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

CHAIRMAN

May 18, 1981

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Attached are the Commissioners' responses to written questions submitted by your Committee in connection with hearings on the Commission's licensing process, dated April 9, 1981.

If you have any further questions about these issues, please do not hesitate to contact me.

Sincerely,

Joseph M. Hendrie

Enclosure: Commissioners' responses
to written questions

cc: Rep. Manuel Lujan

Function of Licensing Hearing

QUESTION 1. Do you believe that holding a public hearing on licensing promotes public confidence in the NRC to protect the public health and safety?

ANSWER OF CHAIRMAN HENDRIE.

I think that holding public hearings on license applications does, to some degree, promote public confidence in the NRC's regulatory role in protecting the public health and safety. However, the hearing process as now constituted and carried out is more formal and encumbered by judicial procedures and legal maneuvering than is necessary to provide that confidence, in my view. I think more informal proceedings in which the issues raised by members of the public could be addressed more directly and decided more rapidly would serve as well as the present hearings to assure the public of attention to their concerns and would be much more efficient.

ANSWER OF COMMISSIONER GILINSKY AND COMMISSIONER BRADFORD.

Probably no aspect of the power reactor licensing process contributes more to public confidence than the willingness of the government to have its conclusions challenged in public hearings by private citizens.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 2. What is your opinion of the effectiveness of a hearing as a forum for resolving disputes concerning technical issues? Does the ACRS review contribute to a resolution?

ANSWER.

Licensing hearings do force a decision on disputed technical issues. Opinion is divided as to whether the process results in improved technical positions or safer plants. A review of 25 disputed cases by our General Counsel indicates that very few cases result in major changes in the outcome. In some cases the hearing raised issues which would not otherwise have been heard, but were resolved without change. The hearings did result in many changes to staff rationale for technical positions, resulting in better explanations of technical positions. Furthermore, the knowledge that licensing positions must be defended in hearings in some instances leads to improved staff review.

To the extent that ACRS review clarifies staff positions, and provides an independent assessment of technical issues, the review does aid resolution.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 3. Do you believe that the right of potential neighbors of a nuclear reactor to participate in the licensing hearing differs from the right of other affected persons to participate?

ANSWER.

No. If both have an interest that may be affected, both may participate.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

Role of Licensing Board

QUESTION 1. Do you see the licensing board as an administrative trial court?

ANSWER.

Yes, in the sense that a licensing board presides over an on-the-record adjudication which resembles in many respects the proceedings conducted by federal trial courts.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 2. Does the role of the licensing board differ, depending upon whether the licensing is contested or uncontested?

ANSWER.

A licensing board would have no role in an uncontested operating license, amendment, materials license, or enforcement proceeding. A licensing board would have a role in a mandatory construction permit hearing. In such a hearing the board is required to determine, without conducting a de novo technical review, whether the record of the proceeding is adequate to support affirmative findings on all the principal issues required to be addressed by the Atomic Energy Act and NEPA as a prerequisite to construction permit issuance. The details on these findings are specified in 10 CFR 2.104(b).

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 3. If you were to limit the boards' authority to raise issues sua sponte, how would you distinguish between issues required to be resolved as a matter of law and those the Board feels should be resolved?

ANSWER.

This would be a difficult distinction to make. Most serious technical issues would arguably give rise to issues concerning whether ultimate safety findings required by the Act could be made.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 4. Does the technical review performed by the ACRS serve a valuable function?

ANSWER.

Yes, we believe the independent technical review performed by the ACRS does serve a valuable function. It serves as a preliminary test of staff positions and provides an additional review of potential issues, particularly generic issues. However, there is a question as to whether the ACRS review should be mandatory for all reactor licensing cases. There are some cases where ACRS review may not be an efficient use of resources, as in the review of the design of a second unit on a site, which is identical in design to a previously reviewed first plant.

NRC Proposals

QUESTION 1: With respect to the proposal on issuing an interim license for fuel loading and low-power testing, what is the earliest stage in the hearing process where an application for such a license can be considered?

ANSWER.

The earliest stage in the hearing process when an application for such a license could be considered would be sometime during the prehearing process, just after completion of staff's safety and environmental reviews associated with fuel loading and low-power operation and testing. There is no requirement in the draft legislation that the hearing process have reached any particular stage when the application would be considered.

