ES 003-3

DOCKET NUMBER
PROPOSED RULE PR50,51,100
(45FR50350)

(42)

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September 29, 1980

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Response To Advance Notice Of Rulemaking Concerning "Revision of Reactor Siting Criteria" (45 Fed. Reg. 50350, July 29, 1980)

Dear Mr. Chilk:

I. INTRODUCTION

By the captioned notice, the Nuclear Regulatory Commission ("NRC" or "Commission") published for public comment an advance notice of rulemaking concerning the revision of the present reactor siting criteria. (45 Fed. Reg. 50350, July 29, 1980). On behalf of Boston Edison Company, Duke Power Company, Jersey Central Power & Light, Metropolitan Edison Company, Northeast Utilities, Pennsylvania Electric, and Texas Utilities Generating Company, we submit the following response.

Our primary concerns at this time are with the scope of the proposed regulations, the procedures which the Commission

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will employ in the course of this rulemaking proceeding and with environmental and value-impact analyses which the NRC Staff must perform prior to the official notice of rule-making. We believe that the proposed revisions to the siting criteria should be limited to facilities seeking construction permits after October 1, 1979. We further believe that the potential effects of modification of the current nuclear power plant siting criteria along the lines proposed in the advance notice of rulemaking could be of similar magnitude to those resulting from the "Emergency Core Cooling System," "Appendix I," "Environmental Effects of the Uranium Fuel Cycle" and the "Mixed Oxide Fuel" proceedings, among others. Due to the importance of this proposed rulemaking proceeding, we submit that the Commission should adopt rulemaking procedures similar to those employed in the above-named proceedings, and, at a minimum, should itself review all submitted comments. In this regard we have provided an attached list of concerns which we maintain should be addressed on the record prior to promulgation of any revision to the rule. We further submit that the importance of this proposed proceeding is such that it requires that the NRC Staff perform and publish for

comment both a NEPA analysis and a value-impact analysis before the official notice of rulemaking is published. Lastly, we are concerned with the timing of any revision to present siting criteria in light of the absence of a clearly enunciated safety goal and in light of the fact that some aspects of the proposed siting rule are contained in the proposed degraded core rulemaking which is just commencing. The specifics as to the scope and justification for each of our positions are discussed herein.

II. THE PROPOSED REVISION TO THE SITING CRITERIA SHOULD BE LIMITED TO FACILITIES SEEKING CONSTRUCTION PERMITS AFTER OCTOBER 1, 1979

Sections 108(a) and (c) of the NRC Appropriation Authorization Act for FY 1980 1/ require the NRC to promulgate regulations specifying demographic criteria for the siting of nuclear power plants. It is to implement this Congressional directive that the NRC published its Advance Notice on reactor siting rulemaking.

Section 108(b) of the Authorization Act provides that all power reactors licensed for construction after promulgation of the new reactor siting regulations must comply with those regulations. However, Section 108(b) also specifically

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1/ Pub. L. No. 96-295, 94 Stat. 780 (1980).

"grandfathers" existing facilities from such compliance by providing that "regulations promulgated under this section shall not apply to any facility for which an application for a construction permit was filed on or before October 1, 1979." In the Advance Notice, the NRC recites this provision limiting the applicability of the siting rulemaking to new applications (filed after October 1, 1979). Nevertheless, the NRC also then states that it questions "whether additional safety features and changed operating procedures should be required for plants licensed on sites that do not meet the criteria." 45 Fed. Reg. at 50350.

We are concerned about this apparent inconsistency between the instructions of Congress and the implementation of those instructions by the NRC. Clearly, Congress intended that the Commission apply the new siting regulations prospectively.

There is support in the Advance Notice to support the conclusion that the Commission should only apply the new regulations prospectively. For example, the Advance Notice observes that reactors under construction or in operation in areas of high population density "are being considered in a separate series of proceedings." The Advance Notice also notes that decisions on the continued operation of existing plants "are being made on a case-by-case basis

in light of site characteristics, upgraded emergency plans, improved operating training, additional safety feature requirements, and other related considerations." 45 Fed. Reg. at 50350-51.

The Advance Notice also confirms that the Commission directed the Staff to review existing sites to determine whether additional modifications in operating procedures, design, or equipment may be necessary. For reactors not yet licensed, the Staff review will be reflected in Safety Evaluation Reports. For reactors under construction or in operation, the Staff review will be reflected in a report to the Commission "for its consideration in making case-by-case decisions." 45 Fed. Reg. at 50351.

These statements emphasize that licensed reactors or reactors for which applications were filed before October 1, 1979, will not be subject to the generic regulations on reactor siting which will be developed in the forthcoming rulemaking. Rather, we assume that these reactors will be reviewed on a case-by-case basis, and that any modifications deemed necessary will be imposed only after appropriate findings are made pursuant to 10 CFR §50.109 and an opportunity for hearing is afforded pursuant to 10 CFR §2.204. There is no suggestion by the Commission that these case-by-case reviews should apply the siting criteria to be developed in the instant

rulemaking. In fact, the apparent timing of the <u>ad hoc</u> reviews will preclude application of the new criteria, since those reviews presumably will be conducted well before completion of the rulemaking.

Congress clearly intended that the new generic siting regulations will not apply to reactors for which CP applications were pending as of October 1, 1979 and thus we request that the NRC so state that fact explicitly. If the Commission acts otherwise, it will exceed its lawful bounds by applying the siting regulations retroactively.

