REPORT OF THE AD HOC COMMITTEE FOR REVIEW OF NUCLEAR REACTOR REFORM PROPOSALS

The Ad Hoc Committee for Review of Nuclear Reactor Reform Proposals has reviewed the proposed Nuclear Standardization Act of 1982 ("the proposed Act"). In this connection, we met to discuss the legislative proposals on six occasions; at one such meeting, we had a useful, extended discussion with Mr. Tourtellotte, Chairman of your Regulatory Reform Task Force.

The proposed Act is intended to provide for:

(a) Early Site Reviews;

(b) Standardized Plant Design Approvals;

(c) One-Step Licensing -- Issuance of a Combined Construction Permit/Operating License;

(d) Stability of Approved Standardized Plant Designs -- Protection Against Unwarranted Backfit Changes;

(e) Deferral by NRC to FERC with Respect to Need for Power Determinations; and

(f) Revised Hearing Procedures for Standardized Plant Design Approvals, Early Site Approvals and One-Step Licensing.

While the Ad Hoc Committee endorses the need for change in these areas, we disagree with:

(a) the scope of the proposed Act;

(b) important details of each of the provisions of the proposed Act; and

(c) the failure to make the intended purposes and characteristics of the public hearing processes explicit in the proposed Act.

We understand that the Commission staff intends to propose, later this summer, a package of administrative reforms and supplementary legislation. It is our conclusion that the Commission should not proceed with proposing the Nuclear Standardization Act of 1982 to Congress without full consideration of the supplementary legislation and administrative reforms now under preparation by the Regulatory Reform Task Force. While the broad features of the proposals were sketched for us by Mr. Tourtellotte, we, of course, did not have them before us. With such proposals on the table, it is possible that some of our opinions with respect to the proposed Act would be modified.

Scope of the Proposed Legislation

There is at least a hiatus with respect to new nuclear plant proposals. Accordingly, it is reasonable and wise to utilize this time period to develop a revised regulatory framework to accommodate such proposals, when and if they should occur. The proposed Act is prompted by the view that the licensing process would be improved if it encourages proposals to locate pre-approved standardized plant designs on

pre-approved sites. While this concept has much ap[redacted]
presents a number of questions, which are discussed[redacted]
And, if the reform legislation is cast only in such[redacted]
it begs the question of regulatory reform for the e[redacted]
nuclear power plants now under construction or in c[redacted]
These amount to more than ten percent of this nati[redacted]
ly planned electric generating capacity; the uncert[redacted]
inefficiency in the regulatory process surrounding [redacted]
is of current, significant national interest.

Moreover, it is possible that a renewal of int[redacted]
nuclear power projects -- in Alvin Weinberg's termi[redacted]
second nuclear era -- may involve plants of very di[redacted]
design, proposed perhaps by new social or economic
institutions. In this regard, it is important that [redacted]
regulatory framework allow for considerable flexibi[redacted]
refrain from insisting on formulations which would [redacted]
new proposals only to more mature versions of the p[redacted]
plants. The proposed Act does not provide the desi[redacted]
flexibility.

A. Early Site Reviews and Approvals

The Committee favors revision of the Atomic En[redacted]
explicitly allow early consideration and resolution [redacted]
related issues. An essential element of such a pro[redacted]
assure that, upon their resolution, these matters w[redacted]

subject to reconsideration at downstream stages of the licensing process in the absence of good cause.

The Commission should be authorized to allow proponents of specific sites to request and obtain a range of approvals and determinations, including:

(a) approval of a site for subsequent installation of a nuclear power plant having specifications within defined limits of design parameters which reflect the site characteristics;

(b) determination of environmental issues, where appropriate, including alternative sites and their rankings; and

(c) individual determination of specific site-related characteristics that could affect the design and/or installation of a nuclear power plant at that site.

While the Commission obviously has to define those characteristics of sites which it may consider significant in any specific instance, the proponent of a site should be permitted to selectively request those approvals or determinations it requires at any time for planning purposes.

In our view, the proposed Section 193 does not clearly allow this flexibility to site proponents, although Section 193g would seem to recognize the possibility of limited site characteristic determinations. Our concern is that, as

drafted, Section 193 appears to be focused primarily on overall site suitability determinations.

We believe the Commission should explicitly consider and determine when and how NEPA and environmental matters will be taken into account in the several site suitability determinations. Among the difficult issues to be addressed and resolved are:

(a) whether and which environmental determinations would necessarily require assessments of the cost of, and the need for power from, facilities which only later may be proposed for installation at the site;

(b) at what point in a site suitability determination would an environmental impact statement be required; and

(c) the stability of environmental determinations made prior to the preparation of an environmental impact statement.

