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REMARKS

The other day, when, you Bill and I met, you mentioned that you may want a compilation of what OELD, OGC and the Commission have said about Sholly to Congress. Here's some material that may be pertinent. I'm sure Joanna and Bill Parler have more material. After you've reviewed this, you may want to have them search their files.

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NUCLEAR POWERPLANT LICENSING DELAYS AND THE IMPACT OF THE SHOLLY VERSUS NRC DECISION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NUCLEAR REGULATION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

MARCH 25 AND 31, 1981

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NUCLEAR POWERPLANT LICENSING DELAYS AND THE IMPACT OF THE SHOLLY v. NRC DECISION

WEDNESDAY, MARCH 25, 1981

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON NUCLEAR REGULATION,
Washington, D.C.

The subcommittee met at 9:15 a.m., in room 4200, Dirksen Senate Office Building, Hon. Alan K. Simpson (chairman) presiding.

Present: Senators Simpson and Symms.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. The hearing will come to order. I may run out of breath before I finish. I have been galloping up and down through the tunnels and the members of my faith were having a lifesaving event over there preparing for the coming reconciliation process, an interesting topic I might add. So I apologize to you all for the delay and hope you understand.

We are meeting here today to hear testimony from nongovernmental witnesses on two important issues regarding the regulatory process for nuclear powerplants. The first of these is the projected delays in the NRC issuance of operating license for plants that are expected to be completed in 1981, 1982, 1983, and beyond. Second is the impact of the November 19, 1980, decision of the U.S. Court of Appeals for the District of Columbia circuit in the *Sholly* v. *NRC*; very controversial decision. The growing problem of licensing delays for nuclear powerplants is a matter of great concern to me. I have shared that frustration with several in the room. When the Commission appeared before the committee last month it confirmed that of the 13 plants expected to be completed in 1981 and 1982, 12 plants were expected to experience licensing delays totaling some 90 months.

Subsequent reports to us from the Commission indicate some limited improvement in reducing the delay for several of those plants due to increased NRC staff work already in progress, but those reports also indicate potential licensing delays for a number of other plants that are expected to be completed in 1983 and beyond.

So clearly we are facing a problem of growing proportion with substantial economic and energy supply implications for this country. I refer to that as the doctrine of progressive regression. It may

have some merit. I am most interested in hearing the views of the witnesses today on the expected impacts of those growing license delays, as well as the reasons for those delays. And since its appearance before this committee, the Commission has submitted a report to Congress outlining a broad range of administrative options for reducing the delays and issuing operating license. These options include the reallocation of NRC staff resources to the licensing case work from other NRC activities, including revisions to the Commission's licensing hearings procedures, modifications to the current revisions on the issuance of operating license after the licensing board has issued a favorable decision but before the appeal board and Commission review.

In addition, the Commission has proposed legislation that would authorize the Commission to permit interim operation of new nuclear plants upon a determination that one, such action is necessary in the public interest in order to avoid the consequences of unnecessary delay in the operation of the plants, and two, in all respects other than the completion of the Atomic Energy Act are met. You remember Senator Domenici spoke of those issues at the authorization hearing.

Interim operation under the Commission's proposal would be limited to not more than 5 percent of full power, and the Commission's interim operation authority would expire at the end of 1983. The legislative and administrative operations identified by the Commission provide us with a focus on the hearing today and the subcommittee will appreciate having the views of the witnesses of those and other options for addressing the licensing delay problem. It would be useful to hear not only how effective these measures will be in reducing the delays, but also what impact these measures will have on other activities of the agency. And opportunities for public participation in the licensing process, which to me is a very important facet of the entire scope of things and must always be very carefully preserved, that issue of public participation.

We will also then be examining this impact of the *Sholly* decision, which held that NRC may not issue a license amendment even if there is no significant hazards consideration, until the completion of any requested hearing.

The Commission's proposed legislation to overturn the *Sholly* decision argues this, that the court's decision mandating a prior hearing on demand on matters insignificant to the public health and safety seriously and immediately encumbers the regulation of nuclear power, and puts at risk a substantial number of nuclear powerplants which would either have to be shut down or operated at reduced power if they are not accorded the authority sought in pending license amendment request. In testimony before this committee last month, the Commission noted that there are approximately 750 licensing amendment applications which are expected to be approved based upon a no significant hazards consideration finding. According to the Commission if hearings are requested in many of those cases, there is the prospect of curtailment of nuclear plant operation for reasons unrelated to protecting the public health and safety.

And that is the reason for the Commission's existence. That is the principal mission of the NRC, to protect the public health and safety.

A series of those type of hearings would severely tax the already strained resources of the Commission staff and divert its attention from more pressing matters. We want to examine that most thoroughly.

So that is rather a full plate for an afternoon. Those are serious concerns. I look forward to hearing the views of the witnesses on the likely impacts of the *Sholly* decision, on the needs for corrective legislation and on the advocacy of the Commission's legislative proposal.

And before the first witness I would recognize with some pleasure the new member of the subcommittee, the Senator from Idaho, Steve Symms, who has certainly added a great dimension to the proceedings here and was the ranking minority member of the House subcommittee before coming to the Senate.

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Thank you very much, Mr. Chairman. I can certainly share your concerns regarding the growing delays in issuing operating license for nuclear powerplants beyond the time when those plants are completed. I believe this is the first time in the history of commercial nuclear power programs that we have faced a situation with literally dozens of plants, will sit idly awaiting the licensing process.

I understand in some cases an individual plant may sit idle for a period of a year or more at a staggering cost to the utility and the ratepayers. Clearly this is a problem that must be corrected as soon as possible.

As you point out, the NRC has identified a series of measures, Mr. Chairman, that could be adopted to reduce these delays, but few of the decisions needed to move ahead with these changes have been made by the Commission. My concern, Mr. Chairman, is that the somewhat optomistic predictions made by the commission of substantial reductions in the length of time needed to complete the licensing process for these plants may be based on administrative actions by the Commission that have not yet been taken and that may not be taken for some time. I am also concerned that these projected improvements may be based more on revised estimates of the time needed to complete the plants, estimates that may not be in keeping with those of the utilities than on the actual experienced improvements in the licensing time. I would hope therefore that our witnesses could give us their views on the extent to which reforms identified by the Commission can realistically be expected to shorten the licensing time for these plants.

With regard to the Commission's legislative proposal, Mr. Chairman, I am also concerned that the low power testing restriction may unduly restrict the effectiveness of the proposal and actually reducing the present licensing delays.

So I would be interested in hearing the views of our witnesses on the advisability of this restriction in terms of developing a solution to this delayed situation. I would also agree, Mr. Chairman, that

the Commission's characterization of the impact of the *Sholly* decision is most troubling. A requirement that the NRC hold hearings before instituting even the most trivial technical types of license amendment simply because a hearing is requested seems to me to make very little sense. Yet this appears to be what the court's decision requires.

And such a requirement stands as an open invitation to those who might seek to use the hearing requirement as a means to hinder or halt operation of plants for nonsafety reasons. I would be most interested in hearing from those who support the result reached in the *Sholly* case, and hear whether or not they believe the public interest is served by a requirement that hearings must be held before putting into effect amendments that do not involve significantly safety hazards simply because someone has requested a hearing, for whatever reason.

I can certainly see the Commission's point that if a large number of such hearing requests are filed for whatever purpose, the results may well be to draw the immediate NRC staff away from other responsibilities with far greater importance.

Mr. Chairman, these are just some of the thoughts I have and I compliment you for getting this committee moving because I think this is a vitally significant and important aspect of our Nation's energy needs, that if we are not able to have the capability in this country and the commonsense to grant simple license for operating a known state-of-the-art technology that is prudent and safe, it will be very difficult I think for this country to ever achieve any kind of independence from the foreign dictates for our energy sources. And I might just add one other dimension to this discussion. I would hope that in the upcoming year or in the very near future that we could get for this committee justification to convince this Senator why we have one perfectly good operating unit sitting idle at TMI at a cost to the ratepayers in Pennsylvania of $12 million a month. And I would hope we can have some evidence brought forth why it is that TMI Unit I has been idle when Congress will probably be asked to provide emergency funds to bail out a situation worsened by our failure to act to start up the one plant that we have. And with that I look forward to hearing from our witnesses, Mr. Chairman.

Thank you very much for calling this meeting and addressing this important subject.

Senator SIMPSON. Thank you very much. I am looking forward to working with you.

Now our first witness, William Lee, president and chief operating officer of Duke Power Co. And I again apologize for the delay and for your good forbearance. Thank you.

STATEMENT OF WILLIAM S. LEE, PRESIDENT AND CHIEF OPERATING OFFICER, DUKE POWER CO., ON BEHALF OF THE EDISON ELECTRIC INSTITUTE, THE AMERICAN NUCLEAR ENERGY COUNCIL AND THE ATOMIC INDUSTRIAL FORUM, ACCOMPANIED BY MICHAEL MILLER, CHAIRMAN OF AIF'S LAWYERS COMMITTEE

Mr. LEE. Thank you, Mr. Chairman, and no apologies necessary, sir. I know you are a busy man.

My name is William S. Lee. I am president of Duke Power Co. and appear here today on behalf of the Edison Electric Institute, the American Nuclear Energy Council and the Atomic Industrial Forum.

Senator SIMPSON. Would you introduce the gentlemen with you.

Mr. LEE. And I am accompanied by Michael Miller, Esquire, who is chairman of the Atomic Industrial Forum's Lawyers Committee.

Not being licensed to practice law and being an engineer, some of the issues before this subcommittee may need a legal interpretation, Mr. Chairman.

The magnitude of the NRC licensing delay problem is shown in the NRC report which was filed with the Congress in January. As the chairman has indicated, the report shows that the NRC estimates that construction will be completed at 13 plants for a total of 90 months before the Commission will be ready to issue operating license for them. This includes three plants which hold zero or low power license but cannot go into commercial operation until the full power license is issued.

The enormous costs to utilities and their consumers associated with these delays for each of the 13 plants would be in the range of $30 to $40 million per plant per month. Those figures include only the cost of replacement power and the interest paid during construction while they are delayed.

For the 90 months of unnecessary regulatory delay the cost then would be between $2.7 and $3.6 billion. This is for 1981 and 1982. Extrapolating this to the plants expected to be delayed through 1983, the total cost of delay would be $7 to $10 billion. In addition, the Department of Energy estimates that due to these delays during just 1981 and 1982, electric utilities constructing these plants will consume 42 million barrels of oil more than they otherwise would have used.

We understand the workload placed on the Commission by the Three Mile Island accident. However, our view is that there are other contributing factors, including a lack of appropriate priorities in allocating personnel to licensing, confusion as to Commission policy and an inefficient public hearing process that are causing these delays.

Examples of causes are suspension of the immediate effectiveness rule, lack of Commission policy direction to the hearing process, and the fact that less than 200 of the NRC's 3,200 employees are assigned directly to reactor licensing.

On March 12 the Commission submitted a report to this subcommittee on steps it is taking to eliminate licensing delays. The report contains a number of sound ideas which deserve to be implemented. However, it is significant that the Commission so far has been able to reach a consensus on only a very few of the operations, there being differences of opinion among the Commissioners on important policy matters. This underscores the need for the President to act quickly to fill the vacant seat on the Commission.

Unfortunately the Commission's reported plan to improve licensing is not being implemented. In 2 weeks of meetings on the subject, the Commission was unable to agree to reinstatement of its immediate effectiveness rule, or to make the changes in procedural rules to support an expedited hearing schedule, or to approve real-

location of all the manpower which would be required to get staff technical review off a critical path, or to issue a final rule establishing license requirements for near-term construction permits, or to discuss in more than a perfunctory fashion several important Commission policies that are contributing to the licensing delays.

In short what the Commission did is to put forward a plan for improvement but failed to make the hard policy and staff allocation decisions necessary to accomplish the objective in planning. The burden should be on the Commission to demonstrate through concrete actions that the improvements will be implemented.

The proposal to amend the Atomic Energy Act to authorize the Commission to issue temporary operating license is an essential component in getting licensing back on schedule. The proposal submitted by the Commission is a step in the right direction. However, I believe it is unnecessarily restrictive in three respects. First, it is not entirely clear—and I am very skeptical—that the licensing process will be back on track by the end of 1983. It would be better to leave open the issue for how long such authority may be required until it can be determined whether the Commission's efforts to expedite the hearing process bear any fruit.

Second, I agree with Chairman Hendrie and the expression of Senator Simpson that the legislation should not be limited to low-power operations. You can go from low power to full power in just a few weeks but hearing delays can be many, many months. Rather than have an arbitrary low-power limitation in the statute, the amendment should permit the NRC to authorize up to full power operation and leave it to the Commission's discretion of how much power to authorize on a case-by-case basis.

Third and finally, the authority should be expanded to include amendments to operating licenses that exist. If a plant is shut down for modifications there is a potential for extensive delays in return to service if it must await the outcome of a protracted public hearing on its licensed amendments.

Broadening the provision to permit temporary operation in such situations would be consistent with the overall rationale of the Commission's proposal and would complement the authority it is seeking to deal with in the *Sholly* case.

I also agree with some points made in Commissioner Ahearne's additional views set out in an attachment to the proposed amendments. It is clear that the public hearing process, particularly at the operating license stage, serves little useful purpose as presently constructed. It is shameful that when a plant is built and ready to go on line, ready to save consumers money, ready to displace other fuels, and a billion or so dollars have been invested in it, it is shameful then to argue interminably about whether it should have been built at all or built elsewhere, about whether a geothermal or biomass facility would be preferable, whether the power is needed or the financial qualification of the utility to operate the plant. As Commissioner Ahearne states, a fundamental reform of the hearing process is needed.

The Commission's temporary operating license authority must not be used however, as a crutch, thereby continuing to duck the hard decisions that must be made to improve the whole process. I also agree with the thrust of the proposal submitted by the Com-

mission to deal with the holding in the Sholly case, and I commend the Commission for its initiative on this matter.

And now to a somewhat new proposal. We have been discussing the temporary operating authority, the authority to deal with the *Sholly* case, restoration of the immediate effectiveness rule and fundamental reforms to the hearing process. They are all immediately necessary. Although essential, they represent the interim band-aid approach. In the longer term the Atomic Energy Act should be amended to delete the opportunity to have public hearing at the operating stage, and have only one license to build and operate with public participation fully exercised prior to the issuance of that license. This could be patterned after that part of the Federal Power Act relating to licenses from Federal Energy Regulatory Commission for large dams at hydroelectric facilities. They too involve issues of public safety as well as a host of environmental considerations. Hydro licenses, including the opportunity for full public participation, are considered in a single proceeding for a license to build and operate the plant.

In the case of the nuclear plant there should be an opportunity for public hearings as a part of the one license procedure, including the necessary fundamental reforms of the hearing process. This procedure would resolve the question as to whether to build and operate a specific nuclear plant if the license is granted. The continual inspection by the NRC can assure that safety standards are met throughout construction, start up testing, fuel loading, and operation. That is what the FERC inspectors do for hydroplants.

I believe this change to be necessary if our Nation is to have any more nuclear energy at all beyond that which will be provided by plants now operating and under construction. The interminable delays at the operating license stage have so added to costs that the final plant cost and its schedule are now unpredictable and totally out of control. Unless this is corrected and reasonable predictability restored, I cannot fill my duty of diligence to investors by recommending they finance a new nuclear plant.

I believe the steps I have recommended will improve the process, will preserve full public participation, and be fully supportive of the Commission's mandate to protect public health and safety. Attached to my statement are the amplifying statements of my associate, Michael Miller, and reports giving the extent, causes and costs of licensing delays and the operations for eliminating these delays. And I would ask that they be incorporated in the record, Mr. Chairman.

Senator SIMPSON. Without objection it is so ordered. [See p. 81.]

Mr. LEE. I thank you, sir, and I thank other members of the subcommittee for the opportunity to present these views. I am glad to try to respond to your questions.

Senator SIMPSON. We do appreciate your testimony, Mr. Lee. You presented that well, as always.

As you indicated in your testimony, the NRC's January report to the Congress projected these licensing delays of some 12 or 13 plants expected to be completed in 1981 and 1982 totaling some 90 months. How accurate do you feel those estimates are, particularly with respect to the estimates for completion of construction?

A second part of that question, are they consistent with the utilities' estimates of construction completion?

Mr. LEE. Our information from a careful survey of the utilities across the Nation indicates that the NRC is assuming construction a little later than the utilities expect to complete construction. Therefore the delays may be somewhat longer than in the NRC report. I can't certify that the utilities will complete construction when they say they will. That may depend in part on what new regulations might fall out between now and then, and what they have to do to comply with that.

My only experience in the NRC's estimates of how long it takes them to do anything has invariably been that it takes much longer than they say.

Senator SIMPSON. To what extent if at all do you believe that these following factors that I am going to relate to you have contributed to this time gap that we are now seeing between expected plant completion and expected issuance of the plant operating license, and that proposal is asked when we consider the time taken by the NRC staff to prepare and issue their SER's, safety evaluation reports. What do you think that contributes to the time gap?

Mr. LEE. Well, even before TMI the target completion dates for completion of their safety evaluation reports continued to slip behind the schedules they set for themselves. Since the TMI accident the slippage has been even greater. I know in the case of one plant with which I am involved the public hearing that has just been concluded was started later than we had hoped, everyone had hoped, simply because of the SER's were not complete.

Senator SIMPSON. What about the time needed to litigate the post-TMI requirements in individual licensing proceedings as permitted by the Commission in its December 18, 1980, order?

Mr. LEE. Well, I would say that the litigation of those requirements, the permission to litigate those requirements is the basic reason why we have just been through several weeks of hearing on a plant that is completed and ready to run. Had they been handled on a generic rulemaking basis then I do not believe that hearing would have been necessary. So that is one instance of delay because of that decision. I am afraid there will be a number of other opportunities for delay because of that decision.

Senator SIMPSON. What about the time gap when we look at the time needed to resolve issues raised by a licensing and appeals board on their own initiative in sua sponte, that being an art form we lawyers use to confuse the unsuspecting populace. Sua sponte, I am going to get that out of the lexicon here. But how about that when they go into their own initiative in addition to the issues raised by the parties in controversy?

Mr. LEE. Well, it seems ironic to me that duplicate plants can be built, maybe in the same State or an adjoining State, where the site characteristics are the same. In the one case there is sufficient public concern about the plant so that someone intervenes. In another case they don't intervene. In the case of the plant where there is no intervention there is no hearing at the operating license stage and no consideration by a hearing board, and no considera-

tion by the appeals board and the operating license is issued and the plant generates electricity.

In the sister plants, I have seen this happen on my own system, in the sister plant you go through sometimes several years off and on of hearings and consideration by the appeal board. They can generate issues anytime they want to. I do not know of any substitute change in any plant ever made as a result of anything brought up by the appeals board.

Senator SIMPSON. None at all that you know of.

Mr. LEE. I am not aware of any.

Senator SIMPSON. Is there anything that would have been uncovered that would have something to do with the public health and safety?

Mr. LEE. Senator, I am not aware of anything substantive. There may have been one or two instances where additional surveillance frequency was required as a part of a license requirement of some variable, but nothing fundamental with respect to the plant design or operation.

Senator SIMPSON. What about the gap when we look at the time needed for the appeal board and the Commission review due to the Commission's decision to suspend the immediate effectiveness rule?

Mr. LEE. Well, that gap can be, according to the rule as I understand it, some 60 days for the appeal board and 20 days for the Commission after the hearing board hands down its decision. But according to the chairman of the appeal board that gap can be much longer than that, maybe 7 months. So the delay would range from 90 days to 7 months according to the testimony of the chairman of the appeal board. And to me that sort of delay is unconscionable in view of the fact that no issue ever raised by an appeal board has caused any substantive effects on any powerplant in the country. And that is a good enough track record to say you do not have to wait 80 days to 7 months for that procedure to grind its very slow pace.

Senator SIMPSON. I think that is something that certainly this subcommittee and full committee in the Senate are going to have to deal with, is the immediate effect of this rule and its real impact and the things that can be done administratively rather than legislatively, and those opinions of course were pursuing. But one more about the time gap. What is your feeling with the time gap and the time taken by these hearing schedules due to such factors as scheduling problems for part-time board members, several who serve on faculties, some of who are available in the summer or various times, and what is perceived to be a general lack of management or discipline in management by the boards in preparing for and conducting the hearings and in writing decisions once the hearings are completed?

Mr. LEE. The length of time they require to write their decision and hand it down is uncanny to me. It does not reflect, using the word you mentioned, a management system that recognizes the cost accountability to society for that length of time. It is an enormous cost, $30 to $40 million per plant per month. And if they had that sense of urgency with that sort of financial clock ticking, then they would implement those management systems with ade-

quate staffing and not conflicting hearings with the same hearing board member in order to crank those decisions out.

I do know that in the industry we are capable of developing information and of writing very complicated technical reports on very short turn around notice.

The NRC says demonstrate why you should not be shut down and give us a technical analysis of such and such to prove that, and do it by next week or shut down, we have a sense of accountability to the public and we get it done, and done thoroughly. It would seem to me the same sense of urgency and accountability to all of our society ought to be inculcated throughout the NRC process.

Senator SIMPSON. Are there any other factors that you feel have contributed significantly or substantially to the lengthening of this time period for expected construction and completion of the operating license?

Mr. LEE. Sir, the two that are sufficiently significant I just want to briefly mention for the record. One is the rapid pace of changing requirements, changed earthquake requirements periodically. That has caused delays, for example, in plants all over this country that are built and nearly ready to operate and then we had to go back and retrofit for a new theoretical earthquake. We need to settle down the pace of regulatory change or the system isn't predictable and I can't go to an investor and say trust me with your money, I want to build one, because I don't know what it will cost.

The other thing is the operating license public hearing, which I think is unnecessary provided you have had full public participation after one license hearing, decide whether you are going to build it or not. If you are going to build it, surely the decision is going to be made to operate it if it meets the safety requirements. But the operating license is a very costly thing in terms of the management and technical and environmental manpower. The applicant is asked a question, it is not necessary to have accountability in the question. It is necessary to have accountability in the answer.

Tens of thousands of man hours are involved in an operating license hearing, tens of thousands. Those people are the most competent people, and those people really are needed on the job to make sure the plant is built and ready to run safely. And there have been delays because of the blotter-like drawing of competent people away from the job in order to get the hearing done.

It seems to me that the time to build the plant can be shortened by keeping the competent people working on that and not running to duplicate hearings.

Senator SYMMS. Mr. Chairman, could I ask a question that goes right along with that line. You mentioned that you will not be able to get investors if this situation is not corrected, and I think your testimony mentioned $3.6 billion in interest, that ratepayers will ultimately end up paying if these plants are not licensed in the first year; is that correct?

Mr. LEE. That is correct, sir.

Senator SYMMS. How long can the United States continue with our present antinuclear policy, or a policy of nonnuclear energy or no growth in nuclear energy before we lose the engineers that actually have the necessary technical expertise? How long will it

be before somebody will decide they want to build a nuclear powerplant only to find when they call GE or Westinghouse that they are sorry, but they can't do it anymore, they don't have a team capable of doing it?

Mr. LEE. Senator Symms, I can't give you a finite answer but it is getting closer with every month of delay. We are already seeing that the young people who are in engineering school are taking now other branches of engineering and the nuclear engineering faculty is partly idle, not enough students, because young people don't perceive that we are going to change our ways and get on with the game and are looking for career opportunities. That is self-defeating.

Other nations are also proceeding a pace with nuclear and their technology is galloping forward, and we are not doing that. We will soon fall behind them if we have not in some areas already. And of course the manufacturers if they don't have business have got to find other things to do and develop other lines of expertise in their people and the nuclear team will have dissipated. And it is tough to restart if you have let it dissipate.

Senator SYMMS. Thank you, Mr. Chairman.

Senator SIMPSON. The Commission's report to the Congress on operations producing delays, especially with regard to the immediate effectiveness rule, one to reinstate the immediate effectiveness rule for operating license and the other would allow the operating license to issue after a brief opportunity to have direct Commission review. What are your views on those two operations and with regard to that second one realistically what could the Commission hope to accomplish in a brief direct review period?

Mr. LEE. Mr. Chairman, I can't imagine what those four or five persons would do, could accomplish in a brief review period. The plant and the hearing record—the plant is complicated, the hearing record is voluminous and if they insisted on a meaningful review of the plant, not only would that be all those persons would do for a living but they would fall further behind than they are now. I simply don't think it is a meaningful contribution to safety. They have a large and competent staff. They have outside consultants, they have the review by the Advisory Committee on Reactor Safeguards. The Commission is there in my view to establish policy and manage the program for our Nation and not to make detailed technical reviews of powerplants.

Senator SIMPSON. Yes.

Mr. MILLER. Senator, I would just like to add as a footnote that it would seem to me if the Commission were encouraged to abandon the excessive restrictions of its own party rules so that it would have access, a meaningful basis to its own fine technical staff during the course of the licensing proceeding, the notion of having the Commission participate in the licensing process would be satisfied and the immediate effectiveness rule could go back into operation without any problem. I think the idea behind the suspension was to involve the Commission in the licensing process, and there are other much more efficient and effective ways of doing that.

Senator SIMPSON. Yes, I hear that. Certainly the Three Mile Island experience raises cautionary procedures with the Commis-

sion that I think are not warranted at the present time. That is my view.

The Commission did issue brief public comment proposed rules to modify hearing procedures that were supposedly to expedite the process. You have reviewed those. If those proposals were adopted by the Commission, how effective do you think they would be in expediting the hearing process?

Mr. MILLER. I will be happy to try and answer that, Senator.

Senator SIMPSON. If we didn't have lawyers.

Mr. MILLER. Yes, sir. I don't think there is any necessary relationship between the schedule that is set out in the supplementary information of the company's proposed rules and the modifications to the rules. The elimination of discovery, for example, against the NRC staff could well be counterproductive in the sense that there might be discovery in effect conducted against the NRC staff during the hearing process rather than beforehand.

There has been in my judgment just some arbitrary numbers put down in the schedule. For example, if one looks at the schedule, the end of discovery is supposed to take place 25 days after the issuance of the supplementary safety evaluation reports. On that very same day revised contentions are to be filed. I don't think that is realistic. There is nothing in the proposed amendments that will cause that to come about.

There is a need for greater discipline to be exerted, to pick up on what Mr. Lee said, better management of the hearing process by the licensing boards. And establishing deadlines as a good way to do that of course.

Senator SIMPSON. I think I was a little surprised myself in reviewing the rules, the procedural rules of the Commission to find that in many cases they are more complex than the Federal rules of civil procedure, they are more complex than any State rules of civil procedure. That is really extraordinary in their complexity, layering upon layering, distinction upon distinction, and that is the very essence of what often chokes off the process in this berg, and that is troublesome, and those of my profession are involved in that and that is even rather sometimes embarrassing I must admit to you, because that as I see it is exactly where much of this has come from. That is another issue, I won't dabble on it here.

But back to the one that I think will be the most controversial is what you touched on, the elimination of formal discovery against the NRC staff. And you think that will impair the opportunities for public participation in the hearing process, and again that is an interest of mine, that that be preserved. I don't favor intervening funding and never have, but I certainly favor intervenors, not intervenors, those with a public interest and that is what the law says, having an interest. But that has been abused, too. But what are your thoughts on that?

Mr. MILLER. Senator, I guess I draw a distinction between the public interest and interest. Public interest in my judgment is served first by the NRC staff, second probably by the utility applicant, with a public to serve with the electricity to be generated. And my own experience has been intervenors use the NRC hearing process as a forum to express their views about the safety of nuclear power generally, and in some instances quite blatantly as a

means to delay the process in the hopes of perhaps engendering the very uncertainties Mr. Lee just told you about in terms of being able to have a predictable process that can attract capital so that the energy needs of the country can be served.

Senator SIMPSON. I was interested in your comments about the instances where we have been exploring the issues not brought into the question about parties particularly at the operating license stage, that we do not find any major safety design changes or major safety improvements that have ever come from that process. Is that correct? To your knowledge?

Mr. LEE. That is correct, yes, sir.

Senator SIMPSON. And according to what I have found in my research, I found the same. I do not find where that laborious extra effort has produced anything that would fit the mission of the NRC to protect the public health and safety.

Mr. LEE. I fully agree, Senator. These are strong words but I think it is a totally unnecessary circus at the operating license stage.

Senator SIMPSON. Just a couple more. The Commission has issued proposed rule, the post-TMI requirements for construction permits, and this will have the effects of resolving those issues on the generic basis. You have touched on that whereby it would not be necessary to litigate the sufficiency of those requirements in each single and individual licensing proceeding. The NRC did not follow this approach for operating license. It appears that these post-TMI requirements, including emergency planning, are issues where hearings are to be held on the plants to be completed in 1981 and 1982. Is this in your view, or Mr. Miller, is this rulemaking still useful for the operating license cases, and if so should it be pursued now?

Mr. MILLER. Emphatically yes. I would just like to point out my information, Senator, is that the Commission has not yet issued any rule with respect to post-TMI requirements even for a construction permit plant; that that was sent back for additional comment.

Senator SIMPSON. Proposed rule.

Mr. LEE. They talked about it and talked about it and couldn't agree and sent it back.

Mr. MILLER. Again picking up on something Mr. Lee referred to earlier in his testimony, what we are looking at is litigation of the selfsame issues over and over again in each of the plants that are going to be coming up for operating license in the next few years. If the Commission were to adopt a rule, or institute a rulemaking proceeding to deal with these issues which cut across individual variations in plants and certainly are not site specific in almost all instances, that whole process of resolving what the final rule should be would be in effect decoupled from getting the operating licenses processed for these powerplants that Mr. Lee described. And I think it is something the Commission ought to be encouraged to do. These requirements have been the end result of a very long drawn out process.

Mr. LEE. And bear in mind that the plants that are being completed now and in the next several years are essentially duplicates of plants running, and that have been running for several years.

Senator SIMPSON. That gets back into further pursuit, and we will do that down the line about standardization and some of those issues and see where that goes, but I understand that.

In connection with one right there in your State, apparently the principle is really not the only contested hearing issue concerning the McGuire plant, is the question of hydrogen control and containment during an accident, of course that emphasis because of the Three Mile Island. Now as I understand that was thoroughly reviewed by the NRC staff and by the Advisory Committee on Reactor Safeguards and their review on the Sequoyah plant, is that correct?

Mr. LEE. That is correct, sir, as well as by consultants and TVA engineers and Duke power engineers and by actual demonstration of the system.

Senator SIMPSON. I recall there were several detailed meetings by the Commissioner on that issue. Now the Sequoyah plant has a full power license.

Mr. LEE. Yes.

Senator SIMPSON. But because McGuire is a contested case, you are not expected to receive a license until a year from now. What are the substantial differences between the two plants on that issue, that one issue?

Mr. LEE. None, sir, and also no substantial differences between McGuire, TVA's Sequoyah, and two plants that have been operating for some time that have similar systems.

Senator SIMPSON. I guess then we come to the issue will that plant be safer because it is a contested proceeding, or will the only result simply be a higher cost for the plant?

Mr. LEE. The result will be a higher cost for the plant and no other changes, sir, in my opinion. Now the hearing board has just concluded the hearings and we have to wait for their decision, which we have already discussed.

Senator SIMPSON. And there we come back to the mission of the NRC, which is to protect the public health and safety, and we wonder if that is being done and it causes me concern that it is actually nothing more than contrived or uncontrived delay in the processing system.

Mr. LEE. I could not agree with you more, sir.

Senator SIMPSON. And why should not those issues then be resolved generically rather than in individual proceedings?

Mr. LEE. I think they should be resolved generically rather than in individual proceedings and I think the case you are citing is a perfect example of the need for legislation to authorize the Commission to give temporary operating license. In this case they have looked at the background themselves very thoroughly. One commissioner has traveled around this country talking to experts about hydrogen, has looked at systems, has inspected plants, feels comfortable with it, and voted for the Sequoyah license. I see no reason in the world why they shouldn't be authorized to give temporary licenses to other plants.

Senator SIMPSON. You have indicated that in your remarks, the extending of the Commission's interim operating authority legislative proposal to include license amendments as well as new operating license. And what is the extent of the operating license amend-

ment problem, particularly with respect to what would be the potential shutdown of the plant?

Mr. LEE. The change in requirements due to what has been learned because of TMI or some new earthquake decision, requires a change in the license, because if you are going to change the plant you have to change the license. Now if someone asks for a public hearing to consider that modification to the license, or amendment to the license, and the plant is shut down, the changes made in the plant, the plant is ready to come back but now the public hearing may not have even started, discovery is just beginning and here we go and the plant is threatened with staying high and dry and unable to return to service pending a proceeding.

Senator SIMPSON. I believe Senator Symms has some final questions. Please proceed.

Senator SYMMS. Mr. Lee, are you objecting to the low power limitation in the Commission's interim operating authority as proposed. For what time would the low power interim operating authority be useful for these plants?

Mr. LEE. A matter of just a few weeks, Senator Symms, whereas the hearing process can be many, many months. That is why if you have a low power license you can load fuel and get to low power in 8 or 9 weeks. But that is still much less than the 7 to 13 months that we have heard about for the procedural delays.

Senator SYMMS. Is the process in each of these cases to eliminate the potential for delay either with or without other steps in your opinion?

Mr. LEE. No; it is not, if you limit it to low power.

Senator SYMMS. You are also recommending the elimination of the operating date for interim proceedings if the change is made in NRC staff resources and in the Commission's hearing process procedures. Would such a sunset provision be appropriate?

Mr. LEE. I do not think so, Senator Symms. They have got a lot of changes to make, the Commission and staff, an awful lot of work to do. I would highly recommend that this subcommittee continue surveillance of the use of the temporary operating permit. And you could instead of putting a sunset provision on it ask the Commission to give you periodic reports and thus this would aid you in deciding when it was no longer necessary.

Senator SYMMS. The NRC "Report to Congress on Measures to Address the Delay Problem" included a March 3, 1981, memorandum for the Commission from NRC's General Counsel and Director of Policy Evaluation. This memorandum included several options for modifying the hearing process beyond the changes already proposed by the NRC. What are your views on the following options, including the Bitwick and Hammer and Memo? Are you familiar with that? The first option was the Commission could establish a firm discovery schedule and require that it be adhered to absent a showing of substantial prejudice to in effect the party. The Commission could establish that normal hearings will start within 30 days after the pertinent staff documents are available. The Commission could encourage presiding boards to meet guidelines for rendering decisions, the Commission could eliminate [illegible] possible Licensing and Appeal Boards scheduled conflicts, the Commission could place the burden on the intervenors to show after discovery

prior to hearing a general substantial issue of material facts by available and specifically identifiable, reliable evidence. The Commission could consolidate identical TMI-related issues into a single proceeding, it could use informal hearings as a means of separating out these particular facts or issues that require formal examination under the Administrative Procedures Act. That is quite a list of objectives.

Mr. LEE. Each of those steps would incrementally help expedite the process. Some would have higher priorities than others. I have not studied any quantified impacts of each one of them.

Mr. MILLER. I think that it really is a question of taking control of the hearing process, and those steps that were just described really are a part of good management. Judges do it in judicial proceedings. I think there is no reason the Commission couldn't do it here.

Senator SYMMS. Mr. Chairman, I just have one other question and I just ask Mr. Lee as an experienced operator, is there any reason in your opinion that health and safety of American citizens would in any way be jeopardized if TMI No. 1 were started back up again?

Mr. LEE. No, Senator; I am familiar with that plant, I have testified in that State on this issue recently, and I think the public would be well served for TMI-1 to restart. They are in process of completing the modifications that we all made from what we learned from TMI-2's accident. Their staff is strong, their training program is ready, and I would recommend that in the public interest that plant be started as soon as possible.

Senator SYMMS. Thank you very much, Mr. Chairman. Thank you very much for making such an excellent witness.

Senator SIMPSON. I do appreciate your testimony. One of the things that comes to me and I hadn't really intended to delve into but I perceive other subcommittee members of both sides of the aisle will and want to look into a retooling of the procedures, the legal procedures of this Commission. It seems to me that after practicing law for 18 years and that the rules of procedure were set up to simplify an issue, and yet I look at these rules and see things about discovery and summary proceedings and hearings and appeals that are flights of fancy in my mind, and I don't know what they do to make the process work. But I think a retooling of procedures, surely that can be done administratively, but we ought to inject perhaps a few laymen into the next session when they all sit down to hatch up some new rules and pick some poor soul to doesn't know a sua sponte from a whatever and see where we go from there. It might be an interesting proposal.

Mr. MILLER. I think the proof of the pudding, Senator, is that the rules that are most complex, for example the ones on summary disposition, are extremely time consuming. I tried them on behalf of my clients in proceedings. They have been time wasters and they have kind of fallen to disuse. But I think your suggestion about taking a fresh look at the procedures is an excellent one and we would be happy to cooperate in that.

Senator SIMPSON. You know how that will be, Mr. Lee will want to help us as an engineer, diligently to do one on us as lawyers.

OK, thank you very much. I do appreciate that.

Senator SIMPSON. Our next witness is Ellyn Weiss, general counsel of the Union of Concerned Scientists, on behalf of that organization.

Nice to see you again.

STATEMENT OF ELLYN R. WEISS, GENERAL COUNSEL, UNION OF CONCERNED SCIENTISTS, ACCOMPANIED BY MICHAEL FADEN, UNION OF CONCERNED SCIENTISTS, LEGISLATIVE LIAISON

Ms. WEISS. Mr. Chairman, Senators, my name is Ellyn Weiss. I am a partner in a Washington law firm and have been general counsel to the Union of Concerned Scientists for 3½ years. Sitting beside me is Michael Faden, probably a more famous face to you. He is a Union of Concerned Scientists legislative liaison.

My other clients include the Natural Resources Defense Council and a number of local or regional citizen groups around the country. Prior to joining my firm, Harmon and Weiss, I was an assistant attorney general in Massachusetts for 5 years. I have practiced before the NRC and in related judicial matters for 7 years. I wish to thank the committee for inviting me to testify today on the variety of measures which have been proposed or suggested by NRC to expedite the licensing of new nuclear powerplants. I will emphasize five points before you today.

First, the hearing process is the single most fundamental protection that the public has to insure the thoroughness and competence of NRC review of nuclear power.

Second, we have seen no convincing evidence that the purported delays in the licensing of new plants are due significantly to public participation in the licensing process, yet this is where the industry and NRC choose to target their proposed reforms.

Third, while we would agree that there is room for improvement in the efficiency of licensing, the administrative measures proposed by NRC are counterproductive to that goal. We will propose alternatives.

Fourth, permitting low-power operation before hearings are concluded is not justified under the current circumstances.

Fifth, most fundamentally, this committee should understand that if NRC expedites licensing by limiting the ability of the public or its own licensing boards to pursue basic safety questions, there is a price associated with that action; a price measured in increased risk to the public health and safety. The system cannot ignore the views of its critics without paying that price. That is a clear, perhaps the clearest institutional lesson of the accident at Three Mile Island Unit 2.

The committee's questions to me begin by asking my opinion of the impact of the projected delays in NRC issuance of operating licenses. With your permission, I will begin a step or two earlier in an effort to address some of the unspoken premises coloring this debate which are reflected in that question and those which follow. In particular, the use of the word "delay"—defined in my dictionary as to defer, postpone or procrastinate—connotes the unjustified waste of time. In my opinion, this word has been chosen carefully to suggest that all remains between applying for a license to operate a nuclear plant and receiving that license are a series of

ritualized formalities which neither increase nor assure the safety of reactors. The implication which follows is that these formalities can be dispensed with or cut back without affecting safety. I believe it would be unwise and dangerous for this committee to accept these premises, particularly in the aftermath of the TMI accident.

It is appropriate at this point to quote a key conclusion from the Report of the President's Commission on the Accident at Three Mile Island (p. 9):

> After many years of operation of nuclear powerplants, with no evidence that any member of the general public has been hurt, the belief that nuclear powerplants are sufficiently safe grew into a conviction. One must recognize this to understand why many key steps that could have prevented the accident at Three Mile Island were not taken. The Commission is convinced that this attitude must be changed to one that says nuclear power is by its very nature potentially dangerous, and, therefore, one must continually question whether the safeguards already in place are sufficient to prevent major accidents.

The licensing process is, in fact, the primary means by which the public may participate in raising important questions about reactor safety. Congress wisely recognized this when it provided for public hearings on license applications. It is my experience that the hearing process is the single most fundamental protection which the public has in attempting to insure the thoroughness, competence, and integrity of the NRC review of this inherently dangerous technology. The recognition that their assertions will be submitted under oath and subjected to the public scrutiny of a licensing board is a powerful deterrent to sloppy technical work and unsupported conclusions. I would be the last to say that the NRC review is perfect. There is no question in my mind, however, that it would be far worse without the check of an open public hearing process. The NRC review, the licensing process, and public participation in it, are not expendable formalities and the time required to accomplish them is not delay. On the contrary, it is a prudent investment in preventing future TMI's or worse.

Thus, I would define delay as that amount of time which is not legitimately necessary for thorough staff review and open and informed resolution of contested issues through the licensing process. Applying this definition to the issue immediately raises a basic question which has been avoided by the nuclear industry. How much of the time now required for staff review and public hearings is unrelated to the resolution of safety issues?

I would suggest on this point that the dubious statistics I have seen provided by NRC and the utilities regarding so-called slippage in the projected operating dates for new plants are virtually useless for answering this question. Putting aside the self-serving and historically grossly inaccurate nature of such projections, the point here is that they do not tell you why the operating date has slipped nor help you to design a meaningful remedy to time delay. Let us assume that plant *x* was completed on January 1, 1981, but that it does not receive a license to operate until September 1981. If those 9 months were required, for example, to obtain from the applicant the information necessary to determine whether the facility complies with post-TMI licensing requirements or for the utility to design and implement an acceptable emergency plan for the plant, I do not believe that this committee would consider that time to be

delay. On the other hand, if the 9 months were attributable to schedule conflicts among licensing board members or the lack of sufficient staff resources to perform a competent review, that would be delay. Moreover, if the latter were the case, the answer would clearly be for this committee to provide NRC the means necessary to increase its staff so that it can perform its job expeditiously. The answer is not to tell it to do its job less thoroughly. To this date, we have seen no convincing evidence that a significant portion of the time required for licensing new plants is not legitimately necessary to insure the safety of those plants.

I would agree, however, that there are inefficiencies in the licensing process which NRC can and should address. In my opinion, by far the single most significant inefficiency is the length of time which now passes between the docketing of an application for a license and the issuance of the NRC of its basic review documents, the safety evaluation report and the environmental impact statement.