A. The Plain Meaning of the Authorization Act Precludes Applicability of Revised Siting Regulations to Licensed Reactors

In our view, routine statutory construction and administrative due process preclude the Commission from attempting to broaden this rulemaking beyond the bounds established by Congress. A basic canon of statutory interpretation is that legislative intent is to be derived from the plain meaning of the words of a statute. <u>United States</u> v. <u>Missouri Ry. Co.</u>, 278 U.S. 269, 278 (1928); <u>United States</u> v. <u>Hunter</u>, 459 F.2d 205 (4th Cir.), <u>cert</u>. <u>denied</u>, 409 U.S. 934 (1972). Congress could not have been more explicit in "grandfathering" reactors under construction, in operation, or the subject of pending applications than by the language used in Section 108(b). That Section flatly precludes the Commission from

applying the new siting regulations promulgated pursuant to the directions in Sections 108(a) and (c) to existing facilities.

In addition, Section 108(c) also indicates that Congress intended licensed reactors to be exempt from the new regulations. That Section directs that in establishing demographic criteria for reactor siting, the Commission must establish maximum population density and distribution criteria "without regard to any design, engineering, or other differences among such facilities." The Commission's phrase to describe this limiting aspect of the new regulations is "site isolation independent of engineered [safety] features." 45 Fed. Reg. at 50351. Of course, Congress was aware when it passed the Authorization Act that many factors are considered in the siting of a reactor pursuant to the requirements of 10 CFR Part 100, including the utilization of engineered safety features. The regulatory framework pursuant to which those reactors were licensed permitted engineered safety features as a "valid, proven, and important way of reducing risk to the public from operation of a nuclear power plant." 45 Fed. Reg. at 50351. Against that background, Congress would not (and did not) authorize the NRC to require, as a result of the instant rulemaking, that existing licensees meet siting criteria which are premised upon site isolation and

which afford no credit fo. engineered safety features. Such an ex post facto regulatory approach obviously was not contemplated by Congress, and should not be adopted by the NRC in this rulemaking proceeding.

B. The Legislative History of The Authorization Act Precludes Application of Revised Siting Regulations to Licensed Reactors

Although the unvarnished language of Section 108(c) itself leaves no doubt that Congress intended to limit the application of the new siting regulations to new reactors, further insight into that intent, if any is needed, is found in the legislative history. A review of the origin and development of the siting provision reveals that it represents a compromise position between those Members of Congress who sought to impose new siting standards on all power reactors and those who opposed any increased regulation in this area.

Section 108(c) of the Authorization Act is a modified version of a floor amendment initially proposed by Senator Hart. See 125 Cong. Rec. S9502 (daily ed. July 16, 1979). The siting provisions were initially submitted by Senator Hart as a part of an amendment which would have placed a six-month moratorium on the issuance of construction permits for power reactors. However, even supporters of the amendment recognized that the directive for NRC to develop

new siting regulations was not aimed at existing facilities. Speaking on the floor of the Senate in support of the Hart Amendment, Seator Biden stated:

> This [siting] provision of the amendment presently before us merely provides that the NRC study currently underway be completed and implemented before new plants are licensed. It would not impact on existing nuclear facilities in any way. [125 Cong. Rec. S9577 (daily ed. July 17, 1979) (remarks of Senator Biden) (emphasis added).]

When his original amendment failed, Senator Hart proposed a second amendment containing identical provisions directing the NRC to develop siting standards, but omitting the moratorium provision. 125 Cong. Rec. S9579 (daily ed. July 17, 1979). That amendment was passed by the Senate after a short debate and became Section 108 of the Senate authorization bill (S. 562). See 125 Cong. Rec. S9575-80 (daily ed. July 17, 1979). There was no comparable provision in the House version of the authorization bill which went to the Conference Committee.

What emerged from the Conference Committee was a compromise between the House position (that no new siting regulations were needed) and the Senate position (imposing specific siting requirements). The final provision resulted from the Conference Committee's revision of the requirements originally contained in Section 108 of the Senate Bill.

See Conference Report on the NRC Authorization Act, H.R. REP. NO. 1070, 96th Cong., 2d Sess. 24-25 (1980). Section 108(c) contains some provisions initially included in Subsections 108(a)(1) and (3) of the Senate Bill. Other provisions in the Senate Bill were omitted.

One compromise between the House and Senate was the inclusion of the October 1, 1979 cut-off date in Section 108(b) for applicability of the mandated siting regulations. The Conference Report underscores the Congressional directive to the NRC in Section 108(b):

> The Conference agreement also establishes October 1, 1979, as the date after which all applications filed for an NRC construction permit for a utilization facility must comply with the new siting regulations. <u>This provision would exempt from the new siting regulations the proposed nuclear power plants with construction permit applications now pending before the Commission.</u> [H.R. REP. No. 1070, at 24 (emphasis added).]

The Authorization Act, as submitted by the Conference Committee, was passed by both houses of Congress after only brief references to the siting provisions by the floor managers of the bill. See 126 Cong. Rec. S7083 (daily ed. June 16, 1980); 126 Cong. Rec. H4725 (daily ed. June 10, 1980).

Thus, the legislative history of Section 108 provides added insight into the genesis and intent of the statutory

directive. It confirms the plain meaning of Section 108 that the new siting regulations shall not apply to reactors for which CP applications were filed on or before October 1, 1979.

In sum, the Advance Notice raises the troublesome indication that the Commission may intend to ignore the Congressional directive that the new siting regulations shall not apply to reactors for which CP applications were pending as of October 1, 1979. We submit that the Commission may not as a matter of law extend the new siting regulations developed pursuant to the Authorization Act to operating reactors, reactors under construction, or reactors for which CP applications were pending as of October 1, 1979. If the Commission agrees with this view (as we assume it will), we merely request that the issue be disposed of by the Commission in the next public notice it issues on the rulemaking proceeding.

