



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555
DEC 28 1989

Honorable Alan Cranston
United States Senate
Washington, DC 20510

Dear Senator Cranston:

This letter replies to your letter dated November 27, 1989 which enclosed an inquiry from your constituent, Mr. Roth. Mr. Roth's letter asked whether information requested by the Commission's Administrative Judge concerning the Rocketdyne facility at Rockwell International Corporation's Santa Susana site would be supplied. Mr. Roth referred to a newspaper article that he believed raised a question as to whether the information would be provided. In fact, the information requested by the Administrative Judge was supplied by the Rockwell Corporation on November 4, 1989. The information is available for public inspection at the Chatsworth Branch Library, 21052 Devonshire Street, Chatsworth, CA 91311, the Commission's Local Public Document Room established for public information.

The proceeding referenced by Mr. Roth's letter is an administrative hearing considering the May 1989 application by Rockwell Corporation for renewal of the NRC license for nuclear materials at the Rocketdyne facility. Petitions to intervene and issues of concern are presently under consideration by the Administrative Judge appointed to preside at the proceeding. A ruling on the application will be made after presentation of evidence by the parties to the proceeding.

On November 2, 1989 Rockwell Corporation informed the Commission that it was modifying its original application for a full term license renewal to seek only a one year renewal and subsequent decommissioning of the Rocketdyne facility. All information concerning the renewal application for the Rocketdyne facility has been placed in the Local Public Document Room at Chatsworth, CA except for the facility security plan which is protected from public disclosure.

Mr. Roth's concern about the report in the newspaper discussing an order by the Atomic Safety and Licensing Appeal Board to Judge Bloch questioning some of Judge Bloch's inquiries in the proceeding, involves certain procedural matters addressed in the Appeal Board's order dated October 5, 1989. On October 13, 1989 Judge Bloch responded to the questions posed by the Appeal Board and on December 21, 1989 the Appeal Board issued a Memorandum and Order containing directives and guidance to the presiding Judge. A copy of the Appeal Board's December 21, 1989 Memorandum and Order is attached.

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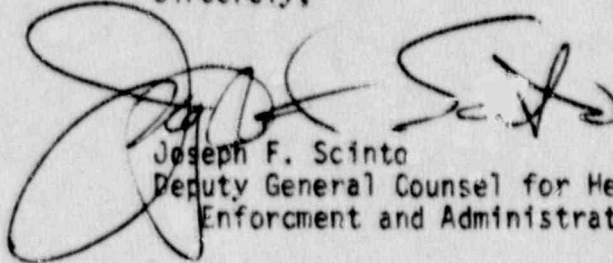
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Honorable Alan Cranston

- 2 -

I trust this information has answered the inquiry of your constituent.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph F. Scinto", is written over the typed name and title.

Joseph F. Scinto
Deputy General Counsel for Hearings,
Enforcement and Administration

~~I trust this information has answered the inquiry of your constituent.
Please advise me if I may be of further assistance.~~

JFS

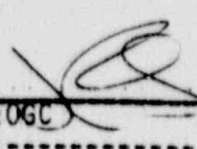
Sincerely,

Joseph F. Scinto
Deputy General Counsel for Hearings,
Enforcement and Administration

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* See previous page for concurrences.



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DEC 21 1989 P 4:04

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Howard A. Wilber
G. Paul Bollwerk, III

December 21, 1989
(ALAB-925)

SERVED DEC 22 1989

12/22/89

In the Matter of)
)
ROCKWELL INTERNATIONAL)
CORPORATION)
Rocketdyne Division)
)
(Special Nuclear Material)
License Number SNM-21))

Docket No. 70-25
(License Renewal)

8905665

MEMORANDUM AND ORDER

This proceeding, involving applicant Rockwell International Corporation's request for a renewal of its special nuclear material license issued under 10 C.F.R. Part 70, is one of the first to be conducted pursuant to the Commission's new rules for informal materials licensing adjudications. See 54 Fed. Reg. 8269, 8276-80 (1989) (to be codified as 10 C.F.R. Part 2, Subpart L, § 2.1201 et seq.). In an unpublished order dated October 5, 1989, we observed (at 1) that the Presiding Officer assigned to this proceeding "appears to be engaging in a form of judicial activism (i.e., discovery) unprecedented in NRC licensing proceedings, in general, and seemingly not contemplated by the special rules that apply to this proceeding, in particular." In this regard, we referred specifically to

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three orders issued by the Presiding Officer in which he requested extensive information from primarily the applicant. Invoking our directed certification power under the rules, 10 C.F.R. §§ 2.1209(d), 2.1255, we ordered the Presiding Officer to explain his authority for taking this action.

