Texas Consumer Association

6/10/81

U:S. Nuclear Regulatory Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR-2 (2)
(46 FR 30349)

Dear Sirs:

Enclosed find the comment of Texas Consumer Association regarding the proposed rule changes for the Rules of Practice and Procedure before the NRC's licensing hearings. The NRC issued the proposed rule on June 3, 1981.

Sincerely,

Rebecca Lightsey
Managing Director
and Attorney at Law

Texas Consumer Association

Acknowledged by card. 6/16/81. mdv

L-4-1, pt. 2
comments

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IN RE:	)	
Proposed Modification of Rules of Practice for Domestic Licensing Proceedings	)	Proposed Rule for 10 C.F.R. ¶ 2 (Issued June 3, 1981)
Before the U.S. Nuclear Regulatory Commission	)	

COMMENT OF TEXAS CONSUMER ASSOCIATION IN OPPOSITION TO PROPOSED RULE CHANGE

INTRODUCTION.

Texas Consumer Association is a statewide consumer advocacy organization supported by approximately 1,000 members in Texas. TCA is affiliated with the Consumer Federation of America, and has been actively involved in representing the interests of consumers before state and federal agencies for over ten years.

The Nuclear Regulatory Commission has proposed several changes regarding the admissibility of contentions in licensing proceedings, the opportunity for discovery in such hearings, the service of documents in such hearings, and motions to compel discovery in the hearings. TCA believes these proposed modifications unduly compromise the rights and interests of its members and consumers of Texas.

In particular, TCA believes the proposed rules will harshly restrict the participation of affected members of the public in nuclear licensing hearings. Furthermore, the proposed rules will ensure that those landowners and residents who become parties will not prevail--not only as to the question of whether a license will be issued, but simply won't be able to prevail on <u>any</u> issue regarding the licensing hearing.

TCA deplores this abrupt turnabout in policy. For years, the Commission and its hearing boards have applauded the contribution of consumer intervenors in their hearings--at times eloquently pointing out valuable discoveries brought to the agency's attention. Moreover, in light of the Three Mile Island accident, most informed observers recommended greater public participation in the licensing process; this implication can be readily drawn from the Report of the President's Commission on Three Mile Island and the independent "Rogovin" report commissioned by the NRC, itself. */

*/ After the Three Mile Island incident, almost all reports on the subject recommended greater licensing attention be paid to "site suitability." Yet without local participation, valuable knowledge of local conditions will be lost.

Furthermore, TCA disagrees with the NRC's perfuctory economic assessment (pursuant to the Regulatory Flexibility Act of 1980) that this proposed rule change will have no significant economic impact on a substantial number of local entities. In many licensing hearings, small business may be affected by the operation of nearby nuclear facilities, and will therefore seek to intervene. A cursory examination of the NRC licensing docket over the years shows that a large number of the intervenors are, in fact, small towns and cities. The propcsed rule change will increase costs for those litigants by: requiring the retaining of expert consultants at the earliest stage of the hearing process; using express mail for service; and using the more expensive process of deposition when the avenue of interrogatories is closed. This, then, will increase the costs incurred by that class of small entities.

In support of its opposing comments, TCA provides the following discussion.

LIMITATIONS ON ADMISSIBLE CONTENTIONS.

The proposed rule attempts to restrict public participation by requiring all contentions to contain references to specific pages of technical documents as support for the contention. In fact, the commentary provided by the NRC Staff regarding this rule indicates the extreme nature of the restriction:

> "In recognition that one purpose of the contention process is to help frame the scope of subsequent proceedings, an intervenor admitted to a proceeding would not be permitted, absent good cause, to seek or establish facts or rely on sources as to which notice was not given when the contention was admitted." [Later commentary states that "new evidence" will be admissible if it wasn't available prior to that time] p. 7.

The result is that the intervenor has approximately 30 days to assemble a whole case. Considering that the applicant for a license has spent unlimited time and money--typically two to three years, in the case of a construction permit--assembling its case, the consumer-intervenor faces a hopeless task. The process is already skewed against the consumer, simply because of the relative inequities in available resources for litigation. However, this proposal simply ensures that the licensing process will be a mockery; the adoption of the rule should also include elimination of the words "contested hearing" from the vocabulary of the agency's administrative process. When an applicant is permitted to prepare over the course of several years to face local intervenors who are asked to assemble their case in 30-45 days, the term "kangaroo court" is not too harsh a description of the NRC's hearing procedures.

A realistic example of the typical consumer group attempting to participate

in an NRC licensing hearings shows that even less time will be available to assemble a case. Unlike electric utility applicants, local intervenors will not utilize legal counsel specialized in the conduct of nuclear regulatory law--in some cases, legal counsel may not be available at all. Attorneys asked to file petitions for leave to intervene will be totally unaware of the requirement that all evidence and facts be assembled prior to being admitted as a party--this lack of knowledge is understandable since such a principle is contrary to any other agency or court proceedings. (Those that do apprise themselves of this facet of the rules will probably advise their clients of the futility of the efforts!) Probably the first notice of this element of the rules will come in the form of a response to the petitions by the NRC Staff and the Applicant's counsel. By that time, the intervenor will probably have about 15 days (in essence) to assemble their whole case for trial. Any evidence or facts that are left out because of inadequate research time simply won't be admissible after that date.

Obviously, this rule means that intervenors must retain any and all expert witnesses or consultants prior to the time they know if they will be admitted as a party. Otherwise, the contention may not contain all the facts and evidence utilized by the expert at the time of the hearing. Not only is this expensive, but this also limits the type of expert testimony which can be presented. If an expert is given 30 (or even 60, for that matter) days to prepare a contention for trial, the only types of expert testimony available to intervenors will be the canned testimony of experts simply re-hashing the issues they developed in another hearing. This eliminates the most valuable contribution outside parties can make to a licensing proceedings--i.e., pointing out new issues never considered by agency scientists, perceiving novel theories or priniciples applicable to the hearing, or analyzing the new and untried components of a nuclear power plant. Requiring that all the evidence be assembled in a short period of time simply closes the hearing process to such a breath of fresh air.

