Northern States Power Company

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(14)

February 20, 1984

Secretary of the Commission
U S Nuclear Regulatory Commission
Washington, DC 20555

Attn: Docketing and Service Section

Proposed Rule on Hybrid Hearing Procedures for
Expansions of Onsite Spent Fuel Storage Capacity
at Civilian Nuclear Power Reactors

Northern States Power Company appreciates the opportunity to review and comment on proposed changes to 10 CFR Parts 2 and 72 involving spent fuel storage published in the Federal Register on December 5, 1983. These proposed changes are of interest to Northern States Power Company because we operate three nuclear power units. Our Monticello and Prairie Island nuclear generating plants may need additional spent fuel storage facilities in the future. Also, our Company took an active role during the Congressional deliberations, and we believe we understand the circumstances that led Congress to address the spent nuclear fuel (SNF) storage issue in the National Waste Policy Act (NWPA) as well as the intent of the language of the NWPA.

During the late 1970's the Federal government had reserved for itself the responsibility for providing away-from-reactor (AFR) storage. That position changed in the early 1980's, when the Federal government decided it was not going to provide an AFR program. Faced with this vacillation, the nuclear utility industry asked Congress to resolve the issue. Resolution was needed because utilities with nuclear plants were faced with a need for additional SNF storage during the mid-1980's.

Although the NWPA that finally emerged from Congress did not include provisions for federally operated AFR's, the NWPA language does state that "The Federal government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor".

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add: Linda Gilbert
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There are 2 options addressed in the proposed rule changes. However, we believe these proposals do not meet the intent of Congress to establish an expedited licensing procedure. Option 1 does not fullfill the intent of Congress, in fact it would lengthen the process to license a SNF storage facility. It would allow an intervenor intent on delay, an opportunity to slow down the proceeding with wide ranging discovery. It also prescribes an untried oral argument procedure. Option 2 partially addresses the requirement of Section 134 of the NWPA, but it needs to be modified to eliminate extraneous contentions and repetitive consideration of generic issues.

NSP strongly endorses the comments submitted to the NRC by the Edison Electric Institute and the Utility Nuclear Waste Management Group to which NSP belongs. In that letter more detail is provided regarding the inappropriateness of Option 1 and the suggested changes for Option 2.

We urge the Commission to move ahead with meaningful regulations that follow the intent of the Congress in the National Waste Policy Act to prevent extensive hardship on our rate payers.

David Musolf
Manager-Nuclear Support Services

DMM/js

cc: Regional Administrator-III
NRR Project Manager, NRC
Resident Inspectors, NRC
G Charnoff
Director NRR

KANSAS GAS AND ELECTRIC COMPANY

GLENN L. KOESTER
VICE PRESIDENT - NUCLEAR

February 17, 1984

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

KMLNRC 84-020
Re: Comments on Proposed Rule

Dear Sir:

On December 5, 1983, two versions of a proposed rule were published in the Federal Register which would amend 10CFR Parts 2 and 172 to implement Section 134 of the Nuclear Waste Policy Act of 1982 (NWPA). The proposed changes would apply only to applications for a license or license amendment to expand onsite spent fuel storage capacity at commercial nuclear power reactors and would not apply to applications which include the use of new technology not previously approved by the Commission.

Kansas Gas and Electric Company has the following comments on the two proposed options:

Option 1 significantly deviates from present practice. It requires the use of a "hybrid" hearing procedure in all proceedings to which Section 134 applies. This option would establish an oral argument procedure as a means of deciding which issues should be settled. The requirement that to be admitted to a licensing proceeding a petitioner must specify at least one valid "contention" would be removed. We feel that this option is inconsistent with both the language and intent of Section 134.

Option 2 is more consistent with the existing rules and would provide a new summary disposition procedure which utilizes oral arguments at the request of any party to the proceeding. However, we feel that Option 2 does not go far enough in establishing meaningful procedural reform to implement the intent of Congress in providing an expedited proceeding for the expansion of spent fuel storage capacity of existing civilian nuclear power reactors.