The Presiding Officer responded on October 13 in a published memorandum and order, LBP-89-29, 30 NRC _____ (1989). Subsequently, he has issued several additional orders that raise still other concerns respecting conformity with the new Subpart L rules for informal adjudications. We now address the Presiding Officer's explanation and set forth our understanding of how the Commission intends informal adjudications such as this to proceed.¹ To this

¹ In his October 13 memorandum and order, the Presiding Officer counsels that the "[u]nilateral action" we have undertaken in soliciting his explanation should be exercised "sparingly." We agree. Indeed, it has apparently been almost ten years since the last such reported instance in a formal adjudication. See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980). Nonetheless, when the circumstances call for such action, we will not hesitate to act -- on our own or in response to a request -- in fulfillment of the responsibility delegated to us by the Commission to assure that the agency's proceedings, both formal and informal, are being conducted by the rules, as intended. Our action here has been undertaken on our own initiative out of necessity: the NRC staff has chosen not to participate as a party; Rockwell has not shown the interest in ensuring compliance with the agency's procedural rules usually demonstrated by an applicant; the intervenors appear to be unfamiliar with

(Footnote Continued)

end, we also issue certain directives to the Presiding Officer vis-a-vis the future course of this proceeding.

A. Background

On May 25, 1989, Rockwell submitted to the NRC staff an application for a 10-year renewal of its license to possess and use special nuclear material pursuant to 10 C.F.R. Part 70.² Three requests for a hearing on the application were filed in June and later referred by the Commission's Secretary to the Atomic Safety and Licensing Board Panel.³ Administrative Judge Peter B. Bloch was designated Presiding

(Footnote Continued)

NRC proceedings; and the Presiding Officer's orders themselves are essentially sua sponte.

As set forth below, the Presiding Officer's rather unorthodox orders have "fundamentally alter[ed] the very shape" of this proceeding before it has barely gotten under way, thereby warranting our interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982). Moreover, given that this is among the first Subpart L proceedings, the Presiding Officer's actions potentially have greater generic implications. Thus, if such actions are inconsistent with Subpart L, they should be disavowed now, lest they become a blueprint for future informal adjudications. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982) (appeal board undertakes interlocutory review of licensing board ruling insofar as it interprets the Rules of Practice), reversed in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

² For a definition of "special nuclear material," see section 11.aa of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2014.aa.

³ The hearing requests were filed by Jon Scott, Estelle Lit, and Jerome E. Raskin, et al.

Officer on August 21. 54 Fed. Reg. 35,550 (1989). He immediately scheduled a telephone conference call for September 1 and invited the three petitioners to amend their hearing requests so as to comply with Subpart L and to show how their interests are germane to the proceeding.

Memorandum and Order (August 22, 1989) at 5-6; Memorandum (August 31, 1989). The record does not reflect whether the telephone conference took place, but on September 1 the Presiding Officer scheduled a "limited appearance" session in California near the Rockwell facility, followed by a "prehearing conference" for the purpose of conducting oral argument on whether the petitions for hearing should be granted. Memorandum and Order (September 1, 1989). These sessions were held on September 28 and 29.

Before ruling on any of the requests for hearing, however, the Presiding Officer issued two orders requesting substantial information from the applicant. First, on September 15, he directed Rockwell to submit, under oath, specified "information about all significant chemical and radiological contamination incidents or releases at Santa Susana Field Laboratory (with respect to activities pursuant to License SNM-21 or with respect to DOE [Department of Energy] activities conducted in Area IV or in close proximity to licensed activities) since 1969." Memorandum and Order (September 15, 1989) at 1 (footnote omitted). Three days later, the Presiding Officer requested the

applicant's response to several questions concerning, inter alia, offsite emergency planning for its facility. Memorandum and Order (September 18, 1989) at 2.