QUESTION 2. What is meant in your proposal to Congress by the statement that all other applicable laws must be complied with? Would this requirement be satisfied by compliance with other applicable laws after the interim license is granted?

ANSWER.

Our intention was that applicable standards and requirements other than hearing requirements must be complied with. Thus, for example, the Commission must be able to find that there has been an adequate environmental review under NEPA and that issuance of a license would not present any undue risk to public health and safety. It was not the Commission's intention that compliance with other applicable laws could be achieved after issuance of the interim license.

QUESTION 3. Do you believe this proposal will shorten the time period required for full power licensing despite the provision for notice, opportunity to comment, and judicial review?

ANSWER.

No, interim licensing would not shorten full power licensing because the full power hearing would be completed in the usual fashion. However, interim licensing should shorten the time required for the utility to reach full power operation by allowing certain low power testing during the formal licensing proceeding rather than after completion of the licensing process. Thus, the time during which a plant would stand idle would be reduced.

QUESTION 4. Directing your attention to the proposal to legislatively overrule the Sholly decision, do you anticipate publishing notice of intent to issue an amendment without a hearing? Will it be accompanied by a statement of reasons explaining the decision that no significant hazards consideration exists?

ANSWER.

It has been the NRC's practice to publish notice in the Federal Register of the effective amendment which describes the change in brief terms, the staff's conclusions about the safety and environmental significance of the application, and how basic information on the amendment may be acquired. That notice would provide the basic information to the public seeking a hearing after the amendment becomes effective. Whether some other notice would be necessary if the Sholly decision goes into effect is still under consideration.

Panel #1 - NRC

QUESTION 1. What do the individual Commissioners feel is the legitimate function of a nuclear reactor licensing hearing, aside from the resolution of disputes between the parties?

ANSWER.

While the adjudication of disputed issues is the primary purpose of licensing hearings, they also serve as a forum for public participation in the licensing process, and should provide an independent judgment of the adequacy of measures to protect the public health and safety.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

ANSWER OF COMMISSIONER BRADFORD.

The principal function of nuclear reactor licensing hearings is the resolution of disputes between the parties. NRC's hearings must provide an opportunity for the safety and environmental concerns of affected citizens to be raised and brought to a sensible conclusion in a manner that would inspire the confidence of reasonably informed and unbiased laymen. To the extent they perform this function well, licensing hearings will provide a check on the technical judgments of the staff and the applicant thereby enhancing the protection of the public's health and safety.

QUESTION 2. Do hearings serve the purpose of protecting environmental values and public health and safety interests by inviting public scrutiny and comment?

ANSWER.

Yes. Furthermore, it is basic human nature to do a better job when one knows that one's efforts will be scrutinized in public.

ANSWER OF COMMISSIONER AHEARNE.

In response to this question, Commissioner Ahearne would refer the Committee to his untitled memorandum on the hearing process, dated April 1, 1981 (attached).

QUESTION 3. What is the extent of sua sponte activity currently exercised by the licensing boards? Does this activity depend upon whether the licensing is contested or uncontested?

ANSWER.

In uncontested construction permit cases the licensing boards' authority to raise issues is not limited. Indeed, in an uncontested CP case the only issues are those raised by the licensing board. In a contested operating license case the rules provide that "matters not put into controversy by the parties will be raised by the licensing board only where it determines that a serious safety, environmental or common defense and security matter exists."

QUESTION 4. What do you feel is the proper role for NRC staff in the early stages of the licensing process, when issues are being clarified and contentions formulated?

ANSWER.

The NRC staff provides an independent view to the licensing board concerning a wide range of matters from the legal considerations applicable to issues in the proceeding to the technical significance of contentions proposed for litigation. In addition, licensing boards rely on the NRC staff to serve as a source of information to applicants and intervenors alike concerning NRC procedures and requirements.

NRC staff counsel is expected to meet informally from time to time with the parties, including applicants, to discuss possible settlements, to refine contentions, to establish schedules, and to otherwise attempt to reduce unnecessary controversy and litigation where possible. During the staff's technical review, participants are routinely provided the opportunity to observe meetings between the staff and applicants to see the technical review process. All participants are provided technical documents and NRC correspondence applicable to the proceeding so that their understanding of controverted issues is as complete as possible. Finally, NRC staff is responsible for assuring that the Commission's rules and policies applicable to the issues in the proceeding are clearly set forth.