Much of the argument I have seen about the length of the licensing process rests on statistics built around the number of months from the docketing of an application until the receipt of a license. These overlook the fact that the docketing of an application and the issuance of public notice of opportunity for hearing are not particularly useful milestones; they indicate very little about the readiness of a case to go to hearing. This is due to two interrelated causes. First, operating license applications are now being filed by utilities when plants are little more than half completed. Second, the issuance of the basic NRC staff review documents typically does not take place until months after the beginning of the hearing process. I do not mean to suggest here that this schedule is due to staff laxness. The process of obtaining basic information from applicants takes some period of time; it is by no means all contained in the original application filed by the utility. Only after staff review is completed and documented is a case genuinely ready to move toward hearing. Consequently, a good deal of the discovery, contention, drafting, and prehearing time prior to that point is wasteful and unnecessary in the long run. It diverts limited staff and licensing board resources and thus slows down the progress of other cases which are ready and should take priority. We are convinced that if the Commission required the staff review documents to be completed at or near, within 1 month, of the time of issuance of public notice of hearing, months would be saved in the overall length of the hearing process. If NRC requires additional staff to perform this job, this committee should support that.

Significant additional savings would be gained by requiring applicants to make all of their documents, analyses and data related to the application public at the time of filing the application, in much the same way as the NRC staff does in its public document room. This would reduce the need to file time-consuming interrogatories and document requests and tend to remove the incentives to evasiveness which pervade the discovery process. Finally, all parties should be required to identify their witnesses early in the process, followed by an NRC-sponsored set of depositions of all witnesses, in which all parties would participate. Depositions are by far the most effective and least time consuming of discovery

tools. This procedure would focus the issues for hearing, greatly obviate the need for voluminous interrogatories and result in shortening the cross-examination in the hearing itself.

In addition, we generally endorse the sort of administrative measures suggested by the chief judge of the Atomic Safety and Licensing Board panel contained in a memorandum from Judge Cotter to the Commissioners dated March 5, 1981. Judicious use of the techniques outlined therein, including particularly settlement conferences, cross-examination plans, combining rebuttal and surrebuttal testimony, would do far more to expedite hearings on ongoing cases than the proposals recently issued for comment by NRC.

Let me now consider those proposals, whose stated purpose is to expedite the licensing process. I am frankly astonished that the primary means chosen by the NRC for accomplishing this goal is the total insulation of the NRC staff from prehearing discovery. From the perspective of one who has been involved in many NRC cases, I can assure this committee that the predictable result of protecting the staff from discovery will be to necessitate many days of needless cross-examination at hearings.

The net result will not only be a lengthening of the adjudicatory process, it will make for a record which is confusing and disjointed, thus, complicating the job of the decisionmaker and lengthening the time required to reach decisions.

Taken as a whole, the effect of these amendments would be to prevent intervenors from posing written interrogatories to the NRC staff, from taking the depositions of the NRC staff or from uncovering the documentation and underlying data used by the staff except what may be obtainable through the Freedom of Information Act. Although the proposed rulemaking document does not indicate in what way this will make for expedited hearings, we infer that the reasoning is that the staff is unable to respond to discovery and prepare its review at the same time. There are several responses to this. First, of course, all other parties, including intervenors with far less resources available than the staff, are required to engage in pretrial discovery in the overall interest of an efficient, intelligent hearing. While exempting one crucial party—the staff—from discovery may make it easier for the staff to prepare for the hearing, that does not mean that the adjudicatory process will be shortened by one day or made one jot more efficient. On the contrary, as we have noted above, hearings will certainly be longer and interrupted more frequently if this proposal is adopted.

Second, it is far from established that the burden of responding to interrogatories or depositions is substantial enough so that removing that burden would effectuate significant change.

Even if the staff could make a case that it has insufficient resources to respond to discovery and perform its review at the same time, these considerations would at most extend up to the time that the SER is issued. After that, the staff should certainly be in a position to disclose the basis for its judgments without straining its recourses. If it cannot do so, this raises troubling and serious questions about its competence.

The theme which implicitly underlies both these proposals, as well as others to abolish the authority of licensing boards to independently inquire into safety issues for example, is that meaningful public participation and thorough licensing board scrutiny are expendable luxuries unrelated to safety. This is a false premise. Just a few examples of the type of safety issues raised by the public and boards will demonstrate the point. Some time before the TMI-2 accident, intervenors in the proceedings to license the Black Fox plant in Oklahoma raised the issue that the failure of equipment classified by NRC as not related to safety could cause serious accidents and interfere with the ability of safety equipment to bring the plant to safe shutdown after an accident. Their contention was disputed by the NRC and the applicant, and in fact rejected by the board on the ground that it postulated incredible sequences of failures. Yet on March 28, 1979, the TMI-2 accident was begun and aggravated by a series of failures in precisely such so-called nonsafety equipment, including the famous valve which stuck open. After the accident, both the Kemeny Commission and NRC's Special Inquiry Group identified as one of the key safety problems demonstrated by the accident the lack of attention given by nuclear plant designers, operators, and the NRC to equipment it classified as unrelated to safety. If the Black Fox intervenors had been heeded, nuclear plants would be safer today.

For years prior to the TMI accident, intervenors, including interested States, had sought through licensing proceedings to force utilities and NRC to design evacuation plans for the populations surrounding nuclear plants. I represented the Commonwealth of Massachusetts in the Seabrook case. Led by the attorney general of New Hampshire, we sought assurance that the close to 60,000 people who pack the beaches adjacent to the Seabrook plant on a summer day could be safely evacuated if necessary. The response from the NRC was that evacuation would never be necessary, hence our concern was misplaced. As you know, TMI has changed all that; evacuation plans for at least a 10-mile radius are now supposed to be required prior to licensing. If the intervenors in Seabrook had been heeded, evacuation plans might have existed in Pennsylvania at the time of the TMI accident, averting much of the chaos and traumatic confusion which attended that accident.

Last, I ask you to consider a case that is going on right now involving the McGuire plant owned by Duke Power. You may have heard that the licensing of that plant has been delayed, but have you learned why? The McGuire plant is one of a very few in this country designed with an ice-condenser system and a thin containment. If an accident no more severe than TMI occurred at that plant, involving ignition of the same amount of hydrogen mixed with oxygen as was generated at TMI, the design pressure of that containment would be exceeded, raising the possibility of rupture and release of radioactivity into the environment. This is the issue that has been raised by the intervenor in that proceeding and is presently being considered by the Board. I do not mean to suggest to this committee that the technical issues involved are open and shut. Both sides have a point of view. I do suggest that there can be no serious dispute that the issue is an extremely important one

and that it should be fully resolved before that plant goes into operation.

The authority of licensing boards to raise issues independently is also very important. Each licensing board contains two technical members, one trained in engineering and the other in environmental sciences. They are there out of recognition that it is the board's duty to do more than umpire a game between parties. If the board members learn of significant safety issues which have been ignored or mistreated, I cannot believe that this committee would recommend that they turn a blind eye.

The NRC has proposed to you a draft bill to amend the Atomic Energy Act to permit testing at 5 percent power before hearings have been conducted, much less completed, if such action is deemed by the Commission to be "in the public interest." The Commission's discretion is to be virtually without limit, since no standards whatever are offered in the legislation to define the public interest, although the accompanying analysis provided by the Commission states that the public interest finding will be based solely on a consideration of costs. This bill would reverse 25 years of AEC and NRC policy that safety is not to be comprised by financial considerations. It is not needed and it is an extremely unwise precedent.

This bill in its sweep and lack of standards should be compared against the amendment which Congress passed in 1972. Congress provided in Public Law 92-307, 86 Stat. 191, that for an 18-month period of time, operating licenses could be granted prior to the completion of hearings if (1) ACRS review was complete (2) the staff SER and EIS were complete and the Commission would find that the public health and safety were protected and that operation of the plant was "essential toward ensuring" an adequate supply of power.

That bill represented a balanced and responsible approach to a true national problem. No such problem exists today, yet the Commission seeks to short circuit the licensing process on economic ground along without even a modicum of the protection afforded by Congress in 1972.

I also urge this committee not to be stampeded by untested assertions that billions of dollars will be lost due to delays in licensing. There are two points that must be to kept clearly in mind. The first is that most of these claims are based on projections of completion of construction. These projections are historically highly unreliable, due primarily to slippages in construction schedules. This is clearly documented in information provided by the NRC in response to questions posed by Congressman Udall and attached to my statement. Both NRC and the utilities compared their projected completion dates as calculated in 1978 with their best current projections today for the same plants. The difference in projections ranged up to 45 months by the utility's reckoning. By far the majority of this change was simply due to construction delays or voluntary changes in construction priorities by the utilities. Today's projections are frought with the same uncertainties. There is no question in my mind that many of the months now calculated by the industry to be postconstruction but prelicensing will turn out to be preconstruction months. For these months, added consumer cost cannot be attributed to the licensing process.

I thank the committee again for inviting me to testify before the committee.

Senator SIMPSON. Thank you for being present. There will be a roll call vote here in a few minutes and we will recess for that time and get right back and we will continue, but until that gong goes off, let me ask you a few questions.

You definitely question the calculations done by DOE and the utilities on the costs of a plant sitting idle once it is completed. What do you believe the costs are for those plants, the ones to be completed in 1981 and 1982, both in terms of additional interest charges and in terms of replacement of fuel costs, and also the consideration for how many of those plants where oil would be the replacement fuel?

Ms. WEISS. Let me give you an example. Putting aside for a moment the factor of replacement fuel, I will concede for the moment that the figures for replacement fuel are accurate. We have not been able to obtain a copy of ANEC's calculations but I have talked to people who have read them. My understanding is that two-thirds of the cost is added interest charges.

Let me give you an example of how an economist would really look at what those charges are from the ratepayer's standpoint. Assuming that the plant is finished in January 1981 but does not go into operation until January 1982, for the year 1981 the ratepayer pays no part of the cost of that plant because it is not in the rate base. The utility however has to go out and borrow extra money to carry its construction costs. Let us say it borrows a hundred million dollars. When that plant goes into rate base in 1982, it is capitalized at $1.1 billion. That plant will be capitalized in January 1982 at $1.1 billion. Over the lifetime of that plant the ratepayer will pay some percentage of that $1.1 billion each year. But it has to be compared with the current value of the dollars which he saved in 1981 also compounded over the same 30 years. And those things largely and, depending on the inflation rate, may entirely offset from the ratepayer's point of view.

Senator SIMPSON. I know that. In your testimony you argue that estimates of cost and delay, I believe you said could be extremely deceptive because the increase in capital cost due to higher interest charges is largely offset by the fact that the ratepayers will not be paying for the plant during the period it is idle. But I think there are many States that include construction work in progress in the rate base and already directly pass through the costs of delay such as those interest charges, even for States that do capitalize costs, will not the capitalization of those costs substantially increase the interest cost that will be repaid over a period of time?

Ms. WEISS. $1.1 billion is more than $1 billion. To that extent over a period of time it is increased. Depending on how the inflation rate fluctuates during that next 30 years, it may or may not be actually more dollars out of the rate-payer's pocket. It is a sophisticated analysis but the point is that those gross figures that have been bandied about really can be and I believe are deceptive in this instance.

Senator SIMPSON. I share your concern. When you get economists into the game certainly there is some confusion, and will always be.

What do you yourself feel are the principal contributors to the growing time periods between when these plants are expected to be completed, assuming the NRC estimates are accurate, and when the operating licenses are expected to be issued in your mind? We know they are happening, you do, too, you admit it, there we are.

Ms. WEISS. I do not think there is any question but that the growth in the time required to review plants is directly related to the accident at Three Mile Island, in two ways. One, it is indisputable that for approximately a year's time by far the majority of NRC's effort was going into looking at the operating plant and making sure that those are safe and deciding on the criteria to use for issuing new license. Now they have come up with those criteria but they need to be applied against each plant. That takes some time.

One thing you need to ask, when you see these figures of periods of months that are required to produce a safety evaluation report, what is generally not reported in that information is how much of that time was required for the utility to provide the information which is necessary for the staff to review, and I suggest to you that that is a substantial component of that time.

Senator SIMPSON. Let me at this point——

Senator SYMMS. Mr. Chairman, I just want to apologize to the witness. I have been out of the room and apologize to you and the remaining witnesses. I have another meeting I have to attend after we go vote so I will not be able to make it back. But I will, due to the efforts of our staff, get updated on everything that is said here and keep up with this. And I compliment you for getting started on this important issue.

Senator SIMPSON. Thank you, it is nice to have your participation. We appreciated it.

Let me recess just for a few brief minutes and I will go and vote and will return.

[A short recess was taken.]

Senator SIMPSON. Thank you again and that, I think, will be the last roll call vote.

I do not know, did you finish your response to that question?

Ms. WEISS. Yes.

Senator SIMPSON. Then let me ask you to what extent you believe, if at all, that the following factors have contributed to this time gap that we now see and that we really have been discussing most of the afternoon. That is the time taken by the NRC staff to prepare safety evaluation reports. How do you see that as one of the contributing factors?

Ms. WEISS. Senator, I think that is a most significant single factor for lengthening the time for review.

Senator SIMPSON. You believe it is?

Ms. WEISS. I do, yes. I would like to qualify that though, and I think I suggested earlier that I do not think it is entirely unjustified. I believe that there is a direct correlation between the seriousness of the safety issues presented, the difficulty of the technical issues, and the length of time it takes to review them. Simple cases, easy cases do not take a lot of time. Hard ones take some time. Now there is wasted time in there and I think that is because NRC does not presently have sufficient resources to do its job and

this committee ought to see it does and support them in their request for that. But I think it would be wrong to let the suggestion pass that this time is unrelated to safety. I believe there is a correlation.

Senator SIMPSON. I think we must all admit that that is very real, yes, just trying to keep that reasonable and responsible I think was the issue. Any delay it is my hunch can always lead us back to health and safety and if it does not we should be doing things differently. But I think there comes a point of absurdity.

Let me ask then about the time gap when we talk about the litigation of post-TMI requirements by individual licensing proceedings under that description of the Commission.

Ms. WEISS. That is hard to say because that is really in the future. There have not been any hearings that were decided one way or another on the basis of that policy statement, even in the McGuire case that hearing was begun pre that policy statement, did not have anything to do with that.

Senator SIMPSON. Do you favor a rulemaking process though that would get us to a generic review of those?

Ms. WEISS. I do. One thing that needs to be also known is that the Commission's policy was that licensees, excuse me applicants for licenses always had the right to challenge the need for any of these new post-TMI requirements. It is only the intervenors who were precluded from arguing the sufficiency of those measures until that revised policy statement which said now either side can argue those.

My view is that both under the law and simply as a matter of wisdom a good, sound policy, there are two ways in which you can resolve these questions. You can do it by rulemaking or adjudication. I think in the case of the action plan it probably would have been far wiser to do it by rulemaking. You should know that plan was well over a year in the making, that the industry was heavily involved in a drafting of that plant and the public was never involved. I think if NRC had been thinking just a few steps ahead, they would have involved the public in a formal rulemaking during that period.

Senator SIMPSON. What is your thought about the time gap when we look at the issues which are raised by the Licensing and Appeal Boards on their own initiative, bringing up issues that are not in controversy between the parties?

Ms. WEISS. I think the period of time is minuscule, insignificant. I suggest that you look at one of the attachments in the material which was sent to me by your committee, an extraordinary response by the chairman of the appeal panel to this allegation which I think has been loosely thrown around that a lot of time has been taken on sua sponte issues. And for the one case that has been mentioned, North Anna, it is clearly documented by the chairman of the appeal panel that not one day of operation of either of those units was lost due to the review by the Appeal Board. Moreover, you will see that the issue has turned out to be quite significant, it had to do with turbine missiles—cracking in a turbine disk and in the first refueling, as you are aware, cracking was found in the turbine disk.

Senator SIMPSON. I recall that from the process, the filming of some of that. Well then, in connection with that response can you give me specific examples in which licensing, or an Appeal Board raising these issues on its own has resulted in any major safety design changes, or other major safety improvements to any plant, and do you have any information to indicate that?

Ms. WEISS. Well, I think the North Anna case is the best one, most recent one. I was personally aware of it, and I think it may well turn out they have to reorient turbines at North Anna. That may be the solution to that problem. I wish I had known you were going to ask that question. I might have tried to do a comprehensive analysis of that, and if the committee is interested we will try to do it and provide you with it.

Senator SIMPSON. Please do. I would like your view as to what you perceive of what has happened from that kind of process that has ever changed or ever given rise to a major safety design change, or a major safety improvement, which I think is what we ought to be about; if we are going to do these things let us hope we are laboring and producing something, and I have my doubts that we are.

Ms. WEISS. I wholly agree but I would ask the chairman to keep in mind the examples that I have given of cases where intervenors have raised important issues, which were rejected, did not end up in that plant being made safer at that time because they were opposed and rejected, but later turned out in the light of TMI or other subsequent events to have been significant. So it is not kosher for the Commission to come here and say we have never changed a plant because there are instances where I think the record is clear they should have.

Senator SIMPSON. But that is a different matter. What I am talking about in sua sponte proceedings, what has that added to the process? Where have we ever uncovered a kernel of truth about public health and safety. And then I guess we come to the basic issue on that issue. What is the Licensing and Appeal Board? Is it intended to serve as a third level of technical review, or is it just to resolve contested issues? I think as I see it it is assuming the former role and I do not believe that was ever intended.

Ms. WEISS. I think overwhelmingly the Appeal Board has served a review function. In fact I have always thought the Appeal Board is the best friend that the utilities have because they have saved the Commission from reversible error on more occasions than I can count. It is just a tiny fraction of the time when the Appeal Board has raised issues on their own, and most of the time if they have raised them and resolved them on their own without remanding back to the Licensing Board, that has been in the interests of expediting the hearings and cutting off a layer of the process, in the interest of the applicant for a license.

Senator SIMPSON. Let me ask you about the time gap as you perceive it when we get to the Commission's decisions to suspend the immediate effectiveness rule.

Ms. WEISS. There is no question that suspension of the immediate effectiveness rule will add 60 days to several months to the time for getting a licensing. In my view that is fully justified in the aftermath of Three Mile Island. The Commission itself ought to be

looking for at least some period of time at the new plants, because issues are being presented with respect to the TMI-related requirements now, which are of a unique characteristic and raise policy issues. Let me give you an example of Sequoyah. That was an uncontested proceeding, I believe, it went all the way through the process and not until it got to the commission level was it ordered that that plant must be backfit so that it can cope with roughly the amounts of hydrogen that generated the TMI accident. It is extraordinarily important and I think that is precisely the function the Commission has to serve for the next 6 months to a year. If they do not, I think you are going to see things proceeding in a disjointed fashion, different appeal boards, different licensing boards doing different things, and the Commission has to bring some coherence to this process for a short period of time anyway.

Senator SIMPSON. It would serve all of us to assist in that. Then the final one in regard to that time gap, your thoughts about the hearing schedules, scheduling problems for part-time board members, what I refer to as general lack of discipline, management discipline by the boards in preparing for and conducting hearings and then the tedious writing of the decision once the hearings are completed.

Ms. WEISS. I commend to you the memorandum by the Chief Judge, Judge Cohen, to the Licensing Board. As far as the management of hearings, the Licencing Boards have improved dramatically since I first started litigating before the Commission. There is no question that there are some inexcusable inefficiencies that result from using part-time members and the schedule conflicts. The answer to that is to provide more staff for the Licensing Board Panel, and I cannot stress too much the need for law clerks. I spoke of it to you in my direct statement. It is extraordinarily important. It would save a great deal of time in the drafting of the decisions. I do not see any reason why NRC did not do it 3 years ago, but in today's climate they ought certainly be looking at measures like that before they talk about cutting back the rights of the public to participate in these proceedings.

Senator SIMPSON. You mentioned three examples of issues that intervenors have sought to raise in licensing proceedings: The impact of failure in nonsafety-related equipment on the ability of safety equipment to bring the plants to safe shutdown was one; the need for emergency preparedness in the vicinity of plants was two; and the hydrogen control question, all three of which come as a direct result of Three Mile Island. Certainly the first of those, the first two of those seem to be applicable to a large number of plants. And the third one I believe has already received considerable attention by the NRC staffs, the ACRS, and the Commission itself in consideration of Sequoyah. Given that very broad application why should not those issues be handled generically rather than on a case-by-case basis?

Ms. WEISS. Perhaps they should be handled generically. Well hydrogen control is being handled generically. Some plants present unique problems. I would put it to you, ice condensers present unique problems. Emergency planning is by its very name a site-related plant dependent kind of an inquiry. They have done rules to the extent that rules can be done; the rulemaking phase of that

is over. They have detailed standards that need to be applied on a case-by-case basis.

I would not want to leave this committee with the feeling I do not approve of proceeding via rulemaking. I think it is highly appropriate in many cases. I just think some forum has to be provided for the input, the technical input, the legal input of persons outside the industry and NRC, whether it is in a rulemaking form or an adjudicatory form, one or the other.

Senator SIMPSON. I think you mentioned previously, I will just touch on it, that intervenors sought to raise evacuation issues in Seabrook and this might have helped in the TMI situation. You said that and I wanted to go back to that. Was not that evacuation actually considered in TMI-2 licensing proceedings just as the intervenors sought?

Ms. WEISS. My understanding is that for TMI-2, and I was not involved in the licensing of that case so this is hearsay and I hope it is largely accurate. My understanding is that they were permitted to put in evidence with respect to evacuation out to 5 miles. That is nowhere near what is required today. And I do not think it obviates the Seabook example. We were told as a matter of law there will never be the need for an evacuation. I do not know what the Licensing Board rationale was in TMI-2.

Senator SIMPSON. Again there is one of those statements that that might have helped in the TMI situation, and I think we find in the record the facts of that issue, local civil defense authorities were brought in to testify and the intervenors did not take an appeal on that issue at all.

Ms. WEISS. Well, the fact is that on March 28, 1979, there were no plans in the State of Pennsylvania and if they had to move people within the first 2 hours, the first day of that accident, I really shudder to think of the consequences.

Senator SIMPSON. But that again becomes one of the great "if's" of history, and that is the thing that leads us astray from our work. And I am not trying to disregard the importance of it but it does often get into high drama and it is high drama of the third kind because nobody knows, there is no response to it, what would have happened if, and that is the way that works. This remains and always will a very emotional arena. If we can keep that in its proper perspective. But anyway in the case of a hydrogen control situation where the Commission has already done the review, why should an intervenor be able to raise the issue in another proceeding unless he or she comes forward with some direct evidence at the outset to show that the previous analysis of the Commission was wrong?

Ms. WEISS. I am glad you asked that question because I listened to the answer Mr. Lee gave. The Commission made a decision in Sequoyah. It was not a contested case and it was not a rulemaking and no public notice ever went out, no member of the public ever had an opportunity to comment on that decision. And they ought to have. If it is going to be applied to other plants, they ought to have. And I suggest to you that there is a good deal of evidence that has been brought forth by that intervenor, primarily documents written in national laboratories suggesting that there is serious question of the efficacy of that igniter system that is being

used in Sequoyah-McGuire. The book is not closed on that. If they had had a rulemaking proceeding before perhaps this question would have been answered. And I will agree that might be an appropriate case to do it. But you cannot cut the public out of all forums.

Senator SIMPSON. No one was suggesting that, certainly not me. I am not. In my travels I get a bum rap from intervenors but I have always said I do not favor intervenor funding. That is a lot different.

Ms. WEISS. I do not want to suggest that you other than fully support public participation. I believe that you do.

Senator SIMPSON. I am on record with that, in more than just air, in fact.

This is one, because you have practiced in this area and you are aware of it. Now we have a situation where an intervenor raises a broad range of issues simply by stating a contention, without any direct evidentiary basis. Why should not the intervenor, we get into this procedure element which I am going to pursue in a new type of zeal, why should not an intervenor be required to come forward with direct evidence that if true would prove its contention before those contentions might be accepted in the hearing process, and in essence that would than place a burden of going forward with an issue on the intervenor, although still the final burden of proof would still rest on the license applicant.

Ms. WEISS. Probably the basic answer to that question is that at the time when an intervenor is called upon to state his contention it is typically the case that the staff has not completed its safety evaluation report, and it would be requiring of an intervenor that which he can not do, to have him come forward with a full factual basis. You do have to state a basis in fact for each contention, and you should not believe that that is a sieve that lets everything through.

There are many contentions that are not accepted, both on relevance grounds and on grounds of lack of specificity and lack of factual basis.

There is also available a mechanism for summary disposition. I have used it. Utilities infrequently use it. It is onerous but it basically parallels the provision in the Federal Rules of Civil Procedure. There are ways available, including some of the administrative mechanisms that have been used by, are in fairly wide use by boards now, including settlement conferences, requirements of reaffirmation of contentions, that result in paring away of an awful lot of what may be unimportant.

Senator SIMPSON. You stated in your testimony that you have seen no convincing evidence that a significant portion of the time required for licensing new plants is not legitimately necessary to insure the safety of the plants. You come back to that. That was a theme. Now I want to ask you then about two pending plant applications. The Zimmer plant in Ohio and Susquehanna in Pennsylvania, according to the NRC both are expected to be delayed 8 months each, both are contested cases requiring hearings yet to be conducted. The principal or a principal issue in the Zimmer case is the financial qualifications of the utility. A principal issue in the Susquehanna case is whether the power being provided from the

plant is needed. Now why should such issues as that be allowed in operating licensing proceedings? Are the hearings on those issues legitimately necessary to insure the safety of the plants or the general health and safety of the public?

Ms. WEISS. Let me first speak to the numbers because I have what I think are NRC's most recent numbers contained in a letter from their Director of Office of Congressional Affairs to Congressman Bevill and his committee. And the Zimmer case has 3 months. Now I do not recall what it was that you stated the issue is in the Zimmer case.

Senator SIMPSON. The issue in Zimmer is the financial qualifications of the utility, and I had a lot of trouble finding out that comes to the public wheel other than financially, but where does it effect the mission of the Nuclear Regulatory Commission?

Ms. WEISS. You are asking me two questions. One: Is that an issue which the Commission ought to concern itself with, financial qualifications? And the second: Is that going to result in any idle months of that plant sitting idle after it is completed? And I would say to you, I am looking at the projected operational date for that, what, June 1982——

Senator SIMPSON. July.

Ms. WEISS. If it were legal I would bet you money and I would give you 6 months that plant would be done in July 1982.

But to your other question: Why do we look at financial qualifications? It is one of the very few issues which are specifically contained in the Atomic Energy Act which the Commission must resolve, and that proceeds from Congress understanding, and I agree, that a company which is strapped financially, does not know where its next nickel is coming from may be forced to cut corners which implicate safety, and that you ought to allow this technology only to be in the hands of the soundest and most competent operators. I think that the financial qualifications are safety related.

Senator SIMPSON. Then the other one was on the issue of whether the power to be provided from the plant is needed, and I do not know what that has to do with the issue.

Ms. WEISS. Well, I am hard pressed to justify that, Senator, I am not even going to try. It seems to me I would agree we ought not to be looking when a plant is all ready whether that power is needed. I do not know the Susquehanna record so I cannot certify that that is really the posture of the issue. But if it is I do not think we ought to be looking at those things.

Senator SIMPSON. That is a very candid and honest answer and I am not here to win or lose, I am trying to develop where we might go to make the process work, and I want you to know I appreciate that.

I have one final question, and I might just, if you will, furnish a few more in writing because I do have this other panel of three, and so this would be a final. In objecting to the Commission's legislative proposal for interim operating authority, you contrast that proposal with the amendment passed by Congress in 1972. Now could you be more supportive of an interim operating authority provision if it included your requirements and findings that the ACRS review is complete, or the NRC staff reviews were complete and the plant could operate safely during the interim just the same

as was contained in the 1972 amendment? Or do you object to any interim operating authority as being unnecessary?

Ms. WEISS. Personally I do not believe it is necessary to have interim operating authority. However, if this committee decides that that is a remedy that they want to adopt, it ought to be tied directly to the need for that facility. If Duke has a need for McGuire such that there is a danger of power shortages which can be very serious, which can have serious consequences, and that fact is established, then a case could be made for interim operation or interim testing in that plant. But one needs to be very careful that the authority granted is not standardized, does not grant unfettered discretion, and I think that the bill you have before you is virtually without bounds.

I do have an objection as a matter of principle, and that is to the precedent that we can look at economics first and safety after. I think that is reversing 25 years of history of the Atomic Energy Commission and I would suggest we ought not to do that unless we are involved in a genuine emergency and there is a real need to do it.

Senator SIMPSON. I do not think that is going to happen with the mission, statutory mission of the Nuclear Regulatory Commission. I do not see how that can possibly be, but it might be a bone of contention.

Thank you very much. I appreciate your being here and your courtesy and kindness in waiting while I did pass my vote on that issue. Thank you very much, and thank you very much, Mr. Faden.

Ms. WEISS. Thank you, Senator.

Senator SIMPSON. Now we will go to the panel of Jay Silberg with Shaw Pittman, Potts & Trowbridge, Robert Hager of the Christic Institute, and John Brown, legislative director of the International Union of Operating Engineers representing Jay Turner, president, with regard to the *Sholly* decision.

I believe staff counsel advised you each have 10 minutes and then we will proceed with the questions. Thank you so much.

STATEMENTS OF JAY E. SILBERG, SHAW, PITTMAN, POTTS & TROWBRIDGE; ROBERT HAGER, CHRISTIC INSTITUTE; AND JOHN J. BROWN, LEGISLATIVE DIRECTOR, INTERNATIONAL UNION OF OPERATING ENGINEERS, REPRESENTING JAY C. TURNER, PRESIDENT

Mr. SILBERG. Mr. Chairman, good afternoon.

I am Jay Silberg, a partner in the Washington law firm of Shaw, Pittman, Potts & Trowbridge.

Before I address the *Sholly* case, I just would point out I am counsel for the applicant in the Susquehanna proceeding and you have correctly described the situation in that case. Not only are we litigating the issue of whether the plant is needed, from the need for power standpoint, we are also litigating, over our strong objection, contentions on whether conservation of energy should be substituted for an already completed powerplant, and whether solar energy and other alternatives should be substituted for an already completed powerplant.

We have tried to use such techniques as summary disposition. I filed our first summary disposition motion in August of last year

and am still waiting for the licensing board in that case to rule on that issue.

It is a problem. I commend to you the testimony that you have heard. It is a very significant problem. We are looking at an 11-month delay between the estimated date of completion and the NRC's projected date on which their licensing process will be finished. That is going to be an extraordinarily costly delay for the owners of that powerplant, their customers and for the whole country.

Senator SIMPSON. That was very fascinating information, I appreciate your sharing it. It is a vexing thing and we must be about doing something to remedy it, and not in a hysterical type of response, but out of just plain old rationale.

We might try a little old commonsense when everything else fails.

Please go forward.

Mr. SILBERG. First I would note I have provided a written statement for the record. I will try to summarize it. I would ask that my written statement be included in the record.

Senator SIMPSON. Without objection it will be. [See p. 110.]

Mr. SILBERG. My law firm represents some 20 electric utility companies with nuclear powerplants in operation or under construction. In addition to other activities, we represent these utilities in Federal and State regulatory and licensing proceedings as well as in court cases.

Three of these utilities are Metropolitan Edison Co., Jersey Central Power & Light Co., and Pennsylvania Electric Co., the coowners of the Three Mile Island Nuclear Station. On their behalf, we have been participating in *Sholly* v. *U.S. Nuclear Regulatory Commission*.

The November 19, 1980, decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Sholly* overturned 20 years of consistent administrative practice by the NRC and its predecessor agency, the Atomic Energy Commission.

Since 1962, when Congress amended section 189(a) of the Atomic Energy Act to reduce the number of hearings which the AEC was required to hold, the Commission has consistently exercised its discretion to issue amendments to reactor operating licenses without prior notice and without prior hearing where it has determined that the amendment had, in the language of the statute, "no significant hazards consideration." The *Sholly* decision held that section 189(a) requires NRC to hold a hearing prior to issuing a license amendment whenever an interested party requests one, even if the Commission has properly determined that the amendment involves no significant hazards consideration.

I would request that a copy of the court's decision and the statement by the four judges who dissented from the decision be included in the record of this proceeding.

Senator SIMPSON. Without objection, it is so ordered.

Mr. SILBERG. The most important immediate impact of the decision—should it go into effect—is that it could result in lengthy and costly hearings precipitated by a simple request and having the potential for shutting down many of the nuclear power reactors now operating in this country. These shutdowns could easily last

for 9 months or more. The economic impact of these shutdowns on utilities and their customers would be dramatic—typical costs for replacing the power generated by a nuclear plant range between $250,000 to $500,000 per day. Over 9 months, this would amount to $67.5 to $135 million. Equally significant would be the effect on oil imports. In some parts of the country—particularly the Northeast—replacement power comes in large part from imported oil—about 30,000 barrels each day for a 1,000 megawatt nuclear plant.

How could a license amendment which does not involve significant hazards consideration bring about the shutdown of a nuclear powerplant? An NRC license typically includes a number of license conditions. It also includes what are known as technical specifications.

Because they are so detailed, technical specifications and other license provisions must frequently be modified. All of these amendments require NRC approval. As of last December, there were some 750 to 800 license amendment actions pending before NRC. Many of these would be expected to be approved based upon a no significant hazards consideration finding. Over the past 4 years, NRC issued 1,500 to 1,600 license amendments involving no significant hazards considerations.

While most of these license amendments are not needed for continued plant operation, some are. The NRC has estimated that if license amendments involving no significant hazards considerations are not issued in a timely manner, over the next few months some 20 nuclear powerplants would either have to shut down or operate at reduced power levels.

I would request that two documents which set forth many of these facts be included in the record of this hearing—first the December 3, 1980, affidavit of Roger Boyd, which was part of Metropolitan Edison's petition for rehearing to the court of appeals. And second, the NRC's motion to stay issuance of mandate, filed with the court of appeals on December 10, 1980.

Senator SIMPSON. Without objection, it is so ordered.

Mr. SILBERG. Getting to the substance of the issue presented by the *Sholly* decision, I do not think that this hearing is the proper forum to argue whether the court of appeals was right or wrong. That question will be presented to—and we hope decided by—the U.S. Supreme Court. Suffice it to say that it is our opinion that the court of appeals misinterpreted the intent of Congress and ignored the Commission's consistent interpretation over almost 20 years of its governing statute.

The policy issue which this committee should consider is whether the NRC should be able to issue license amendments having no significant hazards consideration without a prior hearing. Let me focus on two questions:

One, are more hearings in and of themselves a good thing, and; two, should Congress allow the technical staff of the Commission to apply its expertise to determine whether some activities are sufficiently routine that they may be allowed to proceed without a prior public hearing?

As to the issue of more hearings, there can be no argument that evidentiary hearings and their associated trappings can take significant periods of time.

It is difficult to conceive of a hearing being completed in less than 9 months after the request is made, even if the issue is a fairly narrow one. Certainly where a license amendment is needed quickly and cannot be applied for far in advance—as is often the case with amendments needed for refueling—a hearing would force the reactor out of operation.

The NRC is already having difficulty staffing its existing hearing load. There are shortages of staff lawyers and Atomic Safety and Licensing Board members. More hearings will only make matters worse. Hearings on matters of no safety significance will necessarily detract staff efforts from matters which do have safety significance.

While some might welcome the idea that more hearings would further delay NRC licensing or cause plant shutdowns, I do not believe that this result is in anyone's best interests. It is certainly not a result which Congress could have intended in 1962 or should intend today.

Hearings with all the judicial trappings are not necessarily the best way to reach decisions on highly technical issues. Despite a lawyer's natural inclination to think that his or her skills are crucial to the search for the truth—as it may arguably be in personal injury litigation or criminal cases—there is a much smaller likelihood that this is the case where purely technical questions are involved.

It is perhaps ironic that the issue of prior hearings for this category of license amendments arose in the context of the krypton venting at TMI. That activity had perhaps more public comment and input than any other license amendment the Commission has ever issued. NRC published a draft environmental assessment and solicited public comments. Some 800 written comments were received.

NRC held public meetings and met with citizens groups. It consulted or received comments from six Federal agencies, the Commonwealth of Pennsylvania, Oak Ridge National Laboratory, the National Council on Radiation Protection, and Measurements and the Union of Concerned Scientists.

NRC then issued a final environmental assessment and considered it in two public meetings and a meeting with the Advisory Committee on Reactor Safeguards. All this occurred before the orders which led to the *Sholly* decision were issued. It is hard to imagine what additional public participation was necessary or even appropriate.

Even in a more typical case, the absence of a prior hearing does not foreclose public input. Our position has not been that section 198(a) prohibits hearings on no significant hazards consideration amendments—only that it authorizes those amendments to be made effective before a hearing.

For these amendments, a hearing which takes place after the license amendment is effective would be more than adequate. Even for the exceptional, irreversible amendment like the TMI venting, an after-the-fact hearing would let the NRC staff know that an outside party was looking over its shoulder.

Other methods besides prior hearings are available for providing input on license amendments involving no significant hazards con-

siderations. Of course, the application for the amendment and the staff's disposition are all on the public record. Interested persons can communicate their comments to the staff; they can file requests for orders to show cause; they can seek reconsideration from the Commission; and they can ask the courts for injunctive relief.

I think that we must reasonably conclude that additional hearings on these types of amendments are not necessarily desirable as an end in itself.

The second question which I posed is whether Congress ought to allow the technical expertise of the NRC to determine that some amendments can be made immediately effective notwithstanding a request for a hearing.

Congress has charged the NRC with responsibility for regulating the nuclear power industry.

If the NRC cannot be relied upon to categorize those license amendments which raise significant safety questions from those which do not, then there is no basis for respecting the NRC's judgments on any questions involving the public health and safety.

With this review of the impact of *Sholly* and the underlying policy issues, there can be no question that the decision should be reversed. But is legislation appropriate? Since the court purported to interpret what Congress intended in 1962, it is certainly appropriate for the Congress to correct the court's conclusion.

The NRC has proposed a bill to Congress which would reverse *Sholly*. The operative language would simply add a new sentence to section 189(a) authorizing the Commission to issue and make immediately effective a license amendment on a no significant hazards determination notwithstanding the pendency before it of a hearing request.

This language would make it clear that no prior hearing was required, but would allow for hearings after license amendment issuance.

The NRC's proposed legislation would also add a second new sentence to section 189(a), which in NRC's view would clarify that section 189(a) does not limit NRC's authority to take immediate action where necessary to protect the public health, safety, and interest. It is not clear that any such clarification is necessary. The NRC has told the Court of Appeals that it does not interpret the *Sholly* decision as interfering which its authority to act when the public health, safety, and interest requires. I would agree with the NRC that this is the proper reading of *Sholly*. If that is the case, the second sentence is not needed.

Thank you for the opportunity to testify before you today.

I will be happy to answer any of your questions.

Senator SIMPSON. Thank you very much.

I appreciate your recognition of the time problem.

Now, the next witness, please, Mr. Hager.

STATEMENT OF ROBERT HAGER

Mr. HAGER. My name is Robert Hager. I am an attorney in Washington, D.C., and I represented, along with my partner, Dan Sheehan, People Against Nuclear Energy, which is a citizens group around Middletown, Pa., and Mr. Steve Sholly and Mr. Don

Hossler, who started the case, which came to be known as the *Sholly* case.

This case was brought by the People Against Nuclear Energy, but the case came to be called the *Sholly* case.

The court did not address the issues presented in the *Sholly* case itself—which was the issue whether notice was required because the orders which were issued by the NRC did indeed involve significant hazards considerations. Messrs. Sholly and Hossler contested that issue in the *Sholly* case itself.

The court did not deem it necessary to refer to that issue so they never did decide whether or not there were significant hazards considerations involved in the case. The court went directly to the second issue and decided that even if there were no significant hazard considerations, there needed to be a hearing, therefore the court did not have to address the issue whether notice was required.

In June 1980, the NRC authorized the first step in the cleanup of the crippled Three Mile Island Unit 2 nuclear reactor by allowing its owner, Metropolitan Edison, to simply open the vents of the containment building and release the accident-generated airborne radioactive materials into the ambient air.

At least four alternatives to this intentional release of radiation on the public had been considered by the NRC. However, these alternatives which would have isolated these dangerous wastes from the environment were rejected on the principal ground that delay in the cleanup would cause psychological stress to the inhabitants nearby TMI-2.

Implementation of the most practical of the alternatives was estimated by the NRC to take as much as a year. Paradoxically, the NRC later ruled in a related TMI proceeding that the NRC had no jurisdiction to consider issues of psychological stress. In making its decision on which alternative to approve for decontaminating the TMI-2 atmosphere, the NRC never undertook to apply the governing rule that emissions of radiation must be kept as low as reasonably achievable.

Each of the four alternatives would have resulted in lower emissions to the atmosphere by definition.

Shortly after the NRC's decision was announced, Steve Sholly and Don Hossler, two citizens of the TMI area, requested that the NRC grant a 30-days' notice period before implementing the decision to vent radiation from TMI-2. They claimed that the decision involved significant hazards considerations and therefore notice was required by statute. The NRC refused to provide the requested 30 days' notice before releasing the radioactive materials from TMI-2. Subsequently a group representing the citizens living within about 5 miles of TMI-2, People Against Nuclear Energy, also known as PANE, requested a public hearing on the venting decision.

When the requested hearing was denied by the NRC, this group filed a suit in the U.S. Court of Appeals requesting that the NRC be ordered to hold hearings before implementing its decision to vent radioactive materials from TMI-2.

The NRC divided its decision to vent into two separate orders designed to avoid public participation in the decision to vent radi-

ation from TMI-2. And this is an important point I would like to make, that the NRC constructed its orders in a way that was designed at any cost to avoid any public hearings. They wanted to avoid this because there were serious scientific disputes over the issues whether or not the materials could safely be vented in the atmosphere and whether there were not indeed, although more expensive, better alternatives that would better promote the public health and safety.

The first order of the NRC permitted venting within the radiation release limits fixed in the operating license and the second permitted venting at rates of release exceeding even those for an operating reactor. PANE alleged that both of these orders were license amendments, although only the second was acknowledged as such by the NRC. Therefore, under section 189(a) of the Atomic Energy Act, a prior hearing was required as a matter of law on the license amendment affected by the orders.

Before the venting occurred, the Department of Justice filed a formal document in the court of appeals agreeing that a hearing was legally required on the acknowledged license amendment even though the NRC had made a finding that this amendment involved no significant hazards consideration. The court of appeals had directly so ruled 7 years before in *Brooks* v. *Atomic Energy Commission*. The language of section 189 was clear and unambiguous and I invite the committee to read the language it is very short, and the Justice Department's own detailed investigation into the legislative history of section 189 would support no other conclusion.