Kansas Gas and Electric Company supports a modified version of Option 2 such as the one being submitted by EEI/UNWMG, and we would encourage the Commission to adopt the comments submitted by EEI/UNWMG.

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Yours very truly,

Glenn L. Koester

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PR-2,72 (15)
(48 FR 54499)

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Department of Energy
Washington, D.C. 20585

FEB 24 1984

Mr. Samuel J. Chilk
Secretary to the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Docketing and Service Branch

Dear Mr. Chilk:

The Department of Energy (DOE) supports the Nuclear Regulatory Commission's (NRC) efforts to establish a hybrid hearing process for applications to expand spent fuel storage capacity at civilian nuclear power reactors pursuant to section 134 of the Nuclear Waste Policy Act ("Act"). Nevertheless, DOE has significant concerns that the approach proposed by NRC on December 5, 1983 [48 FR 54499] satisfies neither the letter nor the spirit of Section 134.

In implementing the requirements of Section 134, the NRC should take into consideration the overall scheme that appears to have been contemplated by the Congress in enacting Subtitle B of the Act. As stated in Section 131(a)(2) --

> the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor;...". (emphasis added)

In order to expedite the effective use of existing storage facilities and the addition of new storage capacity, Section 134 of the Act authorizes the NRC to provide for abbreviated licensing proceedings at the request of any party.

Although Section 131(a)(1) recognizes that the owners and operators of civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel, the Act also provides for Federal storage of 1,900

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metric tons of spent nuclear fuel "when needed to assure the continued, orderly operation of such reactors." The Federal storage authorized is to serve merely as a safety-valve in the event that the utilities are unable to meet their storage responsibility. Accordingly, Congress intended that the NRC enable utilities to meet their primary storage responsibility by establishing an expedited licensing procedure.

The proposed rule would amend 10 C.F.R. Part 2 and 72 to implement Section 134 of the Act. The changes to existing NRC procedure would apply only to applications for a license or license amendment to expand on-site spent fuel storage capacity at commercial nuclear power reactors through the use of high-density fuel storage racks, fuel rod compaction, the transhipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity or by other means. Excluded from the proposed procedure would be the first application for a license amendment to expand on-site fuel storage capacity by the use of a new technology not previously approved by the Commission for use at any nuclear power plant. The proposed rule identifies two options.

Option 1 would require use of a hybrid hearing procedure in all proceedings to which Section 134 would apply. The hybrid hearing procedure would establish a two-stage proceeding in which an oral argument procedure, at the first stage, would be employed as a method to determine those issues which require adjudication for their resolution in a second stage trial type proceeding. Option 2 would create a new summary disposition procedure, utilizing oral argument, which could be used at the request of any party to the proceeding.

DOE is concerned that Options 1 and 2 do not go far enough to realize the type of hearing envisioned by Section 134 and cannot with any degree of confidence be expected to encourage and expedite the effective use of existing storage facilities at civilian nuclear power reactors. DOE believes that the procedures proposed in Options 1 and 2 are so rudimentary as to be insufficient to carry out the spirit of Section 134 or successfully meet the challenge of prescribing an effective hearing procedure. Option 1, though ambitious in scope, does not successfully come to grips with the problems reasonably to be anticipated. (See the attached Section-by-Section Analysis for specific comments.) It appears to create a hybrid hearing but fails to tailor the hearing

procedures to the specific and unique requirements of the subject matter, i.e.
a previously licensed technology. Option 2 is modest in scope, and DOE supports the use of an improved summary disposition procedure in an adjudicatory proceeding. Nevertheless, DOE seriously questions whether Option 2 goes far enough to create the comprehensive procedure contemplated by Section 134.

To facilitate the expansion of existing storage capacity at civilian nuclear reactors through the use of a previously licensed technology and effectively to implement Section 134, DOE makes the following recommendations:

1. Adapt the hearing procedures to take account of the fact that the proceeding will deal with a previously licensed technology.

