UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

Attachment 5

February 25, 1981

MEMORANDUM FOR: Chairman Ahearne
Commissioner Gilinsky
Commissioner Hendrie
Commissioner Bradford

FROM: B. Paul Cotter, Jr.
Chief Administrative Judge, ASLBP

SUBJECT: WORKLOAD, RESOURCES AND RECOMMENDATIONS

I. INTRODUCTION

We have concluded from workload and scheduling analyses in January of this year that 42 of our 62 active proceedings could go to hearing in the next 12 months. As a result of our analyses, it is clear that to meet this workload, certain actions must be taken with respect to scheduling, personnel resources, and hearing management. This memorandum sets forth the ASLBP's recommendations.

A. Background

1. Staffing

As you are aware from my February 20, 1981, status report, the Panel is presently understaffed in comparison with the full staffing level of 1975. This circumstance arose as a result of a variety of factors that were of a transient nature. It should be noted, however, that since the Panel assumed

its present form in November 1972 and began to staff up early in 1973, the average length of service for all full-time Panel members is 4.2 years. Many of those who left did so because (1) they did not wish to spend protracted amounts of time away from their families at lengthy hearings, or (2) because they did not like sitting in a Panel of three members, or (3) because they had reached retirement age relatively shortly after they came on the Panel. Many of those interested in joining the Panel are either relatively young (and thus more transient) or are career civil servants nearing retirement. It has become increasingly difficult to obtain qualified Panel members, not only for the foregoing reasons, but also because of the pay cap.

2. Proceeding Management

The fundamental fact in judicial management of multi-party proceedings is that it is extremely difficult to get a number of parties in one place at the same time. That difficulty is recognized not only in NRC rules governing licensing procedures but also in the rules governing complex proceedings in other administrative agencies. In our rules, for example, there are only a few sections requiring action by the parties within fixed periods of time, and all these are subject to the requirement of flexibility in administrative proceedings.

The difficulty in managing licensing proceedings is compounded further by provisions authorizing intervention by interested parties, many of whom are not represented by counsel, do not possess resources adequate to manage litigation, and may well never appear before a board again. Because such parties are entitled to full administrative due process under the Administrative Procedure Act, the rule of flexibility is even broader in scope.

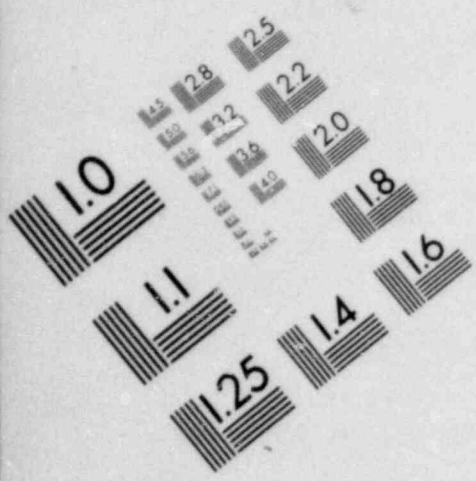
In addition, boards do not have final authority over a major party, the Commission staff, in scheduling dates for the submission of documents and taking other actions required by that party. Finally, other factors add to the difficulty of managing licensing proceedings. Examples include delay in the construction of a facility and Commission action in imposing new hearing requirements resulting not only from events such as TMI but also from changes in the current state of the "art."

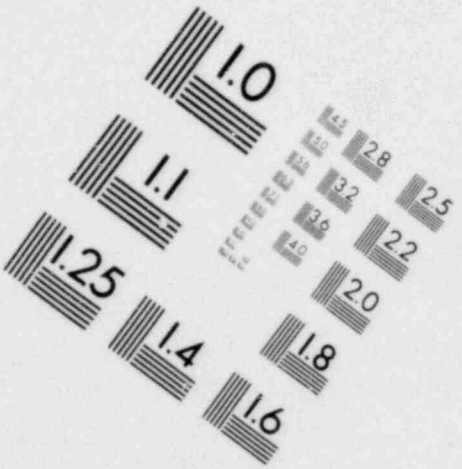
The foregoing factors point to the principal reasons why licensing proceedings do not lend themselves to absolute predictions of the time between the appointment of a board and the issuance of its final initial decision.

3. Decision Writing

The first task in preparing a decision is to review the record. In a recent case, Pilgrim Nuclear Power Station, Unit 2, the record, compiled during 66 days of hearing, was comprised of 12,000 pages of testimony and 128 exhibits of several hundred pages. Generally, the record review is divided among the three judges. Some parts of a transcript can be read quickly; others have to be studied intensively to cover points not well developed at the hearing. Complex technical issues, can require a full day to read and understand a single day's transcript, normally 220 to 320 pages. Next, the decision writers study the briefs and proposed findings of the parties. In Pilgrim these totaled 800 pages. In a major decision this preliminary work can take a minimum of several weeks.

On the basis of their review of the record, the judges select the most difficult issues to be decided. The issues cover matters of vital concern: health and safety; the varied impacts of a nuclear reactor on a community; the effects and ramifications of possible malfunctions; and the effects of construction and operation on the environment. Memoranda on these matters are prepared; conferences are held; and tentative decisions are reached. Then issues are assigned to each judge to prepare a draft decision. This stage two process takes one to three weeks.





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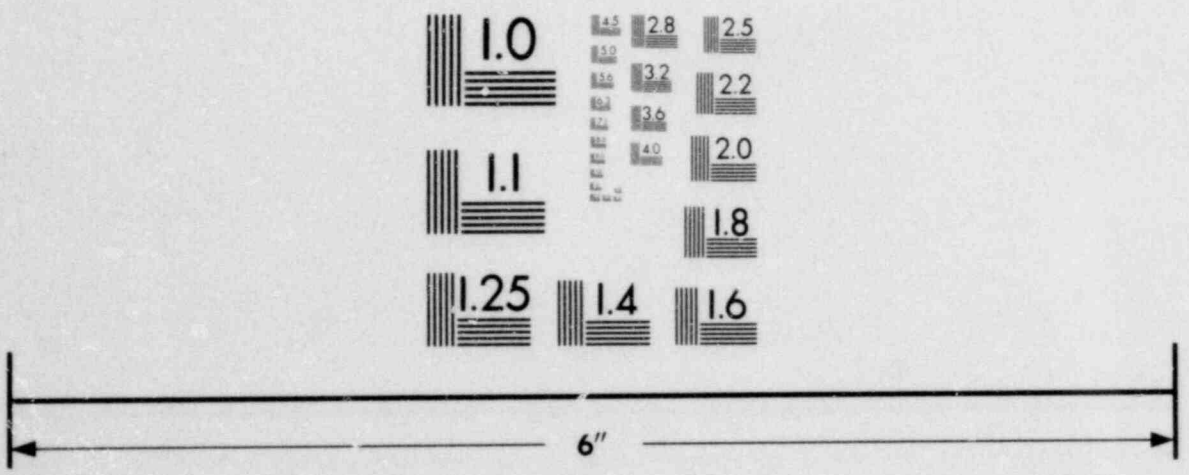