III. REVISION OF THE NUCLEAR SITING CRITERIA AS PROPOSED MAY HAVE A PROFOUND EFFECT UPON BOTH PRESENT AND FUTURE NUCLEAR POWER REACTORS AND THE NATION THEREBY WARRANTING MORE THAN NOTICE AND COMMENT RULEMAKING

Adoption of the recommendations proposed in the advance notice would prevent siting in a great many areas that meet the present siting criteria. In this regard, on the basis of the rules as proposed, it is

highly probable that many utilities (such as those located in the Northeast corridor) will no longer have the nuclear option available to them. Some utilities owning present sites but who have not yet begun construction may find the site no longer useable. It will also be necessary for that utility (and others from whom the nuclear option would be removed) to modify any long-range generation plans it had made that included a nuclear plant at a now unavailable site.

The proposed modifications to present siting criteria would directly effect this nation's long-range energy options. The elimination of many or most potential sites for a nuclear power plant would necessarily reduce the potential contribution nuclear energy could make to meeting our future energy needs and eliminating our dependence on foreign oil. This reduction in the amount of energy available from nuclear power would force the nation to either suffer the economic consequences (in terms of jobs and growth) of not replacing that energy or to suffer from the adverse environmental and social consequences of dramatically increased coal utilization or increased dependence on foreign oil.

Also, the adoption of the remote siting concept may give rise to additional concerns due to the location of

subsequent nuclear generating stations, (1) in more remote, but seismically active regions of the country, (2) on the periphery of the electrical grid system where grid instability and loss of off-site power become more frequent event initiators, and (3) where emergency response and assistance becomes more difficult. In this regard, the societal and individual costs and benefits associated with remote siting have not yet been demonstrated.

Finally, despite our strong opposition, the proposed regulations could cause many presently operating plants or ones under construction to add extensive new safety features to conform to the new siting criteria. Depending on the outcome of this proposed proceeding, it is possible that several plants could be forced to either shut down or operate at reduced power levels. This would have severe financial consequences upon the utilities involved (and their customers) and would further reduce the contribution nuclear energy could make to meeting our nation's energy needs.

The above enumerated consequences of the adoption of revised siting criteria as recommended are not offered as a "parade of horribles" but to illustrate the extraordinary consequences this proceeding could have on the future of

this country. It is the prospect that such consequences could be involved that leads us to request utilization of procedures that go beyond those provided for in a notice and comment rulemaking.

In proceedings in which the Commission determined that more than the normal "notice and comment" procedures were called for, it described the considerations that had led it to make that decision. Each proceeding had potential effects similar to those here and the Commission considered them sufficient to require additional procedures. In the "Mixed Oxide Fuel" proceeding, the Commission specifically requested comments on the procedures to be used "for decisions relating to wide-scale use of mixed oxide fuel." 2/ The procedures it chose were influenced by the comments received as well as the policy considerations which the Commission stated as follows:

> In considering and arriving at its various determinations, the Commission was motivated by several basic policy objectives in carrying out its responsibilities under the Atomic Energy Act and NEPA. In keeping with its general approach to regulatory matters, it sought to structure a decisional process which will assure thorough consideration of all salient factors and achieve this as expeditiously as practicable. It was the

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2/ 40 Fed. Reg. 53056, November 14, 1975, referring to request for comments published in 40 Fed. Reg. 20142, May 8, 1975.

> Commission's companion objective that this decisional process result in determinations that are sufficiently definitive and well-founded to allow firm planning by the nuclear industry. Further, the Commission was mindful of the need for sound guidelines to provide for such interim licensing as is compatible with the Commission's decisional course and consistent with the overall public interest. 3/

Legislative-type hearings were employed and the public was granted rights of full participation in them in order to insure a decisionmaking process that was both "sound and expeditious." 4/

In the "Environmental Effects of the Uranium Fuel Cycle" proceeding, the Commission was called upon to decide what procedures should be used at the reopened hearing on the interim rule. 5/ Therein the Commission stated:

> the law is clear that an agency may provide for public participation beyond the statutory requirements. In deciding on the need for such additional procedures in this matter, several factors have been considered. The procedures

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3/ 40 Fed. Reg. at 53059.

4/ 40 Fed. Reg. at 53060. The procedures employed included the presentation of direct and rebuttal testimony, the suggestion of questions for the hearing board, the filing of concluding statements of position for the Commission's consideration, limited discovery of Staff documents, and the ability to request cross-examination on particular issues following completion of the legislative-type hearing. See 41 Fed. Reg. 1133 at 1134-35, January 6, 1976.

5/ 42 Fed. Reg. 26987, May 26, 1977.

> must be designed to develop and illuminate the important matters of fact, policy and law that underlie the proposed rule. Also, provision for procedures to permit testing of information provided may be appropriate. Finally, the need for prompt and efficient decisionmaking must be considered. 6/

Here also, the Commission found that a legislative-type hearing was called for to insure adequate public participation.

The Commission has also employed hearings having most of the characteristics of full adjudicatory hearings when that was deemed necessary to insure adequate public participation in rulemaking proceedings with potentially far-reaching effects. In both the "Appendix I" and "Emergency Core Cooling System" proceedings, participants were permitted to present their testimony under oath, question the witnesses of other participants, employ experts to assist in the questioning of such witneses, and to have access to appropriate documents relied upon by the other participants with an opportunity for formal discovery in exceptional circumstances. 7/ The AEC also made appropriate witnesses available to explain the background, purpose and rationale of the interim policy

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6/ 42 Fed. Reg. at 26988.

