UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

APR 27 1981

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne

FROM: William J. Dircks
Executive Director for Operations

SUBJECT: PROPOSED CHANGES TO 10 CFR Part 2 -- RECOMMENDATION WITH REGARD TO ELIMINATION OF DISCOVERY AGAINST THE NRC STAFF

I have reviewed the General Counsel's April 26, 1981 Memorandum entitled "Proposed Changes to 10 CFR Part 2 -- Analysis of Public Comments and Recommendations of NRC's Legal Offices and Licensing Panels," and agree with the positions taken with respect to all items except for the neutral position taken with regard to elimination of formal discovery against the NRC staff. I believe that the discussion of the discovery question in the General Counsel's memorandum contains an evenhanded presentation of the advantages and disadvantages of adopting the approach proposed in the March 18, 1981 Notice of Proposed Rulemaking, and a fair summary of the public comment received on the proposal. I do not believe, however, that the memorandum forcefully reflects the importance attached by the staff to its position in this matter. In the brief comments which follow, I endeavor to highlight the staff arguments and reiterate my strong recommendation that the original proposal to eliminate formal discovery against the NRC staff be adopted without change.

The Commission had a single objective in mind when it formulated and sought comment upon a series of changes to its rules of practice in 10 CFR Part 2 -- the facilitation of the expedited conduct of adjudicatory proceedings on license applications for nuclear power reactors. The target was a schedule providing for an elapsed time of eight months from issuance of the staff's SSER until issuance of the Licensing Board's decision. The only way in which that or any other schedule which significantly improves upon present practice can be achieved is by the elimination of built-in delays which exist under the current rules. Of all the features of the proposed rule changes, only the elimination of formal discovery against the staff provides for schedule reductions measured in months -- as much as four months in complex cases. The minimum savings, assuming one round of contested interrogatories, is 103 days under existing rules. As set forth in our original comments, and summarized below, the costs of achieving this benefit are truly minimal (notwithstanding their magnification out of all proportion in many of the public comments received).

Contact:
H. K. Shapar, OELD
492-7308

None of the alternatives alluded to in the General Counsel's memorandum provide for comparable time savings. We are equally unable to suggest an alternative to elimination of formal discovery against the staff which has the potential for such significant time savings. Failure to adopt the original proposal will result in failure to achieve any measurable progress toward the objective of shortening the adjudicatory process. (It should be emphasized that the time savings are more than simply the months saved on the schedule of a given proceeding; staff resources which would otherwise be spent responding to formal discovery in one case can be devoted to moving forward with other project reviews.)

The very vocal opposition to the proposal appears to stem from the (untrue) premise that details of the staff case are made known to intervenors and others only through formal discovery. In point of fact, staff reponses to formal discovery are generally repetitious of information the staff has already made public. The full dimensions of the staff position can be, and are, made known in advance of the actual hearing through a number of mechanisms: (1) the SER, which documents the staff's position, is available to parties well in advance of the hearing, (2) the staff makes material available and answers questions on an informal basis (this would continue under the proposed rule), (3) the Freedom of Information Act (with response time requirements independent of the hearing schedule) is currently used extensively in lieu of formal discovery to obtain staff documents, (4) the Commission's Policy on Differing Professional Opinion routinely surfaces disagreements among technical members of the staff, (5) the board notification policy requires the staff to inform the presiding board and participating parties of relevant information, (6) staff testimony is prefiled in advance of the hearing, and (7) virtually all of the documentation supporting the staff's case is available in the public document room and in LPDRs. In light of these features of NRC practice, it is apparent that formal discovery against the staff is not needed to achieve the traditional objective of discovery -- prevention of surprise at the hearing stage.

In sum, I believe that the benefits of discovery against the staff have been vastly overstated in the comments, given the massive disgorgement of the staff's position in advance of hearing even without discovery, and that the

costs of eliminating that discovery are negligible. The benefits, in terms of schedule improvement, however, are very substantial. I urge the Commission to adopt as a final rule the proposed elimination of formal discovery against the staff.

William J. Dircks
Executive Director for Operations

cc: OPE
OGC
Chairman, ASLAP
Chairman, ASLBP
SECY ✓