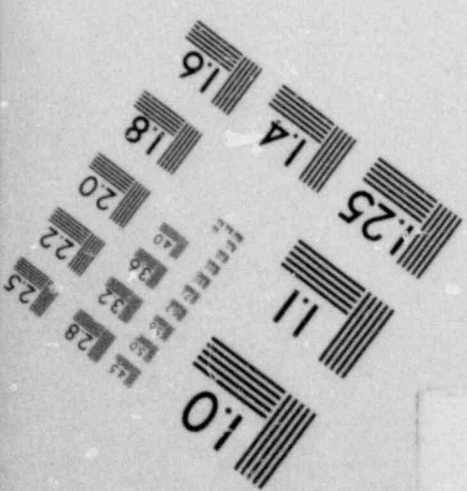

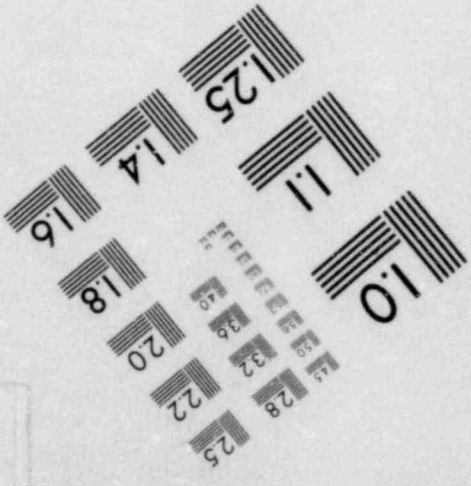

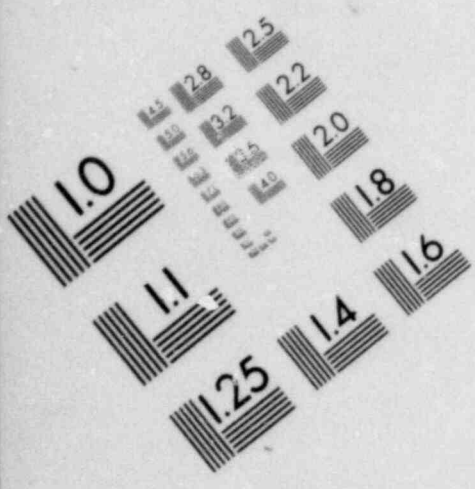

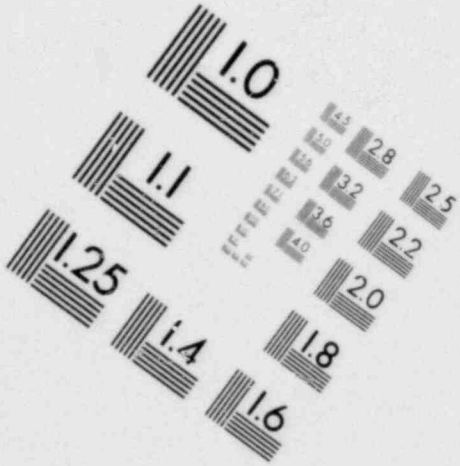

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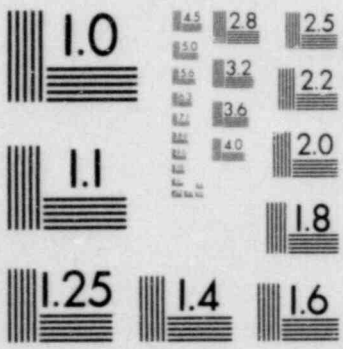
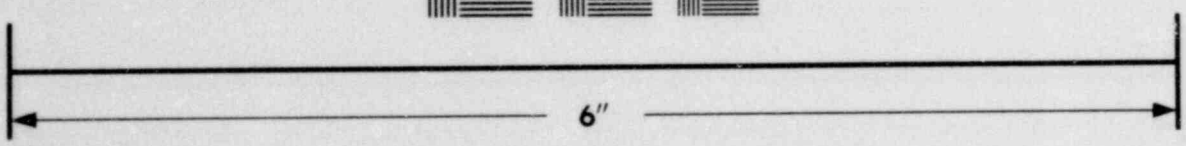
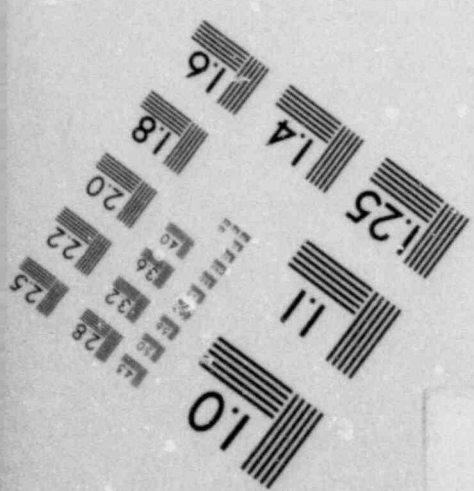
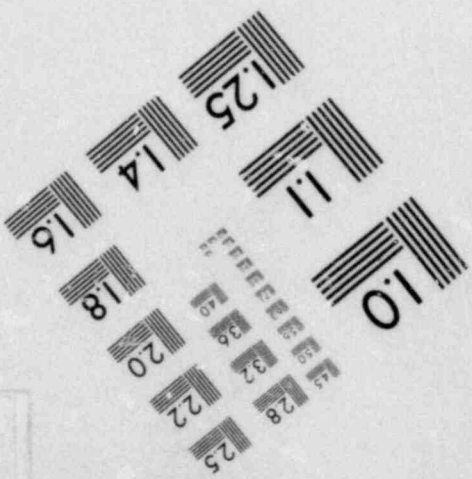








Further conferences are held at which the drafts and decisions on specific issues are considered. Absolute accuracy and precision are needed in this work, and sound judgment is attained only after deliberation on issues such as the technical qualifications of the applicants to build and operate a nuclear plant, seismology, and specific engineering issues such as steam generator tube integrity.

