UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

May 21, 1981

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne

FROM: B. Paul Cotter, Jr. BPC
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: PROPOSED SUA SPONTE RULE (SECY-81-304)

I. INTRODUCTION

While recognizing that the proposed rule is within the Commission's authority to establish in delineating the Boards' jurisdiction, the Licensing Panel strongly opposes the rule as framed, and offers an alternative, if deemed necessary. As written, the proposed rule is objectionable on the following grounds:

1. It represents an extraordinary derogation of any presiding officer's inherent authority. Cf. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965);
2. It partially muzzles the one consistent source of independent expertise on health, safety, and the environment in an adjudicatory system that otherwise treats such questions randomly (i.e., hears only those questions put in controversy by the parties);

3. It could delay the process by:
   a. requiring 15 days delay when Board questions arise close to hearing;
   b. requiring 15 days delay when Board questions arise during hearings;
   c. requiring 15 days delay when a party asserts that Board examination on an admitted contention during the hearing is actually a sua sponte question; and
   d. requiring unquantifiable delay for the Commission to resolve questions that a Board might note in an Initial Decision as one the Board considered serious but was forestalled from pursuing.
4. It could reduce the historical cooperativeness of applicants that have responded fully and promptly to past Board questions and taken action to correct or amend Board identified problems without a hearing.

If sua sponte restriction is ineluctable, then the Panel would advocate that the proposed rule apply only to generic rather than site and plant specific issues. At the very least, some guidance should be furnished to the Boards and the parties to avoid delay under 3.c. above.

II. BASES FOR OPPOSITION

The Commission codified sua sponte authority six years ago at 10 C.F.R. §2.760a after stressing in Consolidated Edison Co. of New York (Indian Point Unit 3), 8 AEC 7, 8 (1974) that

> A Licensing Board, typically comprised of two technical experts and a lawyer, is this agency's primary fact-finding tribunal in the hearing process. These expert tribunals are entrusted with critical tasks in the licensing process. .... To tie a Board's hands, when it sees an issue that needs to be explored, would be utterly inconsistent with its stature and responsibility.

In short a Licensing Board's responsibility "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it ... ." Cleveland Electric Illuminating Co. (Perry Plant, Units 1 and 2), 6 NRC 741, 752 (1977) quoting from the Scenic Hudson case, supra.

The Boards have never viewed sua sponte authority as a license to conduct "fishing expeditions." The authority has been used in only 12 cases in six years.

Thus, no showing has been made of the need for the proposed rule in contrast to the statutory history, purpose and actions of Atomic Safety and

Licensing Boards over the last 20 years. No plant has ever been delayed by a sua sponte question, and the head of NRR has said it is not a problem.

Conversely, the system provides that construction permit licenses are issued on the basis of a preliminary design. There is no such thing as a standard plant, and the construction of the design is completed many years after the design. No structure, "as built", is ever identical to the original design. In addition, technological developments require modification of previously approved preliminary designs. Thus, the plant eligible for an operating license frequently has significantly different components from those in the design licensed for construction.

Technological developments also may change the bases for health, safety and environmental evaluations. Boards act for the Commission in monitoring these ongoing technical developments which may impact particular license applications. In this capacity, they receive many so-called "board notifications" from the Staff which must be evaluated. Those which a Board considers significant often result in Board questions.

The procedure recommended would hamper the Boards in the performance of this function. It would require them to explain in detail the potential significance of the notification to the Commissioners who, in most cases, would not be familiar with the details of the application or the notification. It would also require a fifteen day waiting period for Commission

action. Because Board notifications have been numerous following issuance of the SSER, the proposed rule would likely result in delays in excess of fifteen days at the most critical phase of the proceeding.

At present, the Panel from which the Boards are drawn has 18 full time members and 40 part time members (see the attached biographies). They have 95 graduate degrees including 32 Ph.D.s (16 in environmental sciences and chemistry and 16 in physics and engineering), include 8 program, laboratory or university department heads, have published literally hundreds of books, monographs and articles in their fields, and have 632 years litigation experience of which 256 years were obtained as members of the Panel in licensing proceedings.

In light of this expertise and experience, Panel members had a variety of reactions. They do not understand why, as adjudicatory officers, they must ask the Commission for permission to address a serious health, safety or environmental question. These Panel members do not understand why, after having been exhorted to become more actively involved in hearings over the last few years, it is now proposed that they be partially muzzled.

Panel members note that NRC reports upon which licenses are issued often are conclusory and brief on any given aspect of the facility in question. Review of these documents, which are filed in all proceedings, often

raises serious questions which potentially affect the ultimate conclusion as to the safety or environmental acceptability of a plant. Usually these questions can be satisfactorily answered with a minimum of effort, and would not have been raised had the staff document been more detailed. To require technically trained people of the Panel members' calibre to notify the Commission before asking a question designed to clear up an ambiguity (or alternatively expose a serious problem) deprives them of the independence to satisfy themselves that they should indeed sign a decision prerequisite to the commencement of a potentially dangerous activity. The very existence of a restriction on the Boards' right to inquire may well erode the public's confidence in the Commission's commitment to safety.

During discussion of the proposal, the question was raised whether a particular member could, in all good conscience, sign an Initial Decision to license a particular facility when he or she felt that a serious question concerning health, safety, or the environment had not been resolved. Panel members also questioned how licensing decisions would be viewed by an appellate court if the court were advised that the agency's experts were not completely free to inquire into the matter they were to adjudicate. It was felt that the likelihood of reversal and remand would be increased.

III. AN ALTERNATIVE

The Panel felt that generic issues which were candidates for rulemaking could properly be the subject of the proposed sua sponte rule and

thereby eliminate potential delay without harmful effect on the proceeding. Issues recently discussed such as alternate energy sources, need for power, and financial qualifications, as well as any pending candidates for rule-making, could be eliminated at the Commission's discretion.

Accordingly, we recommend that the proposed rule be amended by inserting in the second sentence of proposed §2.760a (SECY-81-304 dated May 14, 1981), a period after the phrase "security issue exists" and adding the introductory clause thereafter: "If the issue is generic, it shall be considered only after, ..." Conforming changes could easily be made to the other sections addressing the subject.

cc: A. Rosenthal
H. Shapar
S. Chilk
L. Bickwit