Attachment 3

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 23, 1981

MEMORANDUM FOR: Chairman Ahearne
Commissioner Gilinsky
Commissioner Hendrie
Commissioner Bradford

FROM: LB Leonard Bickwit, Jr.
General Counsel

SUBJECT: EXPEDITING IMPACTED OPERATING LICENSE HEARINGS

Some measures that could expedite the conduct of operating license adjudicatory proceedings for the impacted plants are described below. We have assumed for purposes of discussion that current statutory hearing and licensing requirements in the Atomic Energy Act are unchanged. We have also reexamined the issue whether the Atomic Energy Act requires formal adjudicatory hearings and concluded that a "reinterpretation" of the Act so as to require only informal hearings would have only a very small chance of withstanding judicial review. Thus we have assumed that there must be formal hearings in contested cases. However, there is some legislative history encouraging use of informal hearing procedures where possible, and this history would be useful to support any effort to make maximum use of whatever flexibility is afforded by the Administrative Procedure Act.

Most of the impacted cases have been under way for some time but have been delayed because of unavailability of staff documents. In these cases parties have been proceeding under current procedures in 10 CFR Part 2 and there is some question as to the extent which changes to Part 2 may be applied without prejudicing parties' rights. This legal issue will be discussed where applicable in more detail below under Comments.

Our discussion focuses on expedition. We have formed no judgments on whether, as a policy matter, the impact of these measures on public participation is warranted by the time savings.

1. New TMI Rules

Concept

The Commission could amend 10 CFR Part 50 to include a set of necessary and sufficient TMI-related operating license requirements

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derived from NUREG-0694 and 0737. This would carve out litigation of some, but not all, pending TMI-related issues and resolve those issues by rulemaking. Parties could still contest compliance with the new regulations. Both proposed and final rulemaking would need to be published.

Comments

Rulemaking would take substantial time (at least 3 months). Moreover, a preliminary study indicates that, except for Diablo Canyon Units 1 and 2, Waterford Unit 3, and McGuire, there are substantial non-TMI-related contested issues that such a rule would not affect. The rule would probably be too late for Diablo Units 1 and 2 and McGuire. The rule could have some beneficial effect on cases further down the line. The litigation risk would be low if the rule is properly drafted and supported.

2. Staff Rulemaking

Concept

There has been considerable discussion and study in recent years of increased use of Commission rules to resolve generic issues in NRC hearings. However, the concept here would be different. Here NRC staff (NRR, SD, etc.) would be delegated authority by the Commission to issue rules, in compliance with the Administrative Procedure Act, that would not be binding but that would be entitled to prima facie validity in the hearing process. Most regulatory guides and standard review plans could be promulgated as rules in this fashion. These rules would then be used in conjunction with summary disposition to eliminate contentions that did not cause any genuine issue. This would minimize resources associated with preparing summary disposition motions.

Comments

This would have a greater potential than concept 1. to expedite hearings. However, staff rulemaking would take time and resources and new rules could not likely be issued in sufficient time to significantly impact most of the impacted cases. Litigative risk would be low.

3. Immediate Effectiveness

Concept

The Commission could amend Appendix B of 10 CFR Part 2 so as to provide that Licensing Board initial decisions on fuel loading and

low power testing (and perhaps full power for limited time periods) may be immediately effective. The time savings, assuming a favorable immediately effective decision in each case that is not stayed, is on the order of two to three months. Under 10 CFR Part 50, Appendix B, the Appeal Board must decide on a stay of the initial decision within 60 days. The Commission is then supposed to act itself on the stay request within 20 days. If stay requests were to be filed directly with the Commission, then about 30 days might be saved.

Comments

Such a rule change could be made effective immediately. Litigative risks would be low.

4. Eliminate All Possible Licensing and Appeal Board Schedule Conflicts

Concept

Self explanatory.