In Pilgrim, some 56 issues and contentions had to be decided. Findings of fact and conclusions of law had to be written for all of them. Proposed findings point the decision writer to support for a specific conclusion, but cannot normally be adopted verbatim because they are intrinsically structured to state a partisan point of view.

Fifteen major health and safety issues were addressed in Pilgrim, and complete findings with supporting references to the record were made. Twenty-five environmental issues were decided, with findings on issues such as alternate energy sources, compliance with the Federal Water Pollution Control Act, cost-benefit analysis, radiological effects, and impacts on land and water use.

Findings were also made on sixteen contentions raised by intervenors, such as the impact of aircraft on the site, alternate condenser cooling, etc.

Basic findings detailing these items had to be included in the overall health and safety and environmental analysis so that proper conclusions could be drawn.

The Pilgrim Board held twelve conferences consuming 20 days in dealing with all the foregoing matters. Drafts were rewritten and positions sometimes changed after these deliberations. Rewrites required intensive restudy of parts of the record.

Writing and editing a nuclear decision is a unique undertaking. Decisions concern technical problems not understood fully by laymen. An intense effort is required not only to articulate problems but also to state reasons that will explain to both the public and the reviewing authorities the correctness of a decision under the statutory standards.

Writing decisions in large proceedings takes time, time required by the technical complexity of the record, the length of the record, the time consumed in analyzing and organizing the facts and conclusions, and the need for care and completeness in deciding each of the issues.

In addition, three special factors should be noted. Firstly, conferences and drafting are often delayed because the judges are hearing other cases while the decision in a particular case is being prepared. The situation is aggravated because almost all hearings are held in the field; judges are then not even available for conferences after regular hours.

Secondly, while the opposition in a nuclear proceeding is almost always intense and emotional, it is often inexpert, inadequate, and unskilled in presentation. Contentions are raised and insufficiently developed by the parties, often only through cross-examination. This situation places an extra burden on the Licensing Board to clarify and explore issues not only at the hearing but also during the decisional process. Frequently, much additional research in and analysis of the record is required after the hearing is over.

Finally, judges spend a substantial amount of time in reading, summarizing, and indexing a record. Much of this work could be done by law clerks who could also search the record for material under the direction of the judges. Clerks could also keep running summaries of the record so that at the conclusion of a hearing the judges could address the essential issues immediately. At the Federal Energy Regulatory Commission, one law clerk is assigned

to each group of two judges or some 10 to 12 clerks for 23 judges. It is the unanimous opinion of the Chief Judge and the judges at that agency that these law clerks have substantially increased the productivity of the judges and improved the quality of their decisions. At the Department of Labor one of some 40 law clerks is assigned to each judge. In addition to analyzing records, these law clerks prepare parts of decisions under the direction of the judges. This practice has proved effective in expediting the issuance of decisions.

II. SCHEDULING

A. The Problem

We have designed a linear schedule to identify conflicts in proceedings where members of different boards overlap. These conflicts are illustrated in Attachments 1, 2 and 3.

As a consequence ten licensing boards have been identified that need to be reconstituted now. Nine Panel members are affected. (Board members to be replaced are marked with an asterisk.) Set forth below is a tentative plan for reconstituting those boards which assumes that the two frozen Administrative Judges (Lawyer) will not be available. Their names are shown in parentheses where they would be used should they become available.

B. The Solution

1. Impacted Boards

Bailly (CPA)	Grossman Cole* Bright*	Holton Leeds
Blue Hills (ESR)	Miller Linenberger* Little	Ferguson
Byron (OL)	Miller Cole* Callihan	Hand
Midland (OM) (OL)	Bechhoefer Linenberger* Cowan	Deci
San Onofre (OL)	Smith* Luebke* Hand	Clark Johnson
Shoreham (OL)	Bowers* Shon Paris	Louis Carter (James Kelley)
South Texas (OL)	Bechhoefer* Luebke* Lamb	Milhollin Hill
Summer (OL)	Grossman Linenberger Hooper*	deSylva
Susquehanna (OL)	Bechhoefer* Bright Paris*	J. Gleason Purdom
Turkey Point (OLA)	Bowers* Paris Luebke	Miller (Peter Bloch)
Zimmer (OL)	Bechhoefer Bright* Hooper	Livingston

The Marble Hill (CP), Pebble Springs (ESR), Perkins (CP), and UCLA Argonaut boards will have to be reconstituted later this year because their chairman plans to retire in February 1982. It should be noted that reconstitution is a continuing practice. For example, four boards have been reconstituted in the last three months alone.

The first set of impacted proceedings identified in "A" above will be reconstituted within the next 10 days. Boards are reconstituted reluctantly because reconstitution means losing the time and expertise of the member being replaced.

III. PANEL RESOURCES

A. Lawyer Chairmen

1. The Problem

The linear charts show that full-time lawyer chairmen are carrying an average of five cases each. Four part-time lawyers have no cases while some part-time lawyers have only one or two cases. As a practical matter, two or at the most three cases are the maximum part-time lawyer chairmen can manage. Consequently, it is clear that the Panel's lawyer chairmen resources are presently strained to the limit.

It is difficult to make pronouncements respecting the maximum number of cases that either full-time or part time board chairmen should be assigned because of the intermittent nature on the proceedings and other factors which cause periods of inactivity in a given case. However, it is clear: (1) that some further reassignment of cases should be made, and (2) that the Panel does not have adequate resources to handle properly any significant number of new cases.

As noted in my February 20 status report, the number of full-time Panel lawyer chairmen has declined from 14 in 1975 to 8 in 1981. The numerical decline is equivalent to an almost 40 percent reduction in full-time judge years available.

2. The Solution

The Panel must obtain an exemption from the freeze for the two recently appointed Board chairmen. Both men are knowledgeable in the field and could assume a full caseload in a very short time. Efforts to have one of these men detailed in the interim from the Department of Energy to NRC are bogged down.

Secondly, the Panel's personnel ceiling should be increased by two more full-time lawyer chairmen. The hiring process, including the work of the

Advisory Screening Committee, takes just as long to complete for a full-time chairman as it does for a part-time. However, full-time chairmen represent 4 to 5 times as many judge years as do part-time Board chairmen.

B. Legal Secretaries

1. The Problem

The ASLBP now has 10 legal secretaries for 19 full-time professionals and managers and 39 part-time professionals. After subtracting the two assigned to the Chairman and Vice Chairman (Executive) and one assigned full time to the TMI restart proceeding, the Panel has seven legal secretaries assigned to perform the work of 12 full-time Administrative Judges, two management personnel, the General Counsel, the Technical Assistant, and 39 part-time Administrative Judges.