Accordingly the Department gave formal notice that the NRC's refusals to grant a hearing would be a violation of law. Notwithstanding this authoritative interpretation of its obligations, the NRC lived up to its reputation as one of the most arrogant and autocratic agencies in the Federal bureaucracy by blatantly violating its governing statute and venting radiation upon unwilling citizens without a lawfully required prior hearing, a hearing which the Department of Justice itself found to be required.

After the fact the court of appeals entered a declaratory judgment that the NRC's action had been unlawful. There are no other consequences that flow from the court of appeals' decision. It is simply a declaratory judgment declaring what the law was at the time the case arose.

The NRC has consistently attempted to cover up its blatant violation of settled law by contending that the court of appeals has imposed a new requirement for public hearings not previously contemplated by existing law. To lend a note of dramatic urgency to this transparently false coverup before it is exposed in the light of experience, the NRC has made wholly unsupported assertions that the court of appeals decision in the *PANE* case will lead to an intolerable drain on its resources and to shutdowns of as many as 20 reactors.

The NRC, while highly critical of the court of appeals, studiously avoids any reference to the facts of the case decided by the court of appeals in *Sholly* case. The NRC chooses to discuss prospects of hypothetical cases which have not and never will occur rather than focus any attention on its own blatant illegal actions on an issue of

pressing concern to the injured and increasingly alienated citizens of Three Mile Island.

A quick look at the facts will reveal the NRC's assertions to be a sham and its proposed legislation as an attempt by an agency already virtually unique in its freedom from control to aggrandize even more power at the expense of due process of law and democratic principles.

Now I will proceed to the questions which have been presented to me by the committee.

The *Sholly* decision will have no impact whatsoever on the NRC's legal obligations. The court of appeals decision was a declaratory judgment that the NRC's actions were illegal. Since the action of releasing radiation is irrevocable, the NRC is not required to take any remedial action whatsoever. The *Sholly* decision does not set any new precedent or make any new law. The statute itself has been clear and unambiguous since 1962. The same court in *Brooks* made the very same ruling of law 7 years ago.

Any effects that the *Sholly* case might have as precedent would already have been experienced over the past 7 years, not to mention the past 18 or 19 years. But the NRC has failed to provide any examples of the claimed ill effects of section 189 as interpreted in *Brooks* or *Sholly*.

The NRC's claims that the *Sholly* decision will require a change in NRC administrative practices rest on the totally false assumptions that either (a) the court's decision actually states law that did not already clearly exist under subsection 189 and the court's previous decision in *Brooks* which it will now discontinue in light of the *Sholly* decision.

The first assumption is revealed as simply untenable by the Department of Justice's statement of the prevailing law before the court of appeals' ruling. If the court of appeals made new law in the *Sholly* decision then why was the Justice Department unable to support the NRC's contentions even before *Sholly* was decided. Moreover the agency has entirely failed to support its assertions concerning its prior practices with a single example. Although repeatedly challenged in the course of litigation to show that the Commission had on even one previous occasion denied a requested hearing on the grounds that "no significant hazards consideration" was involved, it was unable to do so.

Mr. Silberberg repeated the allegations today that there has been a consistent 20-year practice by the NRC, but in their brief they were only able to present one case which came out of an Atomic Licensing Board where the right to a hearing had been denied on the grounds of no significant hazards consideration.

I have looked for cases and there is no previous example. Accordingly so there is no previous administrative practice over the last 20 years to deny hearings in this situation.

While the public, like the Justice Department, had every reason to believe before the *Sholly* decision that an affected person was entitled to a hearing on a license amendment notwithstanding a "no significant hazards consideration" finding, the NRC had never before had occasion to deny a requested hearing on this ground.

The *Sholly* decision will have no effect on the number of hearings requested on license amendments, the number of such hear-

ings granted, or the total time and resources spent on such hearings. As for the NRC's fanciful suggestion that it will force the shutdown of operating reactors for hearings on issues that involve truly no significant hazards consideration, the easy answer which would save this subcommittee's valuable time is to let the NRC come to Congress after such events actually occur, rather than at this time, claiming some possibility of future delay.

Even if the *Sholly* decision was novel and did represent a departure from established law and precedent, it would not have the grave impact wildly claimed by the NRC. Compared to the huge amount of subsidies (which have been recently confirmed by DOE's "Bowring Report"), that the Government has given nuclear power the resources devoted to assuring public participation and due process are miniscule.

Public participation provides independent scientific and other information to the decisionmakers by way of private not public resources. Studies have shown that regulation, and specifically public hearings, have not been the most significant case of delay in licensing reactors. Where time is important, surely the NRC is capable of holding an expedited hearing. In the NRC's example of changing fuel, such a change can surely be anticipated and approved sufficiently in advance that any brief hearing would not interfere in the operation of a plant.

Moreover, in the imagined case where a hearing is requested on an issue that truly involves some trivial matters of no health and safety consequence, the NRC has ample means, other than expedition and control of its own procedures, to deny a hearing or prevent a hearing from interfering with plant operation.

The NRC applies a rigorous standing requirement to any party desiring to participate in its proceedings. Such a party must show an interest that may be injured in fact as a result of the proceeding and that the interest is protected by the Atomic Energy Act. Mere economic concerns, for example, are not sufficient to obtain standing before the NRC.

The NRC's rigorous standing requirements have been frequently adequate for weeding out those imagined hearing requests on issues that do not legitimately affect the public.

I will try to summarize at this point, Senator.

Question 2 relates to statistics that I may have on the number of hearing requests on license amendments.

Senator SIMPSON. You don't have to answer those questions.

Mr. HAGER. The only statistics I have are for 1980, which show there were about 470 operating license amendments. Of the total of 470, there were only 11 requested hearings. Seven were withdrawn or dismissed by the NRC, leaving a total of four requests for hearings, and this is after Three Mile Island when we expect to have more rather than fewer requests for hearings. But I have submitted a separate letter where I suggest a number of questions to present to the NRC to elicit this kind of data, which I think is important before Congress acts to understand what kind of order we are talking about.

Senator SIMPSON. That is part of the reason for our process. So if you will furnish whatever you have, that will be certainly considered.

Mr. HAGER. As far as your question——

Senator SIMPSON. Can you please summarize it and conclude? Thank you.

Mr. HAGER. The question, this boils down to—I will just put my statement aside——

Senator SIMPSON. You can respond in writing if you wish.

Mr. HAGER. My statement does respond.

Senator SIMPSON. If you can do that in 1 minute. I will let you go 15.

Mr. HAGER. I think the bottom line here is that NRC, first of all, has attemped to state a future problem that does not exist and I don't think will exist, that the public isn't likely to spend its own scarce resources on requesting hearings where there is no impact on the public. They don't have enough resources to intervene in hearings where serious issues of health and safety are involved. They are highly unlikely to waste those resources trying to get hearings on issues that do not involve their own health and safety.

Second of all, these hearings are exceedingly expensive and there are ways of dismissing parties who are not prepared; for instance, in the discovery process. Up in Three Mile Island before the start of the hearing some highly talented scientists were dismissed because they didn't respond to recovery in time and now their views will not be available to NRC.

What will happen if the legislation which the NRC has requested is enacted is that one more hurdle to participation in hearings will be presented to the public. When they request a hearing they will first have to prove that their issue does involve a significant health and safety hazard. They may have to go up to a court to establish this and it will be one more set of rules, more lawyers and less scientists.

Senator SIMPSON. Thank you.

Mr. HAGER. Thank you very much.

Senator SIMPSON. I appreciate your time.

Now Mr. John Brown, please.

STATEMENT OF JOHN J. BROWN

Mr. BROWN. Mr. Chairman, my name is John J. Brown. I am the legislative director of the Operating Engineers and my apologies from President Turner who was called out of town this morning to the west coast. I will present his statement.

Mr. Chairman and members of the Committee on Nuclear Regulation, my name is J. C. Turner, general president for the International Union of Operating Engineers. I am appearing here today on behalf of the officers and members of the Operating Engineers Union. In addition, the views I will express at this hearing are endorsed by several other labor organizations: The International Brotherhood of Electrical Workers, AFL-CIO; the International Union of Electrical, Radio & Machine Workers, AFL-CIO; the Laborers' International Union of North America, AFL-CIO; and the Building and Construction Trades Department, AFL-CIO, representing 4 million construction workers.

On behalf of those organizations, I am here today to speak in favor of the proposed amendment to section 189 of the Atomic Energy Act of 1954. The purpose of this amendment reflects what

we believe to be the original intent of Congress that nuclear license amendments may be made effective without prior hearing.

Let me make it clear at the outset that safety for workers and the public is our first consideration in the development of nuclear energy. None of our organizations would, under any circumstances, accept or support a measure that would create any unnecessary dangers to our members, to the public living near the site of a nuclear plant or to the environment.

We do not, however, find that the legislation under consideration here will create such dangers. The *Sholly* decision imposes an intolerable burden on the nuclear industry without creating any additional safety factors.

Under the terms of this decision, any intervenor can, by questioning a nuclear licensee's proposed amendment, demand prior hearings before permission is granted to implement the amendment. Thus, for little more than the price of an 18-cent stamp multibillion dollar construction jobs can be brought to a complete halt with severe consequences to workers and to the consumers of electrical power.

No engineering project is so thoroughly reviewed, from a safety standpoint, as a nuclear generating facility. The applicant must give detailed accounts of engineering safety responses to both high- and low-probability accident scenarios. These responses are reviewed by committees and subcommittees of the Nuclear Regulatory Commission before which the licensed applicant must defend his design repeatedly. Before a construction license is granted, the Nuclear Regulatory Commission will have assessed the reaction of the plant to any conceivable circumstance.

At the end of that process, the construction permit applies to a facility that has been examined down to the last valve. The construction permit, when issued, applies specifically to the engineering design which was so examined. This is the key to evaluating the *Sholly* case. Given such detailed examination, an amendment to a nuclear plant license may involve no more than a change in valves, or the pipe plan, or a rearrangement of wiring inside the plant. Yet, under the *Sholly* decision, each of these insignificant change orders could become the occasion for stopping work on the facility for periods ranging from 6 to 9 months while public hearing and comment goes forward under the rules of the Administrative Procedures Act.

Our support for the proposed amendment, which will overturn the *Sholly* decision, is based on certain prime considerations.

The first is our view that U.S. energy policy demands the maximum production of all forms of domestic energy—nuclear, oil, coal, gas, synthetic fuels, and renewable sources.

If we are to achieve energy independence, no one fuel source is sufficient. We need everything we can get. Nuclear power is clearly one major source of energy immediately available for development. It is clean, plentiful, relatively inexpensive and, in most regards, less damaging to the environment than alternative sources involving fossil fuels.

Clearly, it is in the public interest to assure the maximum safety precautions are taken by the nuclear power industry.

It is also in the public interest that once the parameters of safety have been established, work go forward at the most rapid possible rate. The *Sholly* decision is an open invitation to violate this simple principle of the public interest.

The first obvious consequence of the *Sholly* decision is that it would greatly inflate the costs of nuclear plant construction. These are multibillion dollar projects. On such projects, the irretrievable loss from construction delays amounts to hundreds of thousands and even millions of dollars a day. Repeated applications of the Sholly decision to routine change orders in the construction of the plant would impose severe cost on the ultimate consumer of electrical power without, in any way, guaranteeing additional safety.

As labor unions, we are, in addition, committed to protecting the jobs of our members. Most nuclear plants require the assembly of large numbers of construction workers in excess of what the local labor market can provide.

When the work which attracted these men is interrupted for long period of time, the assembled labor force scatters very quickly. Thus at the end of the public hearing period, the contractor would be obliged to recruit an entirely new labor force and engage in the training and security processes required by the NRC. This not only interferes with the earning power of our members, but, again, imposes a large additional cost which will have to be met by the customers of the power company.

I have repeatedly stated that the application of the *Sholly* decision adds no increment to either the workers or public safety in the construction of a nuclear plant. In addition to that, I should point out that passage of this amendment will, in no way reduce the public's ability to participate in safety discussions regarding the nuclear power facility.

The NRC, even under the terms of this amendment, will still be required to hold public hearings on demand even with respect to amendments to a nuclear plant construction license.

However, if this amendment is passed, work will proceed under the terms of the amendment where the NRC has found that "no significant hazard" is raised by the license amendment.

If this were any other situation than the construction of a nuclear powerplant, the *Sholly* decision would be merely a curiosity and not the matter of serious concern that it is.

Since it does apply to nuclear power construction, we may be sure it will be used to provide unending interruptions to construction projects. Opposition to nuclear power, we have observed, rises above any consideration of procedural or legislative safeguards or engineering assurances of safety.

The *Sholly* decision, if allowed to stand, could well spell the doom of nuclear power development in the United States. Certainly we believe it would be used for this purpose in spite of the fact that no responsible commentator on our future energy needs has been able to draw a scenario that does not include extensive use of nuclear energy.

In closing, gentlemen, I wish to reiterate that our unions would in no way tolerate any denigration of worker and public safety by the nuclear power industry. If the *Sholly* decision in any way contributed a safety factor I feel we would be adamant in our

support for its implementation. We find, upon careful examination, however, that the rules stated in the *Sholly* case add only confusion, costs, and the interruption of vitally necessary work without adding one single increment to safety in the nuclear power industry.

Thank you, Mr. Chairman, for your consideration and time.

Senator SIMPSON. Thank you very much for your close observation of the time and your interesting testimony.

I have some questions.

Over the past 4 years the NRC has issued more than 1,600 amendments to the nuclear powerplant operating license based upon a no significant hazards consideration determination. I would ask in how many of those cases was a hearing requested? You gave me a figure, I believe, and I would like to know your comparison of that.

If you can just answer these as crisply as possible.

Mr. HAGER. Yes, the figure I had was 470 license amendments in 1980. I didn't have that broken down into the number of no significant hazards findings

Senator SIMPSON. Do you have any knowledge about that, Mr. Silberg?

Mr. SILBERG. Other than the *Sholly* request itself, I do not. I think the reason why there haven't been is very clear, if I could take just a second. The Commission's regulations since 1962 have specifically said that there shall be no prior hearings on no significant hazards consideration amendments. And I think those regulations, which were specifically called to the attention of the Congress in 1967, are the reason why the Commission was not asked for prior hearings on no significant hazards consideration amendments. Their position has been very clear.

Mr. HAGER. That simply isn't true.

Senator SIMPSON. Was the last time you two were together at the council table?

Mr. HAGER. No, I have never met Mr. Silberg before, but the brief of his firm did assert that point. But they could not find any regulation of such a nature.

Senator SIMPSON. Are you aware of any instances in whch a hearing was requested and convened, ultimately resulting in reversal by the NRC of its original position?

Mr. HAGER. None at all.

Mr. SILBERG. I don't.

Senator SIMPSON. Do you know anything about what standards the NRC used in the past to determine why license amendments involve no significant hazards consideration?

Mr. HAGER. The NRC recently proposed a rule earlier this year but they set out a series of standards and they claim that these are standards which they had applied in the past. So the presumption is that these would reflect the standards which were applied. However, the standards were of little help in solving this case. There is nothing in the standards which would determine whether under the circumstances of the *Sholly* case itself the action taken would be considered to present a significant hazards consideration or not. So the standards were not sufficiently detailed to apply to the one case which has never arisen.

Senator SIMPSON. So we really don't know whether the NRC standard for determining which license amendments involve no significant hazards consideration has been satisfactory or not, or whether it is overly broad or overly narrow.

Mr. HAGER. They have been unsatisfactory in the one case in which they were called upon to solve the issue.

Senator SIMPSON. At the time of the *Sholly* decision the NRC had circulated for public comment a proposed standard for determining which license amendments involve no significant hazards consideration.

Briefly that amendment provided that is the license amendment, one would not involve this significant increase and the probability or consequences of an accident previously evaluated; two, would not create the possibility of an accident of a type different from any evaluated previously; and three, would not involve a significant reduction in the margin of safety, then that amendment involves no significant hazards consideration.

What are your views with respect to the adequacy of that proposed standard?

Mr. HAGER. My reaction—I haven't articulated detailed comments but my reaction is they are very abstract statements, and that they do not help much more than the phrase itself, significant hazards consideration. They are too abstract to be helpful to solve any concrete cases.

Mr. SILBERG. Mr. Chairman, procedurally are you addressing these questions to both of us?

Senator SIMPSON. Well, I assumed our good friend, Mr. Brown, didn't want to get into this thicket, but any time anyone of you may respond on issues that you are aware of personally.

Mr. BROWN. Mr. Chairman, it is out in the plant where you have to face reality maybe I would involve myself at that stage of the game, but between two lawyers I would be a pretty foolish boy. My mother didn't raise a foolish boy.

Mr. SILBERG. I think someone talked before about the necessity for commonsense. I think we have just seen the best application so far of that principle.

Senator SIMPSON. A heavy portion of it, yes.

Mr. SILBERG. I would like to correct a statement that Mr. Hager said when he said we never mentioned any of the Commission regulations in our brief. I have our brief right here and not only did we mention it on page 24 and 25, but we also included in appendix A complete texts of the Commission's regulations as they exist today, 10 CFR 50–58, which I can read.

Senator SIMPSON. No citations, please.

Mr. SILBERG. And a similar regulation issued in 1962.

Senator SIMPSON. Is that not correct, we have already accepted that into the record?

Mr. SILBERG. No, this is a prior brief we had not talked about.

As to the standards which the Commission has used, those are laid out in my prepared statement on page 5, and they are, of necessity, general because the types of amendments which need to be considered range over the entire gamut of nuclear power operation.

If you try to get very specific tests you will find either that they are unworkable because they don't cover everything, or that they are so specific as to become voluminous. One just can't function with them.

So the kinds of reasonably general tests, but certainly more specific than the statutory language, that the Commission has laid out we think do provide an adequate basis for the Commission to make that determination, and in fact they have served that purpose for many years.

Senator SIMPSON. Thank you.

Mr. BROWN. Mr. Chairman, if I could just point out, if you are talking about organizations who have a history of safety such as the AFL-CIO and the ones that I am representing here today, especially in the evolvement of EMSHA and OSHA, and I think if you look into the Three Mile Island cleanup, you will find out it is being done by our people.

I doubt very, very much we would have gone into that area if we thought our people would be endangered in any way. So safety has been our prime target in any nuclear operation.

Mr. HAGER. In response to Mr. Silberg I must add that I did not say the Trowbridge brief cites no regulations in their brief. They cite them; but none of those cited state that a hearing is not available upon a finding of significant hazards consideration.

Senator SIMPSON. The courts of appeals held that even where a license amendment involves no significant hazards consideration, an interested person who requests a hearing is entitled by this section 189(a) of the Atomic Energy Act to a hearing before the amendment becomes effective.

To what extent, if any, will this decision impair the NRC's supervision of operating nuclear powerplants?

Mr. SILBERG. Well, to the extent there are requests for hearings, it will certainly divert resources which the Commission should be using on important safety questions. I cannot predict how many requests there are, but certainly the grapevine among intervenor groups is quite active and very quick, and word will soon get out if the *Sholly* decision goes into effect, that this is an easy way to shut down nuclear powerplants. They will choose their targets carefully, they will not pick those amendments of no significant hazard considerations which do not result in a plant shutdown.

However, once those kinds of requests start coming in the NRC is going to be under tremendous pressure to devote major portions of their resources to get those plants back up online quickly. Those resources will have to come from issues which have more significant hazards considerations.

Mr. HAGER. The statute has been on the books 19 years. There has only been one case where this issue has arisen, that is, the *Sholly* case. That was a case where scientists have said as many as 50 to 100 people will contract fatal cancer as a result of the emissions of Three Mile Island, and the NRC found that there would be no significant hazards considerations.

There were considerations of hazards. But the NRC made a finding there were none for the express purpose of avoiding hearings. The hearings were in fact, avoided and that is the kind of situation we would like to avoid in the future.

Senator SIMPSON. I think we have heard that the NRC approves approximately 400 license amendments based upon this determination no significant hazards consideration. In how many of those cases then would you anticipate there to be a request for a hearing as a result of *Sholly?*

Mr. SILBERG. I can't predict the number. I think it would probably be a fairly small number, perhaps 10 or 20, but when you note that those are 10 or 20 operating nuclear powerplants whose shutdown is going to cost between a quarter and a half million dollars a day, it doesn't take a lot of those requests to have a dramatic impact on the cost of power to consumers, and as I said before, on the cost to the NRC staff resources.

Mr. BROWN. Mr. Chairman, my previous occupation before coming onboard as a labor representative in Washington was what they might call a stationary engineer in the State of New Jersey, which is a licensed engineer, licensed by the State to run any type powerplants, refrigeration plants, different degrees of license. Now anybody who has been involved in powerplants has to accept the fact that day in and day out you have changes of valves, you have different type valves brought in, different pieces of equipment installed, and if we leave *Sholly* open, what you are saying is every time you give responsibilities to people to operate the plant, that they have to make some insignificant change to keep that plant running that it is going to be open to public scrutiny, you are saying shut down that plant, shut down millions of dollars not only in lost wages, but lost benefits to the consumers. There is no way you can construct a plant or run a plant that at any given time within a day or week you might have to make certain changes. It should not be. You have people in there appointed and approved by the Government of the United States and we think they should be the ones running the plant.

Senator SIMPSON. I think I will ask, and I will just submit some questions in writing because they will have differing answers from the three of you. Let me do that. Those questions will be in the area of how long would it take from the time such a hearing is requested until issuance by the hearing officer of a final decision. I am sure that will differ. Would the decision be subject to appeal of the Commission? How much additional time will that require? If it is not currently appealable to the Commission, should it be? I would ask though, presently, for the record, what additional resources do you think will be required by the NRC in order to process hearing requests as a result of this decision?

Mr. SILBERG. I would think you would need a number of new licensing board panels. I think the testimony you heard today indicated that the NRC is already suffering because of a shortage of licensing board chairmen and technical panel members. I would think you would probably need two to three additional panels. You would also need more staff lawyers to handle the cases; staff legal resources are already stressed and in some cases are holding up pending hearings before the NRC.

I think you will need additional technical resources.

Mr. HAGER. My position, of course, is that there will be no request for hearings, there hasn't been in the last 19 years. There has only been one request, that is the *Sholly* case. As a result of

that we now have this proposed legislative rule. But there was no opportunity for scientists to get a chance to talk rather than lawyers so I think the proposed legislation is going to create more rules, more work for lawyers and less opportunity for engineers and scientists to get together and knock out problems.

Mr. SILBERG. I would point out, as I said in my prepared statement, there were extraordinary opportunities for scientists and engineers to get together on the TMI question.

The Union of Concerned Scientists, not known as being terribly friendly with the nuclear power industry, issued a report which concluded there would be no physical health effects from the venting at TMI. The Commonwealth of Pennsylvania reached the same conclusion. Many independent groups looked at it. There was adequate opportunity, indeed overly adequate opportunity for everyone to get their views across to the Commission on the impact of that decision. If someone wants hearing opportunities in addition to that 6 months of public scrutiny, I don't know what we are doing except providing more work for the lawyers.

Senator SIMPSON. The *Sholly* decision indicated to me a very interesting bit of language, saying that any significant change in the operation of a nuclear facility constitutes a license amendment in itself.

I would ask where a licensee's technical specifications or license conditions call for NRC approval prior to taking certain action, would the granting of an NRC approval constitute a significant change in the operation of a nuclear facility?

Mr. HAGER. Senator, the reason for that language in the court's opinion was that the NRC had contended that the authorization of venting of radioactive materials, which was later found to include strontium-90 as well as the Krypton did not require a license amendment. They vented that material without taking into account what had happened at Three Mile Island. As a result of the accident there were new kinds of material in the atmosphere that had never been there before in the history of commercial power. The NRC tried to sneak it by without a hearing by bringing it within the standards of the operating technical specification. So the court had to rule this was a license amendment, even though the NRC tried to pretend it wasn't. The accident itself involved a significant change.

Senator SIMPSON. I am trying to be very judicious but the use of the term "sneak it by," that is absurd. You don't sneak by anything that had to do with Three Mile Island, I know. I was involved deeply and there wasn't any of that. So I don't quite grasp that.

Mr. HAGER. If I may, Senator, the NRC did successfully avoid hearings in this case even though what they did was blatantly illegal and they were told ahead of time by the Justice Department they couldn't do it. They did it.

Senator SIMPSON. I used to practice a little law, too, and we could bat that ball back and forth. I don't want to do that. You deserve more than that from me. I am just trying to develop it as best I can.

I am interested, though, in that phrase, "Any significant change in the operation of a nuclear facility constitutes a change in the amendment itself." That is, I think, an extraordinary change in a

statute. It could lead to a reinstatement, say, of some preexisting authority, the lifting of the suspension order, and that would constitute an amendment.

There would be many, many things that would come to mind in that.

Mr. SILBERG. Mr. Chairman, I think it is clear there are two parts of the court's opinion—one of them, the one you mentioned, and the other defining what constitutes a request by an interested person—in which the panel was rightly taken to task by the four judges who so sharply criticized the decision, for writing a decision which tries to be immune from review from above yet binds those below.

The court has, I think, taken steps which, if not countermanded, would have a tremendous impact not just on license amendments as was the case in *Sholly*, but on the whole NRC practice. The decision basically says that any time anyone does anything with respect to a nuclear plant, any person, once he has expressed at some time deep in the past any interest in that facility, is entitled to a prior hearing before that change can go into effect. The impact of that is to set up an entirely new level of technical review, without any study or any indication that that kind of review is worth while or indeed wouldn't be counterproductive.

Senator SIMPSON. Let me just draw to a conclusion here, because this one is the most interesting consequence to me, and it has to do with this.

To what extent will the *Sholly* decision result in technical specifications of a very much more generalized nature, thereby limiting the number of routine license amendment actions subsequent to the hearing requirement? In other words, I think we are headed in the opposite direction where the Nuclear Regulatory Commission will say, "Well, if that is the way it is going to be, then we will just get very generalized, we won't go into the amending process like we used to," and that will hinder the enforcement objectives of the NRC and lessen the abilities of those most concerned, the intervenors, the interested parties, to assure the pursuits of the technical issues. I am sure that has been thought of.

Mr. HAGER. I know the NRC has claimed that before the court as well as before this committee, and I believe it is another of their parade of horribles of what might happen in the future and it simply won't happen with these nonexistent intervenors who want to discuss issues that don't affect their health and safety.

Mr. SILBERG. I think that is one of the options that the Commission would have to look at. I think it is unlikely that they would go that route because the Commission rightly views its role to protect the public health and safety very seriously. I think they would believe that very general technical specifications would make it more difficult to protect the public health and safety. And in any event, changing technical specifications from specific ones to general ones would in itself be a license amendment which would itself require a prior hearing on request and would further slow down the process.

And if you had to go through those hearings for every plant in the country, just think what the impact would be on NRC resources.

Senator SIMPSON. The definition that you describe of the parade of horribles has certainly not been limited to one side in this particular litigation.

Well, I am going to submit a few more questions in writing and would ask you to respond in writing for the record. The case moves on. The Solicitor General will file the petition on March 30, I believe, and the new Justice Department will join with the NRC's position on that interesting case, whereas the previous one did not, and that may or may not have been because Mr. Jim Moorman was involved in the process at that level of determination, he being a person who was formerly a very active official of the Natural Resources Defense Council, a public interest law firm, and then they talk in this administration about the revolving door. Fascinating business, isn't it?

Mr. SILBERG. I would point out that the Solicitor General who made the decision to proceed and support the NRC's position is not the new Solicitor General, but is the one who has been the Solicitor General for the past 4 years.

Senator SIMPSON. Indeed, Wade McCree, one of the most delightful gentlemen I have met in my 2 years in this place. A very fine personal friend.

So I thank you for your testimony. I think I will be sure that the record stays open, that we will have the subcommittee recess until Tuesday, March 31, at 10 a.m., when we will hear from the Nuclear Regulatory Commission on these issues, these two issues.

I thank every one of you very much. You look like very able advocates of your position and that is a pleasure to see, as a fellow lawyer, and you, Mr. Brown, a very able proponent of your position on behalf of the union.

So thank you very much and I appreciate your courtesy in a long day.

Thank you.

The hearing is concluded.

[Whereupon, at 5:50 p.m., the subcommittee was recessed to reconvene at 10 a.m., Tuesday, March 31, 1981.]

[Statements submitted for the record follow:]

Hearing on Delays in the NRC Licensing Process
Senate Committee on Environment & Public Works
Subcommittee on Nuclear Regulation
March 25, 1981

My name is William S. Lee. I am President and Chief Operating Officer of Duke Power Company. I am appearing here today on behalf of the Edison Electric Institute, the American Nuclear Energy Council, and the Atomic Industrial Forum. I am accompanied by Michael Miller, Chairman of AIF's Lawyers Committee. I am pleased to have this opportunity to discuss with the Subcommittee the substantial delays being encountered in the issuance of construction permits and operating licenses by the Nuclear Regulatory Commission.

The magnitude of the delay problem is revealed in a report which the NRC filed with the Congress in January. The report shows that NRC estimates that construction will be completed at 13 plants for a total of 90 months before the Commission will be ready to issue operating licenses for them. This includes the McGuire 1, Farley 2 and Salem 2 plants which hold zero or low power licenses, but cannot go into commercial operation until a full power license is issued.

The costs to utilities and their ratepayers associated with these delays are enormous. While costs vary from plant to plant, a conservative estimate of the average costs incurred for each of the 13 plants would be in the range of $30-40 million per plant per month, taking into account both the cost of replacement power and the interest paid during construction. For the 90 months of unnecessary regulatory delay, the cost would be between $2.7 and $3.6 billion. If this is extrapolated to all the plants expected to be delayed through 1983, the total cost of delay would be $7 to $10 billion. In addition, DOE estimates that due to these delays, during 1981 and 1982 electric utilities constructing these plants will consume 42 million barrels of oil more than they might otherwise have used.

This is the first time in the 30 year history of nuclear power that completed plants will sit idle waiting for NRC licensing action. NRC contends that this situation is due to the extraordinary workload placed on the Commission by the Three Mile Island incident. This, undoubtedly, is an important factor. However, our view is that there are other contributing factors, including a lack of appropriate priorities in allocating personnel to licensing, confusion as to Commission policy, and an inefficient public hearing process. Examples of specific causes of delay would include: the Commission's decision to suspend its rule which provided for issuance of operating licenses or construction permits immediately upon decision by a hearing board, which is unnecessarily adding up to three months to the licensing process; unclear Commission policies concerning the impact of TMI on the hearing process leading to widely varied interpretations by hearing boards and to broad latitude in the hearing of tenuous intervenor contentions; and the fact that less than 200 of NRC's 3200 employees are assigned directly to reactor licensing casework.

On March 12 the Commission submitted a report to this Subcommittee on steps it is taking to eliminate licensing delays. The report contains a number of sound ideas which deserve to be implemented; however, it is significant that the Commission so far has been able to reach a consensus on only a very few of the options. It is clear that differences of opinion among the commissioners makes it extremely difficult to reach a consensus on important policy matters. This underscores the need for the President to act quickly to fill the vacant seat on the Commission.

Unfortunately, the Commission's report does not inspire confidence that the sought for improvements in licensing will soon be realized. The fact is that in two weeks of meetings on the subject the Commission was unable to agree to reinstatement of its immediate effectiveness rule, or to make the changes in procedural rules required to support an expedited hearing schedule; it failed to approve reallocation of all of the man power which would be required to get staff technical review off the critical path; it again put off issuing a final rule establishing license requirements for near-term construction permits; and it discussed only in a perfunctory fashion several important Commission policies which are contributing to licensing delays. In short, what the Commission did is to put forward a plan for improvement, but failed to make the hard policy and staff allocation decisions necessary to accomplish that objective.

Based on the Commission's March 12 report, it is difficult to tell how much, if any, improvement may be expected in the licensing process. Whether some or all of the months of delay currently estimated for licenses to be issued through 1983 will be realized is still an open issue. The burden should be on the Commission to demonstrate through concrete actions that the improvements will be implemented.

Because of the uncertainty surrounding whether the proposed improvements, particularly in the hearing process, will actually be achieved, the proposal to amend the Atomic Energy Act to authorize the Commission to issue temporary operating licenses is an essential component in getting licensing back on schedule. The proposal submitted by the Commission is a step in the right direction; however, I believe it is unnecessarily restrictive in several respects.

First, it is not entirely clear that the licensing process will be back on track by the end of 1983, when the Commission's authority to authorize temporary operation would expire. As Commissioner Ahearne said at a recent Commission meeting, temporary operating authority is a hedge against failure to realize the improvements being sought. Thus, it would be better to leave open the issue of for how long such authority may be required, until it can be determined whether the Commission's efforts to expedite the hearing process bear any fruit.

Second, I agree with Chairman Hendrie that the legislation should not be limited to low power operations. This would permit only fuel loading, start-up and low power testing. As Chairman Hendrie notes, in some cases this might be all that is required, but in other cases it may be necessary or appropriate to authorize operations at other power levels, up to full power. It seems pointless to give the Commission only a portion of the authority it may need to deal with the delay situation. Rather than to have an arbitrary

low power limitation in the statute, the amendment should permit NRC to authorize full power operation, and, perhaps leave to the Commission's discretion how much power to authorize on a case-by-case basis.

Finally, I believe the authority should be expanded to include amendments to operating licenses. As a result of Three Mile Island, a number of new requirements are anticipated for operating reactors which would require license amendments. If a plant needs to be shut down to accomplish these modifications, there is a potential for extensive delays before the plant could go back on line if it must await the outcome of a public hearing. Broadening the provision to permit temporary operation in such situation would be consistent with the overall rationale of the Commission's proposal, and would compliment the authority it is seeking to deal with the Sholly case.

I would also like to note my agreement with the points made in Commissioner Ahearne's additional views set out as an attachment to the proposed amendment. It is clear that the public hearing process, particularly at the operating license stage, serves little useful purpose as presently constructed. It is not reasonable that when a plant is built and ready to go on line, and a billion or so dollars have been invested in it, to consider such issues as whether it should have been built on a different site, whether a geothermal or biomass facility would be preferable, whether the power is needed, or the financial qualification of the utility to own and operate it. Commissioner Ahearne is correct in stating the need for a fundamental reform of this process and the issues he raises need to be addressed. In particular, as Commissioner Ahearne states, the Commission should direct boards to limit the scope of the hearing only to substantial issues raised by the parties; it should raise the threshold for the admission of such contentions; and it should direct the boards to manage the proceedings with a strong hand. If the Commission is unwilling or unable to effect these, and other needed changes, the Congress should mandate them by law.

One concern inspired by the Commission's temporary operating license proposal is that it not be used as a substitute for making the required improvements in the technical review process, Commission policies, and the public hearing procedures. These changes are absolutely required to bring order and stability to the licensing process and to eliminate the inordinate costs which the current system imposes on utilities and their ratepayers.

I should also like to note my agreement with the thrust of the proposal submitted by the Commission to deal with the holding in the Sholly case. The Commission is to be commended for its initiative on this matter.

The Commission mandate is to protect public health and safety. I believe these steps noted herein improve the licensing process and support that mandate.

Attached to my statement are reports of the American Nuclear Energy Council which analyze in detail the extent, causes and costs of licensing delays, and the options for eliminating these delays. I would like to request that they be placed in the record of this hearing.

I thank the Chairman and the Subcommittee members for this opportunity to present our views, and would be happy to answer any questions you may have.

AMERICAN NUCLEAR ENERGY COUNCIL
410 FIRST STREET, SE • WASHINGTON, DC 20003
(202) 484-2670

MEMORANDUM

February 10, 1981
Revised: 2/20/81

TO: File

FROM: George L. Gleason, Executive Vice President

RE: January, 1981, NRC Report to House Appropriations Subcommittee on Status of NRC Licensing Proceedings

The status reports are significant both for what they tell you about licensing delays, and, perhaps more importantly, for what they don't reveal. The reasons for this are discussed below. However, as a preliminary matter, it is interesting to note the expanding pattern of delays in the issuance of operating licenses as evident from NRC's estimates of both the number of plants impacted and the total number of plant-months of delay, beginning with its testimony of last April 17 to the Subcommittee.

April 17, 1981 testimony:	Three plants impacted for 10 months of delays.
November, 1980, Report:	Five plants for 29 months of delay.
December, 1980, Report:	Seven plants for 36 months of delay.
January, 1981, Report:	Eleven plants for 79 months of delay.

NOTE: The NRC figures do not include Farley 2 or Salem 2 as impacted plants, because they already hold zero power licenses; however, they should be included since the plants cannot be put into the rate base until a full power license is issued. Including these two plants would increase the projected delays by 11 months, or to 90 months total. (See attachment)

CONSTRUCTION PERMITS NOT COVERED

There is no information in the January report upon which delays in the processing of application for construction permits can be determined; however, most applications are known to be a year or more behind schedule. This appears to be the Commission's lowest priority program. Construction permit licensing has been at a standstill since the TMI accident on March 28, 1979. Initially, the Commission declared a moratorium with respect to processing such applications. Finally, on August 1, 1980, it took the first step to resuming CP licensing for the six remaining near-term construction permit applications by approving, for public comment, post-TMI licensing requirements proposed by the NRC staff. As of this date -- some 6-1/2 months later, these post-TMI licensing requirements still have not been finalized and issued. Before near-term construction permit applicants can begin to worry about dilatory actions of the NRC staff and undue delays in the licensing process, NRC Commissioners must take the following steps.

a. finalize and issue psot-TMI licensing requirements for pending CP applications;

b. issue guidance to NRC licensing boards as to the scope of the issues to be considered at hearings;

c. assure that the NRC staff assigns adequate technical staff to evaluate applicants' Preliminary Safety Analysis Reports (PSAR) information addressing new licensing requirements and to issue Safety Evaluation Reports.

In connection with c., the January report indicates an allocation of only 12 man-years in FY81 to process CP applications and only 10 man-years in FY82 and FY83. This hardly seems adequate to complete the review of the six (11 unit) pending construction permit applications.

DELAYS IN OPERATING LICENSES

The Repo.ts Do Not Indicate Actual Delays

The January report indicates that, including Farley and Salem, 13 plants are impacted for a total delay of 90 months. What the report does not reveal is that the actual delay is far in excess of that amount. This is because delays estimated in the report are calculated as the number of months between NRC's estimated completion of construction, and issuance of a license; however, the pace at which construction proceeds is often constrained by the pace at which NRC's licensing review proceeds, or by NRC's advice to licensees as to when a license may be expected, e.g., a licensee may go from a three-shift construction schedule to a two-shift schedule in response to a slippage in NRC's licensing schedule. Therefore, the measure of actual delay should be the length of time between when construction could have been completed under normal licensing constraints, and NRC's schedule for license issuance. For example:

* For Summer 1, NRC estimates an eight month delay; however, construction could be completed 8/81, rather than 10/81, as NRC estimates. Additional delay is two months.

* For Shoreham, NRC estimates a one month delay: however, construction could be completed 6/82, rather than 9/82, as NRC estimates. Additional delay is three months.

* For Waterford 3, NRC estimates a six month delay; however, the report does not reflect an earlier slow-down in construction due to previous NRC delays. Additional delay is 13 months.

The pattern is the same for the other impacted plants. It is significant that many applicants advise that the schedules included in the report were never discussed with them.

Moreover, because of the format used, the monthly reports show only the delay from one month to the next, not the cumulative delay from the first report to the last. Thus, the January report shows 11 plants impacted for 79 months of delay. However, going back to the November report and using NRC's

estimate of construction completion, the total delay for these 11 plants would be 144 months, rather than the 79 months shown in the January report. If the applicants' estimates of construction completion shown in the November report is used, the total delay for these 11 plants is 171 months.

Another measure of delay is to compare the length of time current applications have been pending against previous experience. In the three year period preceeding Three Mile Island, the time from the docketing of the Final Safety Analysis Report (FSAR) to issuance of an operating license averaged between 51 and 53 months (NUREG-0380, 5/23/80); the estimated average time for issuance of the full operating licenses for the 13 impacted plants is 79 months, or about 50 percent longer.

Review of these reports indicates that, because of the methodology used, they do not reflect actual expected delays, which in most cases will be greater than that estimated. Nevertheless, even the delays which are reported indicate a serious and growing problem.

Arbitrary and Inconsistent Assumptions

Another problem is that the assumptions used to estimate delay are arbitrary and are inconsistently applied from one plant to another. In particular, it appears that the hearing schedules have been lengthened for certain close-in hearings, but not for others which are expected to experience similar duration. In other words, they have expanded the schedules for certain hearings, and compressed it for others without any evident reasons. For example, the duration of the hearing on Comanche Peak 1 has been expanded from five months in the second report to eight months in the third report; however, the schedule for Shoreham, which is a similarly heavily contested proceeding, has been compressed from eight months to six months. The schedule for the start of the Waterford 3 hearing has been slipped six months, with a similar slip in the date for issuance of the license. The report states that the reason for this is "to allow for an initial decision on the environmental issues before starting the safety hearings" (page 3). There has been no decision by the hearing board to this effect, and the need for such a bifurcated hearing has not been discussed with the applicant or the other parties. Nevertheless, the extended hearing schedule will now become a pacing item in the staff's review.

List of Impacted Plants is Incomplete

The list of impacted plants is incomplete. There is no reason why the assumptions listed on page three of the January report should not be applied to all of the pending operating license applications, rather than just those scheduled for Fiscal Years 1981 and 1982. That they are not so applied indicates that NRC simply has not extended its analysis to the remainder of the plants. If the same assumptions were applied, it would probably add four to seven months each to the projected schedules for the remaining 40 applications, for an additional total delay of 160 to 280 months.

Is it reasonable to expect that these additional delays will actually be encountered? The answer is yes. The reason for this is the diversion of staff from the more distant licenses to other non-licensing-

related work. In most cases, the schedules for the more distant licenses, as listed in the report, are simply paper exercises, unsupported by sufficient staff resources to carry them out. However, there is no information in the report, or elsewhere available, to know just how bad the problem is. It would appear that this would be an appropriate line of inquiry for the Subcommittee.

Cost of Delays

The report does not calculate the financial costs to applicants and their stockholders, and their ratepayers associated with the projected delays. The costs are enormous. For example --

* Diablo Canyon, Units 1 and 2 -- Cost of delay of the two units is $1 billion per year, or $83 million per month.

* San Onofre, Units 2 & 3 -- Cost of delay of two units is $3 million per day, or $90 million per month.

* Shoreham -- Cost of delay is $1.3 million per day, or $39 million per month.