Comments

This is a matter of resource allocation. Our initial review suggests that Licensing Board schedule conflicts may be a problem in some cases (San Onofre-2, Shoreham 1, Summer 1, Susquehanna, and Zimmer). The Licensing Board Panel Chairman should be consulted on this. Litigative risk would be low. Substituting board members in the late stages of a complex case will cause some confusion and delay.

5. Review of Contentions

Concept

The Commission could (with OGC and OPE assistance) review the intervenor proferred contentions in selected cases. The time saving is speculative since saving would require Commission disallowance of contentions admitted by the Licensing Board.

Comments

This is only feasible where the number of contentions is manageable -- for example, in Diablo Canyon 1 & 2 and McGuire. Some cases, like Shoreham, have a large number of contentions. We believe, based on a preliminary study, that Commission review under current standards for basis and specificity would result in only a small

number of contentions disallowed. Views of the parties would need to be solicited as part of the Commission review. Litigative risk would be low, depending on the soundness of the individual Commission rulings.

6. Changing the Action Plan Policy Statement

Concept

The Commission could change the TMI Action Plan Policy Statement so as to treat some pending operating license cases the same as existing operating licenses. The effect would be that certain items in the so-called NTOL list would be deferred for the impacted cases. The Commission could also clarify the Action Plan Policy Statement to indicate which items in the NTOL list went beyond the regulations. On these items the Commission could define more precisely the safety matter at issue and the grounds for challenging sufficiency.

Comments

Treating some pending operating license cases the same as existing operating licenses would not affect licensing hearings since under the Policy Statement intervenors can always challenge the sufficiency of the list. Thus, intervenors can argue in favor of the present NTOL list during the hearings notwithstanding the Commission changes to the Policy Statement. However, we believe that confusion would be diminished if the areas where sufficiency could be challenged could be more precisely defined. Time savings are difficult to estimate. Litigative risk would be moderate.

7. Special Order

Concept

An Order could be issued by the Commission in each docket which would do some or all of the following:

a. Require the Licensing Board to set firm and stringent time limits on discovery, filing of testimony, cross-examination, and filing of proposed findings. Some illustrative examples of time limits could be included.

b. Require the Licensing Boards to issue initial decisions within a given time period after close of the record.

c. Require filing of cross-examination plans so that cross-examination is focused and non-repetitive.

d. Require at least one settlement conference with Board attendance. Parties would be required to explain why issues cannot be settled or narrowed.

e. Emphasize that failure by any party to comply with discovery, filing or other obligations without good cause will, in serious cases, result in dismissal of that party from the proceeding.

f. Require early partial initial decisions on separable issues where this would advance the course of the hearing.

g. Encourage the Licensing Board to adopt parties' proposed findings when they are supported by the record.

h. Require simultaneous, as opposed to sequential, filing of initial proposed findings.

Comments

Such Orders could significantly expedite pending cases. Each case would have to be examined to make sure that all of the items are applicable and would be helpful. No amendment to the Commission's rules would be required. Litigative risk would be low assuming that the Order is reasonably applied.

8. Split Reviews and Hearings

Concept

Under current practice no particular attention is paid to intervenor contentions in the staff review. Under this split review and hearing concept staff review resources would be allocated so that intervenor contentions are specifically addressed early in the review, and partial evaluations issued. The hearing could then go forward on these issues while the rest of the evaluation was underway. This concept involves low litigative risk.

Comments

This would be most beneficial for cases where delay in the issuance of staff documents is the most serious. However expediting the staff review may be difficult in cases where the intervenor contentions go to troublesome technical issues. 10 CFR 51.52 may need to be amended to allow issuance of and hearings on partial impact statements. This should be a minor matter that could be accomplished by immediately effective rulemaking. This concept involves low litigative risk.