7/ 37 Fed. Reg. 287, 288, January 8, 1972 and 37 Fed. Reg. 288, January 8, 1972.

statements which had been issued in each proceeding, requested that all parties similarly make knowledgeable people available. provided a procedure for certifying to the Commission requests that the testimony of a named person be included in the record of the proceeding, and required all direct (and to the extent appropriate, redirect and rebuttal) testimony to be served on the Commission in writing at least five (5) days prior to the session at which such testimony was to be presented. 8/

The application of the policy considerations enunciated above and a comparison of the potential effects of the proceedings in which additional procedures were employed to the potential effects of this proceeding demonstrate that additional procedures to insure adequate public participation are needed here. We submit that adjudicatory rulemaking most properly will insure that all salient factors are thoroughly considered and thus result in "determinations that are sufficiently definitive and well-founded to allow firm planning by the nuclear industry." Such a proceeding will allow the Commission and concerned parties to more fully test the informational bases upon which any proposed rules will rest through cross-examination of the regulatory staff's case. Such a course assures the full development

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8/ 37 Fed. Reg. at 287, 288.

of a record. 9/ While a legislative rulemaking is more desirable than notice and comment rulemaking, the elimination of cross-examination rights greatly curtails the ability to test the basis for this potentially far-reaching rule. 10/ In this regard, we have attached hereto, as Appendix A, a set of important issues which should be addressed on the record prior to the promulgation of any rule revising the present siting criteria. 11/

We, of course, recognize the general principle that agencies are free to fashion their own rules of procedure. See Vermont Yankee Power Corporation v. NRDC, 435 U.S. 519 (1978). However, agencies have an obligation to utilize

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9/ In order to properly ascertain the underlying basis of the proposed rule, and to assist in the proper presentation of our case, including cross-examination, it is important that the Commission provide for the full utilization of discovery procedures. 10 CFR §2.805 enables the Commission to adopt "procedures which in its judgment will best serve the purpose of the hearing." Accordingly, the authority exists to fashion the requested relief.

10/ The significance of the proposed rule is obvious from the fact that Congress has deemed it so important as to include it within the statutory framework. Neither ECCS, Mixed Oxide Fuel, Fuel Cycle, nor Appendix I issues have commanded such attention.

11/ Regardless of the Commission's disposition of our request for a hearing, the questions set forth in Appendix A should be discussed in an environmental impact statement and a value-impact analysis.

procedures that are tailored to assure that fundamental fairness to all parties is accorded. For example, in Vermont Yankee the court noted that "constitutional constraints" or "extremely compelling circumstances" overrode the free will of agencies to fashion their own procedure. (435 U.S. at 543). We submit that the factors identified above serve as extremely compelling circumstances and warrant utilization of procedures beyond those provided for in a notice and comment rulemaking. Such a course benefits all concerned, for it insures not only that the issues will be well-ventilated, but also that the potential for misunderstanding will be minimized by such on-the-record development of the issues.

IV. IN THE EVENT NOTICE AND COMMENT RULEMAKING IS PURSUED, THE COMMISSION SHOULD TAKE AN ACTIVE ROLE IN THE PROPOSED RULEMAKING AND DIRECTLY REVIEW ALL SUBMITTED COMMENTS

The NRC's rules of practice regarding rulemaking proceedings (10 CFR §2.800 et seq.) follow the requirements of §4 of the Administrative Procedure Act. 12/ These requirements call for, inter alia, the publication of "notice" of proposed rules and provisions for public participation in the rulemaking proceeding, usually in the form of

12/ 5 USC §553.

"comments" filed by interested parties. 13/ Normally, the regulatory staff reviews the comments received, adjusts the proposed rule as it deems warranted, and briefs the Commissioners on the comments received when it presents the proposed final rule to them for review. Neither the Commissioners nor their personal staffs directly review the comments received absent unusual circumstances. While this delegation of authority may be entirely proper in a rule-making proceeding with less far-reaching effects, we submit that the nature of the proposed proceeding here is such as to require the Commission itself to directly review the comments submitted. 14/

The purposes of the notice and comment procedure are well known and have been expressed by one court as follows:

13/ 5 USC §553(b) and (c); 10 CFR §§2.804 and 2.805.

14/ See Relco, Inc. v. Consumer Product Safety Commission, 391 F.Supp. 841, 845-46 (S.D.Tex. 1975) wherein it was stated that "some functions are so primary and so basic to the implementation of the statute as to be nondelegable. Functions constituting final agency action, such as administrative adjudications and rule making, must be made or ratified by the Commissioners and may not be delegated to subordinates under broad grants of authority. Congress did not intend to provide the Commissioners with the right to effectively abdicate responsibility in any area. While intra-agency delegation is a necessity in carrying out some of its functions, such delegation cannot be excessive." See also I DAVIS, ADMINISTRATIVE LAW TREATISE, Section 9.01, (2nd Ed., 1967).

> The Supreme Court has stated that the notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969). These provisions afford an opportunity for "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3rd Cir. 1969). Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested -- and perhaps best informed -- on the subject of the rulemaking at hand. See Shell Oil v. FEA, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978). 15/

This procedure is also designed to "provide fair treatment for persons affected by the rule" 16/ and to allow the Commission "to benefit from the input and expertise of interested parties" 17/ at a time "when the agency is more likely to give real consideration to alternative ideas." 18/

15/ Brown Express, Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979).