The proposed Act implicitly recognizes the advantages to planners and the public alike in early selection and approval of power plant sites. We concur. We recognize too, however, that the planning process often involves sequential consideration of a variety of factors. The Commission's procedures should recognize this and allow for appropriate state agency and public participation in making binding determinations with

regard to such matters. In some states, state agency involvement in early site approval may be a necessity for its practical implementation.

The proposed Act is not sufficiently explicit with respect to the binding nature of such determinations. It addresses the matter only in terms of "validity" of the site permit for a term of years. The determinations and approvals made in the early site review process are essential premises for planners. The statute should clarify the extent to which such determinations and approvals can be reopened prior to or at any subsequent licensing stage, at the initiation of the staff or any party. The present draft is silent on these matters, although it would allow review -- presumably at least by the staff -- of "significant new information" at a renewal of a site permit. A "backfit" standard should be developed for application to these site approvals and individual site characteristic determinations. The standard should also be applicable to applications for renewal of such approvals and determinations. In our view, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the site approvals and determinations. In this connection, while we address below the matter of public hearings as they might apply to early site reviews and other matters, we note that the proposed Act is silent with respect to public hearing opportunities at the renewal stage of a site permit. The Commission's intent in this regard should be clarified.

B. Standardized Plant Design Reviews and Approvals

The section-by-section analysis of the proposed Act contemplates review and approval under Section 194 of an "essentially complete final design for a whole nuclear power plant usable at multiple sites." This definition is not explicitly included in the draft statute.

The Committee recognizes and endorses the value of standardized design reviews and approvals. Such review could reduce redundant staff review activities, and approved designs of whole nuclear plants could be matched with previously approved sites to expedite the regulatory process for purchasers and operators of such approved plants.

Nevertheless, we believe the limitation of Section 194 to essentially complete final designs for whole nuclear power plants would reduce the value and utility of the proposal. The statute should authorize the Commission to allow the submittal of designs of major safety-related systems or subsystems which represent sufficiently discrete major features of nuclear power plants so as to be amenable to independent review. Similarly, while the statute should facilitate the review of final designs, it should not insist on essentially complete final designs. We believe the value of this more flexible approach outweighs the potential benefit of inducing standardized plant design by limiting Section 194 (and Section 185) to such plants.

For purposes of standardization, the degree of finality should be measured by whether the proposed design can be subject to a reasonable backfit rule and whether, if constructed, the only regulatory responsibility would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters. This may not require at the standardized plant design review stage all of the detail that is now included in an FSAR. But it will require the definition by rule, or in individual case determinations, of detailed performance criteria for all safety-related plant systems and key safety components.

Under the proposed Act, standardized plant design approvals would be "valid" for a term of years. While we believe we understand the concept of validity here to disallow any modifications in the approval except through the backfit or design stability provisions in Section 196, it would be well to be explicit here.

Like the early site approval, the draft is inappropriately silent with respect to public hearing opportunities, if any, to be afforded in connection with amendments or renewals of standardized plant design approvals. In addition, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the design approval.

Our discussion below of Section 196 is also applicable to the criteria set out in Section 194e(2)(B).

C. One-Step Licensing

The Committee agreed that in appropriate cases, a single hearing on the principal issues related to whether to construct and operate a nuclear reactor at a proposed site is desirable. Although arguably much of this could be done without new legislation, it would be unwieldy, unreliable, and would cause much litigation and attendant delays to do it without legislation. The legislative proposal presented for review, however, was not deemed adequate, primarily because of its ambiguities and failure to address key concepts central to such a proposal. The justifications provided in the preamble to the legislative proposal were also judged to be inadequate and in some cases inaccurate.

Either a standardized design or a custom design, to the extent it contains the required detail, should be eligible to qualify for a combined CP/OL. To require a standardized design could limit the combined CP/OL to only a handful, if any, of licensing proposals and might have utility only years in the future. There is no apparent safety or environmental concern which would justify limitation of this concept to pre-approved standardized designs only. Although such a limitation might encourage standardization, we believe the flexibility afforded by our proposal outweighs such considerations.

As with standardized plant designs, the Committee is of the view that the Commission should have the authority to allow one-step review and resolution of sufficiently discrete major portions of the plant design which are amenable to independent approval. This would facilitate use of the benefits of combined hearings to the fullest extent possible without waiting for final designs on all parts of the plant.