At the conclusion of the September 29 "prehearing conference," the Presiding Officer orally granted the three apparently unopposed hearing requests and admitted those petitioners as intervenors to the proceeding. Tr. 240. No order to that effect, however, has ever been issued. See ibid.⁴ Then, in a third request to the applicant, the Presiding Officer set forth his own additional concerns and posed still further questions based on his review of Rockwell's response to his earlier inquiry. The Presiding Officer requested the applicant to submit "reports (unusual occurrences, NCRs, RDs, environmental non-conformance reports, etc.) for events that occurred during the past 20 years, involving releases of radioactive materials, . . . regardless of whether or not the standards of 10 C.F.R. §§ 20.105 and 20.106 have been exceeded." Specifying a filing

⁴ In a Federal Register notice dated October 2, 54 Fed. Reg. 41,529 (1989), the Presiding Officer noted that "three petitions to intervene were granted last Friday, September 29," but did not indicate who those intervenors are or how they satisfied the requirements of 10 C.F.R. § 2.1205(g). Likewise, the Presiding Officer's October 5 memorandum and order, LBP-89-27, 30 NRC ____ (1989), establishes the schedule and procedures for filings in this case, but does not identify the intervenors, let alone explain the basis of their standing and interest as parties.

date for intervenors, the Presiding Officer added:

"Intervenors may desire to litigate a concern derived from my inquiries." Memorandum and Order (October 4, 1989) at 3. The Presiding Officer also made a request of the NRC staff -- not accompanied by an "order," however -- that it consider in its forthcoming Safety Evaluation Report each of the comments made by speakers at the limited appearance session and that it refer certain matters to DOE for its consideration. Request (October 3, 1989) at 1-2.

These unusual requests for information at the very outset of the proceeding -- particularly the Presiding Officer's orders of September 15, September 18, and October 4 -- prompted our October 5 order calling upon the Presiding Officer to explain the authority for his inquisitive actions. In his response, the Presiding Officer first states that his actions were "taken in order to expedite this proceeding pursuant to Commission policy." LBP-89-29, 30 NRC at ___ (slip opinion at 3). After conceding that "the orders requesting information from Applicants [sic] may not have been authorized at the time they were issued by 10 C.F.R. §1233(a) [sic: § 2.1233(a)]," the Presiding Officer contends that "the possible error appears to be largely a technical one and has not harmed any party." Id. at ___ (slip opinion at 4) (footnotes omitted). He then explains that he properly exercised his authority under Subpart L to ask questions so as to assure a complete record. The

Presiding Officer stresses that he is "obligated 'not just to call balls and strikes' . . . but to raise questions that would help to complete the record so that a fair, informed and efficient decision [can] be made." Id. at ___ (slip opinion at 5). See id. at ___ (slip opinion at 8-11). Indeed, he concludes that the Commission's Subpart L rules place an especially heavy responsibility on a presiding officer to elicit information in informal adjudications like this. Id. at ___ & n.10 (slip opinion at 5-6 & n.10). Citing a number of decisions in which licensing boards (with our assertedly tacit approval) assumed an active role in obtaining information from parties in formal adjudications, the Presiding Officer further disputes the suggestion in our October 5 order that his actions are unprecedented in NRC licensing proceedings. Id. at ___ (slip opinion at 11-15). The Presiding Officer concludes by ordering the staff to "include in the hearing file any materials or studies in its possession (that are not already in the hearing file) that relate to the way in which pollution at the Santa Susana facility was deposited there and to Rockwell's responsibility or lack of responsibility for that pollution." Id. at ___ (slip opinion at 16).