16/ Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C.Cir.), cert. denied 434 U.S. 829 (1977). See also Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1099 (5th Cir. 1976) (The Administrative Procedure Act, 5 U.S.C. §551 et seq. "must give all interested persons a reasonable opportunity to participate and present their views.").

17/ National Tour Brokers Ass'n v. U.S., 591 F.2d 896, 902 (D.C. Cir. 1978).

18/ United States Steel Corp. v. United States Environmental Protection Agency, 595 F.2d 207, 214 (5th Cir. 1979).

The Circuit Court of Appeals for the District of Columbia has stated that the purpose of receiving comments on a proposed rule while it is still in the formative stage is to

> see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of "final" rules. People naturally tend to be more close-minded and defensive once they have made a "final" determination. 19/

We submit that the purposes of the notice and comment procedure may not be fulfilled if only the Staff directly reviews the comments which are submitted on the proposed rules. The Staff began work on nuclear power plant siting in 1975 and has expended a considerable amount of time and effort on this project ever since. We are concerned that the Staff may not be fully "flexible and open-minded" when it receives comments on the proposed rules; there may be a feeling that its credibility is on the line in that the Staff will have proposed its version of final rules. It is thus questionable whether these comments would be received at a time when the Staff will give "real consideration to alternative ideas" in a manner to "provide fair treatment for persons affected by the rule." Direct consideration of the comments by the Commission would remove all these

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19/ National Tour Brokers Ass'n, *supra* fn. 17, at 902.

concerns. The Staff would proceed to treat the comments as it normally would and the Commission would have the benefit of the views of both the Staff and affected persons in a very important proceeding. This would allow the Commission to educate itself fully on the broadest base of information possible to "assure fairness and mature consideration of rules of general application."

A biased decisionmaker in any adjudicatory proceeding is constitutionally unacceptable. 20/ This principle applies to administrative agencies which perform adjudicatory functions. 21/ Agency officials who have acted in investigative or prosecutorial roles cannot later act as the decisionmaker in proceedings in which they had prior involvement. 22/ Thus, 5 USC §554(d) states:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, or any agency review pursuant to section 557 of this title. (Emphasis added).

20/ Withrow v. Larkin, 421 U.S. 35 (1975).

21/ Gibson v. Berryhill, 411 U.S. 564, 579 (1973). See Withrow, 421 U.S. at 46.

22/ Grolier, Inc. v. Federal Trade Commission, 615 F.2d 1215 (9th Cir. 1980). We are cognizant that the Commission is the ultimate decisionmaker. However, the Staff has assumed a decisionmaking role in determining what information is filtered to the Commission.

The legislative history of the Administrative Procedure Act makes it clear why this combination is forbidden in adjudications:

> a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. 23/

This has been characterized as the "will to win" and was specifically adopted by the Senate Judiciary Committee as the reason for prohibiting such situations when it was considering the APA legislation. 24/ The court in Grolier held that Congress meant to preclude not only persons with the title "prosecutor" or "investigator" but all persons who had developed a "will to win" by prior involvement in the case. 25/

We submit that the underlying principles and rationale of the foregoing should be applied in this proceeding. After years of involvement and intense effort, members of the NRC Staff may have developed a "will to win" in terms of having the proposed siting criteria adopted in the form they

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23/ Report of the Attorney General's Committee On Administrative Procedure 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

24/ Senate Judiciary Committee Print, 79th Cong., 1st Sess. 15 (1945), reprinted in Administrative Procedure Act -- Legislative History, 79th Cong., 1944-46, at 25 (1946).

25/ See fn. 22, supra, at 1220.

will propose. They may be acting as advocates for their position and would thus occupy seriously inconsistent positions if allowed to be the sole determinant of which portions of the comments are to be presented to the Commission. Many points which the industry might consider very important may thus not be presented to the Commission. They may have thus "adjudicated" what comments are brought to the Commission's attention and may have had a strong hand in determining the final outcome of the rulemaking proceeding. It is clear that the principles which were codified in the APA to prevent the person who had developed a "will to win" in a given matter from deciding that matter should be applied in this proceeding to prohibit the Staff from being the sole arbiter of the industry's presentation to the Commission. To do otherwise would be to deprive the industry of meaningful participation in this proceeding contrary to fundamental fairness. 26/

In summary, we believe that the extraordinary importance of this rulemaking proceeding, the purposes behind the notice and comment procedure, and the inherent unfairness in

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26/ As noted earlier the potential breadth of the proposed regulation is such as to warrant more than traditional notice and comment procedures. This point takes on added significance when it is recognized that any impact on the ability to site nuclear power plants will have a direct impact on the national energy policy and will, in all likelihood, inhibit energy independence.

"filtering" the submitted comments through another interested party to the proceeding, combine to require that this Commission take an active role in this proceeding by directly reviewing all submitted comments.

V. NRC MUST PERFORM A NEPA ANALYSIS PRIOR TO THE NOTICE OF RULEMAKING SO AS TO AFFORD THE PUBLIC AN ADEQUATE OPPORTUNITY TO COMMENT

Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA") 27/ requires that all agencies of the Federal Government "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment a detailed [environmental impact] statement. . . ." We submit that modification of the regulations concerning nuclear power plant siting will be an action which triggers the above quoted NEPA provisions, and that the NRC Staff must perform the required environmental analysis.