Aside from the Chairman and Vice Chairman (Executive), legal secretaries are assigned to two Administrative Judges, one legal and one technical. At that ratio, we have no one to assign to the three full-time members just appointed, should they become available. The Panel has lost three positions since 1977, one clerk-typist, one secretary and one full-time docket clerk.

In fact no secretary is specifically assigned to either the Assistant Executive Secretary, the Management Services Assistant, or the 39 part-time Administrative Judges. The latter situation is particularly distressing for part-time board chairmen. In any given week, at least three part-time members are in the office for the sole purpose of writing and issuing orders, memoranda, and partial or full initial decisions. They compete with only moderate success and considerable frustration for secretarial support.

2. The Solution

Increase the ASLBP personnel ceiling by three legal secretary positions. One position would support one full-time Administrative Judge (Legal) and one full-time Administrative Judge (Technical) when those two positions are exempted from the freeze or otherwise become available. The second would support an Administrative Judge (Lawyer) and the Assistant Executive Secretary of the Panel. The third legal secretary would be assigned to the Management Services Assistant who furnishes all administrative support to the 39 part-time Administrative Judges. This last legal secretary would thus be available at all times to support part-time members.

C. Law Clerks

1. The Problem

At present the Panel has no law clerks. One honor law graduate scheduled to begin work in August 1981 has been caught in the freeze. In comparison, the Federal Energy Regulatory Commission has one law clerk for every two Administrative Law Judges or hearing officers.

Law clerks increase the productivity of Administrative Judges by a substantial percentage. Law clerks can save enormous amounts of time by preparing first drafts of orders and memoranda, reading through and outlining voluminous transcripts, preparing first drafts of findings of fact and conclusions of law and by performing a broad range of legal research assignments. At present, all these functions are performed by the Panel's Administrative Judges.

More significantly, this work can be performed by a law clerk while an Administrative Judge is hearing another case or working on another decision. At present, we frequently have situations where an Administrative Judge assigned to more than one case cannot begin the basic work necessary to draft initial decisions because he or she must attend a hearing previously scheduled. Law clerks would minimize such conflicts and save weeks in the issuance of final decisions.

2. The Solution

Increase the personnel ceiling of the ASLBP by a minimum of four full-time law clerk positions. The positions would be two-year appointments.*

D. Administrative Law Judges

1. The Problem

At present the Commission has only one Administrative Law Judge ("ALJ"), and he is devoting full time to the TMI restart hearing. To my knowledge, no arrangements have been made with the Office of Administrative Law Judges in OPM to authorize use of NRC qualified ALJs in other agencies as needed.

The Atomic Energy Act authorizes the use, in licensing and related proceedings, of either a single Administrative Law Judge or a three-member panel chaired by one experienced in the conduct of administrative proceedings. Historically (and wisely), the Commission has elected the three-member panel alternative because of the technical and scientific expertise it brings to resolving complex issues affecting the public health, safety and environment.

In the near term, ALJs could be used in four situations: (1) alone in civil penalty proceedings; (2) alone in antitrust proceedings; (3) as chairman in

*These positions could well furnish both the Office of the General Counsel and the Office of the Executive Legal Director with a steady supply of experienced attorneys.

licensing proceedings; and (4) alone in spent fuel pool expansion cases not involving complex technical issues. Of these, only four civil penalty cases and six antitrust cases and less than six total spent fuel pool cases have been filed in the last five years.

However, of all the cases heard by the Panel, antitrust proceedings demand the most judge years. By their nature they have the longest hearings and the largest records for decision. The cases arise at the construction permit stage and are normally heard by panels of three lawyers or two lawyers and one economist. Most antitrust cases settle, after the record has been made.

The Office of the Administrative Law Judge exercises strict control over the appointment of ALJs to an agency and interagency assignment of cases to non-agency ALJs. In both instances, control is exercised in part by establishing criteria for qualifying particular ALJs to hear certain types of cases. It should be emphasized that additional ALJs represent an unavailable resource rather than an immediately perceived need.

2. The Solution

Authorize the Chairman of the Atomic Safety and Licensing Board Panel to initiate discussions with the Office of the Administrative Law Judge for the purpose of: (1) establishing criteria for qualifying ALJs for NRC hearings;

(2) determining whether present board members can be designated as ALJs; and (3) establishing a specific list of ALJs in other agencies qualified to hear ASLBP cases as needed.

E. Financial Resources

1. The Problem

We have conservatively estimated that total travel costs for the 8 months remaining in Fiscal Year 1981 will total $100,000.00. Our travel budget has been cut from $210,000.00 to $180,000.00, and we have spent $90,000.00, leaving a balance of $90,000.00.

The foregoing figures include the one-week training session for the entire Panel in May but make no allowance for other individual training after the first week of March of this year. I believe strongly that other training needs should be funded.

The immediate effectiveness of any new Panel members would be greatly enhanced by attendance at a one or two week session at the National Judicial

College. The same holds true for all existing Panel members, at the rate of six per fiscal year. The Judicial College offers invaluable sessions taught by sitting judges in the hearing and management of litigation for hearing officers who are lawyers and for hearing officers who are not lawyers. These sessions can greatly increase the effectiveness of our boards.

2. The Solution

Reallocate travel funds to the Panel for hearings ($10,000.00) and training ($30,000.00) in the total amount of $40,000.00.

IV. HEARING MANAGEMENT

1. The Problem

The management of hearings is a function of the size of the record. The size of the record is in turn a function of the number of contentions in a hearing and the factors described in Section I.A.2., above. Given the requirements of the three principal statutes governing board proceedings, I estimate that not more than 25 percent of the time needed to complete a licensing proceeding can be controlled by hearing management tools.

The Administrative Procedure Act and 10 CFR Part 2 presently contain virtually all of the authority Administrative Judges need to conduct their proceedings. However, the issuance of a policy statement by the Commission would reiterate and enhance that authority and facilitate its exercise.

Similarly, the management of hearings depends on the number of issues required to be heard. Public policy dictates that a broad range of issues be considered. NRC case law, largely made by intervenors at the trial and the appellate level, broadly implements that public policy.

In view of the present substantial length of time required for NRC proceedings, a policy statement addressing the subject of contentions would be most helpful at this time. That is particularly true because of the convergence of a large number of proceedings going to hearing in the next 12 months. Attachment A is a working paper in the form of a draft proposed statement of policy addressing the subjects of contentions and hearing management.