After receiving and reviewing Rockwell's response to his October 4 request for information, the Presiding Officer acknowledged that "[a] full evaluation of the Response goes beyond my expertise and the expertise of my adviser because

we do not know the full extent of Rockwell's operations and because we lack professional expertise in quality assurance." Memorandum (November 22, 1989) at 2. He also noted that his "concerns about quality assurance do not by themselves call into question the issuance of the amended license that Rockwell has requested." Ibid. The Presiding Officer then asked the staff to review and provide him with its judgment about the adequacy of the applicant's response in this matter. Id. at 2-3. Shifting gears, he also encouraged the parties to explore settlement possibilities. To that end, the Presiding Officer offered his assistance, suggesting that the negotiations under his auspices could be "private and confidential." Id. at 3.

Less than a week later, the Presiding Officer once again ordered Rockwell to file certain information, this time about its onsite emergency plan. Invoking 10 C.F.R. § 2.1213, he also directed the agency staff to participate as a party on this issue. The Presiding Officer's action was prompted by his review of an NRC Region V Inspection Report concerning matters raised at the September 28 limited appearance session by a person whom the Presiding Officer went on to admit as a party to the proceeding. LBP-89-37,

30 NRC ____ (November 28, 1989).⁵ Finally, in yet another order and despite his earlier disclaimer of a lack of expertise in the area, the Presiding Officer posed several more questions to the staff concerning quality assurance matters. Memorandum and Order (December 1, 1989).

B. Analysis

1. As pertinent here, pursuant to the Subpart L rules for informal adjudications, the proceeding commences with the filing of a detailed request for a hearing on the subject materials license application (§ 2.1205(c), (d)); the applicant and NRC staff may respond (§ 2.1205(f)); and, in deciding whether there will be any hearing at all, the presiding officer "shall determine that the specified areas of concern are germane to the subject matter of the proceeding[,] . . . that the petition is timely[,] . . .

⁵ In three subsequent orders the Presiding Officer admitted five more intervenors, bringing the total to nine. Memorandum and Order (November 29, 1989); Memorandum and Order (December 7, 1989); Memorandum and Order (December 19, 1989). The occasion for the filing of these late petitions was Rockwell's November 2 amendment to its application, shortening the renewal period for the license from ten years to less than one year (i.e., till October 30, 1990), and the Presiding Officer's sua sponte extension of time to petition to intervene. 54 Fed. Reg. 47,846 (1989). We do not decide the issue here, but nonetheless note our doubt about the propriety of allowing or inviting such late petitions to intervene, when the license renewal application amendment that assertedly triggered them substantially limits the scope of the license renewal originally requested. See also 10 C.F.R. § 2.1205(j), (k).

[and] that the requestor meets the judicial standards for standing," based on the consideration of several specified factors (§ 2.1205(g)). If the presiding officer grants a hearing request and a notice of opportunity for hearing was not previously published, a notice of hearing specifying when any additional intervention petitions are to be filed must be published in the Federal Register (§ 2.1205(i)). Moreover, within 30 days of the entry of an order granting a hearing request, the NRC staff is to prepare and make available to the presiding officer, parties, and public a "hearing file" consisting of the application, any amendment thereto, the agency's related environmental impact statement or assessment, and any other NRC report and correspondence relevant to the application (§ 2.1231(a), (b)). Discovery by the parties and any other participants, however, is explicitly prohibited (§ 2.1231(d)).

After publication of the notice of hearing (if necessary) and establishment of the hearing file, the parties are given the opportunity, per the order of the presiding officer, to submit written arguments and other data, information, and evidence (§ 2.1233(a)). These initial written presentations are to be detailed and supported with appropriate references (§ 2.1233(c), (d)). Thereafter, additional documentary data, informational materials, or other written evidence may be submitted or referenced by any party . . . in a written presentation or

in response to a written question only as the presiding officer, in his or her discretion, permits" (§ 2.1233(d) (emphasis added); see also § 2.1233(a)). As the Commission explained in its Statement of Considerations accompanying the final Subpart L rules, "in the vast majority of cases these presentations and follow-up written questions, rather than an oral hearing before the presiding officer, will be the vehicle by which the parties . . . are heard and the issues resolved." 54 Fed. Reg. at 8274 (emphasis added). Indeed, oral presentations, including testimony by witnesses and examination solely by the presiding officer, are authorized only "[u]pon a determination that [such are] necessary to create an adequate record for decision" (§ 2.1235(a)). The presiding officer then renders an initial decision on the issues raised by the parties (§ 2.1251(a)); "[m]atters not put into controversy by the parties may not be examined and decided . . ." (§ 2.1251(d) (emphasis added)). If the presiding officer believes, however, that "a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy, [he or she] . . . shall advise the Commission promptly of the basis for that view, and the Commission may take appropriate action" (ibid.).