Even though "option A" in the rules is supposed to be devoid of rulings on the merits of facts, in fact such rulings will be inevitable, and will thus be little different in practice from "option B." A fact or credible reference to one person may not be regarded as a fact or credible reference to another person. In order to rule on whether such fact or reference is specific enough to be adequate basis for the contention, the hearing board will inevitably be

led to rulings on the credibility of references or the acceptability of facts. Such practice will be different only in degree from the irrational requirement of "Option B" that the Board evaluate the merits of contentions prior to the admission of parties. The latter option leads one to question why the NRC proposes to have hearings at all, if the Board evaluates the merits of sources and evidence prior to discovery. By requiring the submission of all "facts" for the contention at this early stage, the NRC will simply infuse the process with more controversy and appeals. Does the simple statement of a physical or chemical principle satisfy the notice of a fact upon which the contention is based; or must an intervenor reference the page numbers of physics textbooks or perhaps attach verifying affadavits of physicists? If the demographics or land features of a site described in an impact statement are a necessary predicate to a contention, does each and every physical or geological fact in the EIS have to be referenced? What about facts believed by intervenors to be such common knowledge that they need not be included in the contention--will the applicant or NRC Staff be permitted to foreclose testimony which relies upon such common knowledge as an underlying fact? Furthermore, it should be pointed out that intervenors are being asked to disclose all of their evidence before they are aware of the evidence which will be used by Applicant or Staff as refutation of the contention. This is caused by the folly of preparing one's case before one has engaged in discovery. Thus, an intervenor may prepare evidence for an alternative site. But when the Applicant alleges the alternative site will contaminate an acquifer, the intervenor is foreclosed from presenting evidence that the site won't contaminate an acquifer simply because the intervenor did not anticipate that the argument would be raised (at the time the contention was written).

Finally, TCA should note that the present process is more reasonable because it allows the proper use of discovery in preparing a case. If it is plausible that basis exists for a contention, parties are permitted to proceed onward with discovery. Through that process of discovery the intervenor can investigate the merits of contentions. The Applicant may have access to information which leads the intervenor to drop the contention. Or, by having access to the information available to Applicant, the intervenor may be able to refine and modify the arguments and evidence utilized for the contention. In any case, the proper time to prepare a case is <u>after</u> discovery has been completed. In the submissions

of the NRC Staff discussing this rule change, no pressing arguments are made for the need to modify the present rules of practice. All parties already have the right to summary disposition if they believe facts do not exist to support a contention. And the applicant and staff already have the right to conduct depositions and transmit interrogatories in order to elicit the particular evidence relied upon by an intervenor.

This proposed rule change is simply intended to make it easier for applicants to obtain licenses and to discourage public participation.

LIMITATIONS ON INTERROGATORIES.

TCA strongly opposes the 50-question interrogatory rule. The primary reason is that this will bias the process against intervenors even more.

This favors applicant litigation because the applicant is the most financially capable party to the proceeding. Intervenors are forced to use the process of written interrogatories to elicit information because this process is less expensive than stenographic depositions. However, applicants have no trouble in covering the costs of a deposition and conduct such discovery with frequency. While the applicant is freely compiling evidence through depositions, the citizen group intervenor or private citizen who can't afford to depose applicant witnesses will be left in an unfair position because of the limitation on interrogatories (a limitation, incidently, which disregards the number of contentions proposed by the intervenor).

The limitation on written interrogatories has other faults. The issues surrounding nuclear regulation are perhaps the most complex of any administrative proceeding. The use of extensive written interrogatories is a necessity in researching such complex issues. Also the limitation ignores the fact that numerous "follow-up" interrogatories may spring from one initial question. This may be due, variously, to imprecise questions, marginally evasive answers, or to new questions raised by the facts obtained from the first question. Unlike oral depositions, written interrogatories may require more than one round in order to get to the heart of the matter.

EXPRESS MAIL SERVICE OF DOCUMENTS.

TCA also opposes the express mail service of document provision of the proposed rule change. As presently drawn, a Board could drive the cost of litigation very high for intervenors simply for the sake of the Applicant's convenience.

The commentary provided by the NRC Staff appears soothing:

> "The Commission would expect express mail delivery to be required only in those proceedings where it appears that construction of a facility may be finished prior to the completion of the operating license proceedings or other similar circumstances where expedition is especially important."

However, the provisions of the proposed rule are not so soothing. The rule simply states:

"The presiding officer may require service by express mail."(proposed language of ¶2.712.)

Service by express mail is expensive. Service of the applicant and staff counsels from Texas would cost, minimally, fifteen dollars. Furthermore, not all cities are served by express mail. Would a resident of Jasper, Texas, who is an intervenor, be required to drive 95 miles to Houston, Texas, in order to find a post office which will send an item by express mail?

Over the course of a proceeding, constant service by express mail would be just another financial attack on poorly funded citizen groups participating in proceedings.

CONCLUSION.

TCA strongly urges the NRC to reject in total the proposed rules advanced here. The NRC should be encouraging public participation in its process, not discouraging such participation. The end result of the rules of practice proposed by the agency will be alienation and frustration on the part of the public. Most citizens expect the rudiments of fairness when they deal with a public agency that vitally affects the value of their property and perhaps the health and safety of their families. The rules as proposed by the NRC will be recognized for what they are--unfairly stacking the deck against the average consumer.