Finally, 10 CFR Part 2 has been revised piecemeal over the course of the last eight years. The Panel feels that it is time to revise Part 2 in its entirety

to incorporate the case law of the last eight years, to rewrite its provisions in succinct, simple English, and to more accurately reflect the current nature of Board proceedings.

2. The Solution

The Commission should issue a policy statement addressing the subjects of contentions and hearing management within the next 30 to 60 days.

The Commission should direct the Chairman, ASLBP, to review Part 2 and submit a complete revision within 90 days for circulation throughout the Commission. The revised Part 2 should be published for comment within 45 days after inter circulation.

V. SUMMARY OF RECOMMENDATIONS

The Atomic Safety and Licensing Board Panel recommends that the Commission take the following steps to alleviate problems in the management of licensing proceedings:

1. Obtain an exemption from the freeze for: (a) the three full-time and two part-time Administrative Judges recently appointed; and (b) four part-time technical vacancies;

2. Issue a statement of policy furnishing guidance to the Boards in the hearing and management of licensing cases (a proposed draft is attached);

3. Direct the Panel to review Part 2 and submit a complete revision within 90 days for circulation throughout the Commission with

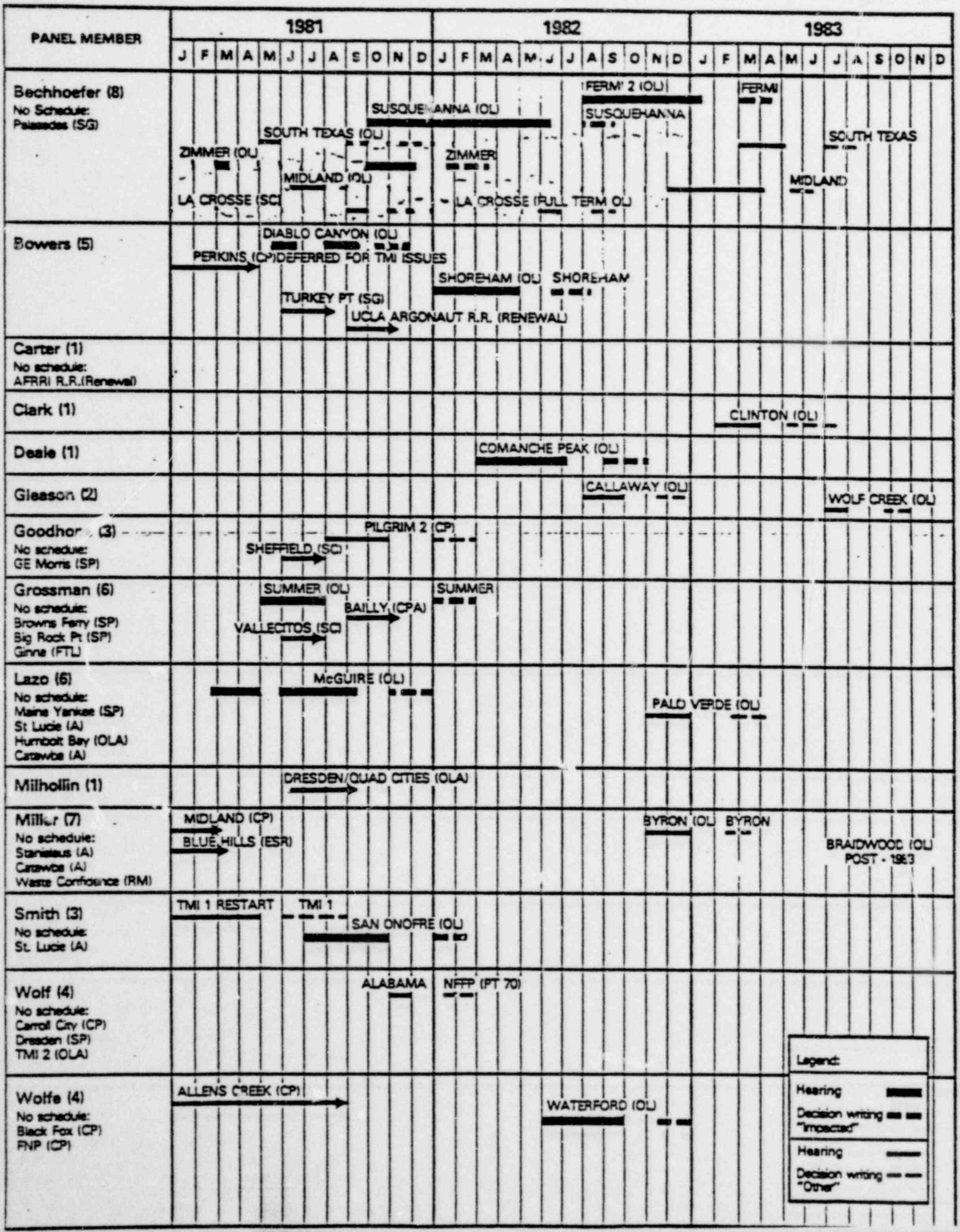
publication of the proposed revisions scheduled for 30 to 60 days thereafter;

4. Increase the authorized personnel ceiling of the Panel by nine: two full-time Administrative Judges (legal); four full-time law clerks (two-year appointments); and three legal secretaries;

5. Increase the ASLBP budget for travel and training by $40,000.00 to $220,000.00 per year for the cost of hearing travel and a.nual training of Board Members at the National Judicial College; and

6. Direct the ASLBP Chairman to seek authorization from the Office of Administrative Law Judges in OPM to: (1) qualify existing Panel Members as ALJs, and (2) obtain authority to use prior Panel Members not ALJs in other agencies, as needed.

