

May 14, 1981



SECY-81-304

RULEMAKING ISSUE (Commission Meeting)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: PROPOSED RULE CHANGE ON ADJUDICATORY BOARDS' AUTHORITY TO RAISE ISSUES SUA SPONTE

Purpose: To provide the Commission with a draft Federal Register notice announcing an immediately effective rule change that would direct Licensing and Appeal Boards to notify the Commission when raising issues sua sponte in operating license proceedings.

Discussion: At the Commission meeting of April 23, 1981, on revised licensing procedures, the Commissioners discussed possible changes in the rules governing the boards' authority to raise issues sua sponte in operating license proceedings. One option which was considered would retain existing standards, but would require a Licensing or Appeal Board wishing to raise an issue sua sponte to give notice to the Commission. If the Commission took no action to forestall the Board within a given period of time, the Board could then consider the issue.

Such a course of action would require changes in several of the Commission's rules. These changes, being purely procedural, could be made immediately effective. Attached is a draft Federal Register notice which is designed to aid in further discussion of this matter. It provides that, prior to taking up an issue sua sponte, the Licensing or Appeal Board will certify the issue to the Commission, which will have fifteen days in which to act on the certification if it so chooses.

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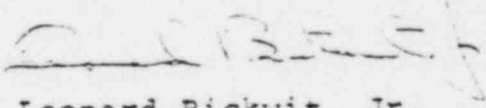
Failure to act within that time would free the Board to consider the issue in question.

Although the Commission in its discussion did not address the subject of OL amendment and CP amendment proceedings, we see no reason, from the standpoint of law or policy, why the approach embodied in the proposed rule should not also be applied to OL amendment and CP amendment proceedings. We therefore recommend that the Commission consider extending the reach of the proposed rule change to amendment proceedings as well.

Recommendation:

Use the attached Draft Federal Register Notice as a basis for further discussion of the issue of sua sponte powers.

OELD concurs in this recommendation.



Leonard Bickwit, Jr.
General Counsel

Attachment:

Draft Federal Register Notice

Distribution:

Commissioners
Commission Staff Offices
EDO

Title 10 -- Energy

CHAPTER 1 -- NUCLEAR REGULATORY COMMISSION

PART 2 -- RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

Review of Uncontested Matters by Licensing Boards During Operating License Proceedings

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its Rules of Practice to provide that during an operating license proceeding, when an Atomic Safety and Licensing Board or an Atomic Safety and Licensing Appeal Board determines that a matter not contested by the parties should be examined by the Board, it shall, prior to considering such an issue, certify the issue to the Commission, which will have fifteen days from the date of the certification in which to direct the Board, if it so chooses, to refrain from considering the issue in question. If fifteen days elapse without a Commission directive instructing the Board not to consider the issue in question, the Board shall be at liberty to consider the issue. The amended rule gives the Commission an opportunity to prevent the delays and resource costs associated with adjudicatory consideration of issues which the Commission determines not to require examination in the context of an adjudicatory hearing.

EFFECTIVE DATE:

FOR FURTHER INFORMATION CONTACT: Martin G. Malsch, Deputy General Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Phone: 202-634-1465.

SUPPLEMENTARY INFORMATION: The Commission's rules governing review of uncontested matters in operating license proceedings are: 10 CFR 2.760a, 10 CFR 2.104(c), 10 CFR Part 2, Appendix A, Sec. VIII(b)[Licensing Boards], 10 CFR 2.785(b)(2), and 10 CFR Part 2, Appendix A, Sec. IX(a) [Appeal Board]. In general, these rules provide that in operating license proceedings, adjudicatory boards may determine that a serious safety, environmental, or common defense and security issue is among the issues to be considered in the proceeding, notwithstanding the fact that it has not been raised by the parties. The Commission, conscious of the problem of delay in licensing proceedings and desirous that the boards address themselves sua sponte only to issues of substantial significance, is changing its rules to provide that before taking up an issue sua sponte, boards will first certify the issue in question to the Commission. The Commission will then have fifteen days in which, should it so choose, it may direct the Board not to consider the issue in question in the adjudication.

The specific rule changes are stated below.

The Rules of Practice, 10 CFR Part 2, are amended as follows:

1. 10 CFR 2.760a is revised to read:

§2.760a Initial decision in contested proceedings for facility operating licenses.

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by

the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental or common defense and security issue exists, and where the presiding officer has first certified the issue in question to the Commission and fifteen (15) days have elapsed without the issuance by the Commission of a directive stating that the issue shall not be considered in the adjudication. Depending on the resolution of these matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

2. §2.104 Notice of hearing.

* * * * *

(c) In the case of an application for an operating license in which a hearing will be held, the notice of hearing will, except as provided in paragraph (d) of this section and unless the Commission determines otherwise, state, in implementation of paragraph (a)(3) of this section, that the presiding officer will consider any matters in controversy among the parties and may, where he or she determines that a serious safety, environmental, or common defense and security matter has not been raised by the parties, and where that issue has been certified to the Commission by the presiding officer and fifteen (15) days have elapsed without the issuance by the Commission of a directive stating that the issue shall not be considered in the adjudication, consider such other matter within the purview of:

* * * * *

3. 10 CFR Part 2 Appendix A, Sec. VIII(b) is amended to read (in relevant part):

VIII. Procedures Applicable to Operating License Proceedings

* * * * *

(b) In an operating license proceeding the board will determine the matters in controversy among the parties, and where the board determines that a serious safety, environmental, or common defense and security matter was not raised by the parties, the board will determine such matter as being among the issues to be decided, but only after it has first certified that issue to the Commission and fifteen (15) days have elapsed without the issuance by the Commission of a directive stating that the issue shall not be considered in the adjudication. The issues to be considered in the hearing will be specified in the notice of hearing issued by the Commission, or in a prehearing conference order issued by the board.

4. 10 CFR 2.785(b)(2) is revised to read:

§2.785 Functions of Atomic Safety and Licensing Appeal Boards.

* * * * *

(b) * * *

(2) In a proceeding on an application for an operating licensing where the Atomic Safety and Licensing Appeal Board determines that a serious safety, environmental, or common defense and security matter exists that has not been raised by the parties, it may give appropriate consideration to that matter, provided that, prior to considering that issue, it first certifies the issue in question to the Commission, and fifteen (15) days

have elapsed without the issuance by the Commission of a directive stating that the issue shall not be considered by the Board.

5. The fourth sentence of 10 CFR Part 2, Appendix A, IX(a) is amended to read:

IX. Licensing Proceedings Subject to Appellate Jurisdiction of Atomic Safety and Licensing Appeal Boards.

(a) * * * In a proceeding on an application for an operating license, if the Atomic Safety and Licensing Appeal Board determines that a serious safety, environmental, or common defense and security matter has not been raised by the parties, it shall certify the issue to the Commission, and if fifteen (15) days elapse without the issuance by the Commission of a directive stating that the issue shall not be considered by the Board, then the Board shall have the authority to give appropriate consideration to that matter.

[Sec. 161(p), Pub. L. 83-703, 68 Stat. 948, 42 U.S.C. 2201(p), sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413, 42 U.S.C. 5841]

Dated at Washington, D.C. this ____ day of _____, 1981.

For the Nuclear Regulatory Commission

SAMUEL J. CHILK
Secretary of the Commission