At the outset, it is clear that NEPA applies to cover almost every significant federal activity. Chelsea Neighborhood Ass'n v. U.S. Postal Service 516 F.2d 378, 382 (2nd Cir. 1975); Arizona Public Service Co. v. FPC, 483 F.2d

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27/ 42 U.S.C. §4332(2)(C).

1275, 1282 (D.C. Cir. 1973); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971). The legislative history of NEPA reflects Congress' expansive intent by indicating that the term "actions" refers not only to construction or licensing of a particular facility, but includes "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs." (Emphasis added). 28/ Thus, it is clear that modification of the current siting regulations is an action potentially subject to the aforementioned NEPA provisions. However, to trigger such provisions, the action must be (1) major and (2) significantly affect the quality of the human environment. Hanly v. Mitchell, 460 F.2d 640, 644 (2nd Cir.), cert. denied, 409 U.S. 990 (1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972). 29/

28/ S. REP. NO. 91-296, 91st Cong., 1st Sess. 20 (1969). See also Chelsea Neighborhood Ass'n v. U.S. Postal Service, supra, 516 F.2d at 382; Scientists' Institute For Public Information v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

29/ It should be noted that most jurisdictions have refused to bifurcate the action forcing provisions of section 102(2)(C):

> To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act [NEPA], i.e., to

(Footnote continued on next page)

The phrase "major Federal action" has been construed by the courts to require an inquiry into such questions as the number of people affected, the length of time consumed, and the extent of government involvement. Hanly v. Mitchell, supra, 460 F.2d at 644. The guidelines of the Council on Environmental Quality 30/ indicate that this phrase should

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> 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.' By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a signficant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. [Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc). Accord, City of Davis v. Coleman, 521 F.2d 661, 663 n. 15 (9th Cir. 1975). See also, W. Rogers, Jr., Environmental Law §7.6 (1977).].

30/ These guidelines provide direction to the federal agencies in determining the necessity of an environmental impact statement and in preparing one when required. 40 C.F.R. §1500 et seq. The case law faithfully applies these precepts. See Virginians For Dulles v. Volpe, 541 F.2d 442, 446 (4th Cir. 1976); City of Rochester v. United States Postal Service, 541 F.2d 967 (2nd Cir. 1976); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974); Sierra Club v. Morton, 395 F.Supp. 1187 (D.D.C. 1975); Natural Resources Defense Council, Inc. v. Morton, 3[illegible] F.Supp. 829 (D.D.C. 1974); Sierra Club v. Mason, 351 F.Supp. 419 (D.Conn. 1972); and Lee v. Resor, 348 F.Supp. 389 (M.D.Fla. 1972).

be "construed by the agencies with a view to the overall, cumulative impact of the proposed, related Federal action ... in the area, and further acts contemplated." 40 C.F.R. §1500.6(a). Applying these criteria to the regulations to be proposed, the government has expended a significant amount of resources on development of the proposed regulations. Further, the impact of the regulation would undoubtedly directly and significantly affect every NRC licensee and, thus, literally millions of public citizens. As the discussion in Section III, supra, makes clear, there have been but a few rulemaking proceedings whose consequences could be considered as great as those here. Thus it is clear that the proposed action is a "major" federal action.

The statutory phrase "actions significantly affecting the quality of the environment" is intentionally broad, reflecting NEPA's attempt to promote an across-the-board adjustment in federal agency decisionmaking so as to make the quality of the environment a concern of every federal agency. Scientists' Institute for Public Information v. AEC, supra, 481 F.2d at 1988. See generally, Calvert Cliffs' Coordinating Committee v. AEC, supra, 449 F.2d at 1112-1113. Accordingly, it is now clear that this phrase should be interpreted to mean that an environmental impact

statement is required when an agency foresees 31/ that a major Federal action "may cause a significant degradation of some human environmental factor." Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).32/ With reference to the instant proceeding, impacts such as those associated with individual and societal risks and costs clearly are within the ambit of this standard. For example, impacts and costs associated with alternate sources of generation must be considered.

In light of these considerations, we submit that the NRC Staff must perform a detailed analysis regarding the appli-

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31/ An agency must use its best efforts to reasonably forecast the proposed action:

> It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of the proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." [Scientists' Institute for Public Information v. AEC, supra, 481 F.2d at 1092.]

32/ Accord, Minnesota Public Interest Research Group v. Butz, supra, 498 F.2d at 1320; Maryland National Capitol Park and Planning Commission v. U.S. Postal Service, 487 F.2d 823, 838 (2nd Cir. 1972); Hanley v. Kleindienst, 471 F.2d 823, 838 (2nd Cir. 1972); and City of Davis v. Coleman, supra, 521 F.2d at 673.

cation of NEPA requirements to the proposed regulations. 33/

VI. THE COMMISSION MUST PERFORM A VALUE-IMPACT ANALYSIS SO AS TO GIVE THE PUBLIC AN EFFECTIVE OPPORTUNITY TO COMMENT

In January 1978, the Commission, reacting to concerns regarding elimination of unnecessary costs resulting from regulatory action, adopted as the policy of the Nuclear Regulatory Commission "that value-impact analyses be conducted for any [non-routine and non-recurring] proposed regulatory actions that might impose a significant burden on the public (where the term public is defined in its broadest sense)." (footnotes omitted). "Guidelines For Conducting Value-Impact Analysis" at pp. i, iii, and 5 (NRC January 1978) (hereinafter "Guidelines"). 34/ 35/ 36/ The Commission emphasized that

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33/ Attached hereto as Appendix A, and made a part hereof, is a list of concerns that should be addressed in an impact statement. We would stress that consideration of these concerns should not however be limited to NEPA; rather, the value-impact analysis discussed in Section VI, _infra_, as well as the Commission's own review, should examine these matters.

