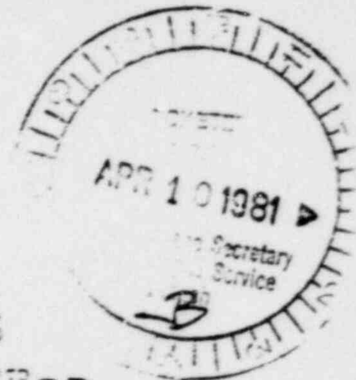

UNITED STATES NUCLEAR REGULATORY COMMISSION

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Upon Solicitation of Comments from Samuel J. Chilk, Secretary of the Commission, March 13, 1981	)	46 Fed. Reg. 17216

DOCKET NUMBER PROPOSED RULE PR - 2 46 FR 17216

<u>COMMENTS OF SENSIBLE MAINE POWER ON PROPOSED RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS; EXPEDITING THE NRC HEARING PROCESS:</u>

In response to solicitation from the United States Nuclear Regulatory Commission, ("the Commission"), promulgated in a Memorandum of March 13, 1981, and published in the Federal Register at 46 F.R. 17216, Sensible Maine Power, ("SMP"), herewith propounds the following comments:

Summary Factual Background of SMP

SMP is a citizens' group comprised of approximately five hundred members located in the State of Maine, and represented by undersigned counsel since September, 1979. SMP is currently an Intervenor in the proceeding 50-309, an application by Maine Yankee Atomic Power Company for an amendment to its operating license to increase its spent fuel storage capacity and to modify its spent fuel storage systems. The State of Maine has recently (March 13, 1981) been accorded the status of participating as an Interested State in that proceeding, and in the event that the State of Maine files Comments in opposition to the proposed amendments, SMP hereby joins in and incorporates the same by reference. SMP also joins in and incorporates by reference another statement already on file with the Commission: "Comments of the Union of Concerned Scientists and the Natural Resources Defense Council on Proposed Rules of

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Practice for Domestic Licensing Proceedings; Expediting the NRC Hearing Process", per Ellyn Weiss, Esquire.

General and Introductory Comments

Insofar as the as the proposed amendments purport to seek greater efficiency in the processing of numerous filings with or applications to the Commission, such proposals are, arguably, to be favored; but insofar as such amendments diminish and contravene certain fundamental and constitutionally protected rights of all parties practicing before the Commission, they are to be avoided.

The "goals and purposes" clause of the solicitation deserves a clear and unmistakeable demonstration. At pages 2-3 the solicitation cites the Three Mile Island Accident as thoroughly disruptive of business-as-usual, and then urges a significantly accelerated schedule for reviewing and evaluating pending and future reactor licenses, operating permits, and the like, to make up for the time lost on the Three Mile Island Accident. Stripped to its essentials, such preliminary pronouncement amounts to this: "Because this regulatory agency has been overburdened by the breakdown of a reactor facility approved by us under existing and more stringent procedures, we must now relax or even abolish those procedures in order to approve additional reactors under revised and less demanding procedures." SMP respectfully submits that the foregoing proposition fails of its own illogic.

Further, the introduction also includes a statement that the nuclear power industry has completed or is likely to complete certain reactors before they are actually approved by the Commission. On such basis the solicitation then urges that the current hearing

process be cut down in order to expedite the review of reactors so completed. Several infirmities stand clear: First, barring extreme or exceptional circumstances, our legal system has never favored an in-process redrafting of procedural law so as to reward unpermitted conduct; here the solicitation urges just such action — that we willy-nilly rewrite a body of procedural law in the interest of aiding the nuclear power industry to gain rapid approval upon the fruits of its unpermitted conduct. Second, it is also implicit in this part of the solicitation that safety, or its antithesis of hazardous conduct, can upon some appropriate standard be rendered into economic or monetary terms. This assumption also bears scrutiny: for more than five hundred years our legal system has recognized and vigorously defended the division between law and equity — based on the fundamental principle that while some injuries can be compensated in money terms, other injuries, whether existing or potential, can be controlled only through the strict regulation of the injury-producing or risk-creating activity itself. SMP urges that this Commission not be swayed by a dollars-for-safety or safety-for-dollars argument; existing procedures for an orderly, constitutionally valid hearing process should not be jettisoned irresponsibly simply because the nuclear power industry has mis-estimated this Commission's work-flow.