ASLBP Case Schedule, Calendar 1981, 1982, 1983
LAWYER - CHAIRMAN



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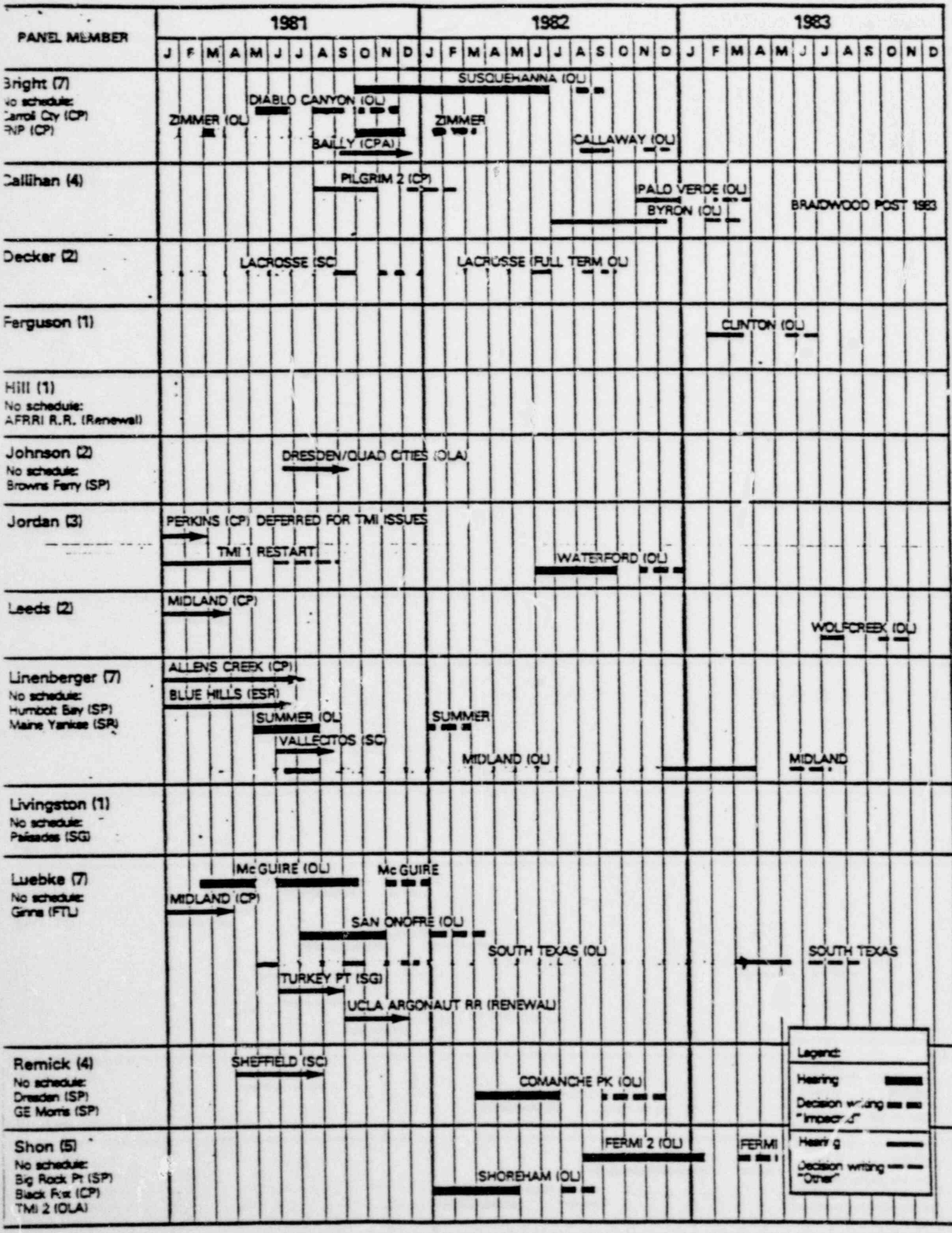

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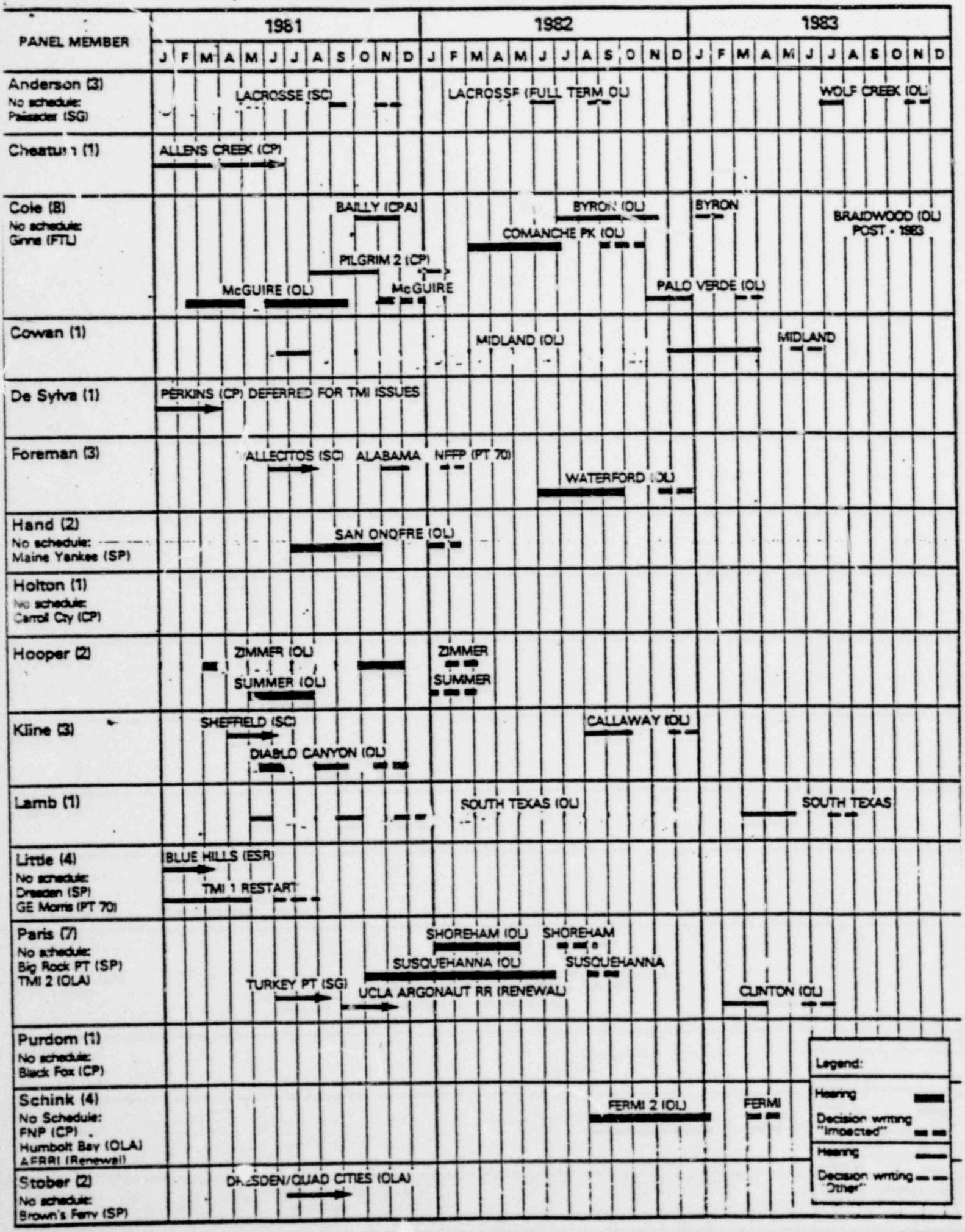

[WORKING PAPER]

U.S. NUCLEAR REGULATORY COMMISSION

COMMISSION GUIDANCE ON CONDUCT OF LICENSING BOARD PROCEEDINGS

DRAFT PROPOSED STATEMENT OF POLICY

I. BACKGROUND

The Commission has reviewed the workload of the Atomic Safety and Licensing Board Panel and the current status of proceedings before its individual boards. The Commission has determined that an unprecedented number of board proceedings are scheduled for hearings the next 24 months. Almost half of these proceedings concern applications for construction permits and operating licenses pursuant to the Atomic Energy Act, as amended. These circumstances will severely strain the existing resources of the ASLBP and have the potential to delay operation of qualified power plants. The potential cost of such delays to consumers is clearly of great consequence.