The Committee also considered the level of design detail which should be required to be eligible for a combined CP/OL determination. Again, as with standardized plant designs, there was agreement that the standard for sufficiency of design detail in standardized plant designs should be sufficient to allow applicability of a reasonable backfit rule, and for those matters considered and determined at the CP/OL proceeding, what should be left would be only the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters.

The Committee recognized that certain matters, such as emergency planning, may not lend themselves to ultimate determination at the time of issuance of a combined CP/OL. Emergency planning, for example, would involve state and local authorities at a point many years before actual planning would be required, thus involving premature expenditures and possibly changing circumstances. One solution would be to defer this

kind of matter to a later time, considering only at the combined CP/OL stage, or at an earlier site approval proceeding, whether there were any peculiar local circumstances that would make development of an adequate emergency plan impractical. In the absence of such a finding, the CP/OL would issue, subject to a condition providing for later development and consideration of emergency planning. While this is a departure from a full one-step CP/OL proceeding and determination, the inherent flexibility it provides may be necessary for plant operating procedures and other issues. The responsibility for scheduling a timely submittal of such deferred matters would, of course, be that of the applicant initially, although the Commission should be able to establish scheduling guidance for such submissions.

The Committee considered the absence of an explicit backfitting provision applicable to combined CP/OLs. The absence of such a provision undoubtedly reflects the view that a combined CP/OL might only be issued in connection with an approved standardized plant design. While the text doesn't make this explicit, we noted our disagreement with such a limitation above. A combined CP/OL will only be meaningful if it is accompanied by meaningful assurances of design stability. The Committee agreed that all issues once resolved should remain resolved absent a showing which meets the requirements of a reasonable backfit provision.

The Committee also generally agreed that when the staff conducts its design verifications, construction inspection and testing, the details of those reviews and findings should be made publicly available. The Committee believes that any person should be able to obtain a hearing on the issue of whether the plant, as built, complied with the combined CP/OL conditions, if the person establishes by a prima facie showing that a significant safety or environmental issue was involved and that the plant did not meet the CP/OL requirements. However, the majority of the Committee believes that in such circumstances, the proper procedure to follow is that established in Section 2.206 of the Commission's regulations, under which the initial determination to convene a proceeding is made by the Director of Regulation. One member believes that the initial determination should be made by an independent decision-maker, such as an ASLB or ASLAB member. In any event, this matter merits explicit consideration by the Commission.

D. Stability of Approved Standardized Plant Designs -- Protection Against Backfit Changes

As is evident from the discussion above, an effective provision regarding design stability is essential to provide a strong incentive for early site approvals, standardized plant design approvals and combined CP/OL issuances. It is also important to the existing power reactors now under construction or in operation. In this regard, the explicit limitation in

the proposed Act of the backfit provision to approved final standardized plant designs only is wanting. Moreover, as a result of a drafting quirk, the intended provision would not seem to protect even the holder of a standardized plant design approval because, by its terms, it would apply only to a "licensee of, or license applicant for a production or utilization facility." To that extent, the incentive for a designer to seek a standardized design approval would be diminished.

The Committee believes that the backfit standard proposed is unworkable because it will not be possible to calculate societal risk with sufficient precision, and because we do not believe that a standard for "acceptable levels of risk" is close at hand. As a concept, the "acceptable level of risk" standard does not appear qualitatively different from the standard in the Commission's existing backfit regulation (10 C.F.R. § 50.109). (In that regard, there is little evidence that the NRC staff is currently abiding by the existing rule.) In our view, it would be a mistake to enact into law a requirement for quantification of risk when the tools for quantification and the standards for acceptance themselves would be likely sources of litigation.

A more workable formulation would be to require the staff to produce a systematic analysis setting forth a rational basis for any required change in design or operating limits (related to safety or environmental concerns), including a discussion of

the objectives of the change; a quantification of the impacts and the benefits of the change, to the extent possible; a consideration of alternatives to the change; and a reasonable implementation schedule. The purpose of such an analysis would be to require the staff to set out whether the proposed change is required to meet the statutory requirements and why. Organizationally, within the NRC an appointed group of senior officials should be charged with reviewing and approving each such analysis. A similar systematic analysis should be required for changes proposed by applicants and third parties, to the extent practicable.