2. Where an application can be determined not to involve significant hazards consideration, hold a hearing after issuance of the requested license or license amendment.

3. Use generic proceedings to approve the use of an existing technology under appropriate conditions, and thereby avoid unnecessary relitigation of issues already raised and resolved.

1. Dealing with a previously licensed technology.

Section 134 envisioned the use of a two stage proceeding in which an oral argument, at the first stage, would be employed to determine those issues which require resolution by adjudication in a second stage trial-type hearing. The first stage proceeding will be facilitated if the notice of proposed action identifies the information available, under 10 C.F.R. Part 2, and this information should be made available for public inspection at the place of hearing. In addition, because the applicant will use a previously licensed technology, a copy of the earlier licensing proceeding should also be made available.

Because extensive information is likely to be available, the Commission should consider the desirability of creating higher standards for raising an issue than the standards used in existing proceedings. The present rules governing admissibility of contentions require that the party offering a contention state the basis for the contention with reasonable specificity. Option 1 would loosen this already permissive test by removing the requirement that to be admitted to a licensing proceeding a petitioner must specify

at least one valid "contention." Once this test is met, the party offering the contention is admitted as a party to the licensing proceeding. DOE disagrees with this approach. Once an intervenor has been admitted to the proceeding, the intervenor can require the applicant to invest considerable time and expense in the discovery process. Depending upon the information available to a would-be intervenor, the Commission should instead establish a stricter threshold for admissible contentions, especially since the proceeding will deal with a previously licensed technology.

2. Issuance of an license or license amendment prior to a hearing.

Section 134 is limited to license applications or license amendment applications for authority to expand on-site spent fuel storage capacity utilizing technologies previously approved by the Commission at the site of a nuclear reactor. Accordingly, as indicated in footnote 1 of the Proposal [48 F.R. 54500], the Commission has the opportunity to determine that a specific application may not involve significant hazards considerations so that a hearing may be held after issuance of the license or amendment. Where appropriate, DOE encourages the Commission to use this approach on a case-by-case basis.

3. Use of Generic Proceedings.

The Commission has the authority, where appropriate, to make a generic determination that a previously licensed technology involves no significant hazards. Such a determination could greatly limit the issues, if any, which require consideration in a two-stage proceeding by specifically providing that issues disposed of in the generic proceeding could not be revisited by the hearing officer in a site specific proceeding. DOE believes that the Commission should more carefully consider the benefits of generic rulemaking upon the hybrid proceedings under Section 134, and that the proposed rules take account of the probability of generic rulemaking by the Commission in this area.

In addition, DOE would like to identify two questions of statutory interpretation for further consideration by the Commission. The first question is whether use of the two stage hearing under Section 134 is optional, "at the request of any party," or is mandatory if a hearing is held at all "at the request of any party." It would appear that the quoted phrase can be read either way.

The second question which the commission needs to consider is whether the proposed summary disposition procedure (Option 2) meets the requirements prescribed in Section 134 for a two-stage hearing. Section 134 provides that the hybrid hearing procedure shall "provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties." (emphasis supplied). Option 2 apparently is intended to be employed for summary disposition of one or more issues at the request of any party in an adjudicatory proceeding under 10 CFR Part 2, while adjudication of the remaining issues goes forward. While this would appear to be a permissible reading of Congressional intent, it could also be argued that Congress in enacting Section 134 contemplated a process that would first require the holding of an informal oral hearing before any issue were committed for handling under adjudicatory procedures. DOE urges the Commission to examine both of these questions carefully and to ensure that the administrative record for its final rule reflects that examination.