9. Summary Disposition

NRC was one of the first agencies to make full use of summary procedures. Under the current rule, 10 CFR 2.749, the Licensing Board may decide issues on the basis of written pleadings without any oral hearing if the moving party shows that there is no genuine issue of material fact. 10 CFR 2.749 is based on Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56 (and 10 CFR 2.749) the burden of proof with respect to summary disposition is upon the movant who must demonstrate the absence of any genuine issue of material fact. J. Moore, Federal Practice, Vol. 6, Ch. 56, para. 56.15[3] (2nd ed. 1966). To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact. Poller v. Columbia Broadcasting Co., Inc., 368 U.S. 464 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1954). The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974) and cases cited therein at pp. 878-79. The opposing party need not show that he would prevail on the issues but only that there are genuine issues to be tried. American Manufacturers Mut. Inc. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F. 2d 272, 280 (2d Cir. 1967). The fact that the party opposing summary disposition failed to submit evidence controverting the conclusions reached in documents submitted in support of the motion for summary disposition does not mean that the motion must be granted. The proponent of the motion must still meet his burden of proof to establish the absence of a genuine issue of material fact. Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977).

Where the existing record is insufficient to allow summary disposition, it is not improper for a Licensing Board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition motion. Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 752 (1977).

a. Earlier Motions

Concept

Current NRC practice calls for filing of summary disposition motions by NRC staff and applicant only after completion of discovery. This is based on the concept, emphasized in case law under Rule 56, that,

where the facts are within the control of the moving party, ruling on a summary judgment motion should be deferred until after the responding party has had a fair chance to gain access to relevant information. Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 ( ). However, there is no statutory right to discovery under the Administrative Procedure Act and it may be possible to advance the filing of motions under 10 CFR 2.749 to the pre- or mid-discovery stage.

Comment

An amendment to 10 CFR 2.749 may be required to move the time of summary disposition motions to pre-or mid-discovery, but such an amendment could probably be made immediately effective. However, whether the change could be applied to pending cases is a little unclear. As a general matter, procedural rule changes may be applied to pending cases only if no prejudice results. Prejudice would result if, for example, parties proceeded to commit resources and foreclose litigation options in reliance on the current rules. Discovery appears to be in progress under admitted contentions in all of the impacted cases with summary disposition motions due after discovery is completed. Our preliminary view is that early summary disposition motions could be filed in these cases with discovery incomplete, but intervenors would need to be given reasonable time to gather materials and technical experts to respond. However, in some cases neither applicant nor staff is in any position to move for summary disposition because the license application and staff reviews are incomplete. Also, preparation of a summary disposition motion requires substantial resources because the safety rationale for the applicant/staff position must be fully set forth in writing. As noted above, the moving party (applicant or staff) bears the burden of showing that no real issue exists. Finally, the time savings in the impacted cases is speculative even if summary disposition motions are filed early. We believe, based on a preliminary review, that there are substantial issues of fact involved in most, if not all, of the impacted cases.

b. Changing the Burden

Concept

10 CFR 2.749 could be amended so as to place the burden on intervenors to show, prior to hearing, a genuine and substantial issue of material fact by available and specifically identified reliable evidence.

Comments

Such a concept would assure that hearings are only held on gennine issues. The burden would be on intervenors to show a genuine issue rather than on staff and applicant to show the absence of a genuine issue. This would be a clear departure from the Federal Rules of Civil Procedure. Our preliminary view is that this rule change woul nevertheless be consistent with the Administrative Procedure Act and could be applied to pending cases provided that intervenors are afforded a fair chance to respond and a chance to argue that imposition of such a burden on them in the particular circumstances of the case would be prejudicial. Litigative risk would probably be moderate if the requirement is applied after completion of discovery higher if the burden is imposed before discovery is completed. The impact in pending cases is speculative. We suspect that in some cases where intervenors have little resources and no access to technical expertise contentions would be disallowed. However, the rule could not be applied to contentions relating to areas where the license application is incomplete since intervenors cannot reasonably be expected to be in any position to attack a proposal that does not exist. In many cases applicants' responses to TMI-related issues are incomplete and in such cases the proposal would be unworkable until some later date.

