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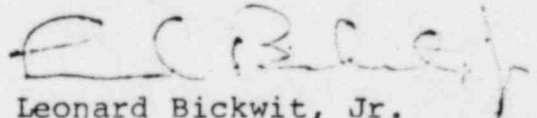
POLICY ISSUE
(Commission Meeting)

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: REVISED POLICY STATEMENT ON THE CONDUCT OF
LICENSING PROCEEDINGS

Discussion: Attached is a revised draft Policy Statement
which I believe reflects the Commissioner views
expressed at the April 22 meeting.


Leonard Bickwit, Jr.
General Counsel

Attachment: Revised Policy
Statement

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SECY NOTE: This paper is identical to the one distributed for discussion at the April 23, 1981, Commission meeting on this subject except that typos have been corrected and the word "also" has been deleted from page 3, paragraph 2, line 8 of the attachment. It is scheduled for discussion at an open Commission meeting on Tuesday, April 28, 1981.

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U.S. NUCLEAR REGULATORY COMMISSION
STATEMENT OF POLICY ON CONDUCT OF LICENSING PROCEEDINGS

I. BACKGROUND

The Commission has reviewed the docket of the Atomic Safety and Licensing Board Panel (ASLBP) and the current status of proceedings before its individual boards. In a series of public meetings, the Commission has examined at length all of the major elements in its licensing procedure. It is clear that there are a number of difficult problems facing the agency as it endeavors to meet its responsibilities in the licensing area. This is especially the case with regard to staff reviews and hearings, where requested, for applications for nuclear power plant operating licenses.

Historically, NRC operating licensing reviews have been completed and the license issued by the time the nuclear plant is ready to operate. Now, for the first time these hearings on a number of power operating license applications may not be completed before construction is completed. This situation is a direct consequence of the Three Mile Island (TMI) accident, which required a reexamination of the entire regulatory structure. After TMI, for a period of over a year and a half, the Commission's attention and resources were focused on plants which were already licensed to operate and on the preparation of an action plan which specified the TMI-related requirements for operating reactors.

Although staff review of pending license applications was delayed during this period, utilities which had received construction permits continued to build the authorized plants. The staff is now expediting its review of the applications, and an unprecedented number of board proceedings are scheduled

for hearing in the next 24 months. At least half of these proceedings concern applications for operating licenses pursuant to the Atomic Energy Act, as amended. These proceedings have the potential to delay operation of qualified power plants. The cost of such delays could reach billions of dollars and is to be avoided whenever measures are available that do not compromise the fundamental Commission commitment to a fair and thorough review of legitimate contentions from interested parties.

The Commission therefore is issuing this policy statement on the need for the balanced and efficient conduct of all phases of the hearing process. The Commission appreciates the many difficulties faced by its boards in conducting these contentious and complex proceedings. By and large, the boards have performed very well. This document is intended to deal with problems not primarily of the boards' own making, though the boards will play an important role in their resolution. Individual adjudicatory boards are encouraged to expedite the hearing process by using those management methods which presently exist in Part 2 of the Commission's Rules and Regulations. The Commission wishes to emphasize though that in expediting the hearings the board should ensure that the hearings are fair, and produce a record which leads to high quality decisions that adequately protect the environment and the public health and safety.

Virtually all of the procedural devices discussed in this Statement are currently being employed by sitting boards to varying degrees. The Commission's reemphasis of the use of such tools is intended to reduce the time for completing licensing proceedings. The guidelines set forth below are not to be considered inclusive, but rather are to be considered illustrative of the actions that can be taken by individual boards.

II. GENERAL GUIDANCE

The Commission's Rules of Practice provide the board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness.

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill its obligations imposed in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve it of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. The boards, for example, could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its

occurrence is an isolated incident or a party of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. At an early stage in the proceeding, a board should make all parties aware of the Commission's policies in this regard.

When the NRC staff is responsible for the delay of a proceeding it should inform the Executive Director for Operations. The Executive Director for Operations will apprise the Commission in writing of significant delays and provide an explanation. This document will be served on all parties to a proceeding and the board.

III. SPECIFIC GUIDANCE

A. Time

The fundamental ingredient in managing licensing proceedings is setting and adhering to reasonable time limits for required actions.

(VG insert)

Requests for extension of time should generally be in writing and should be received by the board well before the time specified expires.

B. Consolidated Intervenors

In accordance with 10 CFR 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 any intervenor.

However, consonant with that condition, single, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument. Where such consolidation has taken place, those functions should not be performed by other intervenors except upon a showing of prejudice to such other intervenors' interest or upon a showing to the satisfaction of the board that the record would otherwise be incomplete.

C. 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.

D. Board Management of Discovery

The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant. The Commission is concerned that abuse of discovery not delay hearings.

Accordingly, the boards should manage and supervise all discovery, including not only the initial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission reinforces the policy of voluntary discovery, and encourages the boards, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery.

Each individual board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone conference calls, and status report conferences on the record. In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

E. Settlement Conference

Licensing boards are encouraged to hold settlement conferences 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 or part of any contention still held valid and important. The settlement conference is not intended to replace the prehearing conferences provided by 10 CFR 2.751a and 2.752.

F. Timely Rulings on Prehearing Matters

The licensing boards should issue timely rulings on all matters. In particular, rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding. Such rulings may eliminate the need to adjudicate one or more subsidiary issues. Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question. In other words, a board should issue timely rulings on questions of fact and law to define the issues in controversy in as specific a manner as is justified. Rulings on procedural matters to regulate the course of the hearing should also be rendered early.

If a significant legal or policy question is presented on which Commission guidance is needed in order to prevent detriment to the public interest or expense, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission. A board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding.

G. Summary Disposition

In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

H. Trial Briefs, Prefiled Testimony Outlines
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. The Commission believes that cross-examination plans, which are to be submitted to the board alone, would be of benefit in most proceedings. Each board must decide which device or devices would be most fruitful in managing or expediting its proceeding by, limiting unnecessary direct oral testimony and cross-examination.

I. 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 opposing witness' answer to a question. Appendix A to 10 CFR Part 2 explicitly recognizes that a board may find it helpful to take expert testimony from witnesses on a round-table basis after the receipt in evidence of prepared testimony.

J. Sua Sponte Raising of Issues by Boards

[To be prepared following Commission discussion.]

K. Filing of Proposed Findings of Fact and Conclusions of Law

Parties should be expected to file proposed findings of fact and conclusions of law on issues which they have raised. The boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law.

L. Initial Decisions

Licensing proceedings vary greatly in the difficulty and complexity of issues to be decided, the number of such issues, and the size of the record compiled. These factors bear on the length of time it will take the boards to issue initial decisions. The Commission expects that decisions not only will continue to be fair and thorough, but also that decisions will issue as soon as practicable after the submission of proposed findings of fact and conclusions of law.

Accordingly, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel should schedule all board assignments so that after the record has been completed individual Administrative Judges are free to write initial decisions on those applications where construction has been completed. Issuance of such decisions should take precedence over other responsibilities.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this ____ day of _____, 1981.