The Department believes that Section 134 provides an opportunity to demonstrate the benefits which will flow from the institution of an effective hybrid hearing procedure, provided that the Commission does not lose sight of the special circumstances surrounding Section 134, particularly the fact that far fewer issues concerning health and safety are likely to arise in proceedings under this Section than in many other licensing proceedings. The adjudicatory hearing structure currently utilized by the Commission is costly and time consuming and involves procedures which do not always appear to be necessary or suitable for resolution of the matters at stake. For this reason, the establishment of a hybrid hearing process is an important component of the Administation's proposed "Nuclear Licensing and Regulatory Reform Act of 1983", introduced in the House as H.R. 2511 and in the Senate as S.894. A hybrid procedure can facilitate effective public participation by focusing attention on the actual questions in controversy among the parties; it can enhance protection of health and safety by concentrating regulatory resources on significant safety concerns; and it can improve the quality of adjudication by ensuring that adjudicatory proceedings are employed only when the issues are amenable to an adjudicated resolution.

In summary, DOE believes that Option 2 does not go far enough to carry out the changes contemplated by Section 134, although it arguably improves the existing procedure for

summary disposition. Option 1 appears to provide inadequate administrative guidance. Accordingly, DOE believes that the Commission should reconsider its approach and recast this proposal to address the issues discussed above so that the two-stage procedure developed by the Commission can more successfully implement Section 134 and more completely realize the benefits of a hybrid hearing.

Sincerely,

Michael J. Lawrence

Michael J. Lawrence
Acting Director
Office of Civilian Radioactive
Waste Management

Attachment

Section-By-Section Analysis

1. §2.1100. Purpose.

No comment.

2. §2.1101. Scope of Subpart.

No comment.

3. §2.1102 Notice of Proposed Actions.

DOE believes this section should provide that the notice of proposed action will list the documents available for public inspection. These documents should include the record of the proceeding which licensed the storage technology which the applicant seeks to employ. All of these documents should be available at the site of the public hearing or some proximate place accessible to members of the public during normal business hours.

4. §2.1103. Requests for hearings or petitions to intervene.

This proposed section abandons the "one good contention" rule, 10 C.F.R. §2.714(b). Instead, any person who satisfies standing requirements will be made a party. Apparently, there would also be no basis for dismissing a party who subsequently fails to state an issue within the scope of the proceeding (proposed §2.1104(a)) or to raise a genuine or substantial dispute of fact for which adjudication is necessary (proposed §2.1106(b)). Accordingly, any person who is admitted on standing gets a "free ride"

through the entire proceeding. Although there is apparent discretionary authority for the hearing officer to limit participation under proposed §2.1103(e), it is unclear when or whether a hearing officer would exercise such discretion. By not providing criteria for discovery, past experience indicates that a hearing officer will generally be reluctant to exercise this authority.

In addition, proposed §2.1103(a)(2) should be revised to require the petitioner to show significantly more than "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene."

5. §2.1104 Filing of lists of issues; requests for oral arguments.

A party need only allege issues. There are no criteria to ascertain whether an "issue" is sufficient as a matter of pleading. This approach abandons 10 C.F.R. §2.714(b) which requires a petitioner to provide a list of the contentions sought to be litigated "and the basis for each contention set forth with reasonable specificity." As a result, the list of issues may become nothing more than a vague shopping list for possible matters in controversy for which an intervenor can obtain discovery under proposed §2.1105. What is apparently required is a transitional set of requirements between the initial list of issues under proposed §2.1104

nd commencement of discovery under proposed §2.1105 which equire a petitioner to identify genuinely disputed questions etween the parties.

. §2.1105 Discovery; oral argument.

This proposed section declines the congressional nvitation to prescribe new criteria for discovery. Instead he proposed section refuses to confront the problem by ropping it in the lap of the presiding officer as follows:

> "A party other than the staff or licensing or license amendment applicant may obtain discovery and participate in oral argument with respect to only those issues raised by that party which are determined to be within the scope of the preceding by the presiding officer."

Furthermore, proposed §2.1105(c) permits cross-examination during the oral arguments at the discretion of the presiding officer. Surely past experience should raise the serious concern that such a carte blanche delegation of discretionary authority to the presiding officer will restrict imposition of any significant limitations upon discovery and serve as an unrestricted opportunity for a fishing expedition. DOE suggests the Commission should add criteria for discovery to this proposed section.

7. §2.1106 Designation of issues for hearing.

No comment.