As a final note, there was disagreement within the Committee as to the need for special provisions in regard to backfits proposed by members of the public. Under existing law, a licensee has a right to a hearing on any order imposing a change in a previously approved matter, and as a matter of logic, Section 196 would impose a burden of persuasion on the party, e.g. the Regulatory staff, seeking such a change. On the other hand, when a third party, such as an intervenor, seeks such a change, his remedy is under 10 C.F.R. § 2.206 and he would not have the opportunity for a hearing as a matter of right. One view is that this is fundamentally unfair, contending that it results in an imbalance of rights among parties who may have participated in the initial licensing proceeding. According to this view, the showing of conformance with the

backfit criteria -- when the proponent of the change is a member of the public -- should be considered by a panel convened from the licensing board roster of members rather than by the staff. The majority view is that the Section 2.206 procedure is consistent with longstanding principles of administrative law which recognize a licensee's vested rights and the presumptive validity of an existing license. Moreover, if incentives for standardization are desirable, maintenance of existing law -- notwithstanding the apparent imbalance of rights -- would seem desirable.

E. Deferral to FERC with Respect to Need for Power Determination

The current version of the legislative package provides, in Section 185B, that

> In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

An earlier version of the legislative package had provided that "the Commission is authorized to rely upon the certification of need for power made by competent Federal, regional, or state government organizations."

The Committee considered at length several ramifications of this proposal, and was able to reach consensus on several points:

(a) There are benefits of regulatory efficiency and accuracy to be gained by providing to the Commission the authority to rely upon the expertise of other government entities in this subject area.

(b) The legislation should allow the Commission broad capability to accept need determinations made by state agencies or other competent government organizations, as originally proposed, rather than restrict it to determinations made by the FERC.

(c) This legislative package is not the appropriate instrument for revision of the extant authority distribution between the federal and state governments in the area of public need certification for electric power units.

(d) It will be necessary to explicitly delineate (in the administrative package) the necessary content and form of any such certification in order to avoid ambiguity concerning which of the several facets of a need determination are covered.

The Committee considers the need issue to encompass the spectrum of factors inherent to generation planning. Not only must future increases in electric power demand be projected, but means of influencing those increases should be considered and the best means of meeting total future power demand must be addressed. Most of these factors, of course, are utility or region specific; they do not lend themselves readily to broad federal plans. Some members of the Committee believe that the existing system of state regulatory authorities, as supplemented by regional organizations, is best suited to consider these factors in reaching determinations of need for proposed new units. Neither the NRC nor the FERC appears to possess sufficient resources or expertise to assume these duties on a national or regional basis. (Moreover, there is at least some doubt as to FERC's current authority to perform such certifications.) In the case of federally authorized power authorities, however, federal agencies could be utilized as the appropriate sources of need determinations for the Commission. Consequently, the Committee recommends that the Commission be given the authority to accept need certifications from a variety of sources. Of course, there may be circumstances where there is no other agency certification or where a certification may be incomplete; in such circumstances, the NRC will have to determine the matter.

The Committee sees a critical need for the Commission to delineate the necessary content of an acceptable certification in its forthcoming administrative package. This should include, among other things, an explicit statement of the issues considered and the decisions made.

Concern was expressed by some members of the Committee that the variations in procedure, including opportunity for public participation, among such a wide variety of potential certifiers could, in some cases, lead to acceptance of inferior quality "need" determinations, compared to what might be achieved through the NEPA review process and by the ASLB. Specifically with respect to FERC, in the absence of established procedures or practice with regard to "need" certifications, there may be questions concerning whether FERC procedures would provide an airing of the issues equivalent to the current NRC procedures. The Commission, outside the docket of any specific license application, should determine whether the procedures utilized by potential certifiers are substantially equivalent to NRC procedures. That determination should be binding and not subject to review by any court or in any NRC licensing proceeding. One member of the Committee, however, believes that under no circumstances should the Commission put itself in a position of judging the adequacy or fairness of procedures utilized by state agencies.

Concern has been expressed by some members of the Committee that new preemption arguments may be made possible under the presently proposed legislative package. The replacement of the state and local governments by FERC in succeeding drafts, coupled with the comments of Commissioner Gilinsky at the April 16, 1982 Commission meeting (Tr. pp. 63-65), could result in future arguments over legislative intent. We believe that is not the intention of the Commission and it should make this clear.