John F. Ahearne
April 1, 1981

Purpose of NRC Hearings

In my limited experience, I have seen our hearings described or justified as having any or all of the following purposes:

1. To satisfy the requirements of the Atomic Energy Act and of the Administrative Procedure Act.

2. To contribute significantly to insuring adequate protection of the public health and safety.

3. To build public confidence in and understanding of NRC licensing.

Assuming these purposes, my estimate of their being satisfied is as follows:

1. Yes -- by design, i.e., the hearing process is designed to satisfy these statutory requirements.

2. There are several arguments offered to support this view:

(a) Plants are safer because of items identified in hearings and subsequently corrected. But: this may be true, but I know of no case.

(b) Contested plants are safer because the NRC staff works more thoroughly when they know they will be tested in a hearing. But: are uncontested plants less safe? Are the 46 1/ plants that received operating licenses without a hearing less safe than the 25 1/ plants that went through hearings?

(c) All plants are safer because staff review is toughened by exposure to hearings, causing the staff to articulate their assumptions and their logic, which assures sound reasoning. But: these benefits, even if true, are unmeasurable, and this is a very costly and indirect approach to improving staff practice. Improving staff practice requires clear guidance and good management.

(d) The staff and applicant are not sole possessors of truth. The hearing process allows others to raise significant issues and to challenge the staff and applicant. The Board will discover the truth. But: aside from the question of significance of the issues, the current process is not well geared to accomplish this objective. Standing is essentially a residence requirement, not an expertise test. Our practices on contentions

---

1/ Preliminary data.

and discovery seem to invite participants to come and look for issues rather than requiring identified concerns be a prerequisite for participation.

The adversary court model presumes opposing sides which have a direct personal interest. The courts do not recognize the dispute when a party represents a public as opposed to a private interest (i.e., Sierra Club v. Morton). But the NRC hearing process supposedly focuses on legitimate issues rather than personal interest, i.e., on public rather than private interests. For a person with an issue to reside near the plant may be entirely fortuitous.

Unless the objective is to delay, the parties should be looking for a mechanism which assures their issues will be given serious attention and provides a response which describes disposition of the issues and makes clear the basis for that resolution. There should be a better alternative than our current process, which exhausts all parties (e.g., Seabrook seismic pleading).

3. If this is the purpose it obviously is not working and may not be authorized (nor funds appropriated).

The process could be defended as educating the public, particularly those who live near a plant: (1) if you have a plant in your backyard, you are entitled to understand it; (2) the hearing provides a mechanism to get the attention of the NRC and the applicant to get answers; (3) the bureaucracy is often unresponsive. But: this is a very costly way to achieve objectives that could be met by more informal public meetings to air issues and educate the local public.

Other Problems

The process as it now exists is unable to distinguish between trivial and significant issues. This is due in large part to (a) a structure which rarely rewards and often punishes attempts to control a proceeding and (b) a failure to provide clear, consistent, timely, and rational guidelines which can be applied by a Board with confidence in an individual proceeding. The first is inherent in the nature of the appeal process. Since interlocutory appeals are discouraged, review almost always takes place from the perspective of a completed hearing. Complaints that contentions, discovery, or testimony were improperly excluded can be effectively raised at this stage. The affected party argues that it was prejudiced in that "if only X were included, the decision would be different." Complaints that too much was included will be academic -- the prejudice lies in the delay which already will have occurred. Licensing Board members are inclined to be "conservative" in allowing issues to enter the hearing. Errors in excluding items might lead to remand, while errors in including items seem to have little consequence.

The second aspect flows from the Commission collegial decision-making process. Collegial decisions are the result of compromise. A final Commission document is the result of a slow process of coordinating and negotiating different views. Unless the Commission devotes great effort, the product will be imprecise.

Proposed Changes

If hearings are not necessary to assure public health and safety, then fundamental reform is needed. The current process has high costs. If there are few benefits, we should look for a more efficient, effective alternative. It is realistic to expect we can provide significant improvements in the process without radical change to the framework. However, any approach which begins and ends by establishing an envelope schedule or by setting time limits for individual pieces is largely a stab in the dark. The logical approach is to (1) understand the major components of the process, (2) identify at least in qualitative terms the major problems, and (3) then address those problems. Recognizing this is a complex process, we must be prepared to make decisions with imperfect understanding.