2. The Presiding Officer here has departed from this procedure and format in several key respects. Although the parties' initial, detailed written presentations have yet to

be filed,⁶ the Presiding Officer has already ordered Rockwell to supply substantial information in response to his inquiries on four occasions, and he has requested information from the NRC staff several times as well. Indeed, the Presiding Officer's first two requests to the applicant preceded his ruling on any petition for a hearing, and thereby preceded the determination that there would even be an informal adjudication of Rockwell's license renewal application.

The Presiding Officer's claim that his intent was to expedite the proceeding is at odds with the record thus far. See LBP-89-29, 30 NRC at ___ (slip opinion at 3).⁷ Suggesting that intervenors may want to "litigate a concern derived from [his] inquiries" appears to be an invitation to broaden the issues beyond those that the parties initially identified, and thus is inherently contrary to any notion of expedition. October 4 Memorandum and Order at 3. Moreover,

⁶ The intervenors' direct cases are due January 3, 1990. LBP-89-27, 30 NRC at ___ (slip opinion at 3).

⁷ In this connection, the Presiding Officer relies on the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981). LBP-89-29, 30 NRC at ___ (slip opinion at 3). The cited portion of that policy (which was issued in the context of formal adjudications) pertains to those situations, unlike here, where it is clear that a hearing on already well-defined issues is necessary. The policy also stresses that licensing boards are to take action "consistent with applicable rules."

the September 15 and 18 orders could not logically have been intended to expedite a hearing, the need for which had not yet even been determined. Finally, the schedule for the proceeding was set on October 5, just one day after the October 4 request to the applicant for 20 years' worth of reports on radioactive releases (whether or not in violation of NRC standards); if expedition of the overall proceeding was the purpose of this broad request for information, one would have expected the establishment of the proceeding's schedule to await the receipt of this information.

Nor can the orders here at issue (including several subsequent to our October 5 request of the Presiding Officer for an explanation) be dismissed as merely "technical" or "timing" violations of the rules, having nothing to do with substance. As is evident from the discussion supra pp. 10-11, Subpart L clearly contemplates that, in the first instance, it is the NRC staff -- not the presiding officer -- who determines what information is relevant to a pending application and hearing requests. Likewise, it is the parties who are to make their own detailed written presentations, and, following the review of this material and the hearing file compiled by the agency, the presiding officer may then pose written questions to the parties. The Presiding Officer here has turned this process on its head by requiring the applicant and staff to supply extensive information -- of dubious relevance, given the incipient

stage of the proceeding -- before it was clear who the parties would be, what their concerns were, and, indeed, whether any proceeding was even warranted.

The Subpart L rules do vest a presiding officer with substantial discretion and have "enhance[d] the role of the presiding officer as a technical fact finder," primarily as the inquisitor during any necessary oral presentations. 54 Fed. Reg. at 8270. But the presiding officer's "responsibility for controlling the development of the hearing record" necessarily begins after the parties have been admitted to the proceeding and have made their own initial evidentiary presentations. Ibid. See also id. at 8269 ("presiding officer has broad discretion in controlling the manner in which the issues raised by the parties are to be explored") (emphasis added). Moreover, when the Commission eliminated discovery by the parties, there is no indication in either the rules themselves or the accompanying explanatory statement that the Commission intended to transfer this early record-development function to the presiding officer acting in an essentially investigative role. See id. at 8270 ("Although there is no discovery, the . . . rules do provide that the NRC staff is to create and update a hearing file consisting of the

materials relevant to the licensing proceeding").⁸ And, by "informalizing" these adjudications, the Commission did not intend, in our view, to encourage "free-form" litigation by any of the participants, including the presiding officer. See *id.* at 8269 (endorsing the "prudent observation" of the United States Court of Appeals for the Seventh Circuit that "the interests of all concerned in the hearing process are better served if the agency formulates regulations that make it clear what procedures will apply to all informal proceedings").