Revised Hearing Procedures

Amendments in 1957 to the Atomic Energy Act of 1954 provided for mandatory public hearings at both the construction permit and the operating license stages for nuclear power reactors. Ever since 1957, the focus of legislative reform of the nuclear regulatory process has been on the public hearing. In the 1960's, the mandatory hearing at the operating license stage was deleted and the institution of atomic safety and licensing boards was created. More recently, the so-called "Sholly" amendments in the NRC authorization legislation addressed the requirement of public hearings in connection with operating license amendments. And, of course, legislative proposals in the 1970's were concerned with the format and timing of hearings, particularly at the operating license stage.

The proposed Act reflects yet another attempt to integrate the public hearing meaningfully into the licensing process -- at least for standardized plant design approvals, for early site approvals and for issuance of a combined construction permit and operating license for a standardized nuclear power plant. In all three instances, Sections 194d, 193d and 185c, respectively, of the proposed legislation would allow for reform of the public hearing process by inclusion of the phrase "after providing an opportunity for public hearing." The insertion of this phrase, according to the section-by-section analysis, was "to assure flexibility of the hearing process for standardized plants," and to avoid the application of the public hearing provisions in Section 189a of the Atomic Energy Act of 1954, as amended, to the one-step proceedings for standardized plants and to the proceedings for standardized plant design approvals and early site approvals.

Whether Section 189a requires very formal adjudicatory procedures or whether it allows a flexible approach to establishing hearing procedures, in our view a serious effort to reform the public hearing process should involve much more explicit proposals to the Congress.

We understand that the Commission's Regulatory Reform Task Force is developing further legislative proposals which may include, among other things, clarification of the Commission's discretion in selecting hearing formats under Section 189a.

Similarly, the Task Force's development of a package of administrative reforms may also deal with hearing formats. Without having those proposals before us, we are not now in a position to comment specifically on the Commission's intended implementation of Sections 185c, 193d and 194d.

Nevertheless, it is our view that, if the reform package is intended to provide more certainty to the regulatory process, and to thereby lessen the risk of endless litigation involving challenges to the hearing procedures, explicit consideration by Congress of the public hearing process should be encouraged. In this regard, a vague reference in the section-by-section analysis to attaining "flexibility of the hearing process" is not sufficient.

Beyond this, we question whether the lack of specific reference to Section 189a in proposed Sections 185c, 193d and 194d is sufficient to exclude judicial application of Section 189a to such proceedings and particularly to amendments and extensions of such permits/licenses and approvals. If avoidance of unnecessary litigation is the goal, this issue should be addressed directly.

In our view, both the Commission and the Congress should explicitly address such fundamental questions as:

(a) the purpose of the public hearings;

(b) the appropriate parties to such hearings;

(c) the role of the NRC Staff in such hearings and the proper standard for sua sponte reviews by the licensing boards;

(d) the timing of such hearings;

(e) the appropriate utilization of formal adjudicatory and less formal processes;

(f) the desirability of intervenor funding;

(g) the appropriate threshold level for purposes of defining an issue in dispute; and

(h) the desirability of applying such reforms only to standardized plants and early site reviews as distinguished from current plant designs.

At the outset, it is important to confront and define the purpose of the public hearings. For out of such definition, guidelines could emerge for responses to the other issues listed above. The definition of the appropriate public hearing process does not carry with it any constitutional requirements. There is no constitutional right to a public hearing and certainly not to a particular form of public hearing, so long as considerations of fairness are satisfied. Surely many -- indeed most -- decisions which affect the lives of many people are made without imposition of particular constitutional concepts. The choice to include an opportunity for public participation in the regulatory process is that of Congress; it

is not dictated by elevated principles of due process. That being the case, the question remains: What is or should be the purpose of the public hearing process?

(1) Should it be to build public understanding of, and public confidence in, nuclear power and the staff review?

This, at one time, was a stated purpose of the mandatory public hearing procedures. While those procedures probably have resulted in more disclosure of the safety considerations associated with nuclear power as compared with most other industrial activities, it is probable that the Commission's public hearing procedures have not led to a significant level of public understanding of, or confidence in, the regulatory process. Indeed, the formalities of those proceedings, although perhaps necessary to safeguard the rights of participants, may have led to misunderstanding of nuclear power and the nature of the staff review. We urge that this not be adopted as a purpose for the public hearing and that alternate means be considered for educating the public.

(2) Should it be to test the adequacy of the Regulatory Staff's review of the application?