These figures include the cost of interest paid during construction and the cost of replacement power, both of which vary from plant to plant. While detailed figures are not yet available for each of the impacted plants, a conservative estimate of the average costs incurred for each of the 13 impacted plants would be in the range of $30-40 million per plant per month. Since the impacted plants have accumulated a total delay of 90 months, the current costs of delay would be between $2.7 and $3.6 billion. As one applicant put it, "for want of a couple of GS-15s it's costing us billions."

Impact of Delay on Use of Oil

The report does not indicate the impact of the delays on the use of oil. It is substantial. DoE has submitted a report to the Appropriations Subcommittee (February 13, 1981) which calculates that the delays projected in the January NRC report mean that, "The electric utilities constructing these plants will consume 42 million barrels of oil more than they might have otherwise consumed". DoE reports that, when operational, the delayed plants will be capable of displacing a daily average of approximately 200,000 barrels of oil. DoE's estimates were based on 15 plants, including Three Mile Island I (the undamaged unit) which it believes could be in operation by the end of 1982.

REASONS FOR DELAYS

Licensing delays appear to be epidemic and continue despite the increase in additional NRC personnel assigned to the Office of Nuclear Reactor Regulation. Shortly after the TMI accident, 100 additional personnel were provided to assist NRC in coping with generic TMI-related tasks and to continue casework reviews of construction permits and operating licenses. Notwithstanding the increase in personnel, licensing delays persist and appear to indicate that something more serious than manpower shortage is the principal cause of delay.

Immediate effectiveness rule. After Three Mile Island, the NRC suspended its rule which provided for issuance of a license upon decision by the hearing board, so that the Commission itself could review each application. The effect of this suspension is to add three or more months to the schedule of each plant.

Staff Unpreparedness. Many applicants believe that staff unpreparedness is a principal cause of delay. For example, the January report shows delays by staff in issuance of Safety Evaluation Reports (SER) of two months each for Grand Gulf 1 and 2; one month for LaSalle 2; two months for Shoreham; one month for Summer 1; and three months each for Watts Bar 1 and 2.

Delay in Start of Hearings. Too much time is being allowed to lapse before start of the hearing. In the case of Comanche Peak the hearing is not scheduled to start until nine months after the issuance of the SER, six months after issuance of SER Supplement and eight months after issuance of the Draft Environment Statement (DES). For Waterford 3, the hearing is eight months after the SER supplement. For Comanche Peak, two years will have passed from the time intervention was permitted to the start of the hearing. No reason is given in report three for the indicated delays in the start of the hearing for Comanche Peak (6 months); or for the hearing start delays in Fermi (6 months); McGuire (5 months); or Shoreham (9 months). The only reason given for the delay in the start of the Waterford hearing is incorrect.

Hearing Board Problems. One problem with hearing boards is that some members are serving on several boards at the same time. For example, one examiner is currently a member of five boards. Too much time (4-5 months) is allotted for decision-writing, perhaps in part because of the multiple board problems. There is some concern also about the qualifications of some board members, and their general procedural bias in favor of intervenors.

Policy Guidance to Boards. Last December 18 the Commission changed its policy which had precluded intervenors from litigating in individual proceedings the sufficiency of NRC's new post-TMI licensing requirements. The new policy (copy attached) permits these requirements to be raised in each pending proceeding. Chairman Ahearne dissented from the policy on the grounds that it "relinquishes Commission control and attention from a major portion of this process." The new policy is already resulting in an estimated 13 month delay in the McGuire case where, after issuance of a low power license, the board has reopened the hearing to consider two issues (hydrogen control and emergency planning) at the behest of a lone intervenor, even though the Commission rules on those items in issuing the low power license. Other plants potentially affected are Diablo Canyon, Summer, Zimmer, Shoreham, San Onofre, Lacrosse and Comanche Peak. The additional delays caused by this change in policy are not yet fully reflected in the status reports and are presently not completely known, but are predicted to be lengthy.

This change in policy has created an ambiguity for the hearing boards, since Section 2.758 of the Commission's regulations prohibits challenging Commission regulations in individual license proceedings. Each

and every hearing board will now have to make its own determination as to the relationship between this rule and the new policy, possibly with conflicting results, since the Commission has given no guidance on the subject. Alternatives to this policy would include having the Commission itself make this determination, or, alternatively, to have it resolved after public notice and comment in a rulemaking proceeding. This is an important issue upon which Commission clarification should be sought.

Sua Sponte Rule. Until the Commission changed its rule in November, 1979, to permit hearing boards to examine any "serious" uncontested matter, a board could review matters not put in issue by a party only in "extraordinary circumstances". The appeal board just recently used this expanded authority to retain jurisdiction of an operating license proceeding from which all intervenors had withdrawn. This unnecessarily enlarges the boards' role. The Commission should change its policy to limit board review to matters put in contention by the parties.

Emergency Planning. In several cases NRC emergency planning requirements have caused a delay in the issuance of a full power operating license. NRC's current requirements call for state emergency plans to be tested prior to the receipt of an operating license. Under a joint memorandum of understanding, FEMA has the responsibility of determining the adequacy of state emergency plans; however, NRC retains the responsibility for determining overall emergency preparedness. Therefore, the Commission itself may in some cases review the results of the emergency test before issuing a full power operating license. The multipartite responsibility between NRC, FEMA, the states, and local communities inevitably results in delays. The requirement that state emergency plans be tested prior to the receipt of a full power operating license exceeds the requirements of P.L. 96-295, and NRC should relax this requirement in order to prevent serious delays.

CONCLUSION

For the reasons stated above, the reports are of limited usefulness in assessing the actual extent of delay in the NRC licensing proceedings. However, they do indicate a significant and growing problem, although its magnitude is understated. The reasons for this are varied, but generally indicate a lack of management discipline within NRC, a lack of appropriate priorities in allocating personnel to licensing activities, confusion as to Commission policy and an inefficient hearing process. Some would add that NRC does not have enough manpower, but the problem seems rather to be the inexperience of a large number of the reviewers and personnel allocation to non-licensing functions.

While the allocation problem is difficult to quantify, it is clear that substantial staff resources are being diverted to non-essential or low priority tasks at the expense of licensing. One example of this is the Commission's proposed program to implement Section 110 of Public Law 96-295. This is the so-called Bingham amendment which requires NRC to develop a program for the systematic safety evaluation of all currently operating nuclear power plants. When this amendment was pending before Congress NRC advised that the task could be accomplished in 120 days at a cost of $4 million. Its current proposal calls for a 7-10 year program which will

require several hundred manyears of NRC manpower and several thousand man years of industry engineering time. The payoff for this program in terms of enhanced safety will be minimal, since it will result only in a paper documentation of existing plant designs against unproven acceptance criteria, which, even the NRC staff admits, "may not be particularly useful or necessary in evaluating the overall safety of the plant." (See attachment for details.)

Another program which consumes a significant amount of NRC staff and Commissioner time is export licensing. Chairman Ahearne is on record as saying this consumes 15-20 percent of the Commission's time. This program should be shifted back to the Department of State.

In assessing the low priority which NRC assigns to processing licensing, it is significant to note that during Fiscal Year 1981 only 198, or less than seven percent, of NRC's 3200 personnel are assigned to reactor license casework; in FY 1982 this is projected to drop to 157 casework reviewers.

Of all the reasons for delay, our analysis suggests four leading causes. The first is the Commission's suspension of its immediate effectiveness rule, which has added three or more months to the licensing process. The second is staff delay in issuing the SERs, without which a hearing cannot begin. More staff must be assigned to this priority activity. The third reason, and the one which is growing the fastest, is delay in the hearing process. Here there are several contributory factors: (a) the Commission's December 18 policy change which permits post-TMI requirements to be litigated in each individual hearing; (b) the change in the sua sponte rule, which unnecessarily enlarged the hearing boards' role; and (c) the assignment of some hearing board members to as many as five on-going proceedings. Finally, the Commission has failed to provide firm direction and guidance to the boards for overall expeditious conduct of hearings. The hearing boards are under the direct supervision of the Commission itself, not the staff, and it has simply abdicated its responsibility for assuring expeditious hearings. One additional problem looming on the horizon is the multiparty responsibility for approval of emergency plans. This is already delaying the Salem plants, and offers the potential for substantially delaying several others.

In conclusion, one gets the impression from reading the reports that they are being treated by NRC as a simple documentation process for the benefit of the Subcommittee, and that the commissioners have not used them as an analytical tool for seeking means to reduce licensing delays, as, I believe, the Subcommittee intended. It would be interesting to hear from NRC just what consideration they have given to the reports' findings.

Attachments

February 10, 1981

SUMMARY OF IMPACTED CP & OL PLANTS

Construction Permits:

Delay is calculated assuming on a historic high processing time of 40 months (Ref. NUREG-0380). This processing time is considerably greater than the NRC estimate of about 24 months (for contested cases) used to determine licensing schedules and manpower requirements. (For multi-unit plants, delay is calculated for only the lead unit.)

Plant	PSAR Docketed	CP Issue	Delay to date
1. Allens Creek 1	12/73	N/S	45+
2. Black Fox 1 & 2	12/75	N/S	21+
3. Pebble Springs 1 & 2	10/74	N/S	35+
4. Perkins 1, 2, & 3	5/74	N/S	40+
5. Pilgrim 2	12/73	N/S	45+
6. Skagit 1 & 2	1/75	N/S	32+
		TOTAL:	218 mos.

N/S = Not Scheduled

Operating Licenses:

Delay is based on the time lapse between NRC's current estimate for construction completion, and the estimated date for issuance of a full power license.

NRC APRIL 17 TESTIMONY

Plant	Construction Complete	OL Issue	Delay
1. Summer	12/80	4/81	4
2. Diablo Canyon 1	5/80	10/80	5
3. San Onofre 2	5/81	6/81	1
		TOTAL:	10 mos.

NOVEMBER REPORT

Plant	Construction Complete	OL Issue	Delay
1. Summer	1/81	10/81	9
2. Diablo Canyon 1	1/81	5/81	4
3. Diablo Canyon 2	6/81	9/81	3
4. San Onofre 2	7/81	5/82	10
5. La Salle 1	12/80	3/81	3
*6. Salem 2	4/80	10/80	6
*7. Farley 2	10/80	1/81	3
		TOTAL:	38 mos.

DECEMBER REPORT

Plant	Construction Complete	OL Issue	Delay
1. Summer	8/81	10/81	2
2. Diablo Canyon 1	1/81	12/81	11
3. Diablo Canyon 2	6/81	12/81	6
4. San Onofre 2	7/81	5/82	10
5. La Salle 1	6/81	4/81	0
6. Zimmer	11/81	1/82	2
7. McGuire	1/81	6/81	5
*8. Salem 2	4/80	2/81	12
*9. Farley 2	3/81	3/81	0
		TOTAL:	48 mos.

JANUARY REPORT

Plant	Construction Complete	OL Issue	Delay
1. Summer	10/81	06/82	8
2. Diablo Canyon 1	3/81	03/82	12
3. Diablo Canyon 2	10/81	03/82	5
4. San Onofre	7/81	04/82	9
5. Zimmer	11/81	07/82	8
6. McGuire	2/81	3/82	13
7. Enrico Fermi 2	11/82	06/83	7
8. Susquehanna 1	03/82	11/82	8
9. Waterford 3	10/82	04/83	6
10. Shoreham	09/82	10/82	1
11. Commanche Peak 1	12/82	02/83	2
*12. Salem 2	4/80	03/81	11
*13. Farley 2	3/81	03/81	0
		TOTAL:	90 mos.

* Plants with FL/ZP licenses which are not listed as impacted plants by NRC.

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Report on the Status of NRC Licensing Delays
March 2, 1981

Pursuant to a request from the Subcommittee on Energy and Water Development, House Committee on Appropriations, the NRC is currently investigating ways to eliminate the substantial and costly delays now being experienced in the issuance of construction permits and operating licenses. A report is due to be submitted to the Subcommittee on March 5. The report is to include not only the Commission's recommended actions, but all actions which could be taken to eliminate licensing delays. Both the House Interior and Insular Affairs Committee and the Senate Environment and Public Works Committee have also requested that the same information be filed with them.

As reported by NRC to the Appropriations Subcommittee in January, 11 plants scheduled for operation in 1981-1982 will be completed for a total of 79 months before an operating license will be issued. There are two additional plants holding low power licenses which cannot go into commercial operation until a full power license is issued. Including these two plants would raise the total to 90 months of delay. The current cost of these delays is estimated to be between $2.7 and 3.6 billion. If this is projected into Fiscal Year 1983, using the staff's scheduling assumptions, total plant delays in that year alone will increase by 162 months, for an additional cost of about $5 to 6 billion.

The NRC staff has presented a proposed recovery plan to the Commission. Briefly, the staff has advised the Commission that even if the additional resources it is requesting are made available, so that NRC technical review is taken off the critical path, the estimated 79 months of delay can be reduced only to 69 months, which is due to delays in the public hearing process. Clearly the burden is on the commissioners themselves, and through them, on the hearing boards to devise a plan to eliminate these hearing delays. The test of the commissioners' commitment to do so can be measured by the actions they may take on the staff's recommended recovery plan, their willingness to change policies which have exacerbated both the technical review and hearing process, the steps they take to introduce order and efficiency into the hearing procedures, and their willingness to support an amendment to the Atomic Energy Act providing for temporary operating authority. A principal problem in this regard, as noted last week in testimony before the Senate Committee on Environment and Public Works, is the substantial disagreement among the commissioners which results in more ways to stop things than to get them done.

The Recovery Plan

The recovery plan which the Director of Nuclear Regulation has presented to the Commission is designed to eliminate, beginning immediately, any delays due to staff review. If there is no near-term relief from hearing delays, to issue an operating license coincident with the applicants' estimated date of construction completion will require that the Office of Nuclear Reactor Regulation (NRR) be assigned the equivalent of 144 additional professional man-years. This is more than twice its current complement of casework re-

viewers. The increase could be reduced to 87 man-years if all but essential safety significant work is deferred. Forty-seven of the 144 man-years would come from reassignment of personnel within NRR; 52 from other NRC offices; 25 from new hiring; and 20 from mandated overtime. It should also be noted that the NRR plan would require an additional 14 attorneys assigned to casework in the Office of the Executive Legal Director, including five to be reassigned from other activities, and nine new hires.

The NRR staff believes that if its proposal is approved there will be no future delays caused by the technical review process. It is a good proposal and deserves the support of the Commission. It is noteworthy that it can be carried out without deferral of current NRC activties. Nevertheless, there are certain possible impediments to its full implementation which must be considered:

* The plan will require very careful prioritization, management and monitoring of NRR casework.

* It will require fundamental changes to the staff review process, such as elimination of the time-consuming second round of staff questions to applicants.

* It requires the cooperation of the other NRC offices and the Executive Director for Operations.

* The Administration's hiring freeze must be removed.

* The NRC federal employees' union must be convinced to cooperate in personnel reassignments and mandatory overtime.

* The allocation of more travel funds to casework reviewers will be required.

By any measure, the NRR recovery plan is an optimistic one, and experience suggests that it is doubtful it will be successful in completely eliminating licensing delays. Because of the tight scheduling it would require, small errors in estimating workload or in assignments or availability of staff could have a rippling effect across the board. Therefore, it is necessary to look elsewhere for complementary changes in the licensing process.

Need for Changes in Commission Policy

In addition to the NRR recovery plan, the Commission has been presented with a number of possible changes by the Executive Director for Operations, the Executive Legal Director and the Chairman of the Atomic Safety and Licensing Board. It has also had the benefit of the views of the chairman of the appeal board. These proposals are addressed to the changes required in Commission policies, organization and operation of the hearing and appeal boards, and hearing procedures. Taken collectively, these are the issues which must be resolved if the Commission is to eliminate the 69 months of delay currently estimated to be due to reasons other than staff technical review, and to prevent further delays due to these causes.

There are several present Commission policies which cause delays in the issuance of construction permits and operating licenses. These were discussed in detail in our February 10, 1981, memorandum, a copy of which is attached. Principal among these are the following:

(1) Immediate Effectiveness Rule

The Commission's decision to suspend its rule which provided for issuance of an operating license or construction permit immediately upon decision by a hearing board is adding up to three months to the licensing process. The NRC General Counsel has pointed out to the Commission that its action to suspend this rule was taken at a time when the time allotted for its review was not on the critical path, and that the cost/benefit equation is now much different due to the high costs of delay. He has presented a number of policy alternatives, ranging from reinstating the rule to modifying the respective roles of the Commission and the appeal board in the stay process. Two things are clear at this time:

(a) This Commission policy is one of the principal causes of delay.

(b) The Commission is sharply divided on what to do about it.

At least Commissioners Bradford and Gilinsky appear to oppose reinstatement of the immediate effectiveness rule, and favor some greater Commission involvement in the stay process. The General Counsel believes this would require substantially more monitoring of proceedings by the Commission and his office. Preliminary analysis suggests that unless the Commission is willing to put strict time limits on its consideration stays, this modification would not result in elimination of delays, and could possibly increase them.

The appeal board chairman's remarks to the Commission underline the seriousness of this problem. He advised the Commission that holding up issuance of a license pending the appeal board's review of the merits of a decision by the hearing board would result in seven or more months of delay, rather than the 90 day period now being projected. He also advised them that there are "precious few" cases where review by the appeal board has resulted in substantive changes in the initial decision. This makes a pretty solid case for permitting an initial decision to become effective immediately, subject to subsequent examination by the appeal board, and/or the Commission itself. Therefore, the Commission's disposition of this matter will have particular significance in evaluating its commitment to eliminate licensing delays.

(2) Increased Rulemaking

The General Counsel has recommended that the Commission make greater use of rulemaking in order to avoid litigation of Commission requirements in individual licensing proceedings. He suggested, specifically, that the pending decision of the Commission to issue the near-term construction permit requirements as rules was a step in the right direction; he suggested the same policy be applied to the near-term operating license requirements. This would require modification of the Commission's December 18, 1981, policy on this matter. He described the benefits of this approach as "expedition", and "less litigation".

3. Policy on Expediting Cases

Both the Executive Legal Director and the General Counsel have urged the Commission to reiterate the existing policy in Part 2 of its regulations which calls for expeditious hearings. Recently, this policy has been evident only in its breach. While it is probably a good idea for the Commission to do this, unless it is made clear to the boards that the Commission is committed to vigorous enforcement it won't have any impact. Also, such a policy will need to be specific with respect to just how the boards are to translate the policy into action.

A number of other possible policy changes have been presented to the Commission, most of which are discussed in the attached memorandum. In addition, Commissioner Gilinsky and others have raised the possibility of eliminating certain non-safety matters from the public hearing process at the operating license stage, including financial qualification, need for power, and alternative site and power issues. Collectively, these changes might have some positive impact, but the real delay-savers relate to the immediate effectiveness rule and the December 18 policy statement on litigability of the near-term operating license requirement in individual proceedings.

Delays in Hearing Process

Delay associated with the hearing process is the area which is growing fastest, and is the one which will be most difficult to resolve, even with the best of intentions. Here is a partial list of the problems:

* A panel of only 14 full-time and 35 part-time lawyer/chairmen to handle a current board of 62 active cases, a 40% decrease in full-time personnel since 1975.

* The difficulty of scheduling hearings around the schedules of each member of the three member boards, some of whom are full-time and others who are part time and have heavy commitments elsewhere.

* Hearing board members assigned to as many as five cases at the same time.

* Hearings which have grown from a duration of days or weeks to months and years, with transcripts stacked from one to four stories high.

* Rules governing hearings which have not been updated to reflect the highly contested nature of current proceedings and which, in any event, are largely ignored.

* Commission policies which have broadly expanded the scope of the hearings and the responsibilities of the boards without any consideration of their impact on delay.

* Confusion on the part of the boards regarding Commission regulations and policy, and second guessing of the hearing boards by the Commission and the appeal board.

* Participation in public hearings of unqualified attornies who would not be permitted to appear in federal courts, and who slow down the proceedings.

* Procedures, such as discovery and summary disposition, which are designed to expedite hearings, but instead are used in such a fashion as to prolong them.

* Hearing board chairmen who believe they don't have all the authority they need to control hearings, and who aren't encouraged to exercise the authority they have.

The list goes on. One gets the impression from sitting through the Commission's recent meetings on hearing delays that the situation is out of control, and the prospects for turning it around in the short-term are not good. Additional hearing examiners are not readily available. Radical changes cannot be made in the midst of on-going proceedings without causing some problems. Hearing examiners who have been operating in a particular mode for years are not going to change overnight. Most importantly, the NRC commissioners seem far from any consensus as to just what needs to be done to straighten the situation out. This is not to say that most of the changes which have been recommended to the Commission shouldn't be implemented; rather, that no short-term payoff should be calculated in the current program to reduce licensing delays. Most of the 15 month delay now estimated by the staff from start of the prehearing procedures to issuance of a license for plants scheduled to operate in Fiscal Year 1983 is probably here to stay, at a cost for that year alone of some $5 to $6 billion to utilities and their rate payers.

The fundamental problem with the hearing process has been pointed out to the Commission by its Executive Director for Operations and others: There needs to be a fundamental reexamination of its purpose. Rather than being directed, like courts, to resolve matters in dispute among parties, the hearing boards, as a result both of Commission policy and neglect, appear to be becoming another layer of technical review. This is evidenced particularly by the Commission's sua sponte rule which permits boards to raise matters not put in contention by the parties, and the Commission's December 18 policy change which requires the hearing boards, rather than the Commission, to decide the sufficiency of Commission requirements. The Commission has been presented with a lot of good recommendations for improvements in the hearing process, but none of them will make any difference until the Commission decides the fundamental issue of whether hearing boards are supposed to be judicial-like triers of disputed facts, or still another layer of technical review on top of the staff and the Advisory Committee on Reactor Safety. If the Commission is unwilling to clarify its policy on this matter, no improvement should be looked for in the hearing process.

Need for Temporary Operating Authority

It is clear that delay in the licensing process after completion of the staff safety and environmental reviews, review by the Advisory Committee on Reactor Safety, and issuance of all staff documents, has become the critical path item in issuance of licenses. These delays are caused by the inordinate time required for discovery and other pre-hearing procedures; start and com-

pletion of the hearing; decision-writing; and the appellate process. As indicated above, for licenses scheduled for issuance in Fiscal Year 1983, these hearing-related steps are estimated to require 15 months to complete, before an operating license can be issued. Since the prospect of materially decreasing this time in the short-term appear to be remote, and since it is some or all of these steps which are responsible for 69 months of delay on the 11 currently impacted plants, action is required to remove them from the critical path.

Recognizing this, the staff has presented a proposal to the Commission to, "Request Congress to provide statutory authority to issue an operating license upon completion of plant construction, favorable staff review, and Commission approval when deemed essential". This, in effect, would allow a plant to commence operation on a temporary basis, pending start or completion of a hearing, provided all safety and environmental reviews are completed, subject to any modifications which may be required as a result of the public hearing, or appeal process. Commissioner Hendrie has already indicated his support for such a measure.

Temporary operating authority is not a new idea and, in fact, the Commission previously had such authority. This authority was contained in Section 192 of the Atomic Energy Act, which was added in 1972, and expired automatically on October 30, 1973. Due to the rather cumbersome procedures which Section 192 required to be followed, however, only one temporary license was issued pursuant to it.

In evaluating the need for temporary operating authority, it must be remembered that this is the first time in the 30 year history of commercial nuclear power plants that a substantial number of completely built plants will be sitting idle for months on end waiting for operating licenses. This is due in large part to delay associated with the hearing and appellate review process. The costs of this run into billions of dollars, and are growing every day. Weighed against this is the historical fact that hearings at the operating license stage rarely result in substantive change in plant design or hardware. As the Director of Regulation told the Commission on February 16:

> Mr. Denton: Before we put that in (the proposal for temporary operating authority) I did take a brief look at the last ten years of decisions on operating licenses just to see what sort of changes might have come about in the design of plants through that process (operating license hearings). I think without exception they tended to be changes that required additional surveillance as opposed to changes in the design of the plant. In other words, they tended to be conditions for additional monitoring sorts of things which we would not be prohibited from doing if a plant had been in low power at some time of operation.

And, as noted earlier, the appeal board chairman is on record as stating that there are "precious few" appeal board decisions which have resulted in substantive changes in hearing board decisions. Considering the substantial costs of delay to utilities and their rate payers, and the increased use of oil which often results from a delay in starting up a reactor, it would appear to be wise public policy for the Commission to seek, and Congress to

enact, a temporary operating authority provision. It is significant that such a provision would not eliminate any required public hearing, or diminish the rights of any party, but simply move the hearing off the critical licensing path.

It is important that enactment of temporary operating authority not be considered by the Congress, the NRC, or the industry, as an alternative to making the required improvements in the technical view process, Commission policy and the public hearing procedures. These changes are absolutely required to bring order and stability to the licensing process and to eliminate the inordinate costs which the current system imposes on utilities and ratepayers totally apart from any consideration of temporary operating authority.

Conclusion

The Commission has been directed by several Congressional committees to report on the steps it intends to take to eliminate the extensive, growing and costly delays being experienced in issuing construction permits and operating licenses. As a result of the recommendations presented to the Commission in the course of several Congressional hearings, and the proposal from its staff and others, it now has before it essentially all of the possible measures which could be taken to achieve that goal. Now is the time for the commissioners to make up their minds, since the situation continues to deteriorate with each passing day. The commissioners' commitment to eliminating delay can be measured by their willingness to address the key delay-causing factors described above, particularly the allocation of the necessary resources to reactor casework; a revision of the Commission's key policies which contribute to delay in the technical review process and the hearing and appeal process; clarification of the purpose of public hearings and the role of the hearing boards; and their support for an amendment to the Atomic Energy Act providing for temporary operating authority.

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LICENSING DELAY REPORT NO. 3
March 9, 1981

Subject: NRC Consideration of Options
to Improve the Licensing Process

The Commission has now had four days of meetings to consider options to accelerate the reactor licensing process. These options are summarized in a memorandum to the Commission dated March 3, 1981, from the Director, Office of Policy Evaluation and the General Counsel, and are covered in more detail in memoranda from the Director of NRR and the Executive Director for Operations. Two meetings on this subject are scheduled for this week. The Commission's report is scheduled to be submitted to Chairman Bevill's Appropriations Subcommittee this Friday, March 13.

The Commission has not yet made any decisions on the options which are before them. In fact, as discussed below, several key items have yet to be discussed. In addition, the Commission has not been able to reach a decision on issuing the rule on near-term construction permit requirements and Commissioner Gilinsky has requested more time to study it. Commissioner Bradford has indicated that he will oppose it.

It is clear that the overriding problem facing the Commission is that with respect to important policy issues it is almost always evenly divided. One concern is that even if it is able to get a majority for making a decision on any of the options pending before it, the compromise required will result in less than optimum action. The Administration should give highest priority to the appointment of a fifth commissioner.

The principal problems before the Commission this week, with respect to expediting licensing, are decisions on increasing the staff assigned to reactor casework, whether to modify or reinstate the immediate effectiveness rule, and how to reduce the extensive delays associated with the hearing and appellate process.

Reallocation of Staff to Licensing Casework

Mr. Denton has presented a plan to take the staff review off the critical licensing path by increasing the casework staff by 145 man-years. This is about double the current manpower level, which had been substantially reduced in the aftermath of TMI. Mr. Denton has also informed the Commission that the additional 145 man-years

could be reduced by about 30 man-years if the length of time to complete hearing is reduced from 15 months to 11 months. Mr. Denton believes that implementation of this plan would eliminate some 130 months of delay now being projected for plants scheduled for operating licenses during 1983. There would still be 69 months of delay for the 11 near-term impacted plants, since staff review of them is already completed.

The benefits of Mr. Denton's plan are very significant in terms of reduced costs due to delay in issuing licenses which, during 1983 alone, would amount to between $4 and 5 billion. Moreover, its implementation, at least in principal part, is within the authority of the Commission to immediately order, since about 120 of the 145 man-years would come from reassignment of personnel already on board, and from mandatory overtime. Thus, the hiring freeze, or the difficulty in securing authority for additional personnel, is no excuse for putting off a decision on this plan. There is no reason why the Commission cannot make the decision this week to reassign the necessary personnel.

Action on the Immediate Effectiveness Rule

The Commission's decision to suspend its rule which provided for issuance of an operating license or construction permit immediately upon issuance of a favorable decision by a hearing board is adding up to three months to the licensing process. After hours of debate spread out over several meetings, the Commission has not yet been able to reach any consensus on this important issue. Chairman Hendrie and Commissioner Ahearne favor reinstating the rule. Commissioners Gilinsky and Bradford oppose it. Commissioner Gilinsky has proposed, as an alternative, that the rule be modified to give the Commission 10 days to review a board's decision to issue a low-power license before it could go into effect, and 30 days for issuance of a full-power license. While this appears to offer some potential for eliminating delay, substantial questions about it have been raised by the staff and others. (See discussion, transcript of 3/5/81 afternoon meeting, pages 4-26.) For example:

* It would require monitoring of the hearing record by the OGC and OPE staffs, which are inexperienced in such matters.

* It would require the commissioners to treat the staff as "adversaries", thus cutting the Commissioners off from the little expertise that remains available to them under their already overly restrictive ex parte rule.

* It could require additional hearings if the commissioners relied on matters outside the hearing record.

* It is unclear how the Commission's expedited review would relate to the remainder of the Appendix B procedures.

* It is unclear how the Commission's review would interface with the appeal board's review.

* It could give the process the facade of a review without any real opportunity for meaningful review, thus subjecting it to legal challenge.

Whatever the merits of keeping the commissioners in the review process, it is clear that Commissioner Gilinsky's approach raises substantial questions which will not be easily resolved. As an alternative, the General Counsel has proposed that rather than rush to a decision on what to do about it, that the Commission issue a proposed rule that sets out the alternatives for public comment. He believes this could be done quickly and, in any event, no case which would be affected by its outcome will be before the Commission until the end of the year.

A strong case can be made for promptly reinstating the immediate effectiveness rule. The appeal board chairman has already advised the Commission that there are "precious few" cases where appellate review has resulted in substantive changes in the initial decision. The director of NRR has also told the Commission that the changes which result from hearings at the operating license stage have historically not resulted in design changes but, rather, in imposing conditions for additional surveillance, which are not precluded by plant start-up. This makes a strong case for reinstating the immediate effectiveness rule. If the Commission cannot agree on this, perhaps it should accept the General Counsel's recommendation for rulemaking.

Problems Associated with Public Hearings

The Commissioners spent a good part of several meetings talking about how to shorten the discovery process in the pre-hearing stage before it became clear that discovery is just one part of the hearing problem. The staff, and especially Mr. Cotter, the chairman of the hearing board panel, found the discussion on the afternoon of March 5 to be particularly frustrating

> Mr. Cotter: Obviously, the more this is discussed, the more you become aware of the morass you have thrust yourself into (page 34).
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> Mr. Cotter: In general, my frustration level is rising as I sit here and listen to you debate my business. Why do you not just tell me to do my business and let me do it with my Boards (page 44).

The staff's current estimate is that it takes seven months from issuance of the last staff document (the SSER) to the start of the hearing. This includes 155 days before the hearing board even

makes a decision as to what contentions will be allowed, which is the decision which commences formal discovery. The staff schedule shows that an inordinate amount of time is wasted at each step in the pre-hearing process. It suggests that hearing boards are being over-generous in granting requests for delays, and leisurely in establishing schedules. It suggests that the Commission's own rules of procedure are being largely ignored, and that procedures designed to expedite hearings, such as summary judgment and discovery, are, instead, being misused in such a way as to prolong them. Nothing short of a complete overhaul of the process will reduce the delays now being experienced in the pre-hearing and hearing process.

So far, the Commission has only touched the edges of this problem. The Commission is discussing issuing a policy statement which would reiterate its policy that hearings should be held in an efficient manner, and it is talking about somehow reducing the seven month pre-hearing stage to five months. Issuance of the policy statement may do some good, but one must wonder what inducements or sanctions it must include to get the boards to abide by the rules they are now ignoring. However, the effort to reduce the pre-hearing process from seven months to five months is misdirected; there is no reason why, in most cases, it should take more than 60 or 70 days.

NRC should not establish a policy based on the assumption that there will be new contentions and new discovery following issuance of the SSER. Such a policy would have at least two harmful consequences. First, it would encourage intervenors to file new contentions and new discovery at that late stage. And second, it would encourage licensing boards to admit new contentions and tolerate new discovery at that stage, regardless of such requirements as good cause, specificity and basis. The Commission should not establish in licensing boards or intervenors the mindset that the SSER triggers a minimum five to seven month delay before those issues can be decided. A policy statement such as is contemplated will only codify the presently unsatisfactory practice.

Rather, the Commission should set strict guidelines, and provide firm guidance to boards, on admitting new contentions. Firm adherence to "good cause" requirements should be demanded, in particular a showing that the information in the SER or SSER was in fact new. In this connection, an intervenor should not be allowed to have a new contention admitted which merely alleges that the applicant's resolution, or staff's review, of an issue is "inadequate".

Even if the staff is to address a nominal schedule assuming new contentions at the SSER stage, the time intervals discussed at the Commission's March 5 meeting are unduly lengthy. First, there is no reason why 30 days is required to formulate new contentions on discovery; 15 days is more than adequate. A second pre-hearing conference should be held at most two weeks later; allowing 65 days

is totally unjustified. Following the pre-hearing conference, the board should issue its order in no more than one week. No time should be allowed for objections to the pre-hearing order; that process, if it is to occur, should move concurrently. Summary disposition motions should be allowed, but should not be included as additional time in the schedule. Neither the applicant nor the staff would sensibly file for summary disposition if doing so would delay the overall schedule. There is no reason why the hearing could not start 30 days after the pre-hearing conference order. If these changes were made, the time from issuance of the SSER to the start of the hearing would be 67 days, instead of seven months spelled out at the Commission meeting. These intervals would be nominal goals and would, of course, be subject to adjustment in unusual cases.

Even if the above steps are taken, it is speculative as to whether there will be any shortening of the hearing process. The fact is that the Commission has still not even discussed the core problem with the hearing process which has been pointed out to it by the Executive Director for Operations and others: The need for a fundamental reexamination of its purpose. Rather than being directed, like courts, to resolve matters in dispute among parties, the hearing boards, as a result both of Commission policy and neglect, appear to be becoming another layer of technical review, on top of the staff and ACRS review. If the Commission is unwilling to clarify its policy on this matter, no improvement should be looked for in the hearing process.

Conclusion

The Commission will meet this week to consider improvements in the reactor licensing process. As discussed above, there are three things of particular importance upon which it must decide:

* The decision to make the staff reassignments to reactor casework, which it has the immediate authority to do?

* The decision to reinstate the immediate effectiveness rule?

* The decision to clarify its policy on the purpose of public hearings, and enforce the required procedural changes?

Several of the matters discussed in this memorandum are covered more fully in the attached ANEC report, dated March 2, 1981.

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Licensing Delay Report No. 4
March 16, 1981

RE: Analysis of NRC's March 12, 1981, report on Options to Improve the Licensing Process

By letter dated March 12, 1981, the NRC reported to Chairman Bevill's Appropriations subcommittee on possible measures to eliminate delays in the NRC licensing process. This report analyzes NRC's response, particularly as to the actual improvements which may be expected.

By way of background, the estimated delays which are at issue are some 90 months of delay in 13 plants scheduled to receive operating licenses during 1981 and 1982, and ten plants scheduled for operating licenses in 1983, for an additional 162 months of delay. The total costs to utilities and their ratepayers caused by these delays is between $7-10 billion.

The NRC met for seven days over the past two weeks to consider the various options set out in the March 12 report. The Commission was able to reach a consensus on only a very few of the options. It is clear that the differences of opinion among the commissioners makes it extremely difficult to reach a consensus on important policy matters. Thus, the March 12 report, when read carefully, and based on a detailed review of the transcript of the Commission meeting, shows that the Commission has made only minimum progress toward eliminating licensing delay. Reduced to its essentials, here is what the report says:

1. The Commission has made clear to the staff that expedited licensing decisions are a high priority -- and that it has already been able to eliminate some months of delay for three of the impacted plants.

2. Further time savings for the 1981-82 plants can be gained by increasing the efficiency of the hearing process and subsequent Commission review -- and proposed rules changes to accomplish this will be issued for public comments in the near future.

3. For the 1983 and beyond plants, the Commission is considering redirecting existing staff resources to casework, including seeking help from the DoE laboratories.

4. The Commission is considering a long term effort to review the basic purposes and functions of the licensing process.

5. Direct Commission intervention in several of the most severely impacted cases is being considered on a case-by-case basis.

6. The Commission may support some variation of legislation allowing interim operation in advance of completion of hearings.

Based on these measures, particularly one through three, the Commission believes it can reduce the time required for the public hearing process (pre-hearing, hearing, and decision-writing) from the current 18 month average, to about 10 months. This, it believes, would substantially eliminate most delays, except for those cases already in the hearing process.

What the NRC report does not tell you is that there is an absence of a majority on the Commission to actually make that happen. Here is what really happened during the two weeks of Commission meetings preceding its report:

1. The Commission discussed, but did not approve, a proposed policy statement directing hearing boards to expedite hearings. In fact, discussions at the Commission meetings must have made clear to the staff that the commissioners are not uniformly committed to that goal.

2. No consensus could be reached on reinstating the immediate effectiveness rule; instead, a proposed rule setting out the options for it will be issued for public comment. There is no reason to believe that at the end of the public comment period the commissioners will still not be stalemated on the issue.

3. The rules changes required to achieve the staff's expedited 10 month schedule could have been made immediately effective. There was no consensus for this; instead the rules changes will be issued for public comment.

4. The Commission had before it a plan to reallocate to licensing casework the 125 additional man years required if the staff review is to be completed in time to accommodate the 10 month schedule. The Commission could have approved this plan without further delay; instead, it gave the staff the immediate go-ahead for only 50 or less of the 125 man years.

5. There was only perfunctory discussion of several important Commission policies contributing to licensing delays, including its rule which permits hearing boards to raise matters not put in dispute by the parties, and its December 18, 1980, policy statement permitting litigation of post-TMI licensing requirements in individual license hearings.

6. The Commission again put off issuing a final rule establishing license requirements for near-term construction permits; instead, it seized on a technicality to issue the rules for a second round of public comment, because there was not a majority to do anything else. This will result in about another 90 days of delay.

In short, what the Commission did is to put forward a plan for improvement based on an expedited 10 month hearing process, but failed to make the hard policy, rule,

or staff allocation decisions necessary to accomplish that objective. The lack of a sense of urgency in making these decisions was apparent to all who sat through the Commission meetings. The commissioners' indecision has simply assured that it will be "rediscovering" further licensing delays three, six or twelve months from now.

The options for improvement set out in the Commission's March 12 report collectively could substantially contribute to eliminating licensing delays. Most of them deserve to be implemented immediately. However, for the reasons set out above, there is reason to doubt that the Commission will act in time to do much good. That makes doubly important the statement in its report that the Commission may support legislation allowing interim operations in advance of completion of hearings -- hopefully, not as an alternative to making the necessary improvements, but as a necessary component in bring order and stability to the licensing process and eliminating expensive and unnecessary delays. As was emphasized at the March 10 meeting:

> Chairman Hendrie: Well, I have no doubt that we are going to end up, in fact, some months of unavoidable delay, because I think some of the near term cases are just at a stage where this (the expedited hearing schedule) isn't going to help all that much. And for those, I see if the Congress wanted to provide it, the only remedy to an impact after construction would be an interim licensing provision to be exercised by the Commission (page 24-25).

Based on the Commission's March 12 report, it is difficult to estimate how much improvement may be expected in the licensing process. The only improvement that can be documented to date is the several months reduced from the three impacted plants listed in the Commission's February 29 monthly report. For the reasons described above and in the attachment, the other improvements that the Commission appears to be tentatively sneaking up on are more speculative. The 10 month expedited hearing schedule will be difficult to achieve without improved management, even if the Commission is successful in getting a consensus for the rules changes which would be necessary to implement it. So far, the Commission has only specifically approved reallocation of two-fifths or less of the staff needed to support the 10 month schedule; moreover, that schedule is based on the probably unrealistic assumption that hearings will always be held on the tightest possible schedule, and that scheduling conflicts of part time hearing examiners will not be a delaying factor. Whether the Commission can achieve a consensus for reinstatement of the immediate effectiveness rule remains to be seen. Therefore, whether some or all of the months of delay estimated for licenses to be issued through 1983 will be realized is still an open issue. The burden should be on the Commission to demonstrate that it will be.

The hearings held before Chairman Bevill's subcommittee, the monthly report which NRC is required to file with the subcommittee, and NRC's March 12 report have been extremely helpful in identifying the causes and extent of licensing delays. It is clear that NRC has just barely begun to implement a program to eliminate, or even reduce, delays. Continued Congressional oversight by Chairman Bevill's subcommittee, and the other committees of jurisdiction is required if substantial improvement in the NRC licensing process is to be realized.

Attached is a detailed discussion of several aspects of the March 12 report. For futher discussion of these and related matters refer to ANEC reports dated March 9, March 2 and February 10, 1981.

Attachment

Attachment

Estimate for Completion of Construction

In devising a plan to eliminate delays the Bevill subcommittee directed NRC to use the applicants' estimated date for completion of construction, rather than the NRC staff's estimate, which is usally later. The reason the subcommittee directed this is that, historically, the NRC staff's later estimate becomes a self-fulfilling prophecy, that is, licensing review and construction are slowed down to meet the extended schedule. As the NRC General Counsel said at the March 10 meeting, "...it is extraordinary that things move faster than guideline schedules or suggested schedules, and rather ordinary that they move more slowly." And, as Mr. Denton added at the March 11 meeting:

> If we plan on the basis of the NRC dates, they will be self-fulfilling, because in general once becomes known that they are not going to get a license until some date, then that becomes the pacing of construction (page 16).
>
> ---
>
> So, if you really want to get off the critical path cleanly, so that we are not accused of the delay, it seems best to schedule on their (the applicants') construction schedule (page 72).

In spite of this, in its last meeting on the subject (March 10), the Commission appeared to be edging away from use of the applicants' estimate. This was evident in the Commission failure to approve reallocation of the full 125 man years to reactor casework which the staff had requested:

> Chairman Hendire: What I would propose we do from this side of the table is to agree that the staff should begin to move forward along the lines of the proposition we have here, not carrying it all the way, because we have some doubt about whether the 90 month basis (the applicants' estimate) is quite the right one, but at least beginning to move in this direction so we are beginning to cover at least the order of half of that, that is about 40 months (page 76).