The opportunity afforded a presiding officer to present the parties, including the applicant, with written questions clearly was intended as a means to clarify his or her understanding of any matter that a party has properly put into controversy through its written presentation, but which is still not amenable to resolution on the existing record. It was not intended as a vehicle to aid an intervenor, prohibited by the rules from engaging in discovery, in preparing the written presentation in which it bears the

⁸ The Commission expected that "the use of informal procedures will not increase significantly the burden upon licensees to respond to hearing requests." 54 Fed. Reg. at 8275. It is thus reasonable to assume that the Commission likewise did not anticipate significantly increased burdens on applicants/licensees in responding to presiding officers' requests for information.

responsibility for adding the factual meat to the bare bones of any previously unsubstantiated concerns.⁹

Quite simply, the Presiding Officer here jumped the gun by several months and several critical steps in the process. In doing so, he has not only failed in a significant respect to abide by the procedures the Commission established for informal adjudications, but also surely interfered with the definition, scope, and substance of the issues in this proceeding -- rendering his action no mere "technical" error. See, e.g., October 4 Memorandum and Order at 3 ("Intervenors may desire to litigate a concern derived from my inquiries").¹⁰

The Presiding Officer has cited a number of court and NRC cases that assertedly provide support for the particularly activist role he has assumed so early in this proceeding. In particular, he quotes a familiar passage

⁹ The rules governing informal adjudications give the presiding officer the authority to settle disputes over the contents of the hearing file (§ 2.1231(b)). It seems apparent, however, that the Commission intended this authority to be used to ensure access to the particular types of agency records specified in that provision, having direct relevance to the pending application. It was not intended as a means by which the presiding officer could be used as a surrogate to nullify the prohibition on discovery.

¹⁰ As noted above, if the presiding officer believes "a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy," the rules provide a mechanism for bringing this to the Commission's attention. 10 C.F.R. § 2.1251(d).

from Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), admonishing agencies "not . . . to act as an umpire blandly calling balls and strikes for adversaries appearing before it" We agree, of course, with this sentiment, having quoted it ourselves on more than one occasion. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 554 (1981) (concurring opinion); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1248 (1984), reversed in part on other grounds, CLI-85-2, 21 NRC 282 (1985). The critical fact in those cases in which this principle has been invoked, however, is that the starting line-ups had been announced (i.e., the party-status of the participants had been determined), and the game was well under way (i.e., the issues to be litigated had been defined by the litigants and the proceedings were at the summary disposition or evidentiary hearing stage). It is in that context that we have approved of licensing boards that have posed questions to the parties

or solicited information and documents.¹¹ As we have seen, that is not the situation here.

The various other proceedings the Presiding Officer mentions as examples of where licensing boards engaged in active questioning of the parties with great success and assertedly tacit appeal board approval (Comanche Peak, Big Rock, Point Beach) similarly do not provide precedential authority for the Presiding Officer's actions here.¹² For one thing, licensing board conclusions on legal issues (such as the correct interpretation and application of the Rules of Practice) that are not explicitly reviewed by an appeal board lack precedential effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978). Further, the board questioning undertaken in all but one of the instances cited appears to have been authorized under the applicable Rules of Practice. That is, it was for the purpose of possibly raising an issue sua

¹¹ Indeed, in Three Mile Island, we found that "the [Licensing] Board should have pursued [a certain] inquiry . . . more fully on its own." 19 NRC at 1263. This, however, was because Three Mile Island was a special proceeding instituted by the Commission itself to resolve certain Commission-specified issues, not dependent upon the active participation of the parties.

¹² Comanche Peak, Big Rock, and Point Beach do have one thing in common with this proceeding -- the Presiding Officer here chaired the Licensing Board in each of those cases.

sponte pursuant to 10 C.F.R. § 2.760a (Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-43, 18 NRC 122, 150-53 (1983)), or it occurred at an appropriate later stage of the proceeding (e.g., Comanche Peak, LBP-86-36A, 24 NRC 575 (1986); id., LBP-85-37, 22 NRC 601 (1985); id., LBP-85-32, 22 NRC 434 (1985); Consumers Power Co. (Big Rock Point Plant), LBP-82-97, 16 NRC 1439 (1982), vacated and remanded on other grounds, ALAB-725, 17 NRC 562 (1983)).