34/ _See also_, "Value Impact Guidelines," SECY 77-388 (July 1977) and SECY 77-388A (November 1977).

35/ "Regulatory action" is defined as "an action taken in direct support of the NRC's mission to protect the safety of, and safeguard the public, and to protect the national security and the environment." _Id_. at p. 32.

36/ As early as 1975, the NRC had recognized the importance and necessity of an adequate and thoroughly prepared value-impact analysis for effective decisionmaking at the NRC. In the United States Nuclear Regulatory Commission Annual Report 1975, required pursuant to Section 307(c) of the Energy Reorganization Act of 1974, the NRC highlighted as one of its accomplishments that:

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value-impact analyses were to be prepared not only for proposed regulations but also for "[a]ll Commission papers classified as either 'Commission Action Items', 'Policy Session Items', or 'Consent Calendar Items', . . ." (Id. at iii); "Branch Technical Positions and new or revised regulatory guides" (Id. at ii); and "new reporting requirements." (Id. at 5 note ***). From the foregoing it is clear that with regard to any proposed regulations concerning nuclear power plant siting, the Commission's policy itself requires the preparation of a value-impact analysis. 37/

We also maintain that the magnitude of the impact of the proposed regulations mandates that the analysis be comprehensive. As the Commission stated, "the depth or extensiveness of a value-impact analysis should depend on the magnitude of the expected costs and benefits associated with the proposed action. . . ." (Guidelines, supra, at p. iii).

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> Impact/value analysis was made an integral part of NRC decisionmaking to be utilized in policy proposals as well as in assessing other contemplated regulatory actions. This involves a systematic assessment of the values and adverse impacts, including added costs to the public, which can be expected to result from the various alternatives. (p. 7)

37/ If the Commission were to disregard the value-impact analysis, such would be violative of its policy pronouncement as contained in its response to the President regarding improving government regulations. Therein, the Commission stressed its reliance upon value-impact analyses. See 43 Fed. Reg. 34358 (August 3, 1978).

VII. THE NRC STAFF'S NEPA AND VALUE-IMPACT ANALYSES MUST BE PUBLISHED SUFFICIENTLY IN ADVANCE OF THE NOTICE OF THE PROPOSED RULEMAKING

It is clear that the agency rulemaking process, including notice and comment rulemaking pursuant to §553 of the Administrative Procedure Act 38/ "contemplates that rules will be made through a genuine dialogue between agency experts and concerned members of the public." 39/ As such, it is incumbent upon the agency involved in such rulemaking to assure that material used in support of an agency decision is made known to the public in advance of the agency decision. As the Court in United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977) stated in rejecting an agency's action:

> To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads in the direction of arbitrary decisionmaking.

In the same vein, when the Consumer Product Safety Commission failed to make a study available to the public until after the comment period had passed, the Court disallowed

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38/ 5 U.S.C. §553.

39/ Judge Wright, "The Courts and the Rulemaking Process: The Limits of Judicial Review." 60 Cornell L. Rev. 375, 381 (1974).

consideration of the study because it was "not exposed. . . to the full public scrutiny which would encourage confidence in its accuracy." Aqua Slide 'N' Dive Corp. v. Consumers Product Safety Commission, 569 F.2d 831, 842 (5th Cir. 1978). Accord, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974). 40/

Applying the above-noted case law to the issue here, it is clear that in rendering a decision regarding the proposed regulations, the Commission will have to evaluate and rely upon, inter alia, the values and impacts associated with the proposed regulations and alternatives thereto. Such being the case, we submit that both the NEPA and value-impact analyses must be prepared for the proposed regulations sufficiently in advance of the notice of rule-making to allow the public a reasonable opportunity for comment. Only then will a full ventilation of the issues be assured.

40/ See also Green v. McElroy, 360 U.S. 474, 496-7 (1959) wherein Chief Justice Warren stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

VIII. REVISIONS TO SITING CRITERIA MUST AWAIT THE OUTCOME OF RELATED RULEMAKINGS

On September 4, 1980, the Commission approved the issuance of an advance notice of proposed degraded core rulemaking. Therein the Commission stated that it would consider "a range of loss-of-core-cooling, core damage, and core melting events" as well as "core retention systems." See SECY 80-357 at p. 2 and pp. 7, 8 and 12 of the proposed rule attached thereto. Item D in the instant proposed siting rulemaking raises the issue of reliance upon interdictive measures to limit "groundwater contamination resulting from a Class 9 accident." Such a subject presumes a core melt accident and the absence of a core retention system. Inasmuch as the Commission has chosen to examine these matters in the degraded core rulemaking proceeding, any discussion in the proposed siting rulemaking should be stayed pending completion of the degraded core rulemaking.

In a similar vein, the ACRS has stated in its comments on the Siting Policy Task Force goals that

> any minimum requirements for parameters such as the exclusion zone radius, surrounding population density, or distance from population centers should be established, if possible, within the framework of an overall Nuclear Regulatory Commission safety philosophy for future reactors. 41/

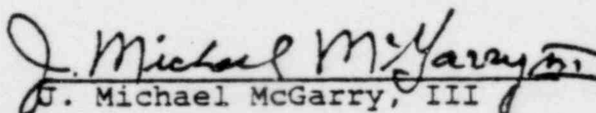
We concur with the ACRS view and maintain that the establishment of an acceptable safety goal is a necessary prerequisite to any revision to siting criteria.