Chairman Hendrie went on to say that the Commission would continue to consider this matter, but it must be questioned whether in view of the substantial costs of delay ($1 million or more per day per reactor) this half way measure is a sufficient response to the staff request. It may be that a better system of estimating when construction will be completed is needed, but until such a system is devised, it would appear prudent to continue to schedule on the basis of the applicants' estimates. As Commissioner Ahearne pointed out, "It is also a hedge that we don't get the improvements in the time of the licensing process" (page 74). In short, use of the staff's estimate is a classical example of what Senator Simpson referred to in a hearing before his subcommittee as an application of the "Doctrine of Progressive Regression", i.e., every effort to reduce licensing delays instead lengthens them.

Steps to Expedite Hearings

The March 12 NRC report suggests that the time required for public hearings (pre-hearing, hearing and issuance of the initial decision) can be reduced to 10 months from the presently estimated 18 months (Note that in the January monthly report the estimated time was 15 months, not 18 months). This schedule should be achievable in most cases, and in some cases should even be shorter. However, none of the steps required to achieve it have yet been taken (see pages 3-4, March 10 meeting):

- The Commission has not issued a new policy statement directing the hearing boards to adhere to this expedited schedule.
- The Commission has not yet agreed to the rules changes required to effect it.
- It depends upon the acquisition of additional hearing board members, reassignments of existing board members, and scheduling of hearings to eliminate delays due to the unavailability of part time board members.
- It depends on the availability of staff which have not yet been assigned to licensing casework.

It should be noted that there is an intimate relationship between the length of this schedule and the level of staff resources required to process casework. The 10 month schedule assumes the availability of an additional 125 caseworkers, of which the Commission has only approved 50 or less. On the other hand, if there is no improvement from the 15 month schedule reported in the January monthly report, 154 additional caseworkers would be required. If the schedule remains 18 months, as the Commission now estimates, or more, even more caseworkers would be required to keep staff review off the critical path. Therefore, it is significant that the Commission does not yet appear to be prepared to reallocate all of the man power which would be required under any of these schedules.

In addition, the real problem of scheduling board members is indicated by the following discussion at the March 10 meeting (page 15).

> Mr. Rosenthal: That has considerable implications, particularly in terms of the part time members. Many of the part time technical members are on university faculties, and in the past at least the scheduling of hearings has been done with a view towards their convenience, scheduling them over the summer or during school recesses or the like. And that is one of the things, I think, that will have to be focused on, is whether it is realistic to expect that part time members who are engaged in other pursuits, such as teaching, will be both able and willing to drop whatever else they are doing and come into the hearing or at the point on the schedule that the hearing is called for, or, for that matter, to be available for heavy participation in the decision writing process.
>
> Commissioner Bradford: Let me try and get a better feel for the scope of this. First of all, most of the hearings that this is a problem are in large measure underway. So, you are talking, in order to get them all sorted out, about replacing existing

> board chairmen with other chairmen so as to minimize the conflicts. And then some of those replacements will, in fact, be chairmen who have never tried a case before.
>
> Mr. Cotter: This is a real barrel of eels.

In view of the foregoing, one must question how much improvement in the hearing process will actually be realized as a result of the measures the Commission now has under consideration.

Purpose of Public Hearing

The Commission's March 12 report provocatively suggests the need for, "...a careful review of the licensing process". In context, it appears that the Commission is really referring to the public hearing process. Unfortunately, it describes this as "a long-term effort." It need not, and should not, be.

The need for a fundamental examination of the purpose of the hearing process has repeatedly been brought to the Commission's attention by the NRC staff. Rather than being directed, like courts, to resolve matters in dispute among parties, the hearing boards, as a result of both Commission policy and neglect, appear to becoming another layer of technical review, on top of the staff and ACRS review. This important issue was only casually discussed by the Commission at its March 10 meeting (pages 45-58). Perhaps the essence of the discussion, which came to no conclusions, is caught by the following remark:

> Chairman Hendrie: With regard to the kind of process it is, I am not sure how far one could go in looking at the fundamentals. It seems to me, though, that part of what you have in mind under that title is that there have been occasions, at least in sections, when some recent hearings have begun to very much resemble a de novo technical review of some aspect of a plant, and that from the way I look at the process, has never quite been the intent (page 46).

Whatever the intent of the Commission may be, it is clear that the boards are increasingly becoming another layer of technical review -- not only the hearing boards, but, amazingly, even the appeal boards, which have begun the practice of directing the submission of new evidence on appeal. This is not by happenstance; it is a direct result of the Commission's sua sponte rule, which originally permitted boards to look into matters not raised by the parties only in "extraordinary" circumstances, and which was broadened in November, 1979, to examine any "serious" uncontested matter. While it is difficult to see how there could remain any "serious" uncontested matter after review by the staff, the ACRS, and the intervenors, the rule clearly permits both the hearing and appeal boards to conduct fishing expeditions, a practice which would be barred by appropriate hearing procedures.

The solution to this does not require prolonged study. The Commission appears to have adopted and expanded its sua sponte rule without excessive study and it can similarly repeal it. If the Commission really believes such independent review by the hearing and appellate boards is necessary to assure the safety of nuclear plants, it tells one a great deal about the commissioners' opinion of its staff, the ACRS, the intervenors, and of their own ability to manage the licensing process. The sua sponte rule should be revoked without further delay.

The problem with the hearing process is also exemplified by the Commission's inability to establish some threshold for admission of contentions in the hearings. This was raised repeatedly by Commissioner Ahearne during the course of the Commissions' deliberations, but never resolved. Clearly defined Commission policy on this matter would contribute enormously to establishing a more efficient public hearing process.

Finally, some bad ideas on the way hearings should be conducted never die. Thus, in spite of the fact that such a program has repeatedly been rejected by the Congress, and a specific prohibition against it was included in NRC's FY 1981 Appropriations bill, Commissioner Bradford said at the March 10 meeting, "...I would be much more confortable with some of these proposals if they were done in a world that included a sensible intervenor funding program (page 46).

STATEMENT
BY
MICHAEL I. MILLER
CHAIRMAN, LAWYERS COMMITTEE
ATOMIC INDUSTRIAL FORUM*
BEFORE THE
SUBCOMMITTEE ON NUCLEAR REGULATION
SENATE COMMITTEE ON PUBLIC WORKS AND ENVIRONMENT

MARCH 25, 1981

MY NAME IS MICHAEL MILLER. I AM CHAIRMAN OF THE ATOMIC INDUSTRIAL FORUM'S LAWYERS COMMITTEE, AND A SENIOR PARTNER IN A CHICAGO LAW FIRM WHICH REPRESENTS UTILITY COMPANIES IN NRC LICENSING CASES. I AM PLEASED TO HAVE THIS OPPORTUNITY TODAY TO SHARE SOME GENERAL THOUGHTS WITH YOU ON THE STATE OF NUCLEAR LICENSING, AND TO BE AVAILABLE FOR YOUR QUESTIONS. DURING THE PAST SEVERAL MONTHS, THE NUCLEAR INDUSTRY HAS BECOME INCREASINGLY DISMAYED OVER THE NRR MONTHLY STATUS REPORTS TO CONGRESS. THESE HAVE IDENTIFIED BOTH ACTUAL AND PREDICTED DELAYS IN GRANTING OPERATING LICENSES FOR A NUMBER OF NUCLEAR PLANTS WITH CONSTRUCTION COMPLETED. ACCORDING TO THE LATEST NRR REPORT, THREE PLANTS HAVE COMPLETED CONSTRUCTION AND ARE READY TO BEGIN SAFE, RELIABLE AND ECONOMICAL GENERATION OF ELECTRICITY. THESE PLANTS NOW STAND IDLE AT COSTS TO THE

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*The Forum is an international association of some 600 domestic and overseas member organizations interested in the peaceful application of nuclear energy. These organizations include electric utilities, manufacturers, architect-engineers, consulting firms, mining and milling companies, nuclear fuel service companies, financial institutions, labor unions, universities, legal firms, and others.

AMERICAN PUBLIC WHICH APPROXIMATE ONE MILLION DOLLARS PER DAY FOR EACH. BEFORE 1981 ENDS, THREE MORE NUCLEAR PLANTS ARE EXPECTED TO JOIN THE RANKS OF THOSE HAVING COMPLETED CONSTRUCTION BUT REMAINING IDLE FOR LACK OF TIMELY NRC PROCESSES. THE DELAYS, IN OUR JUDGEMENT, DO NOT PROVIDE THE PUBLIC WITH MEANINGFUL PUBLIC SAFETY BENEFITS. INSTEAD, THEY MERELY WASTE MONEY.

RECENTLY, IN LARGE PART BECAUSE OF PROPER PRESSURES FROM THE CONGRESS, NRC HAS SHOWN SOME SIGNS OF ABANDONING THE HELPLESS POSTURE PORTRAYED IN THE NRR MONTHLY REPORTS, AND HAS STARTED TO FORMULATE SOLUTIONS TO THIS SERIOUS PROBLEM. THIS IS COMMENDABLE, BUT CONTINUED VIGILANCE FROM THE CONGRESS IS UNDOUBTEDLY A NECESSARY INGREDIENT FOR THIS APPROPRIATE CHANGE IN ATTITUDE TO FLOURISH. CONGRESSIONAL OVERSIGHT MUST BE MAINTAINED TO ENCOURAGE THE CARRYING OUT OF ACTUAL EFFICIENCIES WHICH ARE WELL WITHIN NRC'S MANAGEMENT CAPABILITY. RELATIVELY MINOR LEGISLATIVE CHANGES CAN ALSO EXPEDITE THE LICENSING PROCESS WITHOUT COMPROMISING PUBLIC HEALTH AND SAFETY OR PROTECTION OF THE ENVIRONMENT.

LOOKING AT THE REASONS WHICH HAVE PRODUCED THE UNJUSTIFIED WASTE TO WHICH NRC NOW ADDRESSES ITSELF, WE NOTE THAT THEY INCLUDE THE FOLLOWING:

- UNWARRANTED SUSPENSION BY NRC OF THE IMMEDIATE EFFECTIVENESS RULE--

  IN 1979, THE NRC SUSPENDED 10 CFR 2.764 AND INSTITUTED A PROCEDURE WHICH DELAYS ISSUANCE OF THE OPERATING LICENSE IN CONTESTED CASES UNTIL THE ATOMIC SAFETY AND LICENSING APPEALS BOARD HAS RULED ON THE EFFECTIVENESS OF THE LICENSING BOARD DECISION, AND THE NUCLEAR REGULATORY COMMISSION HAS ITSELF HAD AN OPPORTUNITY TO PASS ON ISSUANCE OF THE OPERATING LICENSE. THIS PROCEDURE ALLOWS THE ASLAB AT LEAST 60 DAYS TO RENDER ITS DECISION AND THE NRC AT LEAST 20 ADDITIONAL DAYS. AT A COST OF ONE MILLION DOLLARS PER DAY, THE SUSPENSION OF THIS RULE WILL ADD AT LEAST 80 MILLION DOLLARS TO THE COST OF EACH COMPLETED PLANT AWAITING AN OPERATING LICENSE. THIS CHANGE IN PROCEDURE WAS NEVER WARRANTED FROM A SAFETY STANDPOINT SINCE THE PRIOR ONE ALLOWED ANY LICENSE TO BE HELD UP WHEN CIRCUMSTANCES AFFECTING PUBLIC SAFETY WARRANTED IT. TO THE EXTENT THAT SUSPENSION OF THE RULE WAS DESIGNED TO INVOLVE THE COMMISSIONERS DIRECTLY IN THE LICENSING PROCESS, OTHER EQUALLY EFFECTIVE MECHANISMS ARE AVAILABLE. SUSPENSION OF THAT RULE SHOULD BE RESCINDED IMMEDIATELY.

- FAILURE BY NRC TO ALLOCATE SUFFICIENT MANPOWER RESOURCES TO CASEWORK TO AVOID CURRENT LICENSING DELAYS--

  WE UNDERSTAND THAT LESS THAN 200 OF THE 3200 PERSONS ON THE NRC STAFF ARE PRESENTLY ALLOCATED TO LICENSING ACTIVITIES. DESPITE THE COMPLETE FAILURE OF NRC TO EFFECTIVELY PROCESS LICENSE APPLICATIONS, THE FY 1982 BUDGET PROJECTS A DECLINE TO ONLY 157 CASEWORK REVIEWERS. ALSO IT IS OUR UNDERSTANDING THAT MANY EXPERIENCED LICENSE REVIEWERS ARE ASSIGNED TO NON-LICENSING FUNCTIONS WITHIN THE COMMISSION INCLUDING AN APPARENTLY INORDINATE NUMBER ASSIGNED TO DEVELOPING AND IMPOSING REVISED DETAILED REQUIREMENTS ON OPERATING PLANTS, MANY OF WHICH, IN OUR JUDGEMENT, RESULT IN QUESTIONABLE OR NEGATIVE SAFETY BENEFITS. IT IS CRUCIAL THAT THE NRC FOCUS ITS AVAILABLE STAFF RESOURCES ON CASEWORK AND INTENSIFY ITS EFFORT TO BRING ABOUT NECESSARY REFORMS. PROJECTS NOT DIRECTED TOWARD THIS GOAL AND NOT OF FUNDAMENTAL SAFETY IMPORTANCE SHOULD BE GIVEN A LOWER PRIORITY.

- FAILURE BY NRC TO UTILIZE GENERIC PROCEEDINGS MORE EFFECTIVELY--

  NRC SHOULD ACT MORE AGGRESSIVELY IN AVOIDING DUPLICATIVE LITIGATION IN INDIVIDUAL LICENSING PROCEEDINGS, AND RELY ON RULEMAKING REGARDING MAJOR, GENERIC SAFETY ISSUES WHERE APPROPRIATE.

DETERMINATIONS OF HOW THE MANNER IN WHICH INDIVIDUAL PLANTS COMPLY WITH THE RULE, WHEN ISSUED, SHOULD BE HELD IN ABEYANCE UNTIL THE CONCLUSION OF THE RULEMAKINGS. IN UPCOMING MATTERS, FOR EXAMPLE, ISSUES RELATED TO DEGRADED CORE CONDITIONS, ESPECIALLY THE ISSUE OF HYDROGEN CONTROL, SHOULD BE ELIMINATED FROM CONSIDERATION IN INDIVIDUAL PROCEEDINGS BY FORMULATING AN INTERIM RULE ALONG WITH A CLEAR POLICY FOR ITS USE.

- FAILURE BY NRC TO ENCOURAGE LICENSING BOARDS AND NRC STAFF TO EXPEDITE HEARING SCHEDULES--

  THE NRC HAS RECENTLY PROPOSED CERTAIN CHANGES IN ITS RULES OF PRACTICE WHICH PURPORTEDLY WILL SPEED UP THE ADJUDICATORY HEARING PORTION OF THE LICENSING PROCESS. THE SUPPLEMENTARY INFORMATION ACCOMPANYING THE PROPOSED RULE SETS OUT AN EIGHT MONTH SCHEDULE FOR ADJUDICATORY HEARINGS, FROM PUBLICATION OF THE FINAL SUPPLEMENTAL SAFETY EVALUATION REPORT TO THE INITIAL DECISION BY THE LICENSING BOARD. UNFORTUNATELY, THE PROPOSED RULE CHANGES BEAR LITTLE RELATIONSHIP TO THE HOPED-FOR SHORTENING OF THE LICENSING PROCESS. IN THIS REGARD, WE ARE IN THE PROCESS OF DEVELOPING COMMENTS ON THESE PROPOSED CHANGES AND WOULD BE PLEASED TO MAKE THEM AVAILABLE TO YOU.

NRC SHOULD ISSUE INSTRUCTIONS TO LICENSING BOARDS TO MAKE AGGRESSIVE EFFORTS TO SHORTEN HEARING SCHEDULES AND SHOULD ALLOCATE INCREASED RESOURCES TO LICENSING BOARDS TO FACILITATE SUCH SCHEDULE SHORTENING. IN ADDITION, THE NRC STAFF SHOULD BE GIVEN INSTRUCTIONS TO ENSURE PROMPT READINESS FOR HEARINGS, AND SUFFICIENT NRC STAFF RESOURCES SHOULD BE APPLIED TO HEARINGS. FINALLY, THE COMMISSION SHOULD ACTIVELY MONITOR THE PROGRESS BEING MADE BY BOTH LICENSING BOARDS AND THE NRC STAFF IN BRINGING HEARING PROCESSES TO EXPEDITIOUS CONCLUSIONS AND, ON A CASE BY CASE BASIS AS NECESSARY, ISSUE APPROPRIATE GUIDANCE TO ENSURE SUCH EXPEDITIOUS CONCLUSIONS. CONTINUED CONGRESSIONAL SCRUNTINY OF THIS GOAL WILL BE AN IMPORTANT INGREDIENT FOR ITS FULFILLMENT.

- INABILITY OF NRC TO RECOVER IN A TIMELY MANNER FROM THE HIATUS RESULTING FROM TMI--

  WHILE TMI HAS UNDOUBTEDLY PRODUCED MANY BENEFICIAL CHANGES, NRC CONTINUES TO STRUGGLE WITH EXTRICATING ITSELF FROM THIS EXTRAORDINARY REGULATORY SITUATION MORE THAN TWO FULL YEARS SINCE TMI HAS PASSED. THIS IS NEITHER REASONABLE NOR BENEFICIAL. ONE KEY FACTOR CAUSING THE ESSENTIALLY STAGNANT SITUATION IS THE SHARPLY DIVERGENT VIEWPOINTS OF THE NUCLEAR REGULATORY COMMISSIONERS. WE URGE THIS COMMITTEE TO ENCOURAGE

THE ADMINISTRATION TO NOMINATE EXPEDITIOUSLY A STRONG NRC CHAIRMAN WITH THE PROPER QUALIFICATIONS, SO THAT A COMMISSION ATTUNED TO THE MANDATES OF THE ATOMIC ENERGY ACT AND THE NEEDS OF THE PUBLIC CAN REGAIN CONTROL OF THIS IMPORTANT REGULATORY PROCESS.

OTHER PARTICULARLY USEFUL NEAR TERM ACTIONS SHOULD INCLUDE:

- ELIMINATION OF DIVERSIONS OF COMMISSION ATTENTION FROM LICENSING MATTERS - NRC SHOULD BE RELIEVED OF FUNCTIONS, SUCH AS EXPORT LICENSING, WHICH UNDULY DETRACT FROM ITS PRIMARY MISSION OF LICENSING DOMESTIC NUCLEAR POWER PLANTS.
- ENACTMENT OF INTERIM OPERATING AUTHORITY - AFTER THE ACRS AND NRC STAFF SAFETY AND ENVIRONMENTAL REVIEWS ARE COMPLETED, COMPLETED PLANTS SHOULD NOT BE PERMITTED TO STAND IDLE DUE TO EXTENSIVE HEARINGS WHICH, HISTORICALLY, HAVE NOT PRODUCED MEANINGFUL, ADDITIONAL SAFETY BENEFITS. THUS, LEGISLATION OF THE FORM OF OLD SECTION 192 WOULD SEEM SUITABLE DURING THE PERIOD WHEN NRC'S IMPROVING PROCEDURES STILL RESULTS IN A LICENSING BACKLOG. CARE SHOULD BE TAKEN IN THE DRAFTING OF SUCH NEW LEGISLATION TO FORMULATE CRITERIA FOR INTERIM OPERATION WHICH ARE REALISTIC AND FEASIBLE, SO THAT UNLIKE SECTION 192, THE NEW PROVISION WOULD FIND READY USE.

- NULLIFY THE SHOLLY DECISION - THE U.S. GOVERNMENT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT RECENTLY HELD THAT NRC MUST HOLD A HEARING, IF REQUESTED, PRIOR TO ISSUING AMENDMENTS TO OPERATING LICENSES, EVEN IF IT DETERMINED THAT THE GRANTING OF THE AMENDMENT INVOLVED NO SIGNIFICANT RISK TO THE PUBLIC. THIS DECISION IS, WE BELIEVE, WRONG, AND REVIEW BY THE SUPREME COURT IS BEING SOUGHT. HOWEVER, THIS WILL TAKE CONSIDERABLE TIME, AND THE COURT MAY NOT AGREE TO REVIEW THE CASE. THE RESULT IS THAT EVEN TRULY INSIGNIFICANT AMENDMENTS MAY BE THE SUBJECT OF WASTEFUL ADJUDICATORY HEARING, RESULTING IN DELAYS IN THE OPERATION OF COMPLETED PLANTS DESPITE THE LARGE ATTENDANT COSTS. LEGISLATION TO REMEDY THIS SITUATION IS PROMPTLY NEEDED.
- PROGRESS TOWARDS A QUANTITATIVE SAFETY GOAL - PURSUANT TO CONGRESSIONAL DIRECTION, NRC IS WORKING ON A STUDY AS A PREREQUISITE FOR MEANINGFUL ACTIVITY IN THIS AREA. CONGRESS SHOULD KEEP THE PRESSURE ON SO THAT NUCLEAR REGULATIONS OF THE FUTURE AND THE REQUIREMENTS PLACED ON OUR INDUSTRY, AND THUS INDIRECTLY ON THE PUBLIC WE SERVE, CAN STEADILY EVOLVE TOWARDS GREATER RATIONALITY AND COST EFFECTIVENESS AS WELL AS TOWARDS GREATER PUBLIC PROTECTION.

WHILE WE BELIEVE THAT THE ABOVE ACTIONS CAN IN TIME REDUCE LICENSING DELAYS AND THE ENORMOUS WASTE RESULTING FROM SUCH DELAYS, WE CONSIDER THAT A MUCH MORE FUNDAMENTAL QUESTION SHOULD BE ADDRESSED BY NRC, THE INDUSTRY AND THE CONGRESS. THAT IS, DOES THE CURRENT HEARING PROCESS PROVIDE A SAFETY BENEFIT TO THE PUBLIC COMMENSURATE WITH ITS COST, AND IF NOT, WHAT SHOULD BE DONE ABOUT IT?

CERTAINLY FOR A COMPLETED NUCLEAR POWER PLANT, WHERE COSTS FOR DELAY DUE TO THE HEARING PROCESS CAN EXCEED ONE MILLION DOLLARS PER DAY, IT IS OUR JUDGEMENT THAT THE ACCURATE RESPONSE TO THE FIRST PART OF THE QUESTION MUST BE: NO. MANY CONSIDER THE HEARING PROCESS, AS PRESENTLY STRUCTURED, TO BE SOMEWHAT COUNTER-PRODUCTIVE TO SAFETY, IN THAT IT REQUIRES THE DIVERSION OF IMPORTANT NRC AND APPLICANT RESOURCES FROM SAFETY EFFECTIVE ACTIVITIES TO SUCH ACTIVITIES AS PREPARING RESPONSES TO REPETITIVE CONTENTIONS AND INTERROGATORIES. WHILE THE BENEFITS OF PUBLIC PARTICIPATION IN THE PROCESS ARE NOT TO BE IGNORED, IT IS ALSO APPARENT THAT MANY INTERVENORS ARE NOT ABLE, NOR DO THEY ATTEMPT TO UTILIZE THE HEARING PROCESS AS A MECHANISM TO BRING ABOUT IMPROVEMENTS IN SAFETY. INTERVENORS RATHER VIEW THE PROCESS AS PROVIDING A FORUM FOR EXPOUNDING THEIR OWN VIEWS ON THE SAFETY OF NUCLEAR POWER AND AS A MECHANISM TO BRING ABOUT ENDLESS DELAYS IN PROJECT LICENSING. SUCH DELAYS INEVITABLY INCREASE COST. THEREFORE THE HEARING PROCESS CAN

HAVE THE COMBINED UNDESIREABLE IMPACTS OF DETRACTING FROM PLANT SAFETY WHILE INCREASING PLANT COST. THIS IS A FUNDAMENTAL ISSUE WHICH BEARS MORE SCRUTINY AND CONSIDERATION THAN IT HAS PREVIOUSLY SEEMED TO WARRANT.

THE LICENSING PROCESS SHOULD HELP RESULT IN SAFE, ENVIRONMENTALLY COMPATIBLE POWER PLANTS. IT SHOULD HAVE PREDICTABLE, ACHIEVABLE CRITERIA SO THAT RATIONAL TIMETABLES FOR CONSTRUCTION AND OPERATION CAN BE ACHIEVED. FINALLY, IT SHOULD ENGENDER PUBLIC CONFIDENCE IN THE PROCESS AND IN THE SAFETY OF THE POWER PLANTS IT LICENSES. THE PRESENT HEARING PROCESS IS NOT SUPPORTIVE OF THESE GOALS.

THUS CONGRESS MIGHT USEFULLY INSTRUCT NRC TO RECONSIDER THOROUGHLY AND REPORT ON THE BENEFITS, SAFETY AND OTHERWISE, ASSOCIATED WITH THE PRESENT HEARING PROCESS, WITH A VIEW TO A POSSIBLE MAJOR REWORKING OF THE ATOMIC ENERGY ACT'S LICENSING SCHEME. THE COMMISSION SHOULD BE REQUIRED TO CONSULT WITH AFFECTED PARTIES IN FORMULATION OF ITS VIEWS AND RECOMMENDATIONS. AIF WOULD CERTAINLY BE PLEASED TO BE OF ASSISTANCE.

MR. CHAIRMAN, THANK YOU AGAIN FOR THE OPPORTUNITY TO PRESENT THESE SUMMARY VIEWS, AND I WOULD BE PLEASED TO ANSWER IN GREATER DETAIL ANY OF YOUR QUESTIONS.

Union of
CONCERNED SCIENTISTS

UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON NUCLEAR REGULATION

TESTIMONY OF ELLYN R. WEISS ON NRC ISSUANCE OF OPERATING LICENSES

March 25, 1981

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My name is Ellyn Weiss. I am a partner in a Washington law firm and have been General Counsel to the Union of Concerned Scientists for three and half years. My other clients include the Natural Resources Defense Council and a number of local or regional citizen groups around the country. Prior to joining my firm, Harmon and Weiss, I was an Assistant Attorney General in Massachusetts for five years. I have practiced before the NRC and in related judicial matters for seven years. I wish to thank the Committee for inviting me to testify today on the variety of measures which have been proposed or suggested by NRC to expedite the licensing of new nuclear power plants. I will emphasize five points before you today:

1. The hearing process is the single most fundamental protection that the public has to ensure the thoroughness and competence of NRC review of nuclear power.

2. We have seen no convincing evidence that the purported "delays" in the licensing of new plants are due significantly to public participation in the licensing process, yet this is where the industry and NRC choose to target their proposed reforms.

3. While we would agree that there is room for improvement in the efficiency of licensing, the administrative measures proposed by NRC are counterproductive to that goal. We will propose alternatives.

4. Permitting low-power operation before hearings are concluded is not justified under the current circumstances.

5. Most fundamentally, this Committee should understand that if NRC "expedites" licensing by limiting the ability of the public or its own licensing Boards to pursue basic safety questions, there is a price associated with that action; a price measured in increased risk to the public health and safety. The system cannot ignore the views of its critics without paying that price. That is a clear, perhaps the clearest institutional lesson of the accident at Three Mile Island Unit 2.

The Committee's questions to me begin by asking my opinion of the "impact of the projected delays in NRC issuance of operating licenses." With your permission, I will begin a step or two earlier in an effort to address some of the unspoken premises coloring this debate which are reflected in that question and those which follow. In particular, the use of word "delay" -- defined in my dictionary as to defer, postpone or procrastinate -- connotes the unjustified waste of time. In my opinion, this word has been chosen carefully to suggest that all remains between applying for a license to operate a nuclear plant and receiving that license are a series of ritualized formalities which neither increase nor assure the safety of reactors. The implication which follows is that these formalities can be dispensed with or cut back without affecting safety. I believe it would be unwise and dangerous for this Committee to accept these premises, particularly in the aftermath of the TMI accident.

It is appropriate at this point to quote a key conclusion from the Report of the President's Commission on the Accident at Three Mile Island (p. 9):

> After many years of operation of nuclear power plants, with no evidence that any member of the general public has been hurt, the belief that nuclear power plants are sufficiently safe grew into a conviction. One must recognize this to understand why many key steps that could have prevented the accident at Three Mile Island were not taken. The Commission is convinced that this attitude must be changed to one that says nuclear power is by its very nature potentially dangerous, and, therefore, one must continually question whether the safeguards already in place are sufficient to prevent major accidents.

The licensing process is, in fact, the primary means by which the public may participate in raising important questions about reactor safety. Congress wisely recognized this when it provided for public hearings on license applications. It is my experience that the hearing process is the single most fundamental protection which the public has in attempting to ensure the thoroughness, competence, and integrity of the NRC review of this inherently dangerous technology. The recognition that their assertions will be submitted under oath and subjected to the public scrutiny of a Licensing Board is a powerful deterent to sloppy technical work and unsupported conclusions. I would be the last to say that the NRC review is perfect. There is no question in my mind, however, that it would be far worse without the check of an open public hearing process. The NRC review, the licensing process, and public participation in it, are not expendable formalities and the time required to accomplish them is not "delay." On the contrary, it is a prudent investment in preventing future TMI's or worse. Both the Kemeny Commission and the NRC's own

special inquiry group prescribed more attention to public participation, not less.

Thus, I would define delay as that amount of time which is not legitimately necessary for thorough staff review and open and informed resolution of contested issues through the licensing process. Applying this definition to the issue immediately raises a basic question which has been avoided by the nuclear industry. How much of the time now required for staff review and public hearings is unrelated to the resolution of safety (and environmental) issues?

I would suggest on this point that the dubious statistics I have seen provided by NRC and the utilities regarding so-called "slippage" in the projected operating dates for new plants are virtually useless for answering this question. Putting aside the self-serving and historically grossly inaccurate nature of such projections, the point here is that they do not tell you why the operating date has slipped nor help you to design a meaningful remedy to time delay. Let us assume that Plant X was completed on January 1, 1981, but that it does not receive a license to operate until September, 1981. If those 9 months were required, for example, to obtain from the Applicant the information necessary to determine whether the facility complies with post-TMI licensing requirements or for the utility to design and implement an acceptable emergency plan for the plant, I do not believe that this Committee would consider that time to be "delay." On the other hand, if the 9 months were attributable to schedule

conflicts among Licensing Board members or the lack of sufficient staff resources to perform a competent review, that would be delay. Moreover, if the latter were the case, the answer would clearly be for this Committee to provide NRC the means necessary to increase its staff so that it can perform its job expeditiously. The answer is not to tell it to do its job less thoroughly. To this date, we have seen no convincing evidence that a significant portion of the time required for licensing new plants is not legitimately necessary to ensure the safety of those plants.

I would agree, however, that there are inefficiencies in the licensing process which NRC can and should address. In my opinion, by far the single most significant inefficiency is the length of time which now passes between the docketing of an application for a license and the issuance by the NRC of its basic review documents, the Safety Evaluation Report and the Environmental Impact Statement.

Much of the argument I have seen about the length of the licensing process rests on statistics built around the number of months from the docketing of an application until the receipt of a license. These overlook the fact that the docketing of an application and the issuance of public notice of opportunity for hearing are not particularly useful milestones; they indicate very little about the readiness of a case to go to hearing. This is due to two interrelated causes. First, operating license applications are now being filed by utilities when plants are little more than half completed. Second, the issuance of the basic NRC staff review documents typically

does not take place until months after the beginning of the hearing process. I do not mean to suggest here that this schedule is due to staff laxness. The process of obtaining basic information from applicants takes some period of time; it is by no means all contained in the original application filed by the utilitiy. Only after staff review is completed and documented is a case genuinely ready to move towards hearing. Consequently, a good deal of the discovery, contention-drafting and prehearing time prior to that point is wasteful and unnecessary in the long run. It diverts limited staff and Licensing Board resources and thus slows down the progress of other cases which should take priority. We are convinced that if the Commission required the Staff review documents to be completed at or near (within one month) of the time of issuance of public notice of hearing, months would be saved in the overall length of the hearing process. If NRC requires additional staff to perform this job, this Committee should support that.

Significant additional savings would be gained by requiring applicants to make all of their documents, analyses and data related to the application public at the time of filing the application, in much the same way as the NRC staff does in its Public Document Room. This would reduce the need to file time-consuming interrogatories and document requests and tend to remove the incentives to evasiveness which pervade the discovery process. Finally, all parties should be required to identify their witnesses early in the process, followed by

an NRC-sponsored set of depositions of all witnesses, in which all parties would participate. Depositions are by far the most effective and least time-consuming of discovery tools. This procedure would focus the issues for hearing, greatly obviate the need for voluminous interrogatories and result in shortening the cross-examination in the hearing itself.

In summary, we propose the following:

1. At the time of filing an application, the applicant files all documentation, analyses and data related to the application in the NRC's Public Document Room.

2. The SFR and EIS are issued at the time of, or within one month after the issuance of public notice of opportunity for hearing.

3. All parties identify their witnesses at an early date and NRC sponsors depositions of all witnesses.

In addition, we generally endorse the sort of administrative measures suggested by the Chief Judge of the Atomic Safety and Licensing Board Panel contained in a memorandum from Judge Cotter to the Commissioners dated March 5, 1981. Judicious use of the techniques outlined therein, including particularly settlement conferences, cross-examination plans, combining rebuttal and surrebuttal testimony, would do far more to expedite hearings on ongoing cases than the proposals recently issued for comment by NRC.

Let me now consider those proposals, contained in an NRC notice of rulemaking of March 13, 1981, whose stated purpose is to "expedite" the licensing process. I am frankly astonished that the primary means chosen by the NRC for accomplishing this goal is the total insulation of the NRC

staff from prehearing discovery. From the perspective of one who has been involved in many NRC cases, I can assure this Committee that the predictable result of protecting the Staff from discovery will be to necessitate many days of needless cross-examination at hearings, interruption of hearings so that parties can respond to "surprise" information or highly technical data produced at the hearing for the first time and the wholesale recalling of staff witnesses to present testimony responsive to the examination of Intervenors which was not included in its original presentation.

The net result will not only be a lengthening of the adjudicatory process, it will make for a record which is confusing and disjointed, thus complicating the job of the decisionmaker and lengthening the time required to reach decisions. It is disingenuous to seek to justify this action as the Commission has on the grounds that "most of the discoverable information can ultimately be produced at the hearing on cross-examination." Without pre-hearing discovery, parties will not be in a position to know what information exists or what questions should be asked to elicit that information at the hearing. Much of the staff's analyses are never referred to in the formal testimony or SER, which are largely conclusory in nature. Moreover, without the ability to review the technical information before the hearing, effective cross-examination is virtually impossible on the complex issues which characterize NRC hearings. Cross-examination is not a meaningful substitute for discovery,

as anyone who has ever litigated an NRC case should honestly admit.

Taken as a whole, the effect of these amendments would be to prevent Intervenors from posing written interrogatories to the NRC staff, from taking the depositions of the NRC staff or from uncovering the documentation and underlying data used by the staff except what may be obtainable through the Freedom of Information Act. (It is worth noting that any savings of personnel time needed to respond to interrogatories must be offset against the additional time required to respond to FOIA requests.) Although the proposed rulemaking document does not indicate in what way this will make for expedited hearings, we infer that the reasoning is that the staff is unable to respond to discovery and prepare its review at the same time. There are several responses to this. First, of course, all other parties, including Intervenors with far less resources available than the staff, are required to engage in pretrial discovery in the overall interest of an efficient, intelligent hearing. While exempting one crucial party (the staff) from discovery may make it easier for the staff to prepare for the hearing, that does not mean that the adjudicatory process will be shortened by one day or made one jot more "efficient." On the contrary, as we have noted above, hearings will certainly be longer and interrupted more frequently if this proposal is adopted.

Second, it is far from established that the burden of responding to interrogatories or depositions is substantial

enough so that removing that burden would effectuate significant change. Depositions in particular are not at all time-consuming; they typically take only one day of the staff member's time, yet they are by far the most effective means of discovery available to Intervenors. Thus, abrogating the Intervenors' right to take staff depositions cannot arguably be justified as a time-saving measure even for the staff. Indeed, it is this sort of proposal which raises fundamental questions about the motivation of these "reforms."

Third, even if the staff could make a case that it has insufficient resources to respond to discovery and perform its review at the same time, these considerations would at most extend up to the time that the SER is issued. After that, the staff should certainly be in a position to disclose the basis for its judgments without straining its resources. If it cannot do so, this raises troubling and serious questions about its competence.

Finally, it is questionable whether the agency may lawfully abrogate in a blanket way a party's right to depose the staff or to engage in any pretrial discovery against the staff. See Recommendations and Reports of the Administrative Conference of the United States, Jan. 8, 1968, June 30, 1970 at p. 571: "[F]airness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing." (emphasis added) See also Harvey Aluminum, Inc. v. N.L.R.B., 335 F.2d 752-755 (9th Cir. 1964).

Once again, the theme which implicitly underlies both these proposals, as well as others to abolish the authority of Licensing Boards to independently inquire into safety issues for example, is that meaningful public participation and thorough Licensing Board scrutiny are expendable luxuries unrelated to safety. This is a false premise. Just a few examples of the type of safety issues raised by the public and Boards will demonstrate the point. Some time before the TMI-2 accident, intervenors in the proceedings to license the Black Fox plant in Oklahoma raised the issue that the failure of equipment classified by NRC as not related to safety could cause serious accidents and interfere with the ability of safety equipment to bring the plant to safe shutdown after an accident. Their contention was disputed by the NRC and the Applicant, and in fact rejected by the Board on the ground that it postulated incredible sequences of failures. Yet on March 28, 1979, the TMI-2 accident was begun and aggravated by a series of failures in precisely such so-called non-safety equipment, including the famous valve which stuck open. After the accident, both the Kemeny Commission and NRC's Special Inquiry Group identified as one of the key safety problems demonstrated by the accident the lack of attention given

by nuclear plant designers, operators and the NRC to equipment it classified as unrelated to safety.*/ If the Black Fox intervenors had been heeded, nuclear plants would be safer today.

For years prior to the TMI accident, intervenors, including interested states, had sought through licensing proceedings to force utilities and NRC to design evacuation plans for the populations surrounding nuclear plants. I represented the Commonwealth of Massachusetts in the Seabrook case. Led by the Attorney General of New Hampshire, we sought assurance that the close to 60,000 people who pack the beaches adjacent to the Seabrook plant on a summer day could be safely evacuated if necessary. The response from the NRC was that evacuation would never be necessary, hence our concern was misplaced. As you know, TMI has changed all that; evacuation plans for at least a 10-mile radius are now supposed to be required prior to licensing. However, Seabrook is now well on the way to completion and the states of Massachusetts and New Hampshire still have no assurance that their citizens can be protected. If the intervenors in Seabrook had been heeded, evacuation plans might have existed in Pennsylvania at the time of the TMI accident, averting much of the chaos and traumatic

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*/ Report of the President's Commission on the Accident at Three Mile Island, p.52-53.

confusion which attended that accident.

Lastly, I ask you to consider a case that is going on right now involving the McGuire plant owned by Duke Power. You may have heard that the licensing of that plant has been delayed, but have you learned why? The McGuire plant is one of a very few in this country designed with an ice-condenser system and a thin containment. If an accident no more severe than TMI occurred at that plant, involving ignition of the same amount of hydrogen mixed with oxygen as was generated at TMI, the design pressure of that containment would be exceeded, raising the possibility of rupture and release of radioactivity into the environment. This is the issue that has been raised by the intervenor in that proceeding and is presently being considered by the Board. I do not mean to suggest to this Committee that the technical issues involved are open-and-shut. Both sides have a point of view. I do suggest that there can be no serious dispute that the issue is an extremely important one and that it should be fully resolved before that plant goes into operation.

The authority of Licensing Boards to raise issues independently is also very important. Each Licensing Board contains two technical members, one trained in engineering and the other in environmental sciences. They are there

out of recognition that it is the Board's duty to do more than umpire a game between parties. If the Board members learn of significant safety issues which have been ignored or mistreated, I cannot believe that this Committee would recommend that they turn a blind eye.

The NRC has proposed to you a draft bill to amend the Atomic Energy Act to permit testing at 5% power before hearings have been conducted, much less completed, if such action is deemed by the Commission to be "in the public interest." The Commission's discretion is to be virtually without limit, since no standards whatever are offered in the legislation to define the "public interest", although the accompanying analysis provided by the Commission states that the public interest finding will be based solely on a consideration of costs. This bill would reverse 25 years of AEC and NRC policy that safety is not to be compromised by financial considerations. It is not needed and it is an extremely unwise precedent.

This bill in its sweep and lack of standards should be compared against the amendment which Congress passed in 1972 when the nation was faced with a genuine emergency caused by the Arab oil embargo. Congress provided in Pub.L. 92-307, 86 Stat. 191, that for an 18-month period of time,

operating licenses could be granted prior to the completion of hearings if 1) ACRS review was complete 2) the staff SER and EIS were complete and the Commission could find that the public health and safety were protected and that operation of the plant was "essential toward ensuring" an adequate supply of power.

That bill represented a balanced and responsible approach to a true national problem. No such problem exists today, yet the Commission seeks to short-circuit the licensing process on economic ground alone without even a modicum of the protection afforded by Congress in 1972.

We realize that the proposed bill would only permit operation to 5% power. However, once the reactor goes critical and the plant passes into the operational phase, changes become more difficult to make.*/ However, the most dangerous and objectionable aspect of this proposed bill is that, for the first time, it gives NRC unfettered discretion to consider economics first and safety after.

I also urge this Committee not to be stampeded by untested assertions that billions of dollars will be lost due to delays in licensing. There are two points that must be kept clearly in mind. The first is that

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*/ Subcritical testing and fuel loading take the bulk of the time; ascension to 5% power produces insufficient time-saving advantages to justify the action.

most of these claims are based on projections of completion of construction. These projections are historically highly unreliable, due primarily to slippages in construction schedules. This is clearly documented in information provided by the NRC in response to questions posed by the Subcommittee on Energy and Environment of the House Interior Committee. Both NRC and the utilities compared their projected completion dates as calculated in 1978 with their best current projections today for the same plants. The difference in projections ranged up to 45 months by the utility's reckoning. By far the majority of this change was simply due to construction delays or voluntary changes in construction priorities by the utilities. Today's projections are fraught with the same uncertainties. There is no question in my mind that many of the months now calculated by the industry to be post-construction but pre-licensing will turn out to be pre-construction months. For these months, added consumer cost cannot be attributed to the licensing process.