One remaining case on which the Presiding Officer relies, however, does bear a similarity to the matter at hand. In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-39, 14 NRC 819 (1981), and id., LBP-81-44, 14 NRC 850 (1981), the Licensing Board posed questions and requested information from the applicant at the very outset of the proceeding, before any intervention request had been granted and discovery undertaken. But the Licensing Board's admittedly "extraordinary" action was taken because the applicant had requested urgent interim relief so that it could begin a steam generator tube sleeving demonstration program. Id., LBP-81-39, 14 NRC at 821. Significantly, on appeal we characterized the Board's procedures (specifically mentioning those in LBP-81-39 and LBP-81-44) as "badly in error" and reminded the Board that the Commission's Rules of Practice, which are sufficiently flexible to have accommodated the urgency in that

proceeding, are intended to be followed and used; fundamental deviations therefrom are not authorized.

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262-63 (1982). Thus, the agency and court cases in which the Presiding Officer seeks refuge provide no legitimate precedent for his premature and extensive information requests to the applicant and staff here.

3. The Presiding Officer's extraordinary information requests are not the only way in which this proceeding has strayed off the course prescribed by the Subpart L rules. For example, in encouraging a settlement between Rockwell and the intervenors, the Presiding Officer suggested that he was available to facilitate a settlement and that "these negotiations could be private and confidential," as a way of discussing, among other things, "what information should be made available to the public." November 22 Memorandum at 3-4. The Presiding Officer quite properly has encouraged settlement. See 10 C.F.R. § 2.1241. The problem is that the role he suggests for himself as a facilitator of "private and confidential" negotiations, where determinations might be made about matters such as the general public's entitlement to information, is inconsistent with other rules in Subpart L and longstanding Commission policy. Under 10 C.F.R. § 2.1209(c), a presiding officer is clearly authorized to "[h]old conferences before or during

the hearing for settlement." Although that provision does not specify that such conferences must be public, traditionally all conferences or meetings in connection with the agency's formal adjudications, held under the auspices and in the presence of an NRC licensing board or presiding officer, have been open to the public, unless matters of national or plant security or classified, privileged, or proprietary information is involved. See, e.g., 10 C.F.R. Part 2, App. A, § II(d). Cf. id. § 2.1203 (public availability of records governed by 10 C.F.R. § 2.790, which provides that NRC records and documents relating to licensing proceedings shall be public unless specifically exempted). This practice reflects the fact that NRC proceedings are not merely contests between private litigants, but rather are intended to resolve matters in controversy in a manner that will protect the health and safety of the public generally. As a consequence, we think it unlikely that the Commission intended to give a presiding officer in Subpart L proceedings greater discretion to hold nonpublic, "private and confidential" meetings with the parties. Cf. id. § 2.1235(b); 54 Fed. Reg. at 8274 (referring to the Subpart L provision on oral presentations, there was "no intention" "to give a presiding officer more

latitude to hold nonpublic informal hearings than is provided for formal adjudications under Subpart G").¹³

The Presiding Officer's encouragement of settlement here is thus commendable, provided that he is not a participant in any private and confidential negotiations between the parties, and, conversely, that any such conferences in his presence are open to the public, absent compelling circumstances. See CLI-81-8, 13 NRC at 456. If such efforts are successful, the Presiding Officer will then be called upon to approve any resulting agreement if he finds it to be fair, consistent with NRC regulations, and in the public interest. See 10 C.F.R. § 2.1241; Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility, Special Nuclear Materials License No. SNM-33), LBP-89-31, 30 NRC ____ (October 27, 1989). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-14, 29 NRC 487, 488-89 (1989); id., LBP-89-22, 30 NRC ____ (August 11, 1989); id., LBP-89-24, 30 NRC ____ (August 30, 1989).