II. COMMISSION DECISION

Based upon an extensive review and consideration of contentions raised in licensing proceedings and the manner in which such proceedings are conducted--a review that is still continuing--the Commission has concluded that the requirements for admissible contentions in operating license proceedings should be refined and that individual boards

should be strongly encouraged to employ all of the hearing management devices presently within their authority under the Administrative Procedure Act. Additionally, the Commission has concluded that, while plant operation must abide the resolution of those issues which materially bear on the public health and safety, the common defense and security and the environment, operation need not await the resolution of other issues.

The purpose of this statement is to express the Commission's policy of expediting proceedings by eliminating contentions which do not raise signficant public interest issues, making greater use of § 50.57(c) of the Commission's regulations, and, because of the intermittent and protracted nature of licensing proceedings, insuring that all possible hearing management tools are employed by licensing boards. Thus, these guidelines are intended to reduce the time for resolving licensing proceedings following Commission action and response to the Three Mile Island accident.

Recent Supreme Court decisions have reaffirmed the broad latitude which agencies have in shaping their proceedures. See Costle v. Pacific Legal Foundation, et al., ___ U.S. ___, 63 L. Ed. 2d 329, 100 S. Ct. ____ (1980) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978). While the Commission views this policy

statement as merely elaborating on existing regulations, these cases provide ample authority for any changes in the interpretation of existing regulations reflected in this statement.

III. CONTENTION GUIDELINES

The Commission expects licensing boards to admit or retain in operating license hearings those issues which raise significant public interest considerations. Issues which do not raise such considerations, such as issues primarily related to private interests, should be looked upon skeptically. Our proceedings should not be made the vehicle for the vindication of some purely private right of action when other fora are available.

Similarly, the Commission believes that contentions which question the justification for the facility, and the consideration of alternatives (both for the site and the facility), matters which are fully explored in the construction permit proceeding, have no place in operating license proceedings absent a strong showing that some new development or information calls into considerable question the validity of the findings made earlier. Boards should be careful not to relitigate at the operating license stage issues which were adequately aired at the construction permit stage. The doctrines of res judicata and collateral estoppel should be judiciously applied.

In short, contentions should be accepted in operating license proceedings only when they raise significant issues pertaining to the health and safety of the public, the common defense and security, and the environment. Contentions should be rejected: (1) which assert essentialy private rights capable of vindication elsewhere; (2) which raise issues which only can be considered meaningfully prior to construction of the facility; and (3) which seek to relitigate issues which were or could have been adequately considered at the construction permit stage.

IV. SECTION 50.57(c) PROCEEDINGS

In operating license cases in which applicants seek authority under § 50.57(c) of the Commission's regulations for low-power testing and further operations short of full power, the licensing boards are to view the request in light of the issues raised in the proceeding. The Commission expects the boards to resolve all issues which raise serious implications concerning the impact of plant operation on the public health and safety, common defense and security, and the environment prior to authorizing operation pursuant to Appendix B to Part 2.

The boards are to view other issues in terms of their significance in the context of plant operation. In the event operation is permitted,

Boards are to insure that appropiate conditions, including limitations on power levels and the duration of the authority, are imposed to safeguard the public. Boards must also keep in mind their authority to order a cessation of operation at any time. It is the Commission's intent that its regulations be flexibly applied to require resolution of issues which raise significant public interest considerations prior to authorizing operation, while permitting operation to commence prior to the resolution of those issues which do not raise significant public interest considerations. In this context, the Commission notes that it is standard practice to permit operation to go on even though substantial issues may be the subject of further evidentiary proceedings before an appeal board. The propriety of continued operation is, of course, viewed in the context of the issues still to be resolved and is not permitted where those issues so dictate. This consideration necessarily involves questions of the acceptability of the risk of operating, pending resolution of the issues, and whether operation might prejudice the imposition of any conditions which might be required as a result of the proceeding.

V. QUASI-JUDICIAL MANAGEMENT TOOLS

Individual licensing boards are encouraged whenever possible to expedite the hearings by using all those hearing management methods which presently exist in Rules and Regulations, 10 C.F.R. Part 2 (1980). These devices include, but are not limited to:

1. Consolidated Intervenors

In accordance with § 2.715a intervenors should be consolidated and a lead intervenor designated who has "substantially the same interest that may be affected by the proceedings and who raise[s] substantially the same questions...." Obviously, no consolidation should be ordered that would prejudice the rights of either party. However, consonant with that condition, single-lead intervenors should be designated to present evidence, conduct cross-examination, and submit briefs, propose findings of fact, conclusions of law, and argument. Where such consolidation has taken place, those functions should not be performed by other intervneors except upon a showing of prejudice to such other intervenors' interest.

2. Negotiation

The parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues. Negotiations should be monitored by the board through written reports, prehearing conferences, and telephone conferences, but the boards should not become directly involved in the negotiations themselves.

3. Settlement Conference

Following completion of the discovery provided in §§ 2.740, et seq., and prior to the filing of motions for summary disposition, licensing boards are encouraged to hold settlement conferencs with the parties. Such conferences are to serve the purpose of resolving as many contentions as possible by negotiation. The conference is intended to: (a) have the parties identify those contentions no longer considered valid or important by their sponsor as a result of information generated through discovery so that such contentions can be eliminated from the proceeding, and (b) to have the

parties negotiate a resolution, wherever possible, of all on part of any contention still held valid and important. The settlement conference is not intended to replace the prehearing conferences provided by §§ 2.751a and 2.752.