An amendment to 10 CFR 2.749 would be required. Our preliminary view is that there would be considerable difficulty, and substantial litigative risk, in applying the new rule to pending cases.

10. Consolidation of Hearings

Concept

Where identical TMI-related issues are raised in a number of cases, litigation of the issue could be consolidated into one separate proceeding. Such TMI-related issues would thereby be litigated in the same manner as the radon figure in Table S-3 is currently being litigated.

Comments

We have not examined a sufficient number of contentions to know whether identical issues are presented. Whether there would be any time savings is unclear. We suspect that there would be some time savings in cases where the issue is highly contested, but that there would be delays where the issue is lightly contested. This concept would assure that the issue is fully explored and that consistent results are achieved in each affected case. Litigative risk would be low.

11. Mandatory Depositions

Concept

Parties could be required to depose all prospective witnesses before the hearing, and additional cross-examination would not be permitted at the hearing absent some special showing. The Commission would bear the cost of the depositions.

Comments

This would narrowly focus the actual hearing. Much time is spent at hearings on cross-examination that resembles discovery, i.e., questions as to the bases for the witnesses' opinions and sources relied upon. Under this concept these types of questions would be asked before the hearing. Time savings are unclear since depositions themselves take time. However, depositions do not require Licensing Board attendance and could be conducted in circumstances where conflicts prevent commencing a hearing. We believe that litigative risk would be low, and that there would be no prejudice if applied to pending cases. There may be difficulty in distinguishing Commission payment of the depositions from intervenor funding. Depositions are very expensive and could not be mandated unless the Commission paid for them.

12. Hybrid Hearings

Concept

Much has been written in recent years about the advantages and disadvantages of formal hearings to resolve disputed technical and policy issues. E.g., M. Damaska, "Presentation of Evidence and Factfinding Precision", 123 Univ. of Penn. L.Rev. 1083 (1975); T. McGarity, "Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA", 67 Geo. L.J. 729 (1979); Crampton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting", 58 Va. L.Rev. 585 (1972). The concept here would be to use informal hearings as a means of separating out those particular factual issues that require formal examination and cross-examination under the APA. In this way the hearings themselves would become narrowly focused. As part of this concept an effort would be made to determine by general rule the kinds of issues that require oral cross-examination.

Comments

There does not appear to be any good case law supporting this proposition, but our preliminary view is that it would be consistent

with the Administrative Procedure Act and the Commission's rules. Time savings are speculative since informal hearings take time and extra effort would be required to decide which issues require oral cross-examination. The concept requires that the Licensing Boards be aggressive and thorough in their questions of witnesses in the informal hearings; otherwise the informal hearing record will be incomplete and too much will be left for formal hearings. We believe that the concept could be applied to pending cases where commencement of hearings is some months away. The concept would probably cause confusion and delay in cases where hearings are scheduled in the next few months. Litigative risk would be moderate if the concept is carefully applied.

13. Commission as Presiding Officer

Concept

The Commission could itself preside over the hearing on some issues in some cases.

Comments

10 CFR Part 2 is unclear whether the Commission may substitute itself for the Licensing Board where the hearing has been noticed and there is no issue of the continued availability of the Licensing Board. However, our preliminary view is that no parties could be prejudiced by the Commission itself hearing the case, so any necessary rule changes could be made immediately effective and applied to pending cases.

The Commission itself would probably not want to preside over prehearing matters (discovery, etc.). However, substantial Commission, OPE, and OGC resources would still be required. A favorable Commission decision after hearing would presumably be effective immediately, so the 80 days provided for Appeal Board and Commission review of stay requests under Appendix B of 10 CFR Part 2 would not be needed for the issues considered. However there would be no time savings unless the Commission took up all issues on the "critical path" to an effective licensing decision. Litigative risk would be low.

cc: OPE
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