Second, it is our understanding that calculations have been made purporting to show the gross cost to the ratepayer of each month of idle capacity. Although we have been unable to obtain copies of these calculations,

we understand that approximately 2/3 of the cost or some $1.6 billion is attributed to extra interest charges necessary to carry the construction debt for the additional time required until the plant is placed into the rate base. Such figures can be extremely deceptive because they do not appear to account for the fact that the increase in capital cost due to higher interest charges is largely offset by the fact that the ratepayers will not pay for the plant during the period that it is awaiting a license to operate. Let me offer a simplified illustration from the ratepayer's standpoint. Assume that Plant X, costing $1 billion, is completed in January, 1981 but does not go into operation or into the rate base until January, 1982. The ratepayer pays nothing for Plant X in 1981. The utility however, needs additional funds - let us assume $100 million - to cover the added cost of financing its construction debt. Therefore, the plant will be capitalized in the rate base at a value of $1.1 billion in 1982. The ratepayer will pay off some percentage of that cost each year for the 30 years starting in 1982. However, this would largely, perhaps even entirely, be offset against the benefit in current dollars which he gained in 1981 from having to pay no part of the cost of the plant. It

must be noted that the extra dollars in the consumers pocket in 1981 must also be compounded over 30 years to make a reasonable economic comparison. This example illustrates the crucial point that the cost of the licensing process to the consumer can be and in my opinion has been seriously exaggerated.

In closing, I thank the Committee again for inviting me to testify before you today. The final thought that I would like to leave you with is a simple one, but one that can be overlooked in the debate over "expediting" the licensing process. As I discussed earlier, there are methods which NRC can and should use to make licensing more efficient. We do not sanction delay for delay's sake and we would fully support this Committee in encouraging the measures we and others have suggested and in seeing that NRC is provided the manpower and technical resources to do its job well and expeditiously. However, proposals to speed licensing which focus on curtailing the public's ability to raise and pursue safety and environmental issues carry a serious price. They can be adopted only at the risk that the issues not raised and not resolved will lead to the next TMI.

80-323 O—81——8

Testimony

By

Jay E. Silberg
Shaw, Pittman, Potts & Trowbridge

Mr. Chairman and Members of the Committee

Good afternoon. I am Jay Silberg, a partner in the law firm of Shaw, Pittman, Potts & Trowbridge here in Washington, D. C.

Among other clients, my law firm represents some twenty electric utility companies with nuclear power plants in operation or under construction. In addition to other activities, we represent these utilities in federal and state regulatory and licensing proceedings as well as in court cases. Three of these utilities are Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, the co-owners of the Three Mile Island Nuclear Station. On their behalf, we have been participating in Sholly v. U.S. Nuclear Regulatory Commission.[1]

The November 19, 1980 decision of the U. S. Court of Appeals for the District of Columbia Circuit in Sholly overturned twenty years of consistent administrative practice by the NRC and its predecessor agency, the Atomic Energy Commission. Since 1962, when Congress amended section 189.a of

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1 Sholly v. United States Nuclear Regulatory Commission, ____ F.2d ____, No. 80-1691 (D. C. Cir. 1980).

the Atomic Energy Act to reduce the number of hearings which the AEC was required to hold,[2] the Commission has consistently exercised its discretion to issue amendments to reactor operating licenses without prior notice and without prior hearing where it has determined that the amendment had, in the language of the statute, "no significant hazards consideration." The Sholly decision held that Section 189.a requires NRC to hold a hearing prior to issuing a license amendment whenever an interested party requests one, even if the Commission has properly determined that the amendment involves no significant hazards consideration. This ruling was not, however without its critics on the court. Four of the eleven sitting judges on the D. C. Circuit sharply dissented from the Sholly decision, charging that it "ignored logic", "distorted the legislative history", and "eviscerated the Congressional mandate".[3] According to these judges:

> The panel's interpretation of Section 189(a), taken as a whole, renders it virtually impossible for the NRC faithfully to follow the implicit congressional directives found in that section.[4]

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2 Pub. L. 87-615, 76 Stat. 409 (1962).

3 Sholly v. United States Nuclear Regulatory Commission, Statement on Denial of Rehearing En Banc (March 4, 1981) (Judges Tamm, MacKinnon, Robb and Wilkey).

4 Id., slip op. at 11.

I would request that a copy of the Court's decision and the statement by the four judges be included in the record of this proceeding.

While the Sholly case purported to decide a number of interesting issues (including some which were not even briefed by the parties),[5] the most important immediate impact of the decision--should it go into effect--is that it could result in lengthy and costly hearings precipitated by a simple request and having the potential for shutting down many of the nuclear power reactors now operating in this country. These shut downs could easily last for nine months or more. The economic impact of these shut downs on utilities and their customers would be dramatic--typical costs for replacing the power generated by a nuclear plant range between $250,000 to $500,000 per day.[6] Over nine months, this would amount to $67.5 to $135 million. Equally significant would be the effect on oil imports. In some parts of the country--particularly the

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5 For example, the Court decided that petitioners in Sholly had requested a hearing notwithstanding the fact that this issue "was not argued by the parties." Slip op. at 19, fn. 25.

6 Affidavit of Roger S. Boyd, dated December 3, 1980, attached as Exhibit A to Metropolitan Edison Company's Petition for Rehearing and Suggestion for Rehearing En Banc (December 3, 1980) ("Boyd Aff."), p. 14. Mr. Boyd is a former Director of NRC's Division of Project Management, with 18 years experience in the NRC and AEC licensing process.

Northeast--replacement power comes in large part from imported oil--about 30,000 barrels each day for a 1000 megawatt nuclear plant.[7]

How could a license amendment which does not involve significant hazards consideration bring about the shutdown of a nuclear power plant? To understand this, some background in NRC licensing practices is helpful. An NRC license typically includes a number of license conditions. It also includes what are known as Technical Specifications. For current plants, these are some 400 pages of very detailed technical requirements, including plant design features, safety limits, safety system settings, limiting conditions for operation, surveillance requirements, environmental technical specifications, and administrative controls.[8]

Because they are so detailed, Technical Specifications and other license provisions must frequently be modified. All of these amendments require NRC approval. As of last December, there were some 750 to 800 license amendment actions pending before NRC. Many of these would be expected to be approved based upon a no significant hazards consideration finding.

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7 Boyd Aff., p. 14.

8 Boyd Aff., p. 2; NRC Motion to Stay Issuance of Mandate (December 10, 1980) ("NRC Stay Motion"), pp. 3-4.

Over the past 4 years, NRC issued 1500 to 1600 license amendments involving no significant hazards considerations.[9]

While most of these license amendments are not needed for continued plant operation, some are. The NRC has estimated that if license amendments involving no significant hazards considerations are not issued in a timely manner, over the next few months some twenty nuclear power plants would either have to shut down or operate at reduced power levels.[10] A typical case might involve a reactor's annual refueling. In many cases, minor adjustments need to be made in the Technical Specifications to reflect the characteristics of the new fuel. Even though these changes may meet the tests used by the NRC to determine whether there are significant hazards considerations, i.e.

-- is there significant new safety information not previously considered;

-- is there a significant increase in the probability or consequences of an accident;

-- is there a significant decrease of a safety margin;[11]

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9 Boyd Aff., pp. ; NRC Stay Motion, p.2.

10 NRC Stay Motion, pp. 2-3.

11 Boyd Aff., p. 3.

a license amendment is still required. If that amendment is delayed because of a hearing, the plant cannot be refueled and it remains shut down.

I would request that two documents which set forth many of these facts be included in the record of this hearing--first the December 3, 1980 Affidavit of Roger Boyd which was part of Metropolitan Edison's Petition for Rehearing to the Court of Appeals. And second, the NRC's Motion to Stay Issuance of Mandate, filed with the Court of Appeals on December 10, 1980.

Getting to the substance of the issue presented by the Sholly decision, I do not think that this hearing is the proper forum to argue whether the Court of Appeals was right or wrong. That question will be presented to--and we hope decided by--the U. S. Supreme Court. Suffice it to say that it is our opinion that the Court of Appeals misinterpretted the intent of Congress and ignored the Commission's consistent interpretation over almost twenty years of its governing statute. The Court's opinion quotes--and then ignores--the legislative history which states that the 1962 amendment adding the "no significant hazards consideration" language

> in no way limits the right of an interested party to intervene and request a hearing [and these are the key words] at some later stage...[12]

12 Sholly v. USNRC, slip op. at 19 (emphasis added).

The policy issue which this Committee should consider is whether the NRC should be able to issue license amendments having no significant hazards consideration without a prior hearing. Let me focus on two questions:

1. Are more hearings in and of themselves a good thing? and;

2. Should Congress allow the technical staff of the Commission to apply its expertise to determine whether some activities are sufficiently routine that they may be allowed to proceed without a prior public hearing?

As to the issue of more hearings, there can be no argument that evidentiary hearings and their associated trappings can take significant periods of time. The Commission's request to Congress last week for authority to issue low power operating licenses while hearings are still underway is ample testimony that NRC hearings tend to be prolonged.[13] It is difficult to conceive of a hearing being completed in less than nine months after the request is made, even if the issue is a fairly narrow one.[14] Certainly where a license amendment is needed quickly

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13 NRC Press Release No. 81-46, "NRC Proposes Interim Licensing Legislation" (March 19, 1981).

14 The NRC's recently proposed amendments to its rules of practice use eight months as the goal for the period of time from the issuance of the last Staff document to the initial decision in an operating license proceeding. 46 Fed. Reg. 17216 (March 18, 1981). That eight month period excludes most of the prehearing procedures.

and can not be applied for far in advance--as is often the case with amendments needed for refueling--a hearing would force the reactor out of operation.

The NRC is already having difficulty staffing its existing hearing load.[15] There are shortages of Staff lawyers and Atomic Safety and Licensing Board members. More hearings will only make matters worse. Hearings on matters of no safety significance will necessarily detract Staff efforts from matters which do have safety significance. While it is impossible to predict how many hearings might result each year from the Sholly decision, there is no reason to believe that the number would not be significant. I would expect this to be the case even though there were few requests for hearings on no significant hazard consideration amendments before Sholly. Should the Sholly decision go into effect, the word will soon go out that there is now an easy way to shut reactors down.

While some might welcome the idea that more hearings would further delay NRC licensing or cause plant shutdowns, I do not believe that this result is in anyone's best interests. It is certainly not a result which Congress could have intended in 1962 or should intend today.

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15 See letter from Joseph M. Hendrie, Chairman, NRC, to Honorable George H. W. Bush, President of the Senate (March 18, 1981) transmitting proposed legislation for interim licensing.

Nor is there any evidence that prior hearings on the kind of narrow technical issues involved in no significant hazards amendments are likely to produce useful results. What are involved are specific technical matters--such as adjustments to maximum average planar linear heat generation rate, changes to minimum critical power ratio, and variations in moderator coefficients.[16]

Hearings with all the judicial trappings are not necessarily the best way to reach decisions on highly technical issues. Despite a lawyer's natural inclination to think that his or her skills are crucial to the search for the truth--as it may arguably be in personal injury litigation or criminal cases--there is a much smaller likelihood that this is the case where purely technical questions are involved.[17] And where the issues involve "no significant hazards consideration", there is even less of a chance that a hearing would serve a useful purpose.

It is perhaps ironic that the issue of prior hearings for this category of license amendments arose in the context of the krypton venting at TMI. That activity had perhaps more public

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16 See NRC Stay Motion, p. 4; Boyd Aff., pp. 4-5.

17 See International Harvestor Co. v. Ruckelshaus, 478 F.2d 615,631 (D. C. Cir. 1973).

comment and input that any other license amendment the Commission has ever issued. NRC published a draft environmental assessment and solicited public comments.[18] Some 800 written comments were received. NRC held public meetings and met with citizens groups. It consulted or received comments from six federal agencies, the Commonwealth of Pennsylvania, Oak Ridge National Laboratory, the National Council on Radiation Protection and Measurements and the Union of Concerned Scientists.[19] NRC then issued a final environmental assessment[20] and considered it in two public meetings and a meeting with the Advisory Committee on Reactor Safeguards. All this occurred before the orders which led to the Sholly decision were issued. It is hard to imagine what additional public participation was necessary.

Even in a more typical case, the absence of a prior hearing does not foreclose public input. Our position has not been that Section 189.a prohibits hearings on no significant hazards consideration amendments--only that it authorizes those

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18 NUREG-0662, Draft Environmental Assessment for the Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere (March 1980); 45 Fed. Reg. 20265 (March 27, 1980).

19 NUREG-0662, Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere (May, 1980), vol. II.

20 Id., vol. I.

amendments to be made effective before a hearing. Most of these amendments are reversible. A surveillance interval which has been shortened can be lengthened. A calculational technique which is modified can be returned to its original form. For these amendments, a hearing which takes place after the license amendment is effective would be more than adequate. Even for the exceptional, irreversible amendment like the TMI venting, an after-the-fact hearing would let the NRC Staff know that an outside party was looking over its shoulder.

Other methods besides prior hearings are available for providing input on license amendments involving no significant hazards considerations. Of course, the application for the amendment and the Staff's disposition are all on the public record. Interested persons can communicate their comments to the Staff; they can file requests for orders to show cause;[21] they can seek reconsideration from the Commission; and they can ask the courts for injunctive relief.[22]

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21 10 C.F.R. §2.206. Denial of requests for orders to show cause are judicially reviewable. See, e.g., Porter County Chapter of Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 606 F.2d 1363 (D. C. Cir. 1979).

22 The Sholly petitioners sought to stop the krypton venting at TMI by filing for injunctive relief in the U. S. Court of Appeals for the Third Circuit as well as the D. C. Circuit. These attempts were denied.

I think that we must reasonably conclude that additional hearings on these types of amendments are not necessarily desirable as an end in itself.

The second question which I posed is whether Congress ought to allow the technical expertise of the NRC to determine that some amendments can be made immediately effective notwithstanding a request for a hearing. Congress has charged the NRC with responsibility for regulating the nuclear power industry.[23] The NRC Staff routinely oversees the highly technical questions surrounding the design, construction and operation of power reactors. The Commission has shut plants down when it felt that safety so required.[24] It has ordered design changes and procedural modifications.[25] This is not to say that NRC is free from criticism in the way that it has carried out its mandate.[26] But these criticisms hardly justify the creation of a "shadow" NRC Staff to duplicate the Staff's work.

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23 See Energy Reorganization Act of 1974, secs. 201(f), 203(b), 42 U.S.C. §§5841(f), 5843(b).

24 See, e.g., Order to Show Cause, NRC Docket No. 50-334, 44 Fed. Reg. 16505 (March 19, 1979).

25 See, e.g., Order for Modification of License, NRC Docket No. 50-321, 46 Fed. Reg. 9279 (January 28, 1981) (modification to BWR containment system).

26 See, e.g., Report of The President's Commission on the Accident at Three Mile Island (1979); Nuclear Regulatory Commission Special Inquiry Group, Three Mile Island: A Report to the Commissioners and to the Public (January, 1980).

If the NRC can not be relied upon to categorize those license amendments which raise significant safety questions from those which do not, then there is no basis for respecting the NRC's judgments on any questions involving the public health and safety. I know that some would argue that the Commission's technical expertise should not be trusted. These individuals can rattle off a laundry list of accidents, abnormal occurrences, and the like. Nonetheless, when the actual record of the nuclear power industry is examined and compared with the alternatives[27] (or indeed with any other technology), the end result of the NRC's technical judgment is difficult to criticize.

With this review of the impact of Sholly and the underlying policy issues, there can be no question that the decision should be reversed. But is legislation appropriate? Since the Court purported to interpret what Congress intended in 1962, it is certainly appropriate for the Congress to correct the Court's conclusion.

If legislation is called for, what should that legislation say? The NRC has proposed a bill to Congress which would reverse Sholly.[28] The operative language would simply add a

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27 See, Committee on Nuclear and Alternative Energy Systems (CONAES) of the National Research Council, Energy in Transition, 1985-2010 (1979).

28 Letter from Joseph M. Hendrie, Chairman, NRC, to Honorable Alan Simpson, Chairman Subcomm.
(continued next page)

new sentence to Section 189.a authorizing the Commission to issue and make immediately effective a license on a no significant hazards determination, notwithstanding the pendency before it of a hearing request. This language would make it clear that no prior hearing was required, but would allow for hearings after license issuance. This language is reasonably straightforward and would accomplish its purpose.

The NRC's proposed legislative would also add a second new sentence to Section 189.a which in NRC's view would clarify that Section 189.a does not limit NRC's authority to take immediate action where necessary to protect the public health, safety and interest. It is not clear that any such clarification is necessary. The NRC has told the Court of Appeals that it does not interpret the Sholly decision as interfering which its authority to act when the public health, safety and interest requires.[29] I would agree with the NRC that this is

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(continued)
on Nuclear Regulation, Senate Comm. on Environment and Public Works. (March 11, 1981).

29 In a December 10, 1980 filing with the D. C. Circuit, the Commission discussed its

> authority to issue immediately effective orders where the public health, safety and interest so requires. We do not read the Court's decision as restricting that authority or the Commission's rulemaking authority.

Motion to Stay Issuance of Mandate, p.2.

the proper reading of Sholly. If that is the case, the second sentence is not needed.

Thank you for the opportunity to testify before you today.

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April 9, 1981

The Honorable Alan K. Simpson
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment and
Public Works
United States Senate
Washington, D. C. 20510

Re: <u>Sholly v. NRC</u>

Dear Senator Simpson:

In response to your letter of April 1, 1981, I would first like to thank you for the opportunity to testify before the Subcommittee at the March 25, 1981 hearing. Your interest and concern with the very important issues raised by the _Sholly_ case are greatly appreciated.

Your letter poses key questions concerning the _Sholly_ decision. I will attempt to answer each one.

1. On the average, how long will it take from the time such a hearing is requested until issuance by the hearing officer of a final decision?

80-323 O—81——9

In my prepared testimony (p. 7), I estimated that it would be difficult to complete a hearing on a license amendment in less than nine months. As I noted, the NRC has described a schedule for the final stages of an operating license hearing which covers 240 days from publication of the final supplement of the Staff's Safety Evaluation Report to a Licensing Board decision. 46 Fed. Reg. 17216 (March 18, 1981). It must be borne in mind that this purports to be an expedited schedule and that most of the early stages of the hearing process are not included. I have developed the following schedule for a hearing on an operating license amendment which I consider quite optimistic.

	Event	Time Elapsed
1.	Filing of petition	0
2.	Filing of answers to petition by utility and NRC Staff	20
3.	Atomic Safety and Licensing Board appointed	25
4.	ASLB order on petition	45
5.	Prehearing conference	75
6.	Prehearing conference order	90
7.	Discovery	
	a. Requests filed	110
	b. Answers filed	130
8.	Testimony filed	160
9.	Start hearing	175
10.	Conclude hearing	180
11.	Proposed findings	
	a. licensee	200
	b. intervenor	210
	c. NRC Staff	220
	d. licensee's reply findings	230
12.	Initial Decision	260

This schedule only has five days for hearings and does not allow time for any delatory tactics by intervenors, schedule conflicts, discovery disputes, or similar problems which have prolonged hearings in the past.

2. Would such a decision be subject to appeal to the Commission? If so, how much additional time would the appeal process add?

Any decision authorizing the amendment of a license is appealable under NRC regulations. These appeals are generally to the Atomic Safety and Licensing Appeal Board, although

the Commission regulations can be read as allowing the Commission to hear the appeal directly. These appeals would not ordinarily stay the issuance of the license amendment. Under §2.764 of the Commission's rules, decisions authorizing operating license amendments are immediately effective unless good cause is shown. The Commission's suspension of the immediate effectiveness rule (Appendix B to 10 CFR Part 2) does not apply to operating license amendment proceedings.

3. Does the Sholly decision require the NRC to publish notice of "no significant hazards consideration" license amendments? If so, how much additional time would this add to the hearing process? If not, should notice be required?

The Sholly decision does not explicitly require that NRC publish prior notice of "no significant hazards consideration" license amendments. The decision clearly points out that the fourth sentence of Section 189.a of the Atomic Energy Act explicitly dispensed with the prior notice requirement for such amendments. However, the decision alludes to the possibility that some notice might be required notwithstanding the clear statutory language.

> As the NRC conceded at oral argument, there may be some type of notice requirement -- although perhaps not 30 days' notice and publication in the Federal Register -- implicit in the opportunity to seek judicial review of determinations of "no significant hazards consideration." Moreover, our decision today does not reach the question of whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fourteenth Amendment or the Administrative Procedure Act notwithstanding a finding of "no significant hazards consideration."

Slip op. at 16, fn. 20.

The four members of court who dissented from the denial of rehearing en banc rightly criticized this decision-by-innuendo.

> If the panel meant to imply by this tantalizing suggestion that notice and publication were in fact constitutionally required in this case, we believe it should have made that point explicitly so that that finding could properly have been the subject of further review.
>
> This repeated evasive tactic by some panels of this court has not gone unnoticed . . ..

Statement on Denial of Rehearing En Banc, slip op. at 12, fn. 9.

If notice were required, this would extend the hearing process by whatever period of time was mandated for notice.

As for the question of whether notice should be required, I fully support the clear direction of Congress in 1962 when it added the fourth sentence of Section 189.a. For this category of license amendments, involving no substantial safety issues, there is no rational basis for requiring either notice or prior opportunity for hearing.

4. What NRC actions, other than direct amendment of a license, constitute a "significant change in the operation of a nuclear facility."

It is not at all clear what the Court had in mind when it stated that:

> Congress apparently contemplated that interested parties would be able to intervene before any significant change in the operation of a nuclear facility.

Slip op. at 23. As in the case of the issue raised by the previous question, the Sholly panel has, in the words of the four dissenting judges, left us with another "tantalizing suggestion."

It is clear that the NRC is continually requesting licensees to make changes affecting the operation of their nuclear facilities. These changes include hardware modifications, procedural changes, new analyses, and additional

surveillance requirements. The requests come in many forms -- new regulations, orders, bulletins from the Division of Inspection and Enforcement, and letters from the Division of Nuclear Reactor Regulation. If the requests to all operating reactors are totalled, there are certainly many hundreds of these changes each year. There is, of course, no way to predict which of these changes a court might deem significant. However, it would not be surprising if a court such as that which decided Sholly would set a very low threshhold for this determination, thus maximizing the number of hearings.

5. To what extent, if any, does the court's decision also affect the NRC's authority to issue immediately effective amendments or orders which can be justified on public health and safety or common defense and security grounds? (i.e., the NRC's emergency powers).

The NRC's authority to take immediately effective action where required to protect the public health, safety and interest is based not on Section 189.a of the Atomic Energy Act, but on Section 9(c) of the Administrative Procedure Act, 5 U.S.C. §558(c). This authority is codified in NRC rules. 10 CFR §§2.202, 2.204. Since the Sholly decision did not purport to examine NRC's authority under the Administrative Procedure Act or under these regulations, NRC's emergency powers are not affected by that decision. As pointed out in my testimony (p. 14 and fn. 29), the NRC told the Court of Appeals in its December 10, 1980 Motion to Stay Issuance of Mandate, that it did not read the decision as restricting the Commission's authority to issue immediately effective orders where the public health, safety and interest so requires.

6. What sort of "expression of interest" would be sufficient to constitute a request for a hearing?

As in the case of several of the previous questions, we are left to puzzle over cryptic language in the Sholly decision. When read by itself, the Sholly language seems to suggest that "expressions of interest", not a very rigorous requirement, are enough to convene a hearing.

> In Brooks v. Atomic Energy Comm'n, 476 F.2d 924, 926 (D.C. Cir. 1973) (per curiam), this court held that

> expressions of interest may be sufficient to constitute a request for a hearing.

Sholly, slip op. at 19, fn. 25. In fact, the Brooks decision did not adopt any such standard. The only language in Brooks which seems to relate to this statement in Sholly is that the Brooks "petitioners had already formally expressed their interest in the continuation or modification of the construction permit by requesting intervention in the section C [to 10 CFR Part 50 Appendix D] proceedings . . .." 476 F.2d at 927 (emphasis added). The Brooks petitioners "formally expressed their interest" when they

> filed a timely response to this notice [of opportunity for hearing] requesting leave to intervene, and an opportunity for hearing, with respect to both the continuation, modification, or termination of the construction permits and the issuance of the facility operating licenses.

476 F.2d at 925-26. In other words, the "expression of interest" in Brooks was no less than a routine request for hearing submitted in response to a routine notice of opportunity for hearing. Thus, the Sholly decision seems to be trying to create new procedural rules by misreading the Brooks decision.

If "expressions of interest" are intended to reach any showing of "continued interest in -- and opposition to -- the actions of the NRC" relating to a particular facility, Sholly, slip op. at 19, fn. 25, then virtually anything can constitute a request for a hearing. As the four dissenters pointed out,

> By finding such facts to constitute a hearing request, the per curiam opinion has virtually read out of the statute the requirement that a hearing be requested.

Statement on Denial of Rehearing En Banc, slip op. at 10-11.

At the very least, the Sholly decision's language, on a matter which the court admitted "was not argued by the parties", slip op. at 19, fn. 25, raises questions about existing Commission requirements. The language is all the more puzzling since it is at odds with an earlier decision by the Court of Appeals, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974), a decision which Sholly did not even cite. In BPI, the court interpreted Section 189.a as permitting the Commission to specify what a "request" for a hearing must include. The Sholly language simply ignored the well-reasoned holding in BPI.

While legislative correction may not be required of the dictum in Sholly that continued interest in and opposition to a facility constitutes a request for hearing, especially in view of the explicit holding in BPI, it would not be inappropriate for Congress to point out that the BPI interpretation is the appropriate reading of Section 189.a.

7. To what extent, if any, will the Sholly decision affect those extraordinary situations, such as the TMI-2 cleanup, where the degree of NRC involvement, particularly in the area of approving actions to be taken, is much greater?

It is highly likely that the Sholly decision would have a major impact on the TMI-2 cleanup and will result in further delaying its completion. In large part this is due to the very detailed Technical Specifications which now govern activities at TMI-2. NUREG-0432, Three Mile Island Nuclear Station Unit 2 Technical Specifications, Appendix "A". These requirements, issued in February 1980, were obviously written before the details of the TMI-2 recovery program were known. And they will certainly need to be modified during the course of the recovery efforts. Even though recovery operations are still at an early stage, the TMI-2 license and the Technical Specifications have already been amended a number of times since the new Technical Specifications were issued. Other amendment requests are pending. It is anticipated that many of the changes which will be needed in the future, like those already issued, will be accompanied by "no significant hazards consideration" findings. See, e.g., Notice of Issuance of Amendment to Facility Operating License, 46 Fed. Reg. 11747 (February 10, 1981) (reservation of waste water tankage for TMI-2 rather than TMI-1).

We would assume that hearings would be requested on at least some of these changes. In this connection, it is worth noting that four separate hearing requests were filed in connection with the adoption of the February, 1980 Technical Specifications. Any hearing would necessarily delay the effectiveness of an amendment. And amendments will certainly be needed at many points during the cleanup. Therefore, the Sholly decision will clearly delay the cleanup process.

8. Where the NRC is unable to arrange for amendment of a license sufficiently far in advance to avoid an unnecessary shutdown, as in the case of a refueling, what are the potential consequences of the Sholly requirement that a hearing be held prior to plant restart?

This information is set forth in the Affidavit of Roger S. Boyd, dated December 3, 1980, attached as Exhibit A to Metropolitan Edison Company's Petition for Rehearing and Suggestion for Rehearing En Banc, and is summarized in my written testimony at pages 3-4.

I hope that these answers are helpful in your consideration of the Sholly case. I would be happy to furnish any additional information that would assist you in these efforts.

Sincerely,

Jay E. Silberg

JES/rf

NUCLEAR POWERPLANT LICENSING DELAYS AND THE IMPACT OF THE SHOLLY v. NRC DECISION

TUESDAY, MARCH 31, 1981

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON NUCLEAR REGULATION,
Washington, D.C.

The subcommittee met at 9:15 a.m., in room 4200, Dirksen Senate Office Building, Hon. Alan K. Simpson (chairman) presiding.

Present: Senators Simpson, Domenici, Symms, Stafford, and Hart.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Well, I do apologize. I think it was just one of those days in Washington when everyone came to work, which is extraordinary because I left at 8:15. I owe you an apology and convey that.

I think it appropriate to just make a comment, I am sure that our prayers wing out to our President and to Jim Brady today and agent McCarthy and officer Delahanty. God bless them and their families and love them.

We meet today to continue hearings on these two important issues regarding the regulatory process. The first of these is the projected delay in the NRC issuance of operating license for plants that are expected to be completed within the next several years. The second of course is the impact of the November 19, 1980, decision of the U.S. Court of Appeals for the District of Columbia Circuit in the *Sholly* v. *NRC*.

As I pointed out especially to you at the table on previous occasions, the growing delays in nuclearpower plant licensing are a matter of deep concern and some frustration to me. When the Commission last appeared before this committee it projected that of the 13 plants expected to be completed in 1981 and 1982, 12 plants would likely experience licensing delays totaling some 90 months. Subsequent reports from the Commission now indicate some improvement for several of these plants, totaling reduction of about 20 of the original 90 months of projected delay. That is due to the increased NRC staff work already in progress but those reports have also indicated potential licensing delays for a number of other plants expected to be completed in 1983 and beyond.

During the past month the Commission has taken a number of actions intended to address the licensing delay problem. At least some NRC staff resources have been redirected to the work of the licensing caseload. The Commission has held several meetings to explore these various options for administrative and legislative action to expedite the licensing progress and process. Those options have been set forth in a report to the Congress submitted earlier this month.

The Commission has also of course submitted a legislative proposal that would authorize the Commission to permit interim operation of new nuclear plants upon a determination that, one, such action is necessary and in the public interest in order to avoid the consequences of unnecessary delay in the operation of the plant; and two, that in all respects other than the completion of the hearing the requirements of the Atomic Energy Act are met. Interim operation under the Commission's proposal would be limited to not more than 5 percent of full power and the Commission's interim operation authority would expire at the end of 1983. In addition to these measures the Commission has issued for brief public comment a series of proposed changes to its rules of practice that are intended to expedite the licensing hearing for these plants. A proposed rule has also been issued to incorporate post-TMI changes to the Commission's requirements for construction permits, merging those changes into the NRC regulation.

The witnesses here last week provided widely differing views on the actions taken thus far by the Commission as well as on the other options identified by the Commission to assist in addressing the licensing delay problem. Some witnesses are of the view that much greater commitment of staff resources to licensing and broader NRC discretion to permit interim operation of these plants at power levels above 5 percent are needed in order to deal effectively with the license delay problem. Other witnesses argued that the Commission's legislative proposal, even as presented, and portions of its proposed rule on hearing procedures represent an unnecessary infringement on the public's opportunity to participate and the NRC licensing proceedings may not result in shorter licensing time. So, of course, that issue of public participation is a very key thing that I believe must be preserved at each instance.

So, our hearing today should provide an opportunity to explore with you members of the Commission both the extent to which these various measures can be expected to reduce the anticipated licensing delays, and the likely impacts these measures will have on other activities of the agency and upon opportunities for public participation in the licensing process. And, of course, we will examine here this morning the impact of the recent *Sholly* decision which held, of course, that the NRC may not issue a license amendment even if there is "no significant hazards consideration" until the completion of any questioned hearing. The Commission in its proposed legislation to overturn the *Sholly* decision argued that if hearings are requested in many of these cases, "there is the prospect of curtailment of nuclear plant operation for reasons unrelated to protecting the public safety."

The Commission also contends that a series of such hearings would "severely tax the already strained resources of the Commis-

sion's staff and divert its attention from more pressing matters." So there are serious concerns as well and we look forward to discussing with the Commission the NRC legislative proposal on the *Sholly* decision during the hearing this morning, and we are fortunate indeed to have all of the members of the NRC with us this morning. Senators Hart and Symms will be here shortly and I will place their statements in the record at this point.

STATEMENT OF HON. GARY HART, U.S. SENATOR FROM THE STATE OF COLORADO

Senator HART. Mr. Chairman, I want to commend you again for the effective leadership you have shown as chairman of this subcommittee and for your willingness to explore several diffficult issues that have emerged from the shadows of the Three Mile Island accident. We are addressing one such issue today. I would frame the issue as follows: Whether unnecessary delays in the NRC's licensing process will prevent the NRC from disposing of an operating license application prior to, or within a reasonable time after, completion of construction on the powerplant.

Before we hear from the Commission on this issue, I want to make three comments. First, I am concerned that inefficient use of available staff and resources, in addition to the general inadequacy of resources, has resulted in unnecessary delays in license application reviews and in additional costs to ratepayers. The lack of resources stems, in large part, from the overall limits on Federal spending that affect the NRC as well as the rest of the Federal Government. It seems unlikely the Congress will remove those limits, at least while the current economic climate prevails. The Congress can, however, do something about the inefficient allocation of available resources within the NRC, and I will consider carefully any proposal to improve the efficiency of the licensing process.

At the same time, however, the two legislative proposals submitted by the NRC—one to overturn the decision in the *Sholly* case, the other to grant the NRC interim licensing authority—seem for the first time to inject economic factors into the NRC's licensing process. Since the beginning of the U.S. commercial nuclear power program, the NRC and its predecessor agency, the Atomic Energy Commission, have had a clear statutory mandate to protect "public health and safety, and the common defense and security." Now, the NRC has asked the Congress to enact legislation that would broaden this mandate to include protection of the "public interest."

The phrase "public interest" is like a chameleon—its definition changes to suit the issues of the moment. It could mean anything to anybody. The subcommittee should scrutinize the two NRC proposals and determine whether the phrase "public interest" lends itself to an unchanging, consistently applicable definition. If not, we should reject it.

The public interest presumably includes economic considerations, such as the additional costs to the ratepayer if a completed plant stands idle or, perhaps, even the financial consequences to the nuclear industry if the public perceives extensive licensing review as an indication of the uncertainty over the safety of nuclear powerplants. I am concerned that legislation permitting the NRC

to balance these economic considerations in its licensing reviews will compromise the NRC's efforts to protect public health and safety.

A second comment: Persons on both sides of the nuclear debate have commented recently that the NRC has an obligation, duty, or responsibility to issue operating licenses. I would emphasize that the primary mission of the NRC is not to issue operating licenses but rather to conduct health and safety reviews of license applications. The issuance of an operating license for a plant that meets health and safety requirements flows naturally from that review. But it is not necessarily the ultimate purpose of the NRC's activities.

Finally—as my third comment—I have the feeling that some of the urging for a streamlined NRC licensing process rests on the premise that hearings and public participation are mere administrative burdens that add little of substance to license application reviews. This notion suggests that the NRC and the industry know best, and that they need not concern themselves with the public's viewpoint.

This is a worrisome notion for two reasons. First, because it is very hard to prove a negative, no one can say precisely how many Three Mile Islands have been avoided because intervenors raised substantive health and safety concerns that the NRC may not have fully considered. If the lessons of Three Mile Island have taught us anything, it is that the licensing process should allow for more, rather than less, public participation.

Second, the chances that nuclear power will survive as a viable energy alternative depend, in large part, on whether the public perceives that the NRC adequately protects it from the hazards of nuclear power. That perception will become increasingly more negative if the public is denied the right of meaningful participation in licensing decisions.

Mr. Chairman, I reiterate my concern about the problem of unnecessary licensing delays and my willingness to entertain any proposals that will make the licensing process more efficient. At the same time, however, I intend to insure that the public continues to enjoy the right of meaningful participation in the licensing process.

I look forward to working with you, Mr. Chairman, in developing an appropriate response to this problem.

STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Mr. SYMMS. Mr. Chairman, I have just a few, brief comments as we continue these important hearings on nuclear powerplant licensing delays and the impact of the *Sholly* decision.

I would certainly agree with the Commission's characterization of the licensing delay problem as an "extraordinary situation." For the first time in the history of the commercial nuclear power program, we face a situation in which literally dozens of plants will sit idle awaiting completion of the licensing process, at a staggering cost to the utilities and their ratepayers. The Commission has identified a range of options for reducing these delays, as you point

out Mr. Chairman, but progress does not yet seem to be assured. I have several concerns here.

First, although many possible changes to the licensing process have been identified by the Commission, it appears that few of the decisions needed to move ahead with these changes have yet been made by the Commission. Until those decisions are made, the somewhat optimistic projections of reductions in these delays may not take place.

Second, the low-power testing restriction in the Commission's legislative proposal for interim operating authority may unduly restrict the effectiveness of the proposal in actually reducing the present licensing delays.

With respect to the *Sholly* decision, it appears that the Court's decision would require that NRC hold hearings before instituting even the most trivial and technical types of license amendments simply because a hearing is requested. I am concerned that such a requirement stands as an open invitation to those who might seek to use the hearing requirement as a means to hinder or halt operation of plants for nonsafety reasons.

Mr. Chairman, I look forward to hearing the views of the commissioners on these issues.

Senator SIMPSON. Without further ado, I believe Chairman Hendrie, you have a statement on behalf of the Commission.

STATEMENT OF JOSEPH M. HENDRIE, CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY VICTOR GILINSKY, COMMISSIONER; PETER A. BRADFORD, COMMISSIONER; AND JOHN F. AHEARNE, COMMISSIONER

Mr. HENDRIE. Yes, Mr. Chairman, I do. Thank you very much.

We are pleased to be here with you today to urge enactment of two pieces of proposed legislation. The first of these is an amendment to section 198(a) of the Atomic Energy Act to overturn the principal adverse ruling in the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Sholly* v. *NRC*, which you have referred to. That proposal was submitted to you by letter of March 11 and I ask that the letter and the supporting memorandum be included in the record.

The second proposal which was submitted by letter on March 18 would authorize the Commission to issue an interim license for low power operation and testing in advance of any required hearing. Again I would ask that the letter be included in the record.

Senator SIMPSON. Without objection it is so ordered. [See pp. 183 and 191.]

Mr. HENDRIE. I would like to discuss these two legislative proposals in turn, drawing principally from the prepared statement that I brought down today. In order to have all the glorious prose of that statement here in the record, I might ask that it just go in as a chunk, Mr. Chairman, and I will divert from it occasionally as we go along here.

Senator SIMPSON. Without objection it will be. [See p. 170.]

Mr. HENDRIE. With regard to the proposed legislation on licensing amendments involving no significant hazards consideration, that is the *Sholly* legislation, the situation that requires it is that a

three-judge panel in the District of Columbia circuit has ruled, erroneously in our view, that:

> The Commission must hold a prior hearing on demand from any interested person before it can issue any license amendment, even if that amendment involves no significant hazards consideration.

Now that phrase went into the law in section 189(a) back in 1962 when the Congress enacted some amendments to the Atomic Energy Act. Their specific purpose as we understood it was to allow the Commission to act on matters that had no significant hazards consideration, to amend a license for such actions, without requiring the completion of a prior hearing when it was requested, if one was requested.

The District of Columbia circuit presumes in *Sholly* to tell us that we are wrong. I understand that a copy of the court's original decision as well as a copy of the recent statement of the four judges of the circuit bench who disagreed with the majority on a rehearing petition was supplied to you and I would expect that would make a useful object for the record as well.[1]

The Solicitor General has filed a petition to the Supreme Court to take the case up and we will supply that to you too if we haven't already.

While we certainly believe that our view of the law is correct, whether or not the Supreme Court will take the case and whether we will ultimately prevail is uncertain. In any event that is a year or more away. In the meantime the *Sholly* decision raises the potential for real havoc with the regulatory process, and that is why we seek legislation at this time.

The main problem with the *Sholly* decision for us is that the ruling is that NRC must hold a hearing on request before it can act on an amendment involving no significant hazards consideration. Now obviously if we do have an amendment that does involve a significant hazards consideration, then we agree that a hearing must be offered and if requested it must be held before we act on it. But we are dealing here with a class of amendments that involve no safety questions in our view of any significance.

Now our practice is and our rules require that if the hearing is held it's an adjudicatory hearing and we seem unable to get through those things in much less than a year. I suppose on a fairly low key amendment you might manage it in 6 months if the people who wanted the hearing didn't litigate too fiercely. But if they do, why you are looking at a process that can run a year or more.

The practical effect of the court's ruling is really to make it questionable whether we can continue to regulate in a sensible way the operating reactors that are out there. Over the past 4 years we have issued something like 1,600 amendments to operating licenses based on a determination that no significant hazards consideration was involved. Over the past few months we would have had 20 plants out of the 70 or so with operating license down for indefinite periods of time if this ruling had been operative.

And they would have been down for reasons which have little or nothing to do with safety in our view. The large number of license

[1]The materials referred to have been received and are retained in the committee files.

amendment actions of this kind which the Commission must act upon each year, something like 400 a year, comes about because of the kind of detailed license that we prescribe for these plants. A license like the one that the court looked at in the *Sholly* case for instance is hundreds of pages long, highly detailed technical specifications. Any changes anywhere in those hundreds of pages is considered a license amendment, and you just run a number of those every year. A refueling for instance, the composition of the core changes slightly with the fresh fuel that is added, shuffling of the old fuel, the technical specifications may contain say for instance some flux ratio to limit operation to a safe region, and the ratio may be 1.17 in the current license. You refuel, you do the same calculation and find in a perfectly straightforward manner the ratio should be 1.15 for the next operating cycle. That is a license amendment. It is not a safety consideration, there is no significant hazards consideration involved but under the *Sholly* decision you would have to have a hearing—if anybody doesn't like the plant, they may request a hearing and you can litigate 1.15 from 1.17 for a year or more, together with all of the other issues that a clever counsel can bring into the case to extend it.

It is a result, the court decision is a result which upsets 20 years of standard practice and acceptance throughout the business in terms of interpretation of the legislation, and is going to leave us if it stands darn near unable to operate. We just don't believe that the Congress intended nuclear regulation and the operation of these powerplants to be subject to unpredictable interruptions every time the NRC receives a hearing request on a matter that doesn't have much to do with safety.

If that is the case, then we can't have this industry and if you apply the same rule anyplace else I would suggest in this society you can't have any other industry either. Yet such consequences are plainly possible under the court's ruling. Of course we don't know how many hearing requests we will get if the ruling stands but the court's opinion clearly provides an incentive for such rulings and for people with some reason not to like their local powerplant it is a tool to be used to keep it shut down.

Another option that we might take to try to get out of the situation is to take all those license documents, detailed technical specifications and say well, we now declare those not to be the license, the license is a piece of paper that just says "Smith Power Co. you can operate this powerplant," and that is the only thing that is the real license. Well in that case we wouldn't amend it very often I will agree and this wouldn't be a problem.

On the other hand we would also lose enforceability of all of those detailed technical specifications that we now propose for a plant and that we think are useful in closely defining the acceptable limits of operation of the plant, and thus in our view encouraging safe operation.

Now what we would propose in the amendment here to deal with the *Sholly* case is simply to amend section 189 of the Atomic Energy Act to make it clear that the Commission may in fact issue a license amendment which involves no significant hazards consideration and to do it without first holding a hearing. It would also clarify section 189 in the sense that it would make clear that the

act does not limit the NRC's authority, or that section doesn't limit the NRC's authority to take immediate action by amendment or order to protect the public health and safety and interest or the common defense and security.