4. Trial Briefs, Pretrial Testimony Outlined and Cross-Examination Plans

All or any combination of these devices should be required at the discretion of the board to expedite the orderly presentation by each party of its case. Each board must decide which device or devices would be most fruitful in managing or expediting its proceeding.

5. Combining Rebuttal and Surrebuttal Testimony

For particular, highly technical issues boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand at the same time so that each witness will be able to comment immediately on an answer to a question by the opposing witness.

ATTACHMENT A.

6. Simultaneous Filing of Proposed Findings

When possible, boards are encouraged to require the simultaneous filing of proposed findings of fact and conclusions of law from all parties.

7. Obligations of Parties

The Commission wishes to emphasize that the failure by a party to comply with discovery, filing or other obligations without good cause should, in serious cases, result in dismissal of that party from the proceeding.

VI. COMMISSION MONITORING

The Commission desires to closely monitor hearing proceedings in order to offer guidance where appropriate. In this connection, should the boards certify close questions regarding the interpretation of this policy statement to the Commission for its consideration, the Commission will exercise its best effort to answer such questions within 20 days of receipt. The Commission recognizes that many such certifications will occur at critical points in the proceeding and that some proceedings will not be able to go forward until such questions are answered.

ATTACHMENT A.

Attachment 6

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

March 5, 1981

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne

FROM: B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: CONDUCT OF LICENSING BOARD PROCEEDINGS

As a consequence of the public meetings of February 26, 27 and March 3, 1981 on licensing procedures, attached hereto is a revised Draft Proposed Statement of Policy on that subject. The draft is based on all the proposals submitted by the ASLBP, the General Counsel, the Executive Director for Operations, the Director of the Office of Policy Evaluation, and the Director of the Office of Nuclear Reactor Regulation concerning possible improvements to licensing proceedings. The draft represents a consensus view of five full-time Panel members (the remaining 10 members were out of the office at hearings and one at the National Judicial College).

Attachment 7

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

March 9, 1981

NOTE TO: Leonard Bickwit, General Counsel

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Board

B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: CONDUCT OF LICENSING BOARD PROCEEDINGS

I have reviewed Tony Cotter's Draft Proposed Statement of Policy on the subject of "Commission Guidance on Conduct of Licensing Board Proceedings" which he sent to the Commission on March 5, 1981.

My suggestions for changes are included in a revised draft which is attached. Further changes will undoubtedly be required as a result of Commission decisions reached in the ongoing Commission meetings on revised licensing procedures (including possible rule changes). One of the things I have tried to do here is to correlate this statement with our existing policy statement (Appendix A to Part 2) and the situation of the "eleven impacted plants".

Howard K. Shapar
Executive Legal Director

Attachment: Revised Draft

Attachment 8

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

March 10, 1981

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne

FROM: Leonard Bickwit, Jr.
General Counsel

Attached are several charts to be used in connection with this afternoon's discussion on licensing procedures.

Attachments

cc: OPE
OCA
SECY
EDO
OELD
NRR
ASLBP
ASLAP

Attachment 9

February 17, 1981

SECY-81-111

RULEMAKING ISSUE

(Notation Vote)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: INTERVENTION IN NRC ADJUDICATORY PROCEEDINGS

Purpose: To offer for Commission consideration a draft rule that would raise the threshold for contentions.

Discussion: At the Chairman's request, we are forwarding for your consideration a draft rule that would raise the threshold for the admissibility of intervenor contentions in NRC adjudicatory proceedings. At present, a person petitioning to intervene in a formal NRC proceeding must file "a list of the contentions which petitioner seeks to have litigated in the matter and the bases for each contention set forth with reasonable specificity." 10 CFR 2.714(b). This requirement serves the threefold purpose of (1) notifying the applicant and NRC staff, at least generally, as to what they will have to defend against or oppose, (2) limiting the scope of subsequent stages of the proceeding including discovery, and (3) assuring, to a degree, that the issues which petitioner seeks to raise are cognizable in an individual licensing proceeding. If a would-be intervenor fails to raise at least one litigable contention, he may not participate in the proceeding as a party. 10 CFR 2.714(b). The contention requirement was upheld in BPI v. Atomic Energy Commission. 502 F.2d 424 (D.C. Cir. 1974).

The draft rule now offered for your consideration would also require the person petitioning for intervention (1) to identify for each contention the material facts in dispute which warrant an adjudicatory hearing, and (2) to submit the documents and other information relied on to show the existence of such facts. If the applicant or NRC staff contested the existence of such an issue, the contention would not be admitted for

CONTACT:
C.W. Reamer, OGC
634-1493

hearing if the documents and other information submitted showed that there was no genuine issue of material fact and no reasonable likelihood that additional facts could be developed which would show the existence of a genuine issue to be heard.

NRC rules providing for summary disposition on pleadings (10 CFR 2.749) recognize the general principle that an adjudicatory hearing is not required for matters as to which there is no genuine dispute. The draft rule seeks to integrate that general principle into the contention stage of a proceeding. In practice, however, a would-be intervenor will be less prepared to fend off summary disposition at this early stage; thus, the rule change could significantly affect public participation in licensing proceedings. The short timeframe for drafting the rule has permitted no real study of this and other questions about the workability and possible consequences of the rule change.

Recommendation: Approve the draft rule as a subject for further study by OGC and direct OGC, after consultation with the staff and the adjudicatory boards, to report its conclusions and recommendations as to whether the draft rule should be the subject of rulemaking.

Leonard Bickwit, Jr.
General Counsel

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Tuesday, March 3, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT February 24, 1981, 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 1

1. Amend 10 CFR 2.714(b) by inserting after the first sentence thereof the following new sentence:

> The supplement must set forth a concise statement of the facts supporting each contention together with references to the written documents and other information relied upon to show the existence of such facts. If an answer filed under subsection (d) of this section contests the existence of an issue of material fact with respect to any contention petitioner shall be afforded a reasonable opportunity to submit additional written documents or other information to show either an issue of material fact or a reasonable likelihood that such an issue may be developed in the course of the proceeding.

2. Amend 10 CFR 2.714(c) by inserting at the end thereof the following new sentence:

> If a party states in its answer that, as to a particular contention of a petitioner, there exist no material facts as to which there is a genuine issue to be heard, it shall submit a concise statement of the material facts not in dispute, together with references to the written documents and other information upon which it relies.

3. Amend 10 CFR 2.714(d) by inserting at the end thereof the following new sentence:

No contention shall be admitted for hearing if the documents and other information submitted show that there is no genuine issue of material fact to be heard and that there is no reasonable likelihood that additional facts can be developed in the proceeding which will show the existence of such an issue.