AA61-2 PDR

J. Goldberg

January 5, 1983

NOTE TO: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: NOTICING POL/FTOL CONVERSIONS

By Memorandum dated December 15, 1982, from Darrell G. Eisenhut, Director, Division of Licensing, NRR, to Edward S. Christenbury, Director and Chief Counsel, Hearing Division, OELD, the Division of Licensing requested OELD's position on whether the forthcoming conversion of provisional operating licenses (POL's) for certain nuclear units to full-term operating license (FTOL's) are required to be re-noticed. The following information and guidance is provided in response to that request.

Section 189a. of the Atomic Energy Act of 1954, as amended, requires the Commission to pre-notice "once in the Federal Register" its intent to issue an operating license. Such notice serves the purpose of informing interested persons of their opportunity to petition for leave to intervene and request a hearing with respect to the issuance of a license. Publication of such notice in the Federal Register constitutes notice to all persons in the United States. 44 USC § 1508.

Since each application for a conversion from a POL to a FTOL already has been duly noticed "once" in the Federal Register, there is no statutory requirement that the NRC re-notice any of the conversions of POL's to FTOL's. The issue becomes, then, whether the original F.R. notice is adequate to support the OL which ultimately is issued if the notice is challenged as inadequate or stale. Due process requires interested persons be afforded proper notice of administrative proceedings. Accordingly, the notice published must reasonably apprise interested persons of the issues involved in the proceeding. Such notice is generally considered adequate in the absence of a showing that an interested person was misled by the notice. Long delay between issuance of the notice and completion of the licensing action is not necessarily fatal. Close cases are decided on the basis of the entire record.

The case law supports the following test as to the adequacy of an originally issued notice: Re-noticing is not necessary if the original notice can be said to not be misleading because it fairly gives notice of the nature and scope of the agency action ultimately to be taken (including predictions of changes in the facility based on reference to future documents which would describe any changes and would be available to interested persons), and there is not a long delay involving a substantial dormant period. If, however,

these conditions are not all satisfied in a given case, then there is a litigative risk involved in not re-noticing, the degree of risk depending on the particular facts. In each case, the following factors should be examined in predicting the litigative risk and deciding whether or not to re-notice the conversion:

(1) the contents of the original notice,

(2) the changes to the facility, and their significance, since the original notice,

(3) the history of the proceeding, including hearings, dormant periods, media publicity, etc.,

(4) the length of time between notice & OL issuance.

In judging the adequacy of Federal Register notices of opportunity for a hearing, the courts have examined the totality of circumstances involved with particular emphasis on the above factors. Of them, the first two factors are accorded the greatest weight, while the fourth factor, concerning delay, is given the least weight.

In summary, there is no statutory requirement that any of the conversions be re-noticed. Each one should be examined individually according to the four factors above to determine the litigative risk in not re-noticing. If it is determined to re-notice a particular conversion, the notice should explicitly state that re-noticing is not required by statute and that the notice is being published as a matter of agency discretion.

Guy H. Cunningham, III
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cc: William J. Dircks
Darrell G. Eisenhut

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