At one time, this too was a stated function of the hearing process, whether the hearing was contested or not. As contested hearings became routine, licensing boards gradually

focused almost entirely on the contested issues before them and abandoned their independent efforts to test the adequacy of the staff review. While disputes as to specific issues surely result in a testing of the validity of the staff's review process, it is clearly episodic only. The hearing process does not provide a systematic check of the adequacy of the staff review, absent a specific dispute. Other mechanisms for this task should be sought. For example, review groups within the staff and the Advisory Committee on Reactor Safeguards acting openly and in a systematic manner could provide a more efficient means of testing the staff review. Nevertheless, a minority of the Committee holds the view that some limited independent testing of the staff review process could be of benefit.

(3) Should it be to allow the expression of conflicting political views?

Public hearings held before licensing boards cannot, by their nature, resolve the larger political disputes surrounding the societal decision relating to whether to utilize nuclear energy to provide electric power. That type of political decision is uniquely appropriate for legislative bodies. Therefore, public hearings should not be directed at responding to conflicting political views.

(4) Should it be to resolve disputes?

This is the classic function of the public hearing process. Members of the public and competing interests in possession of facts or views contradictory to those of the applicant or license holder could benefit the decision-making process by presenting those facts and views to the agency. The public hearing provides such an opportunity and should allow for the testing of such facts and views. Under the circumstances there should be no opportunity for sua sponte review by licensing boards, nor should the boards be expected to reach conclusions related to matters beyond the scope of the disputes before them. If the sole purpose of the public hearings is the resolution of disputes -- and this is the view of the majority of this Committee -- then absent a matter in dispute, there should be no public hearing.

We have not attempted to be exhaustive with respect to either the purposes of the public hearing or the issues to be addressed in connection therewith by the Congress or the Commission. Nor have we arrived at a consensus on each of these matters. We have unanimously concluded, however, that reform of the regulatory process requires explicit consideration of these matters by the Congress. Applicants, be they private or public bodies, can no longer be expected to commit a few billion dollars to a single power plant without having an adequate appreciation that the hearing process will be better

focused and better managed than it has been in the past and with less risk of contentious litigation and judicial review. Similarly, interested states and third party intervenors cannot be expected to invest the necessary effort to make the process work better without a better appreciation of the focus and purpose of the public hearings. Thus the Commission should first determine the purpose of the public hearing process and then decide the issues affected by that determination.

We find the consideration of the public hearing process in the proposed Act to be unacceptably brief and indirect. Nor are we persuaded that reform of the public hearing process should be initiated only in the context of standardization proposals. The issues listed here transcend such proposals; they apply equally to plants now under construction or in operation.

Conclusion

We have concluded that the present hiatus -- if that is an appropriate term -- in new nuclear plant proposals provides an opportune time to review and reform the regulatory process. The reform proposals should address the regulatory process as it applies to both the plants in operation or under construction as well as any prospective new plants.

The Proposed Nuclear Standardization Act of 1982 reflects a serious effort to address the major problems in the

regulatory process as it would apply to prospective new plants. Certainly early site approvals, standard plant design approvals, combined CP/OL's and stabilization criteria reflect serious proposals for consideration by the Congress. In our view, however, the proposals do not adequately address important current problems, nor are they sufficiently comprehensive in their consideration of the problems to which they are addressed. It would be better, in our view, to first develop the remaining legislative proposals and administrative reforms now under consideration by the Regulatory Reform Task Force. In that comprehensive context, the overall reform proposals could be considered in a more meaningful fashion.

SEPARATE VIEWS

OF

ANTHONY Z. ROISMAN

The report of this Committee represents a substantial effort to accommodate the views of all of its members and produce a consensus. Each of us on one or more issues would have taken a somewhat different view were it not for our desire to reach a consensus, a desire motivated by our belief that the failings of the present licensing process are so severe and so long-standing that a new and better process, even if not a "perfect" process, is preferable to no change. The principal report focuses on those aspects of the hearing process which if modified will make it operate more smoothly and efficiently. In short, we address proposals which will reduce the total elapsed time required to decide whether to build and operate a nuclear power plant.

While this efficiency will undoubtedly <u>indirectly</u> improve the quality of the presentations at the hearings by allowing each party to better focus its efforts on the principal matters in dispute, it does not <u>directly</u> improve the quality of the hearing. Yet in the last analysis if the primary function of the hearing is dispute resolution, the most important task of the hearing is to assure to the fullest extent possible that the dispute is correctly resolved. This is particularly true here where the incorrect resolution of a safety issue can and has caused significant damage. Thus, for instance, it is now undeniable that all parties would have ultimately benefitted if the hearings on Three Mile Island, Unit 2 had included an

analysis of the incident which had occurred at the Davis-Besse plant several months earlier and which was ultimately the initiator of the Three Mile Island accident. Such an analysis would have slightly lengthened the hearing but the benefits of full knowledge of and remedies for those events before operation began would have far outweighed any conceivable cost of delay.

