term is normally used in adjudicatory proceedings; if evidence on a particular matter is in equipoise, the Board's recommendation may be expected to reflect that fact. The staff will be a party to the proceeding, and the licensees will be admitted as parties upon request filed within 30 days of Federal Register notice of the appointment of a Licensing Board. All others wishing to intervene shall file petitions for intervention within 30 days of Federal Register notice of the appointment of a Licensing Board. The appointment of the Licensing Board will be announced by subsequent order of the Commission.


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