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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Proposed Amendments to the "Rules of Practice for Domestic Licensing Proceedings" of the United States Nuclear Regulatory Commission	)	10 CFR Part 2 (46 FR 17216)

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U.S. NUCLEAR REGULATORY COMMISSION

Comments of the California Energy Commission

The California Energy Commission ("CEC") hereby submits its comments on the proposed amendments to the Nuclear Regulatory Commission's Rules of Practice for domestic licensing proceedings (10 CFR Part 2). These comments also respond to the proposed hearing schedule contained in the amendment notice which, while it would not be formally incorporated into NRC regulations, would serve as a guideline for NRC licensing proceedings.

Like the NRC, the California Energy Commission has jurisdiction over the licensing of new electric power plants, including nuclear facilities. We as a government agency are extremely concerned that the hearing process does not litigate irrelevant issues and that licensing decisions are made expeditiously. However, our experience has shown us that these goals cannot be achieved through the limitation of access to information, decreased rights to intervenors or less analysis of issues. Instead, California

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believes that a thorough analysis of issues, actively involving the public, coupled with reasonable but enforced schedules, is more conducive towards expediting the licensing process.

California has carefully reviewed the proposed changes in the NRC's Rules of Practice and believes that the methods proposed by the NRC will bring on more delays for applicants than are already being experienced and that there will be a noticeable lessening in the quality of the actual proceeding. In these comments California points out problems with the procedures and then offers suggestions on how the current system can be improved without a loss of quality.

1. The proposed amendments should not be adopted at the expense of the NRC's mandate to ensure the protection of the public health and safety.

The notice of the proposed amendments states that the NRC staff has proposed a "substantial reordering of staff review resources" from "investigating the causes of the (Three Mile Island) accident, assuring the safety of operating power reactors and developing new generic safety requirements based on the lessons learned from the accident." The reasons for this "reordering" and the resulting proposed expedited review procedures are not, as one would hope, because the NRC can now assure the public that nuclear reactors operate safely or that the NRC has

developed sufficient new generic safety requirements based on the lessons of Three Mile Island. Rather, the sole justification given for the proposed change is that some nuclear plants on which adjudicatory hearings are being held will be completed prior to the finish of proceedings and that the resulting delay could cost utilities and ratepayers billions of dollars.

The proposed amendments seriously ignore the lessons of Three Mile Island. Among its findings, the Kemeny Commission determined that:

- To prevent nuclear accidents as serious as Three Mile Island, fundamental changes will be necessary in the organization, procedures, and practices -- and above all -- in the attitudes of the Nuclear Regulatory Commission and . . . of the nuclear industry. (p. 27)

- The NRC is so preoccupied with the licensing of plants that it has not given primary consideration to overall safety issues. (p. 51)

- NRC labels safety problems that apply to a number of plants as "generic." Once a problem is labeled "generic," the licensing of an individual plant can be completed without resolving the problem. NRC has a history of leaving generic safety problems unresolved for many years. (p. 51)

- Although NRC accumulates an enormous amount of information on the operating experience of plants, there was no systematic method of evaluating these experiences and looking for danger signals of possible generic safety problems. (p. 51)

Through these proposed amendments, the NRC apparently proposes to return to its prior focus on the licensing of nuclear reactors rather than giving top priority to investigating the causes of the Three Mile Island accident,

resolving generic safety issues, and assuring the safety of operating reactors. The NRC's role is not to license nuclear power plants on a least cost basis to utilities, regardless of the impact on public health and safety. The NRC's mandate is to allow the licensing and operation of nuclear power plants only after it can assure the public of their safe operation.

The apparent return by the NRC staff to its pre-Three Mile Island priorities is premature given the absence of affirmative findings that the safety problems highlighted by the Three Mile Island accident have been resolved. The only proper emphasis for the NRC, given its mandate to protect the public health and safety, must be to resolve safety issues of operating nuclear facilities first, rather than adding risks by licensing additional plants while major safety issues remain unresolved.