41/ 45 Fed. Reg. at 50352.

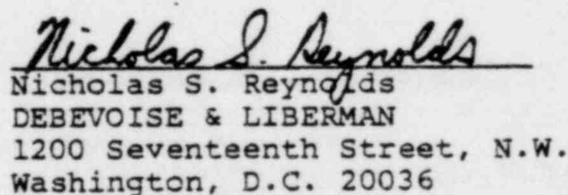
IX. CONCLUSION

For the above-stated reasons, the Commission should limit the scope of the proposed rule to facilities seeking construction permits after October 1, 1979. It should also employ procedures beyond those provided for in notice and comment rulemaking. Further, it should review all comments submitted on the proposed regulations directly and the Staff should perform both NEPA and value-impact analyses sufficiently prior to the notice of proposed rulemaking to allow the public a reasonable opportunity to comment upon them. Lastly, the Staff should refrain from promulgating a proposed revision to the siting criteria until an acceptable safety goal has been established and, at least with respect to Item D, until the degraded core rulemaking has been completed.

Respectfully submitted,



J. Michael McGarry, III



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APPENDIX A

ITEMS TO BE CONSIDERED IN NRC
ADVANCE NOTICE OF SITING CRITERIA RULEMAKING

The following are theshold issues which the members of the instant siting group believe must be answered on the record before the promulgation of any rule revising the present siting criteria.

I. Region

1. How should "regions" best be defined? What constitutes a region? How large need a region be? What anomolies in the siting process can be introduced by different definitions of region? How is an optimal definition of region determined in the abstract?

2. Has consideration been given to the situation which forces a generating facility to be located outside the political domain to which the primary benefit accrues and into a political domain which, due to a lack of explicit benefits from the powerplant, then elects to establish legal and political barriers to its construction and use and thereby precludes the construction of nuclear power within the "region"? Should not suitable alternative options be made available to applicants who are so constrained?

3. Does the establishment of demographic criteria pursuant to Congressional directive mandate remote siting? If so, what is the basis for this conclusion?

II. Risk

1. Has the Commission or its Staff concluded that individual and/or societal risk to health and safety is actually reduced by remote siting? If so, what is the basis for this conclusion and by what degree has the risk been reduced?

2. What are the individual and societal costs of the risk reduction presumed to occur as a result of remote siting? How do these costs relate to the costs associated with other expenditures for averted health effects?

3. Under what circumstances would both societal and individual risk be increased by remote siting?

4. What are the aspects of siting that are the major contributors to nuclear power plant risk?

5. With regard to external hazards and the subject of standoff distances, what level of risk to the nuclear power plant as a function of distance is presented by each of the subject hazards? What are the levels of uncertainities of the risk that are projected? What type of plant induced system failure results from each hazard? At what distances do the hazards cease to be threatening? Assuming what design features?

6. What methodology will be utilized by the NRC Staff in determining the quantitative risk associated with each hazard? Will this methodology be made available for peer

review prior to the initiation of any rulemaking which attempts to determine acceptable standoff distances?

7. What is the basis for determining that demographics is an appropriate screening device for the adequacy of a nuclear power plant site? What evaluation has been made between the appropriateness of the use of demographics as a screening device and the appropriateness of using probabilistic risk assessment techniques (to which demographics is but a single input) as an evaluation tool?

III. Impact

1. Will a detailed quantitative value-impact analysis of societal risk averted/dollar spent be developed as a function of increased capital and operating costs associated with the increased power transmission distances? Will the ratio of expended dollars per health effect averted as a result of population density reduction via remote nuclear power plant siting be compared with alternate societal expenditures per health effect averted as a function of alternate population density criteria?

2. Will the value-impact statement and the NEPA EIS analysis explicitly estimate the potential increase in individual and societal residual risk that will result as remote siting forces shifts in reactor site locations from less active tectonic provinces (defined in 10 CFR Part 100, Appendix A) to more active tectonic provinces? (In this regard, residual risk is defined as the risk remaining of a seismically induced Class 9 Accident resulting from an earthquake with an intensity greater than that of the design basis earthquake.)

3. Will the value-impact statement and the NEPA environmental statement analyses explicitly evaluate the increase in individual and societal residual risk that will result from generating plant locations away from the load centers on the periphery of the electrical power system grids which increase the potential for grid instability, and increase the frequency of offsite power outages and/or the potential for adverse environmental impacts on transmission lines, all of which in turn increases the probability of the blackout sequence which in turn increases the probability of a blackout-induced coremelt scenario?

4. To the extent that major equipment design modifications are required to overcome distance or remote siting induced coremelt event sequence probability increases, will

those costs be explicitly estimated and included in both the value-impact analysis and the NEPA environmental impact analysis?

5. Will the environmental impact statement conclusively demonstrate that the regulation or alternative forms of the regulation under consideration allow siting in all regions of the country without major equipment design modifications or additional plant equipment being required? To the extent that such are required in order to allow siting in all regions of the country, will they be weighed against the societal benefits associated with the remote siting rule?

6. Will the impact (or lack of impact) and the benefit (or lack of benefit) of remote siting as such relate to health effects be explicitly discussed?

7. Will the impact of the proposed regulation and/or rule on the individual utility decisional processes associated with the selection of either a nuclear power plant or a coal power plant be explicitly assessed and evaluated as part of the environmental impact statement analysis? If the NRC site selection process forces remote nuclear plant siting away from utility service areas and load centers to an extent that near load center siting of coal plants is elected over remote siting of nuclear power plants, will the