A significant amount can be accomplished even without radical change to the current hearing process. Although I agree with the Chairman of the Licensing Board Panel that Board members must be given responsibility and authority to make judgments for individual proceedings, the Commission has the responsibility for setting the general rules.

In light of these considerations I propose that the Commission take the following actions:

-- Support use by the Boards of current authority to control proceedings.

-- Raise the threshold for admitting contentions.

-- Clarify responsibility of the Boards.

  - o Modify or eliminate sua sponte authority
  - o Strengthen deference given to judgment of a Board in an individual case
  - o Support sanctions

A. Emphasize current authority of the Boards. We should issue a policy statement which gives strong support for the Boards to use existing authority to control proceedings. The primary utility would be to stem

the trend of the past few years. A policy statement would have a positive effect because we would clarify our expectations of the Boards. We also must be prepared to support Boards when they follow our guidance.

The statement proposed in the March 5th Cotter memorandum is good. Use of existing authority by Boards could significantly shorten and focus proceedings.

B. Raise contention threshold. This very important step is relatively simple, feasible, could be implemented quickly, and directly addresses the failure to distinguish between trivial and significant issues.

We must develop better mechanisms for selecting real issues. Regardless of whether the Allens Creek decision was correct or not (i.e., whether it merely continued a body of practice which originated in 1973 or constituted a departure from past practice), this issue needs to be addressed. (Summary disposition is not a reasonable substitute for adequate screening of contentions. Summary disposition motions require a disproportionate amount of resources and accelerated schedules will make them virtually impractical.)

OGC should work with the various Licensing Board members who expressed concerns in connection with the Allens Creek decision. OGC should also specifically consider Costle v. Pacific Legal Foundation (63 L Ed 2d 329). That decision in combination with Vermont Yankee should be analyzed to help formulate an appropriate, higher threshold.

C. Clarify responsibility of Boards. Is the primary responsibility of a Licensing Board to resolve disputes presented by the parties or to perform an independent technical review? I believe it to be the first but perceive an increasing shift towards the second. I would narrow and strengthen the focus of the Boards on contested issues by the following:

1. Modify or eliminate sua sponte role. Under the current rule a Board is to raise an issue on its own in an OL proceeding when it determines "that a serious safety, environmental, or common defense and security matter exists." The "serious" threshold has been lowered. Boards have read Commission and Appeal Board decisions over the last few years as defining a broader responsibility for them, which increases the pressure to build an all inclusive record. We could take action to counteract the recent expansion of the sua sponte role (e.g., see attached excerpt from my February 23, 1981 memorandum) and reinforce the "serious" threshold.

If uncontested plants are safe enough, only admitted contentions should be debated. I would eliminate the sua sponte role. The hearing

should examine only contested issues, i.e., the ones that make the case different from uncontested cases. The threshold should be high. Public confidence would then be based on real issues being debated.

If there is no support for deleting the sua sponte role, we should restructure the process by which these issues are raised. In particular, a Board should certify to the Commission a question it believes should be raised before requiring parties to address it in a hearing. This would serve to emphasize the unusual nature of such inquiries.

At the very least we need to reemphasize the boundaries which were established in the original articulation of the sua sponte rule:

> "The fact that the Boards may inquire into matters that concern them should in no way be construed as a license to conduct fishing expeditions. As a general rule, Boards are neither required nor expected to look for new issues. The power to do so should be exercised sparingly and utilized only in extraordinary circumstances where a Board concludes that a serious safety or environmental issue remains. Normally there is a presumption that the parties themselves have properly shaped the issues, particularly because the hearing follows comprehensive reviews by the regulatory staff and the Advisory Committee on Reactor Safeguards."
> Consolidated Edison Co. (Indian Point Unit 3), CLI-74-28, 8 AEC 7, 9 (1974).

2. Strengthen deference given to a Board's judgment in an individual case. No Board is going to aggressively manage a process if it is concerned that it will be second guessed at a later date. Given guidelines, such as those in the Cotter March 5th memorandum, a Board's judgment should be given great deference. Application of general principles to specific cases will usually turn on the details of the circumstances. The Board is most familiar with those details and has the advantage of personally participating in the ongoing proceedings. A paper record is no substitute for actual presence.