2. The proposed amendments are unlikely to decrease costs or accelerate operation of nuclear power plants.

The proposed amendments assume that limiting the rights of intervenors to participate in NRC licensing proceedings will eliminate delays in the operation of nuclear power plants. However, a recent report by the Congressional Budget Office on nuclear reactor delays ("Delays in Nuclear Reactor Licensing and Construction: The Possibilities of Reform," March 1979) found that the longest delays in nuclear power plants occured <u>after</u> licensing due to project

financing problems, construction snafus related to materials, labor, and management, and changes in demand for power. Delays attributable to the private sector were found to average about 80 percent of the total project delay. Since that study, financing problems, decreased demand, and other factors beyond the NRC's control have only accelerated the trend in delaying the construction and operation of reactors. The amendments proposed by the staff do nothing to eliminate these factors.

The amendments apparently seek to expedite NRC licensing approvals of nuclear power plants while underlying safety issues, including those identified as a result of TMI, remain unresolved. Extensive experience with the 70 existing reactors demonstrates that failure to thoroughly examine and resolve safety issues in advance of construction and operation does not mean that those problems vanish. Rather such unresolved problems surface during the plant's operation and inevitably lead to shutdowns with expensive and time-consuming retrofits. It is in everyone's interests - the NRC, the public, the utilities and their ratepayers - that safety problems are dealt with adequately during the NRC licensing proceeding and not postponed through years of backfitting and loss of on-line time.

3. The amendments and proposed hearing schedule will significantly impair the quality of the NRC licensing hearings.

The revisions of Sections 2.720(h)(2), 2.740(f), 2.740a(j) and 2.744 to eliminate formal discovery against

the NRC staff seriously compromise the fairness of the hearing process for licensing applications. Even under present regulations the NRC staff is required to answer interrogatories only if they are "necessary to a proper decision" and the answers "are not reasonably obtainable from any other source." (10 CFR § 2.720(h)(2)(ii).) Many important issues in the past NRC licensing proceedings could not have been raised absent certain NRC documents. Eliminating access to NRC documents will lead to substantially less thorough analysis of issues.

As the Commission has recognized, the NRC staff is a party and advocate for a definite staff position in a licensing proceeding.* In this adversarial context, it is unreasonable to expect that the staff will provide the same information voluntarily as a party must provide under the requirements of formal discovery. In practice, eliminating discovery of the staff will eventually lead to confrontations between the parties and to motions to the licensing boards. The result will be delay compounded by complex procedural arguments.

The Commission's rationale that "discoverable information can ultimately be produced at the hearing on cross-examination" is not a suitable substitute for advance

*"A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing" [SECY 80-130, (March 1980) at pp. 156, 161].

preparation. Such a procedure will only increase the time needed for the licensing proceedings as it is far more time-consuming to ask discovery-type questions in an adjudicatory hearing than to do such preparation beforehand and reserve hearings to issues actually in dispute. In practice, the hearing will lengthen as witnesses find out they do not have the material with them to answer the questions of intervenors at the time of their cross-examination and the hearings are delayed while the material is produced.

Furthermore, discovery through cross-examination penalizes intervenors' presentations as it does not allow them time to analyze the responses to determine which answers are worth pursuing through further questioning or production of documents and which answers are sufficient. Finally, discovery from other parties is also commonly used to aid in preparing one's own testimony. Elimination of discovery against the NRC staff will deprive intervenors of valuable material to use in preparation of their testimony until the hearings and will probably lead to numerous requests for filing revised testimony thereby increasing hearing delays.

Use of cross-examination for discovery would restrict access to relevant data and foster trial by surprise, which is inappropriate to any adjudicatory proceeding, particularly an administrative proceeding concerning serious

and contested issues involving the public safety. Rather, fairness and efficiency require that all parties in a licensing proceeding should have available full information at the earliest practicable time. Timely access to this information through formal discovery would ensure a complete hearing record upon which the Commission and its licensing boards could reach reasoned decisions.

The proposed schedule also compromises the quality of the proceeding as it simply does not allow sufficient time for discovery. Twenty-five days for discovery after issuance of the final supplemental SER is far too short when one acknowledges that the bulk of the staff's case is contained in that document. No time is allowed for followup discovery, thus providing parties with an incentive to give nonresponsive answers to initial discovery. Furthermore, the schedule requires filing of revised contentions within 25 days after publication of the final SER, also the final day of discovery. Since revision of contentions may well depend upon information produced during discovery, the discovery period must really end before Day 25 if the parties are to have time to analyze the discovery and prepare revised contentions. Thus, the schedule would in practice eliminate discovery.

