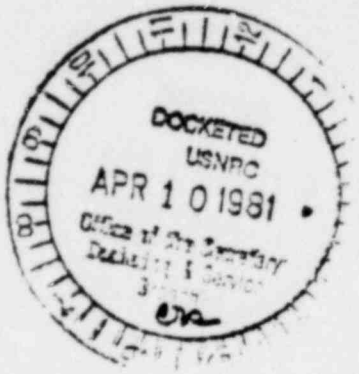

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April 10, 1981

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

ATTN: Docketing and Service Branch

RE: Request for Comments Regarding Rules of Practice for Domestic Licensing Proceedings; Expediting the NRC Hearing Process - 46 Fed. Reg. 17216, March 18, 1981

Dear Sir:

These comments are submitted on behalf of Public Service Company of Oklahoma ("PSO") in response to the Commission's request for comments on proposed revisions to the Rules of Practice For Domestic Licensing Proceedings in 10 C.F.R. Part 2. PSO has an application pending before NRC for the construction of the Black Fox Station (Docket Nos. STN 50-556 and 557) which consists of two 1150 Mwe boiling water reactors to be located near Tulsa, Oklahoma. Although the record in this proceeding has been closed since February 28, 1979, a decision on the application is awaiting the Commission's approval and issuance of the proposed near-term construction permit rule. Over 50 days of environmental and safety hearings have been held in connection with the application, and this extensive experience with NRC's hearing process uniquely qualifies PSO to comment on the proposed amendments to NRC's Rules of Practice.

NRC's proposal sets forth a hearing schedule that would serve as a guideline for NRC's Administrative Judges. This guideline is intended to apply only to the delay-impacted OL cases which are the subject of Congressman Bevil's appropriation hearings; and then only to those cases where the subject matter of the Final Supplemental SER (hereinafter referred to as the "post-TMI SSER") deals solely with post-TMI issues. Therefore, we assume the proposed revisions to 10 C.F.R. Part 2 are intended to improve the hearing process and thereby increase the certainty that the schedule will be met with respect to the delay-impacted OL cases.

4-4-1, pt. 2

The principal procedural change proposed by NRC involves the notion of eliminating discovery against the NRC Staff with the objective of limiting the discovery period to 25 days. The balance of the suggested procedural revisions merely tinker with the hearing process and, although some may be useful, together they will not expedite the hearing process in any significant way. Consequently, NRC's proposal is meaningful only if the changes to the discovery process will in fact expedite the completion of licensing hearings. We submit they will not.

The most troublesome aspect of the discovery issue is NRC's stated intent to afford intervenors the right to obtain discovery from the NRC Staff through cross-examination at evidentiary hearings. Such an exercise only has to be witnessed once to conclude that this type of cross-examination, not normally permitted at evidentiary hearings, degenerates into a time-consuming and aimless fishing expedition that only confuses the hearing record. Moreover, delays well beyond those experienced by a reasonable opportunity for discovery will be incurred when the resourceful cross-examiner uncovers the existence of relevant documents or other information that is not immediately available at trial. In such circumstances, hearing boards would have no choice -- assuming some semblance of administrative due process is maintained -- but to recess and grant a reasonable continuance to allow the pursuit of the newly discovered information. Generally, experience teaches that a reasonable discovery period, applicable to all parties, results in a shorter proceeding with a better developed hearing record. Undue delay attributable to discovery can be avoided through careful supervision by the licensing boards.*

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* It likely will be emphasized in the comments submitted by others that 25 days is insufficient time to conduct meaningful discovery on the post-TMI SSER. We would share this view if discovery against the Staff were possible under NRC's proposal. In the circumstance of litigating the post-TMI issues, discovery serves no useful purpose if the author of the SSER, the primary document to be explored at the hearing, is free of any discovery obligation. Consequently, if discovery against the Staff were prohibited, it would seem to follow that the discovery period should be eliminated completely from the schedule.

The proposal to eliminate discovery against the NRC Staff, aside from not improving the efficiency of the hearing process, also would contravene the rights of the other hearing participants. License applicants as well as intervenors often advocate positions contrary to that of the Staff. Furthermore, licensees in enforcement proceedings are clearly adversaries of the NRC Staff. In all instances, the right of discovery against the NRC Staff is essential to preserve administrative due process. Thus, as long as adjudicatory hearings are required in connection with the issuance and enforcement of licenses, the discovery rights involving the NRC Staff should be maintained as presently provided in 10 C.F.R. § 2.720(h).

There are, of course, a number of means for expediting the hearing process. Reinstating the immediate effectiveness rule and enacting interim operating license authority into law are two such measures. Another is improved management by the NRC. Although it is true that licensing boards have been lax in assuring that hearings proceed expeditiously, they are not solely the cause of the breakdown in the NRC hearing process. Indeed, recent criticism from Congress and others disproportionately faults the licensing boards for this problem. Others must also share the blame.

Improved participation by the NRC Staff would greatly enhance the efficiency of the hearing process. The management of the NRC Staff must be directed to (i) develop technical positions on schedules consistent with those established for the hearings, (ii) comply with schedule commitments for the issuance of SER's and other testimony, and (iii) present qualified and knowledgeable witnesses who can deal with the rigors of cross-examination. In short, the Staff must raise the level of importance it attaches to its participation in the hearing process.

All counsel to an NRC licensing proceeding, including Staff counsel, have a responsibility to assure that adequate and complete cases are presented. However, substantive participation by the Staff's lawyers often appears limited to the prehearing procedural aspects of 10 C.F.R. Part 2. The Staff's lawyers should become involved earlier in the development of the Staff's technical case to enhance the effectiveness of their presentation at the hearings.

The Commission can assist in improving NRC's management of the hearing process by providing strong leadership through the prompt issuance of a Statement of Policy. The Statement should provide for a firm management structure under the continuous supervision of the Commission that is dedicated to the efficient and timely operation of the hearing process. This action would impress all NRC hearing participants that dilatory activities will no longer be tolerated.

Sincerely,

Joseph Gallo

Joseph Gallo
Counsel to Public Service
Company of Oklahoma

JG/pm