How then can a licensing reform package not only properly make the hearings more efficient but also make them more effective? On this point the Committee was unwilling to reach a consensus and thus I have prepared and submitted separate views.

The key ingredient to assure better quality in the hearings is to assure that as to legitimate matters in dispute, the decision-makers have the benefit of the most reliable and complete record reasonably attainable. Thus, for instance, a hearing board should not have to conclude that although significant additional evidence was available -- such as the testimony of a particular expert -- nonetheless a disputed issue would be resolved without that evidence because no party offered the expert. Does this happen? Absolutely, as the hearing board or appeal board members will attest. Does the absence of such additional information adversely affect the public? Yes, as Three Mile Island so dramatically illustrates. How can the problem be solved? There are several possible solutions.

First, hearing boards could be given the autho[redacted] direct the Staff to retain particular experts or pa[redacted] types of experts to do an analysis on and present [redacted] with respect to a disputed issue as to which the bo[redacted] aware that significant relevant information would [redacted] be presented. Second, the board itself could reta[redacted] experts for the purpose of the hearing. Third, upo[redacted] cation of a party who demonstrated its lack of suff[redacted] financial resources, the board could tentatively ag[redacted] reimburse that party for the cost of such presenta[redacted] extent the board concluded after hearing the evide[redacted] was of significant value in resolving the disputes.

The benefits of a system such as this are sig[redacted] First, there is a positive incentive to the staff [redacted] that its own presentations fully encompass all rele[redacted] evidence (not merely that evidence which supports [redacted] conclusions), thus avoiding the need for the board [redacted] any evidence gathering authority. Second, it provi[redacted] premium to the party in the hearing that fully deve[redacted] rational way its contention by assuring that such a [redacted] will not fail for lack of competent evidence. Cont[redacted] which no competent technical evidence is reasonably [redacted] will be inherently less worthwhile to pursue. Thir[redacted] establishing a mechanism that assures a full explor[redacted] disputed issues which have substantive merit, the C[redacted]

can more properly -- both legally and politically -- establish high standards for an issue to be allowed into the process. Since the function of the hearing under this regime would be dispute resolution and not a vehicle to allow every interested person to express his view regardless of the merits of that view, the Commission could probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid. Interested parties could focus their limited resources on making that showing on those meritorious issues, confident that if they met that threshold the disputed issue would be fully developed. Finally, and most importantly, the decision whether or not and how to build and operate a nuclear facility would more likely be correct, thus better protecting the public interest and in the end improving the stability of the decisions made.

The majority of the Committee presented essentially philosophical objection to this proposal. It centered on the premise that the process should be "neutral" and avoid favoring one party over any other party. Already the process fails in this neutrality since significant financial help is provided to the industry through taxpayers supporting research and development to better able nuclear facilities to pass muster in the hearings. And, of course, taxes pay for the staff participation and involuntary utility rates pay for the applicant participation. It was also observed that it is the staff's job

to fully explore all relevant issues. If the staff fully presents all relevant data as to a disputed matter, the board will not order production of additional evidence. If not, then the staff has not fulfilled its function and the board must see to it that the gap is filled.

Finally, the majority of the Committee argues that in any event, a contested proceeding is not the best way to resolve these disputes and particularly a contested adjudicatory hearing. This would argue for abolition of all hearings and elimination of all fair mechanisms for resolving what are undeniably real disputes. The majority wisely does not argue this logical extreme and if, as we all acknowledge, a legal mechanism for dispute resolution should exist, then it is far better to assure a full evidentiary presentation as a prerequisite to the dispute resolution. In fact, it is hard to imagine that the "collegial" decision-makers suggested by the majority would be satisfied to decide disputed issues without all the relevant data before them.

In the last analysis, the essential consideration must be that the decision-maker has available a substantially complete record in order to decide the significant issues presented. Only in this way will we achieve the legitimate goal of the hearing: to produce as nearly as reasonably possible a correct result. It is this goal which the present system does not now achieve, but could with the modifications proposed here.