This does not mean we should not follow closely individual cases. I will support efforts to develop better ways to monitor the hearing process.

3. Give sanctions real content. Although authority clearly exists to sanction parties who do not meet their obligations, as a practical matter a Board cannot make a credible threat of sanctions. For example, a Board has no control over the NRC staff. Obviously, the staff has a number of competing priorities. Although in some cases its hearing work should slip, the staff should be prepared to justify those slips.

We should expand the concept suggested by the Appeal Board in OPS, i.e., communication by a Board when the staff does not meet its hearing responsibilities. The EDO should be told of each scheduled commitment by the staff in a proceeding and of any failure to meet such a commitment.

The applicant already has an incentive, in that delay can be very costly. However, if the applicant does not meet deadlines, it should not be heard to complain about the ultimate delay in the process. We should document contributions to delay by the applicant.

With respect to other parties, the penalties described by Cotter should be used. Focusing the hearing on more important issues will help avoid dissipation of intervenor resources as well as staff resources. In addition, clarifying the responsibility of Boards to pursue issues on their own will help make the threat of throwing out a contention more realistic. It is not very effective to strike a contention and then adopt it as a Board question (which has happened).

D. Interim Licensing Legislation. Interim licensing legislation is the wrong solution. The licensing impact problems are due to (1) TMI having deflected staff resources and (2) an inefficient process. Going for interim licensing authority neglects the first and accepts the second. It significantly undercuts public credibility, introduces the least efficient part of the licensing process (the Commission) directly into our ongoing proceeding, but, worst of all, accepts all the problems with the current system. If the majority concludes they are unwilling or unable to address making substantive changes to the process, or that such changes would take too long to affect the near term problems, I would not oppose a legislative proposal for low power interim licensing.

Conclusions

Although I question whether the adjudicatory format is appropriate for the resolution of technical issues involving a large degree of professional judgment, I recognize that a fundamental change in the process will not occur without extended debate. We can significantly improve the process without radical change to the framework. The participants in the process are entitled to guidance, and it is the Commission's responsibility to provide it. A pronouncement that "we want the hearing process shortened -- go and do good" is not enough. It fails to address fundamental questions. By not addressing the purposes of the Hearings and the details of the process, we can neither estimate whether the schedule will really be shortened, nor the costs of shortening.

EXCERPT FROM FEBRUARY 23, 1981 MEMORANDUM TO THE COMMISSIONERS FROM MR. AHEARNE, SUBJECT: HEARING ISSUES REQUIRING COMMISSION ATTENTION

. . . UNRESOLVED SAFETY ISSUES

7. The Commission should clarify the Licensing Boards' responsibilities in OL and OL amendment proceedings concerning unresolved safety issues, to make it clear that litigation and findings are required in this area only if a Board determines that a "serious safety environmental or common defense and security matter exist." See 10 CFR 2.760a.

Discussion

I did not object to the Appeal Board decisions in Monticello and North Anna because I expected they would be interpreted as simply cautioning boards to be particularly sensitive about possible issues relating to unresolved safety issues. In other words, resolution of unresolved safety issues inherently is more likely to contain a serious issue. I never thought there was danger that they would be interpreted as an independent mandate to consider those issues since that would be contrary to Section 2.760a. However, apparently the Boards have not seen it my way.

For example, the September Zimmer decision contains the statement (p. 3): "Recent Appeal Board decisions have also re-emphasized the obligation of Licensing Boards in operating license proceedings to make findings concerning the resolution of unresolved generic issues applicable to the particular reactor, whether or not the issues are the subject of contentions." In fact, one Board seemed to find such a responsibility even in an amendment proceeding (see the ASLB decision issued January 26, 1981 in the Dresden spent fuel pool proceeding). That Board sua sponte ordered: "Based on a review and analysis of the various generic unresolved safety issues under continuing study, what relevance is there, if any, to the proposed spent fuel pool modification? Further, what is the potential health and safety implication of any relevant issues remaining unresolved?"

To avoid further expansion of the already unwieldy hearing process, I recommend we clarify this matter. . . .