



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555

OFFICE OF THE  
COMMISSIONER

September 10, 1981

MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Bradford  
Commissioner Ahearne

FROM: Thomas M. Roberts *TR*

SUBJECT: RECONSIDERATION OF THE INDIAN POINT ORDER OF JANUARY 8, 1981

There are a number of things which disturb me about the Order of January 8, 1981. I was not here at the time the Order was issued and I would like clarification of these matters and perhaps the issuance of a new Order which would clarify or correct the deficiencies as I perceive them.

1. The second full paragraph on page 6 of the Order second and third sentences read as follows:

"In fact, according to the Task Force report, Indian Point was the highest population within 10, 30 and 50 miles of any nuclear power plant in the United States. At fifty miles, its population is more than double any other plant site."

Although question 3 on page 10 appears to limit consideration of the Board to a 10 mile radius of the site, the language at page 6 also suggests that perhaps the Board may look at thirty and fifty mile radius as well. It seems to me that we should make it clear to the Board we do not wish them to consider populations beyond the ten mile radius except where a specific scenario for a Class 9 accident is presented and it is clearly demonstrated that that scenario is likely to happen.

2. On page 7 of the order the first full sentence reads as follows:

"The record of the proceeding, together with recommendations, will then be forwarded to the Commission for final Agency action on the merits of the proceeding."

It appears that what the Commission has done here is similar to what it did in TMI. That is, they have cut the Appeal Board out of the picture and suggested that the Licensing Board bring its decision directly to the Commission for Commission's determination. It appears to me that the record of this proceeding is likely to be of a considerable size and if we are going to use the Appeal Board to review the record prior to submitting recommendations to the Commission, that decision should be made now so that the Appeal Board can staff up for it and can follow the proceeding along.

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3. In the footnote which starts on page 6 and continues on on page 7 there are a considerable number of matters I find it difficult to follow or to understand. The first of these concerns the sentence appearing at the top of the footnote on page 7 which reads as follows:

"Because the Commission itself is designating by this Order the issues it wishes to be addressed in the adjudication, it is particularly important that the Licensing Board have discretion to formulate contentions and sub-issues, on the advice of the parties, so as to effectuate that purpose."

This sentence gives me difficulty for two reasons. First, it appears to be non sequitur. There is no logical connection between the fact that the Commission has designated the issues in this Order and the Licensing Board somehow having discretion to formulate contentions and additional sub-issues to effectuate that purpose. The Commission has either formulated the issues and the Licensing Board therefore is bound by them or the Commission has not formulated all of the issues and is relying upon the Licensing Board to further expand on the issues which are presented here. My view is that because of the history of the development of this unusual adjudication the Commission should define the issues to be tried and the Licensing Board should not be encouraged to expand on those issues.

4. This takes me to the second objection I have to that sentence. Setting aside the non sequitur which appears there, the second part of the sentence seems to indicate that we are encouraging the Licensing Board to use its Sua Sponte powers. I find this rather peculiar when at this very time we are considering in Commanche Peak and San Onofre the question of whether Sua Sponte powers should in someway be limited. I foresee a possibility that we would be sanctioning the full use of Sua Sponte powers here and within a week or two making a decision which would reverse a Licensing Board for using those same powers. If used, Sua Sponte issues should be certified to the Commission for approval prior to being litigated.

5. I am also troubled by the following sentence in the footnote which states:

"In admitting and formulating contentions and sub-issues, therefore, the Licensing Board will not be bound by the provisions of 10 CFR Part 2."

There may be a purpose for this sentence but it is not clear in the footnote what that purpose is. On its face it appears to invite chaos in the proceeding. If not chaos, it certainly is confusing if you read the second sentence after that which states.

"Except as provided above or elsewhere in this Order 10 CFR Part 2 will control."

Does this mean that the Licensing Board is not bound by 10 CFR Part 2 but perhaps the other parties in the proceeding are? It presents a rather ponderous judicial job for the Licensing Board to pass through the entire Part 2 and explain to the parties which apply to them and which do not apply to them during the course of the proceeding. If the objective is to let the Licensing Board know that they may apply Part 2 liberally or that Part 2 should serve as only a procedural guide, the order should so state.

On the other hand, if the purpose of the sentence which relieves the Licensing Board of following the provisions of Part 2 is to make it possible for the Licensing Board to conduct the hearing more efficiently, I believe words should be drafted to more directly reflect that objective. Specifically, if this direction is retained in the Order it should be clarified to suggest that the procedures to formulate contentions should be with a view toward shortening rather than lengthening the proceeding.

6. On page 9 of the Order, the first question could be read to suggest that an accident beyond the plant's design basis is assumed to have occurred. If that be the case, it would be virtually impossible to determine the risk level because it would never be clear precisely what kind of accident actually occurred. I believe this question should be clarified to require that a scenario for an accident beyond the plant design basis be alleged by anyone wishing to litigate that matter in keeping with the Commission standard practice on litigation of such issues.

7. The second question on page 9 includes in parentheses the following suggestion:

"(A contention by a party that one or more specific safety measures in addition to those identified or referenced by the Director, should be required as a condition of operation at the facility or facilities, would be within the scope of this inquiry.)"

On its face this seems to establish a very loose standard and would allow the litigation of virtually any safety question raised by any party regardless of its relative merit to the Indian Point plants. Moreover, it is potentially inconsistent with the voting on SECY-81-526 concerning the raising of threshold for contentions in proceedings. I suggest at a very minimum that the Order be modified to reflect our vote on SECY-81-526 when that vote occurs. If that is somehow impractical at this point, the contention should at least state with specificity why additional safety measures are required and what safety benefits will be derived from their implementation.

8. Page 10, last sentence directs the Board to make its recommendations no later than one year from the date of the Order. That means this Board would have to make its recommendation by January 8, 1982. I believe that is an unrealistic date and should be adjusted in a subsequent Order.

cc: EDO  
OGC  
OPE  
SECY

TRANSMITTAL TO:



Document Control Desk,  
016 Phillips

ADVANCED COPY TO:



The Public Document Room

DATE:

September 14, 1981

Attached are the PDR copies of a Commission meeting transcript/s/ and related meeting document/s/. They are being forwarded for entry on the Daily Accession List and placement in the Public Document Room. No other distribution is requested or required. Existing DCS identification numbers are listed on the individual documents wherever possible.

1. TRANSCRIPT OF: Discussion of Indian Point Order, September 11, 1981. (1 copy)
  - a. Memo from Commissioner Roberts to the Commissioners dated Sep. 10. 81, Subj: Reconsideration of the Indian Point Order of January 8, 1981. (1 copy)

  
jake brown  
Office of the Secretary