SEPARATE VIEWS

OF

GERALD CHARNOFF, GEORGE L. EDGAR,
STEPHEN LONG, ROBERT F. REDMOND

In his separate views Mr. Roisman contends that, once a dispute is accepted for resolution by a licensing board, the assigned board should be authorized to (a) direct the staff to retain particular experts to present testimony on the disputed issue, (b) itself retain such experts, or (c) tentatively agree to reimburse a party -- needing such funds -- for the cost of its presentation if it determines that such presentation "was of significant value."

We disagree with this proposal. It is neither necessary nor desirable as public policy; it is not necessary as a stimulus to public participation.

Both we and Mr. Roisman agree that the primary, if not the sole, purpose of the public hearing is the resolution of disputes. And Mr. Roisman apparently agrees that the Commission "could" -- may we say "should" -- "probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid," at least if the proposal is accepted. It does not follow, however, that the proposal is sound.

The Roisman proposal is a refined version of intervenor funding proposals which have regularly been rejected by the Congress. The proposal fundamentally is at odds with the philosophy of a regulatory system under which a government agency is staffed and funded at great public expense to assure

the public health and safety. That agency and its staff are charged with making an independent review of licensing requests from the standpoint of the public interest. The proposal is premised on the proposition that the regulatory agency will not be ably staffed or will not obtain the services of competent expert consultants; therefore, the proposal would equip the licensing boards to overcome such alleged agency staff deficits. This, however, would only provide, as noted in the Committee Report, an episodic check on the staff. We would urge a more systematic review program if that is required.

As between private disputants, the law and the process should remain neutral. The funding authority proposed by Mr. Roisman would serve to promote more litigation, further complicate and protract the hearing process, divert public resources, and most likely divert Commission attention from its principal task of managing the agency and its staff.

While the adversary process may be well suited to resolving ordinary disputes, we do not believe it is the best way to arrive at fundamental safety and environmental decisions of a technical nature. This is best done by objective and competent experts engaged in direct informal discussion and evaluation of technical analyses and data. The adversary process does not facilitate that kind of interchange or the clarification and resolution of technical issues. The Roisman proposal, on the other hand, would place more emphasis on the

adversary process for these purposes. It is not an appropriate policy.

SEPARATE VIEWS

OF

DAVID W. STEVENS

I would like to associate myself with the views of Mr. Roisman relative to the establishment of conditions to improve the quality of the hearing process. I do not necessarily dissent from the views of the Committee relative to the ways which we have explored to improve the hearing process. I subscribe to them. The separate statement of the other members, however appears to conclude that: (1) there is no need to further improve presentations made under a revised and improved hearing process by making limited financial support available where need is demonstrated, and (2) the adversarial aspect of licensing is found wanting and an atmosphere of information-sharing by experts in a relatively informal atmosphere would be a preferred approach. I doubt that under current conditions of public concern and uneasiness that such a technique, as is suggested by the latter proposal, is achievable. A central point with which we can all agree is that there probably is too much litigation and that in the interests of all, it should be reduced. That is not to say, however, that we can and should eliminate disputes. That will not happen. We can and should, and certainly the Committee has striven to suggest the kind of licensing structure which will, if executed, improve the efficacy of the process. We cannot will an elimination of disputes, but we may be able to confine them in a more appealing framework.

I am also persuaded that the members of the Committee who are hesitant about the impact of intervenor funding may have been persuaded by past, more comprehensive proposals and not by those presently advanced by Mr. Roisman. Funding of intervenors appears to be only a part of the proposal, not the central theme. And such support would not be automatic; it would be conditional.

I suspect that in a "pure" regulatory framework that there ought not to be a need for intervention -- that all analytical work would be comprehensive and inclusive of all relevant information on all substantive issues without added external input. That state may not be achievable in the foreseeable future. It can be argued that there are potential issues that may not have the proper exposure unless some supporting resources are made available. I would not feel comfortable in foreclosing that opportunity during the discussions on regulatory reform. I think that the proposal advanced by Mr. Roisman is cautious, relevant and should be further explored.

The desire of all of us on the Committee is common -- that we encourage a regulatory foundation that will permit identification and resolution of relevant issues on a timely basis. In doing so, we would hope to avoid the emotional contentiousness which permeates much existing regulatory review.

The regulatory process is not suitable for the promotion of philosophic views of individuals or groups. Generic considerations should take place in other, political forums. I would not support the utilization of scarce resources to advance a particular cause or position. I do not feel that is the case in this separate proposal. I think that is a proper concept to raise in our review of the regulatory reform proposals.