¹³ Apart from being out-of-step with Commission policy that virtually all NRC proceedings be public, a presiding officer's involvement in private settlement negotiations has another potential problem. Being privy to such negotiations, particularly in instances that involve frank discussions of the strengths and weaknesses of the parties' legal and factual positions, could compromise a presiding officer's role as an impartial adjudicator, should the negotiations fail and the proceeding continue.

Another questionable action is the Presiding Officer's several requests to the NRC staff, which come close to oversight of the staff's work. See October 3 Request; November 22 Memorandum; LBP-89-37, 30 NRC ____; December 1 Memorandum and Order. But as the Commission explained in Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980), adjudicatory boards are not authorized to "direct the staff in performance of [its] administrative functions."¹⁴ There is no reason to assume that this principle, which simply recognizes the inherently different functions of the technical staff and neutral adjudicators,¹⁵ would not apply equally to presiding officers in Subpart L proceedings. This does not mean, however, that the Presiding Officer must ignore matters that raise serious safety questions. As discussed supra p. 11 and note 10,

¹⁴ In using the word "administrative," the Commission did not mean "ministerial." The board directive to the staff at issue in Shearon Harris was to assess the capability of the applicant's management to operate the facility safely. 11 NRC at 515-16.

¹⁵ Simply put, the staff is to perform the technical review of license applications, and adjudicators are to resolve disputed issues between the parties. The Presiding Officer himself essentially recognized these different responsibilities when he conceded that a full evaluation of certain of the extensive information he requested from the applicant was beyond his expertise. November 22 Memorandum at 2.

there is a mechanism for bringing such matters to the Commission's attention, 10 C.F.R. § 2.1251(d). See also Shearon Harris, 11 NRC at 517.

Finally, our review of the record discloses no written order granting the first three petitions for hearing. As noted supra p. 5, the Presiding Officer granted these petitions at the September 29 prehearing conference, but never committed this ruling to writing, addressing the appropriate factors as required by 10 C.F.R. § 2.1205(g). To be sure, that section does not state in so many words that rulings on requests for a hearing must be in writing, but other provisions of Subpart L clearly assume that to be the case. For example, sections 2.1205(n) and 2.1231(a) refer, respectively, to "service of the order" and "entry of the order." Further, the determinations mandated by section 2.1205(g)¹⁶ -- e.g., that the areas of concern specified in a petition for hearing are germane to the subject matter of the proceeding and that the requestor meets the judicial standards for standing -- are not readily amenable to oral ruling. See also 10 C.F.R. § 2.1205(m) (concerning

¹⁶ It is noteworthy that the language of section 2.1205(g) ("shall determine") is mandatory, apparently even if there is no opposition to a request for hearing -- a circumstance contemplated by the permissive language of section 2.1205(f) (the applicant and staff "may file an answer" to a request for a hearing).

conditions that might be imposed on the grant of a request for a hearing). Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 n.61 (1985) (criticizing licensing board's oral ruling on the admission of a contention), aff'd in part on other grounds and review otherwise declined, CLI-86-5, 23 NRC 125 (1986), remanded in part on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719 (3d Cir. 1989). And, for the sake of a complete record, a written order on a ruling as important as the granting of requests for a hearing is a necessary and not unduly burdensome formality.

As discussed above, the Presiding Officer has taken a number of actions that are contrary to the Commission's rules for informal adjudications, 10 C.F.R. Part 2, Subpart L. No purpose would be served, however, by vacating those actions now and remanding for remedial action. But, during the future course of this proceeding, the Presiding Officer is instructed to comply with both the letter and intent of the Subpart L rules. In particular, pursuant to 10 C.F.R. § 2.1251(d), the Presiding Officer is to examine and decide only those issues properly put into controversy by the

parties, absent some basis for invoking the exception found
in that same provision.

It is so ORDERED.

FOR THE APPEAL BOARD


Barbara A. Tompkins
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

ROCKWELL INTERNATIONAL CORPORATION

(Rocketdyne Division, Special
Nuclear Materials License SNM-21)

Docket No. (s) 70-25-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER DTD 12/22 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
22 day of December 1984

John Kronebusch
Office of the Secretary of the Commission