Similarly, the proposed revision to Section 2.730(e), to eliminate the requirement for written orders disposing of written motions, undermines the development of a record in

licensing proceedings. It is crucial that NRC decisions on licensing applications be based upon stated facts and reasoned application of the Commission and licensing boards' expertise. The elimination of a strict requirement for such written opinions deprives the parties and a reviewing body of a fully articulated statement of a licensing board's reasoning and invites speculation that factors outside of the formal record may have formed the basis for a decision. Indeed, the absence of written orders may result in the reversal of the full Commission's ultimate resolution of a licensing application because of the absence of substantial, documented evidence and reasoning in support of the Commission's decision. The proposed amendments to Section 2.730(e) also eliminate the requirement that parties be notified of Commission decisions on written motions. It is hard to understand why the NRC staff believes failure to notify parties of Commission rulings will expedite proceedings.

Further, the revision of Sections 2.751a(d) and 2.752(c) would eliminate a hearing board's discretion to certify unresolved issues to the Appeal Board and Commission pursuant to Section 2.718(i). As the recent revisions and interpretations of the Commission's "Revised Statement of Policy" (CLI-80-42) on Three Mile Island related issues indicate, the licensing boards are faced with complex and unresolved legal and policy issues in reviewing post-TMI licensing applications. Commission or Appeal Board guidance

on these issues can eliminate time-consuming errors by the licensing boards and would foster a full development of the record at the licensing board level. Rather than eliminating this mechanism for prompt review of significant issues, the Commission should strengthen this procedure by encouraging the licensing board to seek guidance on complex issues. In the practical context of a contested hearing, such certification would in fact shorten the licensing proceeding.

4. Procedures different from those proposed in the amendments and hearings schedule can improve the NRC licensing process.

As stated in our introductory comments, the CEC has found in its licensing proceedings that intervenors can fully participate in the licensing process, staff can disclose the bases for its positions, and significant issues can be thoroughly analyzed, without sacrificing timely decisions. The CEC has accomplished these goals by establishing a number of practices to facilitate meaningful intervenor, staff, and applicant participation in its proceedings. Establishment of similar procedures by the NRC would improve present practices and, in contrast to the proposed amendments, would not decrease the quality of the licensing process.

For instance, the CEC has adopted regulations specifically providing for a "Prefiling Review," which allows

an applicant to discuss with the CEC staff in advance of filing a licensing application the information that must be included in the application. The CEC employs "informal workshops" among its staff, utilities, and intervenors to solicit and exchange information about a proposed facility. We have found that these informal workshops have helped intervenors (and staff) better understand relevant issues while at the same time decrease the number of issues needed to be adjudicated. These workshops allow parties to identify areas of agreement and disagreement; allow the public to ask questions of the staff, utilities, and parties concerning the siting proposal, the CEC's procedures, and parties' potential positions; and permit a general exchange of information.

Another useful mechanism for expediting the process has been the requirement that one of the CEC Commissioners must always preside at any CEC licensing hearing. As a result, at least one Commissioner is directly involved in the siting case. The Commissioner's presence effectively keeps the proceedings focused on relevant issues. It also ensures that Commission policies are implemented throughout the proceeding and that any particularly significant issues are brought to the Commissioner's attention at an early date.

Finally, the CEC has an Office of the Public Adviser responsible for assisting the public in understanding and participating in CEC proceedings. As a result of this

assistance, parties tend to understand CEC siting procedures better and limit their participation to relevant and significant issues.

CONCLUSION

As discussed above, the California Energy Commission objects generally to the proposed amendments and hearing schedules. In particular, the CEC objects to those amendments eliminating parties' right to formal discovery against the NRC staff. Finally, the CEC believes that the NRC can implement alternative measures which are much more likely to expedite the licensing process and which will avoid the substantial decrease in quality of hearings that would occur under the proposed amendments.

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Respectfully submitted,

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