I would like to note on Commissioner Gilinsky's behalf that he would prefer the standard to be limited to public health and safety. He believes the addition of public interest tends to broaden NRC authority and that his proposed language of public health and safety more precisely reflects the standard NRC actually employs. But the Commission unanimously believes that the legislation is needed to overturn the adverse effects of the *Sholly* decision on our ability to regulate nuclear energy.

So let me turn now to the second piece, because there is another area in which we find we have to come to you for legislative help with the problem we have. The second piece of legislation is that asking that we be given authority to issue an interim operating license for fuel loading and low power operation testing. This piece of legislation is a temporary cure for an extraordinary and we hope, temporary situation, namely the licensing bind that we have found ourselves in after Three Mile Island, the delays you have already referred to, Mr. Chairman.

As you know, we can't issue an operating license under the Atomic Energy Act unless we have completed a hearing if there has been a request for a hearing from any person whose interest may be affected. In the past we have managed to keep the reviews coming along at a rate that a hearing could be held if requested and the plant still would not be completed, construction would not be completed, the hearing would come to an end, an initial decision would issue about the same time or before completion of the construction, so we managed to keep the licensing process, however long it may have taken for the operating license stage, it wasn't holding anything up in terms of the ability of the plant to go ahead and operate.

Now however, after Three Mile Island we have gotten ourselves into a situation where there are a group of about a dozen plants that are either now in hearing or are about to go into hearing in the coming months and in spite of the things that we are trying to do within our present authority to reduce the delays that seem sure to occur, I think it is clear that we simply don't have the capability to relieve the delays for all of those months.

The public interest impact of those delays has been discussed pretty extensively and for whatever one thinks of such points as to where the interest charges should lie, it is clear that quite apart from those arguments the costs to consumers of these delays are going to be very, very large, in the order of tens of millions of dollars a month in many cases.

Now the proposed amendment that we bring to you to aid in this situation would allow the Commission if it finds such action is necessary and in the public interest in order to avoid the consequences of unnecessary delay in the operation of a completed plant to issue an interim operating license authorizing fuel loading and low power operation and testing in advance of the conduct or completion of any required hearing. In all other respects except the completion of the hearing the requirements of the Commission

would have to be met. That is the public health and safety requirements would have to be met, the common defense and security requirements, the environmental findings, and then we would have to make a finding that it is in the public interest to avoid the unnecessary delay that might otherwise occur. Furthermore, whatever hearing was requested would still be held and any terms and conditions deriving from that hearing would certainly apply to the plant when the hearing was complete.

The proposed amendment would simply allow us to issue a license for the operators of the plant to go ahead and load fuel into it. They could then do the zero power testing, move on to low power testing and get at least that much of the operation, the startup operation of the plant underway before the hearing was completed. We think that it would be reasonable to limit the application of this sort of temporary cure to the group of plants which appear to be impacted under our current schedules, and we put a termination date then on this authority of the end of 1983. That covers the group of a dozen plus a few months' latitude after that, depending on when Congress might act on this bill.

Now the gain from the legislation is obviously going to depend a little bit on the individual case. My own assessment is that it is worth an absolute minimum of 2 months in the operation of a plant because I don't see how you can get through the work that would be authorized under this legislation in less than 2 months. My guess is that for most plants it would be more like 3 months. And then you may save a great deal more time in any given case because inevitably if you start up operations, as you go from one level to another you will find things out about the plant that you really couldn't test until you reached that level of progression in the startup. And if you come along and you start your 5 percent testing and you discover something that you didn't know before, that you have to take out valves or put new seats in them or whatever, that is it is going to have to go back to the manufacturer and will take a couple months, this provision could save you that time by getting you started on that process that much earlier. So there is the opportunity for really substantial time saving here.

We think that, speaking for the collegial body we have come forward with this proposal with a 5-percent limit, 5 percent of normal full-power limit on it, on the basis that that limitation to low power together with the termination at the end of 1983 so it just covers this group of plants represents really a minimal intrusion on our normal review, licensing, and hearing process. We recognize it is in fact an intrusion because in cases where it is applied why you are letting the plant go ahead to these low power things before you have completed the hearing. But it is my view in this situation the alternative is consumer costs that are going to be very high.

I should note that my colleague, Commissioner Ahearne, while he supports this low power interim licensing at this time, thinks that full power interim licensing may be necessary if significant improvements aren't made in the reactor licensing process. In particular Commissioner Ahearne believes the Commission should direct the licensing boards to decide only issues of substance that have been raised by the parties and manage the proceedings with a

strong hand. He recommends raising the threshold for admitted contentions and limiting the sua sponte authority of the boards, and without such changes he feels that at some time in the future we are likely to be back here requesting full power interim licensing authority.

I should add my own comment that first the proposition from the Commission which we all support for the low power interim licensing authority I think is a very important one and will have a very valuable saving, very large savings to consumers. For myself I would have been willing—and am willing—to ask for interim authority for full power operation, having in mind that my best guess is that out of the group of plants we talked about there are only about six which would need that, and the number might be a couple smaller than that. But I think there is a sort of hardest hit group within the dozen or so for which even if low power interim licensing authority will not keep them from having substantial delays and the people who buy their electricity will incur substantial additional cost.

Mr. Chairman, I thank you very much for your time and attention here and we would be glad to answer questions as we can.

Senator SIMPSON. I thank you very much, Chairman Hendrie. If any member of the Commission would like to comment briefly, very briefly, then we will get into questions and you can each respond if you so desire.

Yes?

Mr. BRADFORD. I do have a brief comment, Senator.

Senator SIMPSON. Please proceed.

STATEMENT OF PETER A. BRADFORD

Mr. BRADFORD. I do support the interim 5-percent licensing measure and proposed so-called Sholly amendment procedure before you today, and I join in the written Commission statement on those points. I want, however, to take a moment though to speak on the importance of the hearing process itself, and to respond briefly to the question why we undertake these time-consuming inquiries that are sometimes imprecise and often expensive. If we are to tamper with hearings without doing violence to their purpose and their benefits, real and potential, we must remind ourselves just what the purposes and benefits are.

The fact is that nuclear power is a uniquely favored industry in terms of its relationship to local fears and concerns. All of the operating plants and all of the plants whose delay we are concerned about today were exempted by the preemptive sections of the Atomic Energy Act from any sort of State or local regulation of a radiation hazard that could force the plant's neighbors to evacuate their homes or that could in the most unlikely case, render the homes uninhabitable for decades.

In terms of basic American tradition of State and local government, this was a breathtakingly radical step, one that could probably only have been taken in an era in which public faith in the benign omniscience of the Federal Government ran much higher than it does today.

Furthermore, as if present concerns weren't enough, the two-step licensing process postponed the hearing of many serious safety

questions until the operating license hearings, after the plant was already built and an immense financial and social commitment made to its operation. While even the more enlightened representatives of the industry would prefer more thorough construction permit hearings today, the fact is that the historic process was set up to suit the needs of the rapidly developing technology, and the plants in the operating license hearings today received construction permit reviews that were not only pre-Three Mile Island, but were often the Atomic Energy Commission's equivalent to a lick and a promise.

Against this background, the NRC hearing process can be understood as the Federal side of two bargains. First, all effective State and local scrutiny of radiation hazard was preempted, but those concerns could be raised and examined in depth in Federal hearings. Second, plants could be built on the basis of relatively flimsy construction permit reviews on the understanding that at least the operating license hearing and review will be thorough. While the proposal before you today can be reconciled with these commitments, others now under discussion in the Commission and in the parts of the Congress would go back on both of these commitments by making the hearing process even more of a sham in terms of effective safety review than it may be considered today.

We look to public hearings to serve two purposes. They should provide a strong and skeptical independent check on the NRC's internal reviews, and they provide the only avenue for citizens to resolve concerns about a new and serious hazard being introduced into their communities. When we talk of streamlining them, we must keep these purposes and the bargains that underlie them in mind.

To curtail discovery or to limit contentions or to impair the boards abilities to inquire into serious safety concerns is to break this bargain. To seek to preempt hearing rights through sweeping rulemaking action is equally unfair unless the Commission is not only empowered but instructed to assure that skeptical public voices are effectively heard from during rulemaking procedures.

As you proceed to consider changes to our process beyond those presented in the Commission testimony, I urge that you keep in mind that the need for serious public concerns to be effectively heard is every bit as urgent as the need to issue a few more licenses per year. Without this balance, both the public's confidence in nuclear power and the thoroughness of our own licensing reviews can only go downhill.

Senator SIMPSON. Thank you very much. I assure you we will keep in mind those concerns.

Well, the February report to Congress on the expected licensing delays projected an improvement for several of the plants expected to be completed in 1981 and 1982, and a total improvement for the 12 impacted plants of some 20 months. Now your next report is due today, is that correct? I think that is so.

Mr. HENDRIE. Let me look over my shoulder and see if the keepers of the report are here.

Senator SIMPSON. Check with the keepers of the report. That would be fine.

Mr. HENDRIE. I see nods back there, Mr. Chairman. I take it that it is indeed due today.

Senator SIMPSON. Could the nod be converted to figures? Can you tell me what your forecasts are for this month?

Mr. HENDRIE. I think I can do that at least in a rough way because I am not unaware of what has been circulating in drafts. For the group of plants, the ones we call the impacted plants, the ones for which delays appear likely, the group to get operating license from now until mid-to-late 1982, that group of a dozen, the report which is due today will not show any particularly useful changes in the scheduled dates. In fact I think they don't show any changes of the decision dates at all.

The reason for that is that the potential time savings from some of the measures under consideration by the Commission will not have been worked out yet into this set of schedules, in particular because most of these cases are already apparent in terms of the individual characteristics of the issues. In order to make decent schedules one needs to know at what time a Commission action will become effective, if we take an action, and so the schedulers have not felt able for this group of plants to include these things in yet.

So if you look at the February report I think you are very close to, with maybe a couple exceptions you are very close to having the current table. However that current table will indeed change as we come to grips with some of this assortment of things that we have under consideration that we have written you about. We have had a long series of meetings on these subjects, as a matter of fact we have another one up this afternoon, and we will be getting back to these things, seeing what the sentiment of the Commissioners is on various points.

Senator SIMPSON. We will be looking forward to those forecasts because that is our only way of determining whether these administrative changes are being made.

Could you summarize briefly what actions you have taken to redirect NRC's staff resources to the licensing casework, specifically, I think I would appreciate knowing how many people are now performing work on operating license reviews, on construction permit reviews. Of those how many have been redirected from other efforts, what were those efforts, and what will be the impact of this action upon those other functions?

Mr. HENDRIE. We have had a discussion with staff a couple weeks ago, Mr. Chairman. On the basis of schedules which were then being used, it looked like we needed to shift something like 125 additional professionals into the licensing activity, and something like $5 million this year and $7.5 or $8 million next fiscal year to add to the forces that had already been programed into those areas in the base budget.

Now this additional increment of staff resource and people and funds was calculated on the basis of trying to meet applicant projections of completion dates for plants in 1983 and after that. There is some question about whether those were exactly the right dates and we are working with applicants where we disagree on completion dates to see what the best date to use is for resource scheduling purposes.

We haven't then committed the whole 125 people and additional funds, all of the funds to NRR. What we have told the Executive Director and Mr. Denton to do is to start moving people into the effort to cover about half, to get about half-way because the difference in apparent need for forces between our dates and applicant dates was just about half of this force. So we have started to implement those staff redeployments but they don't go all the way to the full number that we are projecting here based on one set of assumptions. We are trying to find out if that is the best set of assumptions to work on.

What I would like to do now is turn and ask Mr. Dircks and Mr. Denton and Mr. Bickwit, singly or jointly to supplement my scattered summary and to bring you up-to-date as to where we are.

Senator SIMPSON. If they could, I would appreciate that, and also perhaps they would respond not only to the issue of redirecting of resources but reassignment of other NRC staff members to work on operating license and construction permits and what has transpired with regard to that. Please, if they would.

Mr. DIRCKS. I would start off by saying how we move people from other activities in the agency into Mr. Denton's office and he could pick up how he is assigning those people within his office, if that is satisfactory.

Senator SIMPSON. That is satisfactory. I would appreciate your doing that.

Mr. DIRCKS. We made a proposal to the Commission several weeks ago to move the equivalent of 125 professional staff into the licensing process. When I say the equivalent, we are talking about not only moving people from one part of the agency to the other, we are talking about moving projects from the impacted licensing office to other offices to make more people available for Mr. Denton's work.

We have not gone all the way with that proposal because the Commission doesn't want to look at impacts as we go along. We have some 30 additional people in the process of moving to Mr. Denton's office because we picked up some economy in staffing when the Commission approved, the merger of the Office of Standards and the Office of Research, and we were able to pick up some additional positions in that respect.

We are also looking at the new hires that are now coming into the agency as a result of the lifting of the personnel freeze, and we are diverting those people, where qualified into the licensing process. We are also talking about contracting out some parts of the technical reviews to laboratories which have the skills that we need. I think as Mr. Denton will get into, we are not only limited in staff numbers, we are limited in terms of skills and discipline. Some of these skills represent bottlenecks in the process and we are looking around at outside agencies and outside facilities to supply those skills to us.

We are talking also about moving funds around, to the extent we can, to allow the contracting out of work—not only the parts of the licensing review or the analyses that go into the licensing review—but also work that had ordinarily been carried out by the Reactor Regulation Office. We are talking, in terms of fiscal 1981, about approximately $2 to $3 million of funds that we could possibly

reprogram into this activity, and we are also talking, in terms of additional 1982 funds and when we can pin down those funds more exactly we will be coming back to the Commission and to the Congress to ask for a new program.

I think with that point, Mr. Chairman, I will let Mr. Denton say how he is reallocating those within his office.

Senator SIMPSON. I would appreciate your comments on that, Mr. Denton. And thank you, Mr. Dircks.

Mr. DENTON. Our basis for reallocation assumes that we will be able to maintain or improve the schedules that were in the February report to Congress and avoid all delays to the plants in 1983. So that was how we arrived at what sort of resources were necessary to achieve those objectives. About 80 percent of the reallocation is coming within the office that I have and about 20 percent of the resources are coming in from the outside. We have mandatory overtime, for example, in the pay period the staff was working about 12 percent overtime. The hiring freeze is lifted so we expect to be able to hire up to ceiling. We are farming out, through contractual assistance, as much of the operating reactor work as we can. We are farming out technical assistance and resolving unresolved safety issues and generic issues to the extent we can and taking those people in who would be working on reactors and assigning them to case work. We are deferring about 10 man-years of effort all together, things that just won't get done. These are our lowest priority activities, they are ones we feel comfortable deferring during this crunch. They are things we want to do some day but they don't have to be done today. The other offices have agreed to take on some items they are uniquely suited to do being out in the plants themselves. So over all we are trying to find the equivalent of 125 man-years but it is coming in at a slow rate. The items that we defer make people immediately available. People being transferred in become immediately available. Spending the dollars transferring responsibility though is slow. So far though we have been able to maintain the schedules that we gave in February.

I can go into more details on how we split it down but I think the key is we are actually deferring very little of the activity that had been scheduled, and none of what I consider essential safety activity. We are getting those jobs done through contractual dollars or through other offices.

Senator SIMPSON. So you feel very strongly that you are not impinging on anything that would have anything to do with the public health and safety?

Mr. DENTON. We are not cutting back at all on unresolved safety issues—the TMI action plan items—and I concur in the statement you made, that we are not cutting back on essential safety activity. We have included in this budget the staff we need to process the expected remaining construction permit applications that are still awaiting final Commission decision. We also budgeted for a lot of upcoming workloads that are not normally very visible—a number of license renewals coming up for research reactors, the Indian Point hearing coming up—so it is not just budgeting for the OL workload. We are trying to project the total number of activities that we might be involved in over the next month.

One interesting number, by the end of the year there could be as many as 60 hearings that we had been involved in in one form or another, either OL's or spent fuel pool amendments or license renewals. So it is a potentially large amount of work that we have to do over the next few years to handle all of those plus process expeditiously all the OL applications.

Senator SIMPSON. What further improvements beyond those predicted in your February report to Congress can we expect from further NRC staff increases on this licensing casework, both for the plants to be completed in 1981 and 1982 and those to be completed in 1983 and beyond? What further improvements do you see beyond those predicted in the February report?

Mr. HENDRIE. The reallocation, redeployment of staff resources, Mr. Chairman, has its main effect on the longer term problem. The problem kind of comes in two pieces, the short-term problem, the long-term problem. The short-term problem is a group of plants, about a dozen of them that come up for completion in the next year roughly, where we are simply behind because of Three Mile Island, behind by up to a year or more, maybe even a year-and-a-half in some cases. But as we look at schedules for plants that will be completed in 1983, 1984 and on out, we find that if we don't move now to put more staff resources than we thought, say, last fall when we made up the budget we are now considering, on those cases and redeploy now, why we won't bring those cases along in a timely way and they in turn will begin in due time to show that no, we are not going to complete the licensing process until after construction is done. So if we don't act now we are just going to propogate this impact problem on down the line in the future.

Now we don't want to do that. The agency has always in the past, for however much we have been criticized for being slow moving in hearings we have at least managed to do operating license reviews and hearings, in a timely way, and we had our license decisions ready to go when plants were done and could use them. And we want to get back to that situation.

Now the staff reallocations then are primarily to deal with that long-term problem. There is some help but only a limited amount for cases that are already in hearing, the short-term cases, the ones already in hearing. The bulk of the staff review work, preparation of the safety evaluation reports, the supplements, the ACRS review, all of that is already done so there is no way you could double the forces and get back any time on it.

With regard to the long-term plants then, the scheduling improvements that we project, and I think not unreasonably project, are that we simply aren't going to have any delay out in 1983, 1984 and beyond. It's the aim of our present redeployment efforts to get to that situation so that—I am not quite sure, it seems to me the February report shows delays out——

Mr. AHEARNE. But it just covered 1982. It picked up a little in 1983.

Mr. HENDRIE. If we hadn't done the redeployment our in-house schedule suggested we were going to be in deep trouble. So the redeployment is to put us in a position so we don't have this problem past the immediate group of plants.

Senator SIMPSON. That is in essence what I was inquiring of and Harold Denton addressed. You have pulled it back together for me. About when we see the corrective action taken on the impact of plants in the present and in doing that and reallocation and reassignment we will have effectively then reached a point that those long-term plants 1983 and beyond will not suffer the same deficiencies and delays that have been suffered at the present time.

Mr. HENDRIE. That is correct, barring obviously in any given case some untold circumstances that we just don't anticipate.

Senator SIMPSON. I might ask Commissioner Bradford, since you and I have discussed this, are you concerned about this redirection of staff? You had indicated to me previously your concern about that.

Mr. BRADFORD. Yes, I am, and I remain concerned about it. One of the virtues of the proposed interim 5 percent operating license is it seems to me it relieves some of the pressure to solve the problem exclusively through staff reallocations. The process of reallocation is such that at the moment it would be very hard to tell whether there were significant impacts. That is, what has been done is for the staff to commit itself to issue a series of safety evaluation reports for particular plants by particular dates. Granted the generic issues may not slip, or TMI action plant items may not slip, the fact is giving the issuance of these SER's top priority means that inevitably some programs, certainly the updating of the standard review plans and in all probability some of the related evaluation of the plants, will slip and we may not be aware of it until Commission deadlines for these items have come and gone.

I would be much more comfortable with this entire exercise if together with this table and the impact on plants you had also before you the table of whatever, four, five, or six safety programs you considered to be the most important, together with the important milestone dates that the Commission had established on those, and that both you and we at the same time we examined the plants, examine slippages in those areas.

Senator SIMPSON. Thank you. The Commission has requested public comment on the proposed rules to modify the hearing procedures that are intended to expedite the hearing process. Let me just inquire if those programs are adopted by the Commission how effective they really will be in expediting the hearings? What type of results do you believe we will see in that?

Mr. HENDRIE. The ones, particular parts of those rule changes which people have commented on most vigorously I think have to do with the part of the process in which the parties try to gather together and get focused on the particular issues that will be argued about in the hearing itself, that is the preevidentiary hearing phase of the process which starts when the staff files its last supplement to the safety evaluation report and presumably is then ready to write its testimony and go to hearing. Between that time and the time the evidentiary hearing formally opens, that period of time appears to be running, well we haven't had enough operating license hearings in the last 2 years to give us a very good statistical base you understand, but looking back it appears to have run all over the map, even as long as a year in some cases. Now it just seems to everyone that it ought not to take that long after a case

has been in process so to speak for a couple of years, for everybody to gather their forces together, get organized and get into the hearing. And what we are hoping to do is to get that time down to something on the order of 5 months maybe.

Now, the rule changes that we have put out for comment are just that. They are out for comment and there is not a commitment on the part of the Commission to adopt any of the changes. And as you may detect as the day goes on there are obviously substantial differences in the views the Commissioners take about these problems. The discovery rules probably are the ones which raise the most heat.

Senator SIMPSON. Let us come back to that. That will be the most controversial one, with regard to the elimination of formal discovery by the NRC staff. I will come back to that but at this point let me ask Senator Hart if he wishes to participate in the questioning, and certainly he has made some extraordinary contributions to this subcommittee.

Senator Hart.

Senator HART. Thank you, Mr. Chairman.

Chairman Hendrie, let me see if I can understand what the Commission is proposing in terms of changing the way in which it will go about issuing licenses, because it seems to me it has the potential to be fairly dramatic.

You are suggesting two statutory amendments as I understand it, one which would permit you to issue license amendments without a public hearing if the Commission determines the amendment would involve no significant hazards consideration, whatever that means. And then would also grant you the authority to take immediate action by amendment or order to protect the public, health safety and interest. What I would like to pursue first of all is what those two phrases mean to you individually, perhaps each of you individually, and whether or not this may be a fairly significant departure in the history of nuclear licensing in this country.

What does no significant hazards mean in practical terms?

Mr. HENDRIE. It means no significant questions of public health and safety.

Senator HART. As determined by whom?

Mr. HENDRIE. The Commission.

Senator HART. Without public participation?

Mr. HENDRIE. Without hearing.

Senator HART. Which is to say without public participation.

Mr. HENDRIE. People can always write us letters to petition or whatever and present arguments that they may have one way or another and submissions to the staff and to the Commission, but without hearing.

Senator HART. How will they know that you are considering an amendment so that they can write these letters? Will there be public notice?

Mr. HENDRIE. We don't present notice on these things, that is right.

Senator HART. What is going to cause somebody to sit down and write a letter?

Mr. HENDRIE. If it is a trivial change it seems to me people are unlikely to write letters, unless of course their aim is simply delay for delay purposes and unrelated to public health and safety.

Senator HART. That didn't answer my question. My question is if there is no public notice what is going to trigger someone to sit down and write you a letter? How are they going to know you are considering amending the license?

Mr. HENDRIE. I daresay they may not.

Senator HART. So they can't obstruct the process by writing a letter because they won't know the process is underway.

Mr. HENDRIE. They may or may not know. There would not be formal notice published in the Federal Register. In most of these cases people who are interested in them simply watch the flow of documents on the docket file which is maintained in the local public document room as well as here in Washington at the NRC public document room. They will see letters coming in from the applicant asking for a license amendment, some adjustment to the technical specifications perhaps on the occasion of fuel loading, something like that. So that they will know from the applicant's request to the Commission for amendment—would you mind please moving out of the line? I am trying to talk to the Senator and you are flashing that light squarely in my eyes.

Senator SIMPSON. If you would please, remain out of the line.

Senator HART. Let me try to put a finer point on the question.

Mr. HENDRIE. The point is you watch the docket file and you see an application come in from the applicant saying look, I need my technical specs amended and then following letters and indeed that is not a Federal Register notice but it is not precisely operating secretly either I suggest.

Senator HART. And there are not an awful lot of citizens who sit around reading those dockets either.

Senator DOMENICI. You would be surprised.

Senator HART. Let me explore the philosophy of the Commission itself and tell me here if I am wrong, or Commission counsel can tell me if I am wrong. Is there a precedent in the law for the Commission to make rather threshold judgments about what is or is not a hazard? Or has it not been the history of the Commission since its inception to have determinations of that sort made in public hearing with notice and with the right of any individual or group to participate to indicate whether it thinks there is in fact a hazard involved? In other words would this statutory amendment not give the Commission an authority that it has not had in the past?

Mr. HENDRIE. No, to the contrary. The Commission has always had that authority and in the case of license amendments has had it specifically since 1962 when the Congress made it explicit in section 189 of the Atomic Energy Act. What we are asking for is an amendment which makes clear to all what in fact the law has been and the way we have operated for 20 years.

Senator HART. You are saying you already have this authority and the amendment would be redundant.

Mr. HENDRIE. I am saying that at least there are three judges on the court of appeals that need more explicit language.

Senator HART. Well now, Mr. Chairman, what the court needs and does not need it seems to me is a determination for Congress and not for the Nuclear Regulatory Commission.

Mr. HENDRIE. I guess that is why we proposed this legislation instead of offering it for comment as a Commission rule, sir.

Senator HART. How would you interpret the public interest, as used in this proposed amendment?

Mr. HENDRIE. I think there are times when questions of reliability of the power supply, stability of an electrical grid and so on offer some considerations that ought to be taken into account in the Commission's ability to order a licensee to shut down or do other things. I think it would be helpful to have that aspect there.

Senator HART. Well it might be if one understood what it meant.

Mr. HENDRIE. Let me remind you, Senator, of the fact I can remember not all that long ago when I was down here and you and the members of this committee were suggesting to this Commission the importance of the number of barrels of oil involved in the shutdown of five plants because we thought the seismic design wasn't as good as it should be, a consideration we were told we were pretty cavalier about.

Senator HART. You didn't hear it from me.

Mr. HENDRIE. I certainly heard it in this committee room and in my view it was a legitimate consideration in that instance, and would come under the public interest thing.

Senator HART. I want to hear from Commissioner Bradford or any other Commissioners that want to comment, but I sense, regardless of your reading of the history of the Commission, a potential significant departure here in terms of the Commission's authority and apparently some members of the court believe so.

Commissioner Bradford.

Mr. BRADFORD. In terms of giving some content to the phrase public health, safety, and interest, I am most comfortable referring back to the case that in fact gave rise to this amendment, namely our effort to vent krypton at Three Mile Island last spring. It is that case in which a hearing was requested and we did not provide the hearing because we felt we had done a thorough assessment of the process already and there was a significent public interest including a health interest, but not exclusively a health interest in getting on with getting the krypton vented so we could get on with other aspects of the cleanup, and also getting it vented at the particular time last summer when for several reasons it seemed best to do so.

In a situation like that I am not uncomfortable with this public health, safety, and interest test being applied. For my own part I would be much more loath to go on and to apply it in a situation where the consideration was purely in barrels of oil, although I suppose it is not inconceivable that there might be some situation in which the barrels of oil weighed so heavily and the public health and safety so lightly that one might go down that path.

Senator SIMPSON. Excuse me, Senator Hart.

Senator Domenici has to leave at 10:30 and has a few questions.

Mr. HART. I can wait. I would just like to complete this one question.

Senator SIMPSON. Do you want to do that? When do you have to leave?

Senator DOMENICI. I can stay until about 10:35 after. I only have 5 minutes, Senator.

Senator HART. I only have one followup here.

Senator SIMPSON. Please go ahead.

Senator HART. Commissioner Bradford, do you believe that adding the phrase "public interest" does not therefore statutorily expand the Commission's authority beyond public health and safety and economic considerations?

Mr. BRADFORD. It would certainly make more explicit our authority to weigh economic considerations together with public health and safety. My own concurrence in this is very definitely in the total phrase public health, safety, and interest, so we are not free to go off and make up some definition of the public interest that is independent of the public health and safety and apply that. If the phrase were public health, safety, or interest that would not be acceptable to me. I consider the three, public health, safety, and interest to be in effect a cumulative test and not one in which the Commission can base a decision on any one of those three.

Senator HART. Mr. Chairman, I want to ask the committee staff counsel or whomever to advise us on the precedent for the NRC in effect to become an economic regulatory commission. I think the potential is there.

Senator SIMPSON. You certainly have that opportunity.

Senator Domenici, I appreciate your participation.

Senator DOMENICI. I just have a few questions.

As I understand it one of the recommendations that you have made, Mr. Chairman and members of the Commission, has to do with clarifying the *Sholly* decision. As I understand it for almost 20 years, you have been acting on the kinds of decisions——

Mr. HENDRIE. Precisely in the way we would propose to act if our legislative proposal were accepted and passed.

Senator DOMENICI. And as a matter of fact the Commission's decision that was litigated was a unanimous decision by the Commission, wasn't it?

Mr. HENDRIE. Our agreement to bring this legislative proposal——

Senator DOMENICI. I don't mean that. The decision that was taken up in *Sholly* was not anything you all disagreed upon.

Mr. HENDRIE. As I recall it that is correct.

Senator DOMENICI. Therefore, when you ask for this change have you asked for any authority that you didn't have before?

Mr. HENDRIE. I don't believe we have.

Senator DOMENICI. And the only reason you don't have it now is because there is a court decision which is on appeal to the U.S. Supreme Court that for the first time challenges that authority that you have been using; is that correct?

Mr. HENDRIE. Yes, sir, that is exactly correct.

Senator DOMENICI. And how long might it take in the typical appeals process to the U.S. Supreme Court for a decision to be forthcoming?

Mr. HENDRIE. My guess is a year or more but let me turn and ask the General Counsel, Mr. Bickwit.

Mr. BICKWIT. I think most probably the Court would not get to the decision on whether to take the case until October. If it chose to take it at that point, it would be several months beyond that before a final decision would be rendered.

Senator DOMENICI. And this Commission didn't have any trouble in making the decision that was appealed from regarding the public health issue involved. You must have found that the decision was a rather clear one and if you didn't you could have voted not to do it I assume. Is that not correct? And that is the kind of authority you would retain under your proposal. You would be a five-member collegial Commission which would decide on each amendment including your process of evaluating whether or not it complied with the law.

So that authority would be retained in a vote 3 to 2 or 5 to 0 not to make one of these decisions that *Sholly* now puts in doubt.

Mr. HENDRIE. Yes, sir.

Senator DOMENICI. That would be a collegial decision on your part.

Mr. HENDRIE. That is correct.

Senator DOMENICI. The last time we had a hearing, at least when I was here, you were going to bring us up some recommendations that concerned themselves with the fact that we are going to have a dozen or so plants ready for operation and their operational date is going to be delayed varying from 8 months to 12 months. As I gather it you have not reached any majority consensus on recommendations to us about those kinds of things that might expedite?

Mr. HENDRIE. Well, we have come to you with a unanimous proposal for legislation which would allow us for this limited group of plants that are impacted by the licensing delays after Three Mile Island, would allow us to issue an interim operating license covering fuel loading and low-power testing and operation. So we have agreed to this and we have come up to you with a letter dated March 18 with this legislative proposal, which is one of the proposals that we speak to this morning.

With regard to other measures, in particular those that lie within the Commission's present authorities, we have had a series of discussions over the last several weeks and there are several measures which are either out for public comment where a rule change might be considered, or are about to go out to comment or something. There are a series of those but none of those, or only a few of those have become final in the sense of the Commission deciding to do that.

Senator DOMENICI. Let us assume the consumers that are out there in one of these plants that is going to be delayed 12 months and they have the investment, the utility company has the investment on the ground. How much time will your 5-percent interim operating authority save for them?

Mr. HENDRIE. Save on that impact? The way I have been characterizing it is it is a guaranteed 2 months, more likely 3 in the average case, and there is a possibility if you find something during that testing that has to be fixed that you wouldn't otherwise have found until down the line, there is the opportunity for substantially more saving. But I would say something like 3 months in the average case is probably a prudent guess. Now that clearly doesn't

get you the whole 12, where a plant has a projected impact of 12 months. I think some of the other measures that the Commission has under consideration would pick up another 2 or 3 months.

Senator DOMENICI. If the Commission does them.

Mr. HENDRIE. To be sure.

Senator DOMENICI. And while you have proposed them, there isn't unanimous support for all of those. There is for the 5 percent interim.

Mr. HENDRIE. There is unanimous support for the legislation that we propose to you, and I think there is another measure which is going to be very useful because it applies to every case that has a hearing, and that is one that has to do with the immediate effectiveness rule where the present procedure is that the Board issues its initial decision and if it is favorable, that decision is stayed and is not implemented by the issuance of a license for a period of about 3 months while the Commission with the assistance of the Appeals Board takes a look at the case.

Senator DOMENICI. What is the feeling of the Commission on the immediate effectiveness rule?

Mr. HENDRIE. Well, we have two alternative changes to it. One of them saves you the 3 months, the other saves 2 months of the 3, and I don't have a vote on it yet, Senator, but my feeling from discussion with my colleagues is that there is a very high probability we will be able to agree on one or the other. So for my own purposes I have been counting on a 2-month saving out of that aspect. I would be glad to have the Commissioners tell me I am wrong but I can just tell you what my sense of the Commission is.

Senator DOMENICI. Are these savings cumulative? If you save three under the immediate effectiveness that is 3 and if your 5 percent works that is another 2 and possibly 4?

Mr. HENDRIE. Yes, sir, I think so.

Senator DOMENICI. Besides those two, proposals what other ones would have a chance of saving cumulative time?

Mr. HENDRIE. The other possibility is in pulling down, that is tightening up the hearing schedule for these dozen cases. Now that is a less certain matter. These cases have already become individualized by the contentions filed in them. It is not that they are just a case down the line where you do not know the specific features.

Senator DOMENICI. I understand but that will have more effect in the future than it will on these 12.

Mr. HENDRIE. So the kind of changes we have talked about and published for comment might take as much as a month of some of these hearing schedules, but it is a very individual proposition.

Senator DOMENICI. My last question, if you have the 5-percent rule on interim licensing, what would the Commission think about flexibility to go beyond that being invested in the Commission, with some criteria for exercising it?

Mr. HENDRIE. Well, for myself I believe that we are going to come down to a group of perhaps half a dozen, maybe slightly smaller, but a group of about half a dozen of these impacted plants for which all of the measures we have talked about, even including the proposed legislation for low power just is not going to save the day for them and they are still going to end up with impact periods that run from a couple months to maybe as long as 6 months. And

for that very limited group I would suggest if you want to relieve those costs about the only way I can see to do it is to allow us to have authority to issue for that small group an interim full power operating license. In my view that would be a reasonable proposition in view of the extraordinary circumstances flowing out of Three Mile Island and the fact that otherwise there are going to be very substantial additional costs to the consumers.

Senator DOMENICI. I will address the Commissioners on that and I will yield.

Senator SIMPSON. Thank you very much.

Senator DOMENICI. May they just comment.

Mr. BRADFORD. I feel less than enthusiastic about going beyond 5 percent, Senator. At 5 percent I am satisfied that the danger to the public in compromising the hearing process beyond the compromise that already exists because of the $2 billion facility is virtually nil. Therefore I am fully comfortable with that. Whether I am willing to go a few percent beyond that is perhaps worth discussing but when you talk about going up to full power, it seems to me it is worth remembering the few incidents we have had occurred relatively early in the plants at which they occurred, and I just wouldn't go to 100-percent power on an interim basis.

Mr. GILINSKY. Senator, I would stick with the proposal for 5-percent power. I think that proposal, if put into legislation and applied by the Commission together with some of the other things that we are doing, ought to deal with the bulk of the problems that we are facing here. There will be a few plants, possibly as few as three but it may be more than that, whose problems will not be dealt with with the collective proposal that we are coming up with. I hesitate however to put into effect an interim full power licensing scheme just to deal with those plants. I think the cost in terms of the hearing process would be very high. There are probably changes we want to make in the hearing process but I think this isn't the way to do it. We have to face that directly.

Senator SIMPSON. Commissioner Ahearne.

Mr. AHEARNE. Senator, I would oppose going above 5 percent and the reason is I think it would take the pressure off the Commission from reviewing the hearing process itself. I think there are some substantial improvements that could be made in that. So I think it would be bad practice to go to a full power interim and bad public policy also. I recognize that there might at some point be a national emergency in which those plants would be needed and granting perhaps getting rapid congressional authority for that would be difficult, at the present time I would much rather reserve that.

Senator DOMENICI. I want to thank Senator Hart.

Senator HART. I would just like to pursue that last line of questioning for a moment. If I understood the testimony correctly, Chairman Hendrie would prefer a statute that permitted the Commission to authorize plants to go to full power before the final licensing authority, is that correct?

Mr. HENDRIE. The way I phrase it, if you ask me to outline for you the draft proposal, I would frame it in terms of the low power authority that we have asked for for the period through the end of 1983, just as it stands, and I would add to it words along the line that further, for a limited group of plants, and I suspect we could

even name them if one wanted to really limit it, that full power operation before the completion of a required hearing would be permitted upon a finding by the Commission that all other public health, safety, environmental, and defense and security findings have been made.

Senator HART. I take it if I understand Commissioner Ahearne's position, it is that he would support the same thing except it takes too long to get through Congress?

Mr. AHEARNE. No, you misunderstood completely, Senator. I would definitely oppose going to a full power, and the reason is I think it is bad public policy and I also think it would be bad practice because I believe part of the problems we have in our hearing process are an inefficient structure and we have to review that. If we had the interim full power licensing authority I think it would remove the sense of pressure that right now the Commission feels for that kind of examination. But I think it would be bad policy to do it.

My point about the Congress was I recognize one of the arguments that sometimes may be raised in favor of that is if there is a national emergency and we need those plants. I would rather, even though it might take Congress time to act, I would rather that situation come to Congress and say here is a national emergency, we need this authority.

Mr. GILINSKY. May I answer, Senator? I agree with those remarks. I think if we approve a general scheme for interim operating license we may find ourselves dealing with many more plants simply because the whole system will slide. Of course if it were done the way Chairman Hendrie suggested, actually naming plants, that would cure the defect.

I have some other remarks that pertain to your earlier question. I wonder if I could take a moment to address them.

Senator HART. Please.

Mr. GILINSKY. You were asking about the amendment to deal with the *Sholly* decision, I think it doesn't extend the Commission's authority except in possibly a small way, which is why I prefer to leave off the "interest" in the finding part of it. Generally the amendment brings us back to what we are doing now. I think that is preferable to letter the *Sholly* decision stand. However there are some problems with the way things are done now.

You asked about the "no significant hazards" finding. It doesn't exactly mean, the way it is interpreted, that there isn't an important safety question. It tends to be interpreted to mean that whatever is being proposed would not lower the safety of the plants being modified, which isn't quite the same thing as there not being an important safety question. I think we have got to go back and deal with that definition so it really says there is not an important safety question.

There is also a problem with who makes the finding. In practice it is made by the staff, not by the Commission. And the staff becomes a party to the hearing should there be a hearing. I am not sure I know how to cure that but it is something that has troubled me.

Senator HART. Well, I guess what I would like each of you to give me as specifically as you can is your definition of what "and

interest" means because you are proposing changing the law. Future courts if challenged will want to know how Congress intended to change the law by language of this sort. Frankly I don't know if we were to adopt this amendment today what "and interest" means. What we are giving to the Nuclear Regulatory Commission is a big blank check. I think we have a responsibility to define for future courts if challenged what we meant when we gave that blank check, or at least put some limits on the check, and I don't have the foggiest idea what this means. I gather each of you has in your minds what the phrase "and interest" means but if I were a judge sitting in a court looking at the congressional record, if this committee were to pass that amendment today and take it to the floor and get it passed so you could get on with this, I would be mystified as to what Congress intended by giving you that authority. So I hope you will give us your ideas, each of you, what an interest means, as specifically as you can.

Mr. AHEARNE. For myself, I would agree entirely with what Commissioner Bradford earlier described, with the stress on the end. For an expansion of it I would like to submit, if I could, a short, letter which was submitted by three out of the five Commissioners last April to the chairman of the Senate Appropriations Committee, which at that time was proposing a modification of policy for the Commission. As it said, this was not intended to in their view expand the authority but confirm authority NRC now has to make prudent and sensible safety and national security judgments based upon safety or security as a paramount consideration, but also giving some consideration to appropriate public interest factors. In the definition it expanded that to indicate consideration to economic impacts and to meeting energy needs. If I could submit that.

[The letter follows:]

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

OFFICE OF THE
COMMISSIONER

April 16, 1980

The Honorable J. Bennett Johnston, Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On February 27, 1980, the Commission testified before your Subcommittee on NRC's FY 1981 appropriation request. During the hearing we discussed with you and Senator Schmitt the desirability of amending the Atomic Energy Act to provide NRC explicit authority to allow for public interest considerations in setting safety standards or resolving safety questions. You invited draft language that would establish such a requirement and resolve the present ambiguity on this point in our statutory charter.

As Senator Schmitt pointed out, the Federal Aviation Administration (FAA) is similar to NRC in that its primary responsibility is to regulate a potentially hazardous industry. However, the FAA in regulating civil aviation is permitted by statute to consider the public interest in setting safety standards. We believe it highly desirable that NRC be provided similar explicit statutory authority to take into account public interests in assuring that the civilian nuclear industry operates safely. Accordingly, we have enclosed draft statutory language which we believe will accomplish this result.

Under the Atomic Energy Act, activities involving nuclear facilities and materials are regulated in order to provide adequate protection of the health and safety of the public and to assure that such activities are carried out in a manner that would not be inimical to the common defense and security. It is clear that these statutory standards do not require zero risk and, so long as some risk may be tolerated consistent with these statutory standards, decisions on "how safe or secure is enough" may properly entail some balancing of safety or security risks against public interest factors, specifically energy needs and economic impacts. Thus, we view this draft legislation as confirming authority the NRC now has, authority to make prudent and sensible safety and national security judgments based upon safety or security as a paramount consideration, but also giving some consideration to appropriate public interest factors.

However, there has been some confusion on this point, and legislation would be highly desirable in order to help avoid future confusion and to make explicit in the Act what is at present only implicit.

Finally, we emphasize that this proposal is not intended to reduce the current standards of protection but rather to permit future decisions to be taken on a more rational basis with all considerations explicitly stated.

Please do not hesitate to call on us if we can be of further assistance in this matter.

