BPI
Business and Professional People for the Public Interest
109 North Dearborn Street, Suite 1300 • Chicago, Illinois 60602 • Telephone: (312) 641-5570

187

April 3, 1981

Mr. Samuel J. Chilk
Secretary of the Commission
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

46 FR 17216

Attention: Docketing and Service Branch

RE: Comment on Proposed Amendments to 10 CFR Part 2
"Expediting the Hearing Process"

Dear Secretary Chilk:

This letter is in response to the invitation to comment on the proposed amendments to the Commission's Rules of Practice, 10 CFR Part 2, as set forth in your letter dated March 13, 1981, and attachment thereto.

Preliminarily, we would point out that if the basis for these proposed changes is, as stated in the "Supplementary Information" portion of the attachment, the effect of the accident at Three Mile Island, it is at least puzzling how these revisions could be so justified. It is indeed ironic that the Commission should use the accident at Three Mile Island as a basis for restricting the rights of the public, as represented by persons intervening in licensing NRC proceedings, when the opposite is the more prudent course, and the only course consistent with the Commission's mandate to protect the public health and safety. It is particularly egregious that such rules should be proposed when the Commission acknowledged the need to improve public and intervenor participation in the hearing process in its NRC Action Plan Developed As a Result of the TMI-2 Accident, NUREG-0660, Vol. 1 at p. V-3. The proposed revisions would have precisely the opposite effect.

We turn now to our more specific comments:

Schedule

The schedule is set forth in the notice appears to be merely a suggestion to the Licensing Boards and not binding on them. However, it may nevertheless have the effect of pressuring the Boards into making hasty and ill-considered decisions.

Further, the schedule is plainly unrealistic. Under other Commission regulations, interrogatory responses and objections are due 14 days after service (plus five for service by mail). The crucial parameter of discovery, of course, is information which would lead to the discovery of admissible evidence. Under the proposed schedule, responses and objections to interrogatories which had been served immediately upon publication of the SER will only just have been received by the proponent of the interrogatories. Responses and objections to requests for production of documents will not have been completed at all. Thus, it is obvious that the schedule is unrealistic, for it allows no time for follow-up on information obtained by that immediate discovery, nor for informal resolution of discovery disputes. It would eliminate, for example, depositions based on discovered documents. Moreover, discovery on revised contentions would be impossible: discovery is allowable only on admitted contentions, and under the proposed schedule, revised contentions are due 50 days after the issuance of the SER, well after discovery has been cut off.

Discovery Against the Staff

The proposed changes to §§2.720, 2.740, 2.740a, 2.740b and 2.744 would eliminate discovery against the staff, and are the most startling and troublesome of the proposed revisions. Further, they appear to be inconsistent with the Commission's objective of providing full and open adjudicatory processes. While we do not know what has occurred in all Commission proceedings, we believe it to be unusual for a party other than an intervenor (or perhaps an interested state under 10 CFR §2.715(c)) to undertake discovery against the staff. To that extent, the proposed revision would have the obvious effect of eliminating intervenors' access to staff information. This is plainly unfair, and in any event it is not evident how elimination of that discovery, which is already allowable only to a very limited extent, would in any way expedite the hearing process.

Indeed, it would inevitably lengthen the hearing itself, for this appears to be the only time a staff member could be subject to cross-examination. Most importantly, it would deprive any party taking a position adverse to the staff of the ability to fully prepare a case. The attachment (at p. 4) states that most "discoverable information" would be available through cross-examination at the hearing. This reflects a basic misunderstanding of the differences of the functions and scope of discovery and of cross-examination.

The attachment states (at p. 4) that the "Staff, however, would produce relevant documents and would respond to telephone and written requests for information wherever practicable." This would not alleviate or mitigate the disadvantages to intervenors inherent in denying them discovery from the staff. First, the above statement is completely gratuitous: there is no provision of the proposed revision which would obligate the staff to even this minimal extent. Second, and especially important because of the staff's usual posture of adversity to intervenors, the staff would have no incentive to cooperate in the informal discovery contemplated by the above-quoted statement since it could never be compelled to do so. Finally, it has not been our experience that the staff is extremely cooperative in informal resolution of discovery disputes with intervenors.

In some circumstances, the staff may be the sole source of information central to a proceeding. For example, if the issue were the adequacy under NEPA of the staff's environmental assessment, there would be no way to discover any information underlying the staff's decision. In such instances the unfairness of the proposed revisions is incontrovertable.

Finally, it is puzzling how deletion of this discovery would speed the regulatory process. There appears to be no documentation -- nor any logical basis -- to support the inference that a significant amount of staff time is now taken by discovery directed to the staff (as opposed to all other discovery) or that the amount of staff time so spent has increased in response to TMI.

Oral Rulings

While there are circumstances where oral rulings on written motions may be preferable and expeditious, the proposed revision to §2.730 is inadvisable. We note that

the description of the change (attachment at p. 5) states that such oral rulings would be permissible "when appropriate", although the rule would not contain that language. We suggest that the revision be clarified to emphasize that there are times when such oral rulings are appropriate as well as times when they are inappropriate.

Motions for Reconsideration

With regard to the proposed changes to §2.751a and 2.752, it should be noted that the mere pendency of a motion for reconsideration does not delay a proceeding. Further, it is unclear how deletion of requests for reconsideration of prehearing orders would save the Licensing Board's time, particularly when compared with the efforts which would be required should the Board be reversed by the Appeal Board for an error which could have been corrected if it had been brought to the Licensing Board's attention.

Powers of the Chair

The proposed change to §2.721 regarding the powers of the Chair of a Licensing Board is ambiguous. New subsection (d)(1) gives the chair "any" power listed in §2.718 whenever the board is not actually in session. However, new subsection (d)(2) enumerates powers of the chair which are different from, and more restrictive than, those set forth in §2.718. Thus, the implication is that the chair's powers are so limited only when the board is not in session. The attachment (at p. 5) states that presently at least two board members participate in "substantive" orders. We are not aware of the meaning attached to the term "substantive" when used by the Commission in this context, and further are unaware of any regulation authorizing this practice. To the extent that the revision would have the affect of enlarging the powers of the chair, it is inadvisable for two reasons. First, it denigrates the role of the technical board members by allowing the chair to rule on all pre-hearing matters, even, for example, the propriety of technical contentions. Second, it would have the effect of isolating the other members from the proceeding until the hearing itself, thereby affecting their familiarity with the issues and reducing their roles to that of a "rubber stamp" of the chair.

Reply by Applicant to Proposed Findings

We believe that the proposed change deleting the applicant's right to file responses to other parties' proposed findings of fact and conclusions of law should be adopted. We would note, however, that this is a deviation from traditional litigation practice of allowing the proponent of an order to have the "last word."

Motions for Summary Disposition

We also agree with the proposed rule change which would allow motions for summary disposition to be filed at any time, for it would allow greater flexibility in the use of such motions. We would question, however, whether the change would result in substantial time savings.

* * *

In sum, it is apparent that prohibiting discovery against the staff would substantially impair the participation of all parties except the applicant and the staff. Other of the proposed changes would result in a degredation of the quality of the decision-making process. With the possible exception of the proposed schedule, which is plainly unrealistic, none of the proposed changes would have the desired effect of speeding adjudication, although several of the changes would be advisable for other reasons.

Please furnish us with copies of all documents pertaining to this matter and notify us of all developments and proceedings in connection with it.

Respectfully submitted,

Robert J. Vollen

Jane M. Whicher

RJV:beg