Last by way of introduction, and insofar as some of the proposed amendments work a violation, deprivation or denial of constitutionally protected due process rights, it should be recognized that the violation of such rights cannot be, and is not now, measured in dollar terms. By way of example only, 28 USC §1331, the primary jurisdictional statute of the United States District Court system,

was amended to abolish the requirement of any dollar amount in entertaining constitutionally-based claims. The nuclear power industry is arguably about two centuries late in arguing that the constitutionally protected due process rights of parties practicing before this Commission can be traded away on an economic basis.

Comments upon Particular Amendments

The apparent purpose of the amendments to abolish discovery by parties upon the Commission represents a thoroughly unlawful and unprecedented violation of the parties' constitutionally guaranteed rights of and to procedural due process.

The closest case in this jurisdiction[1] on the point of an interested party's constitutionally protected due process rights to discovery upon a federal administrative agency is Ralpho v. Bell, 186 U.S.App.D.C. 368, 569 F.2d 607, on rehrg 186 U.S.App.D.C. 397, 569 F.2d 636 (1977). There plaintiff had presented a claim under the Micronesian Claims Act for the value of his home, destroyed in World War II; in awarding him compensation therefor the Micronesian Claims Commission relied upon a value study of its own as to which the plaintiff had not been accorded prehearing access. In recognizing the applicability of due process protections to an administartive hearing the court stated:

> (Plaintiff) claims, inter alia, that the Commission's putative reliance on evidence to which he had neither access nor opportunity to address violates the Due Process Clause of the Fifth Amendment. * * *(T)hat constitutional provision binds the Commission and (Plaintiff) is entitled to demand its protections. * * * (I)t is settled that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law. Id., 186 U.S.App.D.C. 379-380, 569 F.2d 618-619.

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[1] Such election is made on the basis that any litigation flowing from erroneous action on the part of the Commission will be conducted primarily in this judicial circuit.

Subsequently applying such due process standards to the case at bar and holding in favor of plaintiff, the court stated:[2]

> (Plaintiff's) basic claim . . . is that the value study upon which the Commission ostensibly relied in assessing his damages was not made available in time to enable him to challenge it. An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process. Id., at 389 and 628, respectively. (Footnotes and citations omitted; emphasis added.)

(2) Written orders upon written motions should be preserved. Any variance from this practice should be conditioned upon the existence of extreme or unusual circumstances, and allowed then only if the hearing officer in charge of the proceedings shall make and state for the record specific and detailed findings of fact and conclusions of law, and furnish a copy of the same to all parties within a reasonable period of time.

(3) Objections to, and motions for reconsideration of, prehearing orders, should be maintained. It is a basic, functional truism of our legal system that error can be most easily and effectively corrected at the point closest to its creation. Such prompt means of correction not only advantages parties practicing before the Commission, but also promotes the public interest in such proceedings.

(4) The "Quorum Rule" requiring two board mebers upon "each substantive order" should be kept intact. Such rule serves to ensure that both the technical and the procedural aspects of any particular question will be considered. A "voluntary consultation" is no substitute.

(5) SMP states no position upon the elimination of an applicant's right to reply.

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[2]Accord, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.287 (1970) (Recognizing due process right to government's information on the part of welfare recipients.)

(6) The "45 day rule" should be maintained, or if compromised, then only subject to such conditions as will ensure to an Intervenor or Interested State a sufficient opportunity to secure additional expert assistance, if and as necessary: one means might be to increase the 20-day response or reply time to 30 days; another might be to allow the opposing party some means of investigation into the expertise of the moving party, whether by formal or informal inquiry of experts relied upon by the moving party.

Conclusion

On the foregoing bases, SMP opposes the proposed amendments to the existing rules of practice. Additionally, SMP urges that any changes as may be adopted by the Commission be limited in application to only such filings as have been made with the Commission more than two years prior to any enactment of changes, and to such filings as may be shown necessary to maintain the operation of an existing facility within two years after such date; stated in its opposite, SMP urges that any changes made not apply to any application unless the applicant can and does show that either: (1) A complete and appropriate application has been on file with the Commission for at least the past two years; or (2) Applicant will be forced to suspend ordinary operations within two years unless the proposed amendments be approved. Such "phased grandfathering", if valid, could promote the interests of all parties to proceedings before the Commission.

These "Comments" are not intended by SMP to accord any propriety to the Commission's attempted redrafting of its procedures, and SMP expressly reserves its right to challenge such amendments to NRC practice and procedure as may be made.

Respectfully submitted,

David Santee Miller
Counsel for S. M. P.