Sincerely,

Joseph M. Hendrie
Commissioner

Richard T. Kennedy
Commissioner

Victor Gilinsky
Commissioner

Enclosure:
As stated

cc: Sen. Mark O. Hatfield
Sen. Harrison Schmitt

DRAFT BILL

The Atomic Energy Act of 1954, as amended, is amended by revising the title of Chapter 2. to read "Definitions and Policy," and by adding a new section 12 to read as follows:

"Sec. 12. Policy. -- In the domestic licensing and regulation of facilities and materials under this Act the Commission shall regard minimizing risks to public health and safety and the common defense and security as the paramount consideration, but the Commission shall recognize that absolute safety or security may be unattainable as a practical matter and give appropriate consideration to economic impacts and to meeting energy needs. This policy shall guide the Commission in applying the domestic licensing and regulatory standards of this Act, including the standards of adequate protection to the health and safety of the public in section 182a. and non-inimicality in section 103d."

Senator HART. That would be very helpful. Any others want to take a crack at this?

Mr. GILINSKY. I had suggested leaving out——

Mr. HENDRIE. You and I are on John's letter, the letter John submitted, so we get a little credit for that.

I am sorry, go ahead.

Mr. GILINSKY. It isn't that I don't think the Commission ought to be able to take economic factors into account. But because this proposed amendment is drafted to deal with a very specific problem, I thought we should limit ourselves to the narrow question in the *Sholly* decision and not use this as a vehicle for modifying the basic Commission finding.

Senator SIMPSON. But I wouldn't quarrel it does modify the basic standards.

Mr. GILINSKY. Which is why I would leave off the "and interest."

Senator HART. Commissioner Bradford.

Mr. BRADFORD. I would intend the type of situation I could imagine using to be like the actual situation that occurred in TMI last spring, in which we were reluctant to say that the public health and safety in and of themselves required the immediate venting of the krypton, but in fact it did seem to us to be a good idea. Also there was no significant hazard involved and one could use the first sentence of this amendment alone to cure that problem. But it seemed that the public health and safety would not be adversely affected and that there were a variety of public interests to be served by getting the krypton out of the plant and getting ahead with the cleanup.

So it wasn't the kind of situation in which one could say the public health and safety absolutely required that the krypton be vented at that time because there wasn't an imminent hazard if it weren't. But it did seem that the longer term public health safety and interest added up to a decision to go ahead and vent it and this standard would make it easier to do that. As I indicated before, I wouldn't separate the word interest out and use it as a basis for a specific economic interpretation.

Senator HART. Mr. Chairman, thank you. As you will recall, one of the first rules you hear when you go to law school is hard cases make bad law. It is an old saying that is designed to put lawyers, I guess, or legislators on notice that in an effort to correct what are apparent deficiencies in the law under various specific circumstances, you are also creating a situation in which totally unpredictable uses of that law can be made in the future. Here I think the word conservative has meaning. I can premise, for example, 10, 20, 30 years from now a Commission that may be very much opposed to nuclear power and could use a phrase of this sort to deny amendments, deny licenses willy-nilly. I don't think the nuclear industry would like that very much and I hope when we start tampering around with this law we are looking not only at the immediate situation but at totally opposite circumstances that could arise when all of us are gone and a whole different set of players are on the field.

Senator SIMPSON. I thank you very much. I must admit that the part of this process that interests me is the diversity of this Commission, and yet there is this sense of unanimity in this particular area that something must be done. I recall that old law school phrase. It might be like the one we had in the legislature which was hardheads make bad legislation.

Now let me recognize the presence of the chairman of the full committee. I value his stability and his interest in all issues that come before the committee. I know each member of this subcommittee including Senator Hart recognize and appreciate his participation.

Senator Stafford.

COMMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Thank you very much, Mr. Chairman, for your gracious words. I regret that due to the unusual situation the country is facing since yesterday afternoon I wasn't able to be here at the outset of the hearing this morning. I had hoped to be because I am, like everybody else, very much interested in nuclear power.

I have no formal opening statement to place in the record here or earlier, Mr. Chairman. I simply want to comment very briefly that in the last several years when I have been involved in various environmental issues I have become acutely aware of the fact that no source of energy that we use very largely in this country is free of problems. We have them almost everywhere in terms of oil and coal and even hydroelectric power where new dams are built to threaten some environmentally valuable areas.

I must say, Mr. Chairman, the more I look at all our major sources of power, the better nuclear power seems to look to me. For example, in the middle of our environmental studies I notice that if we try to sharply increase the use of coal or oil with a higher sulfur content that we are producing a lot of contaminants in the atmosphere that play havoc with the human system, with some of our crops and some of our animals and forests and forestlands. For example, nuclear powerplants have their problems and we want them to be as safe as they possibly can, but they don't produce any nitrous oxides or sulfur oxides that are beginning to cause some anguish not only in their own light but in terms of acid rain. The nuclear plants don't produce any carbon monoxide or carbon dioxide or any ozone chemicals or any particulates or any hydrocarbons. So as I say, I have to conclude, Mr. Chairman, that the more I look at the difficulties we have with other major sources of power, the better nuclear power looks to this Senator. And I am glad the Commission is here this morning. I think it is important to get on with the business of reviewing and issuing license where that can properly be done.

Thank you.

Senator SIMPSON. Thank you very much, Mr. Chairman. I appreciate those comments from you. You have an extraordinary background in environmental legislation and a deep interest in it indeed.

I have some questions with regard to the *Sholly* decision. In reaching that determination that a particular license amendment involves "no significant hazards consideration," what criteria has the Commission employed in the past and how do these criteria differ from those that the Commission had published in proposed form and was in the process of completing at the time of the *Sholly* decision?

Mr. HENDRIE. Could I ask the General Counsel to talk about this definition matter, Mr. Chairman?

Senator SIMPSON. Please.

Mr. HENDRIE. Mr. Bickwit.

Mr. BICKWIT. The proposed rule is helpful because it is in effect a codification of the practice that staff and the Commission have been using in reaching decisions on these issues. What the proposed rule would say is that the Commission will consider in making a no significant hazards consideration finding whether the proposed amendment would one, involve a significant increase in the probability or consequences of an accident previously evaluated; two, create the possibility of an accident of a type different from any evaluated previously; or three, involve a significant reduction in a margin of safety. And those have been basically the criteria the Commission has been using.

Senator SIMPSON. And those would remain the principal criteria?

Mr. BICKWIT. This is a proposed rule for which the comment period has closed. The Commission will now consider comments and decide whether this is the practice that it will continue to adhere to.

Senator SIMPSON. To what extent if any will the *Sholly* decision impair the NRC's supervision of operating nuclear powerplants?

Mr. HENDRIE. Well, if the decision were to stand, Mr. Chairman, then we would very rapidly begin to have very grave difficulties. We undoubtedly are going to be in hearing on some fraction of those 400-odd amendments a year that have no significant hazards consideration associated with them. We very rapidly are going to saturate in terms of the ability of the staff engineers and staff lawyers to deal with those hearings, let alone the ability of the licensing board panel to provide boards to hear them.

What you will then have are plants that have operating licenses that are shut down for extended periods while these hearings work their way along. It is not a very practical sort of an outcome it appears to me. It furthermore has the peculiar aspect that it would leave us having to decide between not making license amendments in order to avoid the possibility of plant shutdowns for extended periods on the one hand, and on the other, having license amendments where we think the technical specifications ought to be adjusted to account for that and so on. And now we are hung. Do we do it in a safe and workmanlike way and end up without meaning to with the plant being shut down for some extended period, or do we shrug and let that one pass and let it operate?

Senator SIMPSON. I think you are coming to an area that concerns me, almost a catch-22 situation, wondering to what extent the *Sholly* decision encourages technical specifications of a more general nature, thereby reducing the number of routine license amendments which would be subject to the hearing requirements of the section.

Mr. HENDRIE. Well, if *Sholly* were to stand I think what we would have to do is to face one major amendment to all operating licenses, that is, create a vulnerability in each operating plant to have a hearing on a general amendment to each license in turn, which would simply cut back greatly on the amount of detail in the license itself, and try to reduce the license to a general statement with the proposition this plant has permission to operate at some power level, up to some power level. Then you take your lumps on the hearing that will probably be requested on that one amendment but thereafter you are able to adjust the technical specifications where there is a need. And we have to downgrade the technical specification to some sort of a companion document which would not have the enforceability that a set of license conditions would.

Senator SIMPSON. There is an issue. Would that hinder the entire enforcement capabilities of the NRC?

Mr. HENDRIE. I think it would throw us considerably in doubt because that would leave us trying to enforce what had been an infraction of what are now less formal conditions, leaving us trying to enforce on something that wasn't a license condition. I don't know, it is a good question.

Senator SIMPSON. Yes, Commissioner Bradford.

Mr. BRADFORD. I was just going to reinforce both the point the chairman made the answer and your question. I would be very much in favor of expanding specificity in the technical specifications. One of my concerns about the impacts of the *Sholly* decision is that that it goes against that and would undermine the enforceability of a number of specifications because once they move out of

the formal documents into the informal documents it becomes very much harder to use them as a basis for enforcement action. My only difference with what the Commission said is I don't share the view of a community out there that is prepared to pounce in on all 70 plants. For me the possibility of one or two plants to be held up in hearings that don't involve significant hazards is sufficient, but I wou'dn't urge you legislate on the basis that the industry would somehow be shut down or even 10 or 20 plants being shut down if the *Sholly* decision became final. I would like to avoid the possibility of even one plant being delayed unnecessarily.

Senator SIMPSON. Commissioner Gilinsky.

Mr. GILINSKY. I think it is worth saying that this analysis of what may happen, which may in fact be correct, is based on the notion that the law requires that a hearing on an amendment, no matter how minor, has to be a full adjudicatory hearing. That is what our lawyers seem to be telling us. I am not myself sure that is right.

Senator SIMPSON. We have all had those suspicions.

Mr. GILINSKY. Even then I would say it is an unreasonable burden that there should have to be hearings on matters which are truly not important.

Senator SIMPSON. One of the interesting things to me in reviewing the *Sholly* decision was you developed that, that really there was ever any advance notice required under previous considerations and now we are going to come up with what might be termed blanket request for hearings, and also this nebulous phrase "expression of interest." The Court rules in that case that there was a hearing required before a license amendment involving, and then this key phrase "no significant hazards consideration" becomes effective if there is a request for a hearing or "expression of interest which is sufficient to constitute a request for a hearing." What sort of expression of interest would be sufficient in your mind to constitute a request for a hearing?

Mr. HENDRIE. Well, it is always hard to know when the judges write an opinion, even when the Commission writes an opinion if it doesn't speak to a particular point you can speculate on what they had in mind. It sounds to me however as though the court leaves open, if it doesn't outright declare, that there is a very broad class of expressions of interest which would have to be regarded by the Commission as either requests for hearings in advance sort of just generally in advance of the issue, or at least put us in a position where we feel it necessary to go and query those specific parties each time one of these no significant hazards amendments came up.

It is possible from a reading of the decision to infer that a party say at the initial licensing of a plant could send a letter to the NRC saying I hearby request a hearing on all license amendments that may come up in the future on this plant as long as it operates or I am around. Then that is on file and the kind of language the court has used here, it is conceivable that could be regarded as a formal request for a hearing, which would automatically trigger a hearing every time one of these amendments came up. If that were the case, I don't know whether I am stretching here too much or not.

Let me look over my shoulder and see what General Counsel has to say.

Mr. BICKWIT. I think the hypothetical the chairman posed is a little unlikely.

Mr. HENDRIE. Unlikely or not in accordance with the decision?

Mr. BICKWIT. I think it is unlikely that it is in accordance with the decision.

Senator SIMPSON. Mr. Bickwit, I have heard the chairman recall against the brethren of the bar and I will leave it at that, and then see him turn and call upon you for the answer to the question. A terrible anomaly.

The court decision too stated that this phrase "any significant changes in the operation of a nuclear facility in itself consummates a license amendment." What in your view constitutes such a "significant change in the operation of a nuclear facility?"

Mr. HENDRIE. There doesn't appear to me to be any reasonable boundary to that. If the court says that a thing is a license amendment even though the specific language of the license document does not change, it is not proposed to be changed in any way, then where do you draw the line? If the operator decides to put his left hand on the panel for the second half of his shift instead of his right hand, I guess at some level of detail that is a change in mode of the operation of the plant. Now you know I trust I have carried the court's language to a ridiculous extreme, but I don't know where between that ridiculous extreme and a substantive matter you draw the line.

It seems to me that the license is a set of pieces of paper, they have things written on them and if you don't change any of the pieces of paper and any of the things that are written down that you haven't changed the license, you haven't amended it.

Senator SIMPSON. I appreciate that, I do, but I would like to wind down here as soon as possible.

But we see the *Sholly* decision rising out of the emotionalism of Three Mile Island, and justifiably so. I have no comment basically about that, with the national interest and human beings' interest. But to what extent if any will this *Sholly* decision affect those absolutely extraordinary situations which are still before us with regard to the cleanup of TMI-2 where the degree of NRC oversight is complete and pervasive? Where are we then?

Mr. HENDRIE. I guess it opens the opportunity for an adjudicatory hearing on each successive stage of the cleanup. Whether some consolidation is possible, there is a question. Generally we won't have in hand all of the details of a stage of the cleanup until people get ready to make it and can supply us the details of what they propose to do. So I suspect consolidation is not very likely and if *Sholly* stands we are likely to do a separate adjudicatory hearing on each step of the cleanup down the line. The first one to come up is processing the water in the containment building. I guess the second one will be a general cleanup within the containment building to get radiation levels down so you can work around the primary. The third would be opening the primary system and taking the core out. There is another one, a question about what do you do with the damaged fuel and the higher level waste. I can see the opportunity for somewhere between three and five perhaps

full-scale adjudicatory hearings to allow these individual steps to occur.

Senator SIMPSON. That is to me a grave problem to have.

Mr. HENDRIE. Well, you couldn't get it done. In your lifetime and mine we won't see the blasted thing cleaned up if these are the administrative procedures we have to go through.

Senator SIMPSON. I will have to think about that. But that is the problem as I see it, Mr. Chairman and members of the Commission, that that is something that will go far beyond what is interpreted by the court in the *Sholly* decision, and must be I think corrected by legislation.

I mentioned during earlier questioning and before Senator Hart inquired when we were talking about the discovery proceedings, if I might go back to the operating license issue and delay, witnesses before the subcommittee for both the industry and the Union of Concerned Scientists at the hearing last week criticized the provision about the elimination of formal discovery against the NRC staff, saying that it had the potential for actually lengthening the license hearings by leading to a protracted type of cross-examination to obtain information that would otherwise be available through discovery. I would like to know what your assessment is of that possibility, how would that measure in particular expedite the licensing process, what effect would that particular measure have in terms of restricting information available to intervenors in those proceedings, and even the possible hindering of their ability to present their case?

Mr. HENDRIE. Well, you saw both the Union of Concerned Scientists and the industry witnesses didn't like this proposition, Mr. Chairman.

Senator SIMPSON. In different ways. That is true.

Mr. HENDRIE. That encourages me to think there is even more merit in it than I had thought when I voted to put it out for comment.

The proposition at the present time is that I think in some cases discovery privileges and rights are being abused and are being used as a delay tactic. Problems of this kind with discovery in general in the legal proceedings, I find there is quite a lot of literature on the subject, it is not just NRC proceedings where there is concern about the abuse of discovery privileges.

In particular the relief of the staff from having by rule to reply to any and all discovery requests would remove the possibility that at a late stage in the proceeding on the publication of its final supplement to the safety evaluation report, the staff is then hit by a great number of discovery inquiries which just take time and staff resource to answer and which are more in the way of trying to create delay and use of staff resources than they are to seek information. Now the staff tries to put substantive matters that it has at hand in its review on the public record. There is a docket file maintained in public document rooms and I think a good part of what people want to discover is already in the public document room. But discovery is very handy because it makes the staff go and round up the particular documents and relieve people of doing it. You know if you are preparing a case you don't have to go and read the docket file.

So on balance I am inclined to think it is a good thing. It would go along with an admonition from the Commission that the staff is to voluntarily supply information and try to respond to discovery requests, but by not making it mandatory for the staff to do it it does give them the chance in those particular cases where discovery may be being abused to say no. But you will want to hear from others along the bench.

I must say, I guess this is a poor time for me to think of it, after I made my argument in favor of the proposition and before others get to make their arguments against it, but we do have to all recognize that it is up for comment and obviously no matter what I feel now, I will want to see what the comments are and then we will have another discussion about it. So I make no commitment here to vote one way or the other. I just tell you what my thoughts are at the moment, and I am sure my colleagues would want a similar disclaimer.

Senator SIMPSON. Commissioner Bradford.

Mr. BRADFORD. I am leery of this provision, Senator. I must say I am surprised to see that the AIC was not in favor of it, but it doesn't have the same effect on me as it does on the chairman.

I will turn now to the point I made at the beginning, that I am reluctant to tinker with the hearing process outside of a more balanced appraisal that is designed on one hand to perhaps provide expeditious but on the other also to strengthen the ability of concerned citizen groups to participate effectively. In specific on the discovery provision, the weakness seems to me that it depends on the Commission's good faith in instructing the staff to make full disclosure on its own anyway. The elimination of discovery might work reasonably well if in fact everything proceeds that way, but it is perfectly possible that the informal appeal process, the discovery provision could be turned around with no formal proceeding at all by another commission in the future, or in fact conceivably by staff action in individual cases, and then there would be no recourse, there would be no discovery and the Commission having revoked its guidance to full disclosure wouldn't be compelled to make full disclosure and at that point the effects of discovery might be very serious.

Senator SIMPSON. I do appreciate very much your all being here. I have other questions and I am going to submit them in writing. I note that we have our newest member of the subcommittee, Senator Symms, of Idaho, who is making a fine contribution, former ranking member of the House subcommittee in this particular similar area.

Senator Symms, did you have any questions?

Senator SYMMS. Mr. Chairman, I apologize to you and Mr. Stafford and the commissioners for my absence. I have been tied up with another meeting.

I will not belabor your hearing by asking questions that are probably redundant. I will be brought up to speed by you and staff.

Senator SIMPSON. Senator Stafford?

Senator STAFFORD. Thank you very much, Mr. Chairman. I had one question occur to me for my better understanding of the overall picture. As I read the statement this morning I gather there are some 72 operating nuclear powerplants in the country and that

your concern this morning is over 13 additional plants that will complete in 1981 or 1982 and getting them licensed. Would it be possible to tell us how many plants additionally to those two totals are under construction now and will probably be completed in the next few years after 1982?

Mr. HENDRIE. Yes, sir. There are something like 70 more after the two groups that you mention that are in the pipeline under construction. Now I think it is fair to guess in this turbulent world that not all of those 70 projects may necessarily come to completion and apply for an operating license but I think a good number of them are far enough along so that I think utilities face pretty substantial costs in cancellations. So I think the bulk of that other 70 will in fact come in for an operating license.

Then beyond that there is a much smaller group of about 11 units for which application has been made for a construction permit but a construction permit has not been granted yet, so they are not on construction except the limited amount of work you can do, in at least one case under a limited work authorization from the Commission. And I think it is hard to guess how many of those 11 units will turn out ultimately to be projects that are completed and come on line, but I suspect a few of them at least.

Senator STAFFORD. Thank you very much.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator SYMMS. Mr. Chairman, if I could just ask one question, and it may have been covered and if it was I apologize to all of you. But what is happening with respect to the good unit up at TMI, the one that was not involved in the accident? Is there a possibility that that will be relicensed and restarted so that horrible $12 to $20 million a month can be removed from those ratepayers?

Mr. HENDRIE. That is Three Mile Island Unit 1, Senator Symms, and there is a hearing going on at the moment. The plant was down at the time of the accident and a show cause order was issued as to why it should not stay down, asking the licensee why they should be allowed to operate since they had an accident with the No. 2 unit, and we made the shutdown order immediately effective. So the plant is shut down, this hearing has been going on. It is running considerably beyond the projected times we had in mind back when we launched it, but it bids fair to complete this summer. Then there would be some time for the Licensing Board to write its initial decision and recommendations to the Commission and then in this case the Commission will make the final decision and we will try very hard to act within 35 days of receiving the Board's recommendations.

Now I guess a sort of round number projection on when that might occur is this fall, and I think we may not be all that far behind, actually behind the rate at which Metropolitan Edison could now get the unit ready to operate because there are a number of things they still have to work into the plant—Three Mile Island—related to requirements, and because the unit has been down for a while they have to do a fairly extended checkout of all the systems. We have recently issued an order that allows them to do nonnuclear testing while the hearing is going on. This is with nonnuclear heat but lets them get the system up to full

temperature and pressure, check all the seals. So they have some months of work before they would be ready to roll anyway.

Senator SYMMS. So we are talking about another $175 million in oil purchase?

Mr. HENDRIE. This is the first of April and I don't see a decision to restart much before October. So it is a chunk, yes, sir, and it has come along at $15 million a month, something like that, purchased power cost.

Senator SYMMS. Down in Chairman Simpson's State they have a saying if you ever get thrown off a horse, the best thing is to crawl back on. So I hope the NRC and the power company——

Mr. HENDRIE. If we have another accident we will think about that.

Senator SYMMS. Can we get this horse restarted so we don't have this continued fear cast on the news all the time about it.

Senator SIMPSON. Well, sometimes you have to chew an ear off the horse. You don't want to do that.

Let me present the rest of the questions in writing, and some of them I think are rather important because they have to do with the so-called Beckwit hand-to-hand memorandum, which to me was a very provocative document. I thought that was very interesting material for us, to observe it. So some of those questions will have to do with intervenors and affirmative evidence and burden of proof and burden of going forward. They are legal questions and we certainly will appreciate your lawyer's response to those, and others with regard to the *Sholly* decision will also be included there.

I do thank you, again apologize for my being somewhat late. I am impressed by the unanimity of the Commission; that has not always been. It is a most extraordinary thing to see, and yet with the exception of the issue and comments of additional public interest, there is a good deal of unanimity and I think you all. I see I think a new sense of congeniality between and among you, perhaps occasioned by the lack of a fifth member. But whatever it is, it is productive I think. I also look forward to our communications together or at the hearing room.

I have nothing further and the hearing will now be concluded. Thank you.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

[Mr. Hendrie's prepared statement, additional material submitted for the record, and responses to written questions follow:]

STATEMENT OF JOSEPH M. HENDRIE

CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee:

I am pleased to be before you today to urge enactment of two pieces of proposed legislation. The first is the Commission's proposed amendment to Section 189a of the Atomic Energy Act of 1954, to overturn the principal adverse ruling in the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Sholly v. NRC. That proposal was submitted to you by letter of March 11, and I ask that the letter, which includes a supporting memorandum, be included in the record. The second proposal, which was submitted by letter on March 18, would authorize the Commission to issue interim licenses for low-power operation and testing, in advance of any required hearing. Again, I ask that the letter be included in the record. I would like now to discuss the two legislative proposals in turn.

Proposed Legislation on Licensing Amendments Involving No Significant Hazards Consideration

The situation prompting submission of the first legislative proposal may be summarized as follows. In the Sholly case, a three-judge panel of the D.C. Circuit ruled -- erroneously, in our view -- that the Commission must hold a prior hearing on demand from any interested person before it can issue any license

amendment, even if that amendment involves "no significant hazards consideration." Since 1962, when the Congress enacted the amendments that added that statutory language, the Commission has interpreted Section 189a to mean that the NRC could issue an amendment that was insignificant from a public health and safety standpoint without a prior hearing. The Sholly decision overturns that consistently applied agency practice. In order to permit a full appreciation of the impact that the court's decision will have, unless it is overturned, let me review some of the background of the case.

In 1962, Congress amended Section 189(a) to add the following language:

> [T]he Commission may, in the absence of a request [for a hearing] ... by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. [emphasis added].

We think Congress intended, by this amendment, to ratify the AEC practice under which the AEC approved license amendments involving no significant hazards consideration without conducting or

offering a prior hearing. The legislative history on this point is explicit that Congress intended to adopt the "criterion ... being applied by the Commission under the terms of AEC regulation 50.59." [S. Rep. No. 1677, 87th Cong., 2d Sess. at 8 (1962)] That regulation specifically provided:

> If the Commission determines that the proposed change ... does not present significant hazards considerations ... it may authorize such change ... without a prior public hearing." [10 CFR 50.59(e)(2), 27 Fed. Reg. 5491, 5492-5493 (June 9, 1962)]

The short of the matter is that we think Congress in 1962 created a category of license amendment actions -- those considered insignificant from a safety standpoint -- to which the requirement of a prior hearing did not attach. That was a reasonable policy decision for Congress to make and it is a reasonable interpretation of the Act reflected in current NRC regulations at 10 CFR 50.58(b). The NRC and its predecessor agency have adhered to that practice for nearly two decades.

The Sholly lawsuit arose over efforts by the utility and the NRC to remove radioactive krypton gas from the containment building at the severely damaged TMI-2 reactor -- a necessary preliminary step to cleaning up the facility. No one seriously disputed that the krypton had to be removed. However, there was a good deal of

debate about the method and the speed by which it should be accomplished. After a public process extending over many months, the Commission decided to vent the gas to the atmosphere. This action did not require a license amendment because the licensee already had authority to vent radioactive gases under its operating license. Rather than have the process drag on, which could have produced adverse public health consequences, the Commission decided to vent the krypton at a faster rate than ordinarily permitted under the license. This involved a modification of the license technical specifications to substitute a direct measurement of the radiation levels offsite for the method specified in the license -- which was to set release limits based on calculated offsite doses. The Commission determined that this minor amendment -- permitting a fast purge of containment gases, while keeping doses to the public at or below levels which the superseded release limits were intended to assure -- involved no significant hazards consideration. Therefore, the Commission concluded the amendment could be made immediately effective.

Among other things, the court in Sholly said that this NRC conclusion was wrong. I understand that a copy of the Circuit Court's original decision and a copy of the recent statement by four judges of the Circuit Court who disagreed with the decision of the Court's full panel of eleven judges not to rehear the

case have already been included in the hearing record. The Solicitor General has filed a petition for writ of certiorari in the Supreme Court on behalf of the Commission and the United States and I ask that a copy of that petition be included in the hearing record. While we believe our view of the law is correct, whether the Court will decide to hear the case and whether we will ultimately prevail is uncertain. In any event, no final Court action would be expected until some time next year. In the interim, the decision raises serious policy questions and clouds the future course of the regulation of nuclear plants. This is why we seek this legislation now.

The principal ruling of concern to the Commission is that NRC must hold a hearing on request, before it may act on an amendment involving no significant hazards consideration. In NRC practice, this hearing would be an adjudicatory hearing, and could last many months. The practical adverse effect of the Court's ruling is substantial.

Over the past four years the Commission has issued more than 1600 amendments to nuclear power plant operating licenses based upon a determination that no si;nificant hazards were involved. Over the past few months some 20 of the nation's 72 nuclear power plants would either have had to shut down or operate at reduced

power if they had not been accorded the authority sought in license amendment requests that involved no significant hazards. If, as the D.C. Circuit has held, hearings are necessary before this authority can be granted whenever an interested person requests one, there is the prospect of a substantial curtailment of nuclear power plant operations for reasons which, in the Commission's view, are unrelated to the safety of the nuclear power plants.

The large number of license amendment actions which the Commission must act upon, reflected in the yearly average of better than 400 amendments, is directly attributable to the kind of detailed regulation of nuclear power plant operation that the Commission and the Congress has demanded. A nuclear power plant operating license, like that issued for Three Mile Island, Unit 2 -- the power plant involved in the Sholly case -- is hundreds of pages long, and consists of highly detailed technical specifications. Any change in the license itself, or in any of those hundreds of pages of technical specifications, has been considered a license amendment. Changes in the operation of nuclear power plants are frequent. For example, whenever a nuclear power plant refuels (usually at about 18-month intervals), the technical specifications often need to be adjusted to reflect the physical behavior of the fresh fuel placed in the

reactor core. The consequence of the Sholly holding could be to keep a nuclear power plant shut down or prevent its operating at full-rated capacity, whenever the power plant refuels. This result could follow in spite of a Commission judgment that there is no significant hazards consideration involved in adjusting the technical specifications to account for the behavior of the fresh fuel. That result lacks practicality.

The Commission does not believe that Congress intended nuclear regulation and the operation of nuclear power plants to be subject to unpredictable interruption every time NRC receives a hearing request on a matter not significant for safety. Yet, such a consequence is plainly possible under the court's ruling. The NRC, of course, does not know how many hearing requests, if any, might be filed in connection with future amendment applications. The court's opinion, however, clearly provides an incentive for such filings. Nor does the Commission think that Congress would want the Commission to attempt to mitigate the unreasonable effects of the Sholly decision by eliminating or grossly simplifying the detailed range of technical specifications which govern the operation of nuclear power plants, although this would be one way to minimize the number of license amendment actions that NRC would have to confront. With such simplification would come a loss of governmental control, a loss

of enforceability, and a loss of detailed assurance in a power plant's method of operation. Acceptance of those kinds of uncertainties would not advance the public interest in assuring safe operation of nuclear power plants.

The proposed legislation, if adopted, would amend Section 189 to clarify that the Commission may issue a license amendment which involves no significant hazards consideration without first holding a hearing. The bill would also clarify that Section 189 does not limit the NRC's authority to take immediate action by amendment or order to protect the public health, safety, and interest or common defense and security. I would like to note here that Commissioner Gilinsky would prefer the standard to be limited to the public health and safety. He believes the addition of "public interest" tends to broaden NRC authority and that his proposed language more precisely reflects the standard NRC actually employs. The Commission unanimously believes that legislation is needed to overturn the adverse impacts of the Sholly decision on the regulation of nuclear energy. Unless overturned, this decision will likely mean frequent and lengthy interruptions in operation of nuclear plants for reasons that have little or nothing to do with safety. We do not believe that prospect to have been intended by Congress in enacting Section 189 and urge prompt approval of the proposed NRC legislation.

Proposed Legislation on Interim Operating Licenses for Fuel Loading and Low-Power Operation and Testing

The second piece of proposed legislation would amend the Atomic Energy Act 1954 to authorize the Commission to issue an interim operating license permitting fuel loading and low-power operation and testing in advance of the conduct or completion of any required hearing. The proposed legislation is designed as an extraordinary and temporary remedy to an extraordinary and temporary situation, which has its roots in the Three Mile Island accident and the reallocation of Commission resources which that accident compelled.

By way of background, the Atomic Energy Act of 1954, as amended, provides that no person may operate a nuclear power plant without first obtaining an operating license from the Nuclear Regulatory Commission. Under existing law, a formal on-the-record evidentiary hearing must be held, and a decision rendered on the basis of that record, if there is a request for a hearing from any person whose interest may be affected. The Commission cannot authorize issuance of an operating license until any required hearing is complete and the decision has been issued.

In the past, the scheduling and processing of licensing reviews has typically provided sufficient time for the hearings to be

completed and the license issued by the time the plant is completed and ready to operate. For the first time, however, it appears that the hearing process, for a significant number of plants, will last beyond the date when construction should be complete and the plants should be ready to operate. This is a consequence of the thorough reexamination of the entire regulatory structure which was necessary in the aftermath of the Three Mile Island accident. For a period of a year and a half after that accident, the Commission's attention and resources were focused on those plants which were already licensed to operate, and on the preparation of an action plan specifying a set of discrete TMI-related requirements for new operating reactors. During this period, utilities that had received construction permits continued to build the authorized plants.

The severe public interest impact of delays in the operation of completed plants has been discussed extensively before this Committee and others of the House and Senate. Though opinions may differ as to the precise impact of the delays, as well as of the dollar costs involved, the cost of delay is now generally estimated as being in the range of tens of millions of dollars per month for each completed plant.

The Commission is making every effort to see that available resources are devoted to the completion of its licensing reviews

of these plants, and that unnecessary delays in these hearings are avoided. Under existing law, however, the Commission lacks the authority to authorize fuel loading and low-power operation and testing on the basis of its safety and environmental evaluation; it must instead await the completion of the hearing process. The result for the plants most affected by TMI-related actions is likely to be delays of at least several months in ultimate operation of the facilities, absent remedial action by the Congress.

The proposed amendment to subsection 189a of the Act would authorize the Commission, if it finds that such action is necessary in the public interest in order to avoid the consequences of unnecessary delay in the operation of a completed nuclear power plant, to issue an interim operating license authorizing fuel loading and low-power operation and testing of the plant in advance of the conduct or completion of any required hearing. In all respects other than the completion of the hearing, the Commission would have to find that the requirements of all applicable law have been met prior to allowing such interim operations. Thus, the public health and safety, common defense and security, and environmental findings would still have to be made, even though the public interest finding is made. Furthermore, a hearing would still be held if requested by an interested

person under section 189 of the Act. The proposed amendment would simply provide that in such a case, the requested hearing could be held or completed after issuance of the license authorizing fuel loading and low-power operation and testing. Moreover, any interim license issued under this authority would be subject to any subsequent findings and orders of the Commission after the conduct of any required hearing. The authority to issue such interim licenses would expire on December 31, 1983.

The effect of this proposed legislation would be to advance by at least several months the date of operation of the plants most affected by the TMI-related actions, where issuance of the operating license is contested. The savings of time could be more substantial in cases where testing showed the need for modification and further testing. By placing a time limit of December 31, 1983 on the Commission's authority to issue such interim licenses, the proposed legislation would assure that the relaxation of licensing requirements would be confined to those plants which have been most directly affected by the Commission's post-TMI actions. Since the risks associated with low-power operation and testing are much smaller than those associated with normal full-power operation, we believe that this authority, limited to the relatively few plants likely to be most affected by our TMI-related effort, represents a minimal

intrusion on our usual review and hearing process. The Commission cannot, under existing law, take these measures to reduce the delay in the licensing of the affected plants. The proposed legislation would result in very substantial cost savings for consumers in the service areas of the affected plants.

The Commission believes strongly that prompt passage of both these legislative proposals is in the public interest.

I would note that Commissioner Ahearne, while agreeing that low-power interim licensing is desirable at this time, believes that full-power interim licensing may be necessary if significant improvements are not made in the reactor licensing process. He has stated that fundamental reforms are needed in the role and practice of the licensing process. In particular, Commissioner Ahearne believes the Commission should direct the licensing boards to decide only issues of substance that have been raised by the parties, and to manage proceedings with a strong hand. He recommends raising significantly the threshold for admitted contentions and limiting sua sponte authority. Without such changes, Commissioner Ahearne expects that at some time in the future, the Commission will request full-power interim licensing authority.

I thank the Subcommittee for its interest in this matter, and would be happy to answer any questions at this time.

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

CHAIRMAN

March 11, 1981

The Honorable George H. Bush
President of the Senate
Washington, DC 20510

Dear Mr. President:

Transmitted herewith is a Nuclear Regulatory Commission legislative proposal in the form of a draft bill to amend the Atomic Energy Act of 1954, as amended, to clarify that the Commission may issue a license amendment, where no significant hazards consideration is involved without holding a prior hearing and for other purposes. A draft bill is in Enclosure 1. An analysis of the proposal is in Enclosure 2. A memorandum explaining the need for the proposal is in Enclosure 3.

This proposal is in response to and seeks to overturn the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Sholly, et al. v. NRC, et al., No. 80-1691 (November 19, 1980). The court held that the NRC may not issue a license amendment even if there is no significant hazards consideration when an interested person has filed a request for a hearing under Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). The decision could also implicate the Commission's authority to issue immediately effective license amendments and orders when the public health, safety, and interest or the common defense and security requires. The court's decision mandating a prior hearing on demand on matters insignificant to the public health and safety seriously and immediately encumbers the regulation of nuclear power, and puts at risk a substantial number of nuclear power plants which would either have to be shut down or operate at reduced power if they are not accorded the authority sought in pending license amendment requests. The number of power plants affected will fluctuate over time depending upon which plants have license amendment applications pending and the nature of the license amendment requests.

The proposed legislation, if adopted, would amend Section 189 to clarify that the Commission may issue a license amendment which involves no significant hazards consideration without first holding a hearing. The bill would also clarify that Section 189 does not limit the NRC's authority to take immediate action by amendment or order to protect the public health, safety, and interest or common defense and security. This legislation is needed to overturn the adverse impacts of the Sholly decision on the regulation of nuclear energy. Unless overturned, this decision raises the prospect of a substantial curtailment of nuclear power plant operation for reasons which in the Commission's view are unrelated to the safety of the facility. We do not believe that

prospect to have been intended by Congress in enacting Section 189 and urge approval of the proposed NRC legislation.

Sincerely,

Joseph M. Hendrie

Enclosures:
1. Draft Bill
2. Analysis
3. Memorandum

A BILL

To amend the Atomic Energy Act to clarify that no prior public hearing is required for applications for amendment which involve no significant hazards consideration and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that:

Section 189 of the Atomic Energy Act of 1954, as amended, is amended by adding the following new sentences at the end of paragraph (a) thereof:

"The Commission is authorized to issue and to make immediately effective an amendment to a license upon a determination by the Commission that the amendment involves no significant hazards consideration, notwithstanding the pendency before it of a request for a hearing from any person. The Commission is authorized to issue and to make immediately effective any amendment to a license, or any order to govern any activity subject to this Act, as it may deem necessary upon a determination that immediate effectiveness is required to protect the public health, safety, and interest, or the common defense and security."

Section Analysis

The purpose of the amendment is to overturn the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Sholly v. NRC, November 19, 1980. The amendment provides that the Commission may issue a license amendment upon a determination that it involves no significant hazards consideration without holding a prior hearing. It also clarifies that nothing in the Atomic Energy Act limits the agency's exercise of its powers to issue immediately effective license amendments or orders to protect the public health, safety, and interest or the common defense and security. This amendment does not affect the opportunity of an interested person for a hearing after the amendment has been issued.

Legislative Memorandum in Support of Proposed Bill

This memorandum sets forth the views of the U.S. Nuclear Regulatory Commission in support of a proposed amendment to Section 189(a) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a), to overturn the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Sholly, et al. v. NRC, et al. (November 19, 1980). That decision seriously and immediately encumbers the regulation of nuclear power, and puts at risk a substantial number of nuclear power plants which would either have to shut down or operate at reduced power if they are not accorded the authority sought in pending license amendment requests. The number of power plants affected will fluctuate over time depending upon which plants have license amendment applications pending and the nature of the license amendment requests. The Commission urges enactment of this amendment.

Statement of Facts

The lawsuit arose over the Commission's efforts to take necessary preliminary steps for the cleanup of the March 28, 1979 accident at Three Mile Island. As a result of that accident the TMI-2 containment building atmosphere held approximately 43,000 curies of radioactive krypton-85 which had been released from the nuclear fuel damaged during the accident. That radioactive krypton posed a barrier to progressing with the cleanup. There was no serious dispute, by anyone, that the krypton had to be removed. After a multi-month extensive public process, the Commission decided to vent the krypton to the atmosphere and amended the license to permit the venting at a faster rate than that permitted under the license's technical specifications while at the same time keeping radiation doses to the public at or below levels which the superseded release limits were intended to assure.

Court of Appeals Decision

In an opinion handed down November 19, 1980, the D.C. Circuit declared that the Commission's refusal to hold a hearing on its venting orders violated petitioners' statutory right to a hearing under Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). Sholly v. NRC, _____ F.2d ____, No. 80-1691 (Nov. 19, 1980). The court ruled that even where a license amendment involves no significant hazards consideration (such as the substitution of dose limits for release limits that allowed for the venting to be completed within two weeks rather than months) an interested person who requests a hearing is entitled by Section 189(a) of

the Atomic Energy Act to a hearing before the amendment becomes effective. The proposed amendment addresses this ruling.1/

Importance of the Court of Appeals Decision

The principal ruling of concern to the Commission is the D.C. Circuit's holding that even where an amendment to a nuclear power plant license involves no significant hazards consideration, an interested person who requests a hearing is entitled by Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239, to a hearing before the amendment becomes effective. The practical effect of that ruling is substantial. Over the past four years the Commission has issued more than 1600 amendments to nuclear power plant operating licenses based upon a no significant hazards consideration determination. Over the past few months some 20 nuclear power plants would either have had to shut down or operate at reduced power if they were not accorded the authority sought in no significant hazards license amendment requests. If, as the D.C. Circuit has held, hearings are necessary before this authority can be granted whenever an interested person requests one, there is the prospect of a substantial curtailment of nuclear power plant operations for reasons which in the Commission's view are unrelated to the safety of the nuclear power plants.

The large number of license amendment actions which the Commission must act upon, as is reflected in the yearly average of better than 400 amendments, is directly attributable to the kind of detailed regulation of nuclear power plant operation that the Commission has demanded. A nuclear power plant operating license, like that issued for Three Mile Island, Unit 2, the power plant involved in the Sholly case, is quite literally hundreds of pages long, and consists of highly detailed technical specifications. Any change in the license itself or in any of those

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1/ The court also ruled that the Commission's approval of venting the TMI-2 containment was itself a license amendment even though not characterized by the Commission as such. This ruling should not prove onerous for three reasons. It is applicable only to a situation where the relevant authority under a license has been revoked as the court mistakenly thought was the case with regard to the TMI-2 license. Second, the Commission does not consider itself bound to follow the court's misreading of the Commission's intent. Third, even prior to Sholly the granting of significant authority where none existed previously would have required a license amendment. Thus the Commission is not proposing to legislatively overrule the court's erroneous ruling with regard to the TMI-2 license.

hundreds of pages of technical specifications is a license amendment.

Since changes must often be made -- for example, whenever a nuclear power plant refuels, which usually occurs at about 18-month intervals, the technical specifications often need to be adjusted to reflect the physical behavior of the fresh fuel placed in the reactor core -- the consequence of the court's holding could be to keep a nuclear power plant shut down or prevent its operating at full-rated capacity, whenever the power plant refuels; and this despite the fact that in the Commission's best judgment there is no significant hazards consideration involved in adjusting the technical specifications to account for the behavior of the fresh fuel. A variety of other kinds of license amendment actions, such as extending the time for imposing a new requirement, or relieving the licensee of a particular maintenance check, could have similar results. For example, as the Commission moves to implement a whole host of new operating license requirements developed in response to the TMI-2 accident, any fine tuning of those requirements involving a delayed effective date or the substitution of one kind of licensing requirement for another could, under the court's ruling, prevent or impede a new power plant from coming on line or impede the operation of a nuclear power plant already in service until the issue was resolved after a hearing. And this despite the fact that the Commission thinks the license or technical specification amendment involved is not of safety significance. That result lacks practicality. The Commission does not think that Congress intended nuclear power regulation and the operation of nuclear power plants to be as episodic and dependent upon happenstance as the frequency of hearing requests on minor matters. Yet such a consequence is plainly a possible result of this Court's ruling that Section 189(a) of the Atomic Energy Act obliges the Commission to hold a hearing on a no significant hazards consideration license amendment, on request, before the amendment becomes effective.[2/] Nor does the Commission think that Congress intended the Commission to eliminate

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2/ The NRC, of course, does not know how many hearing requests, if any, might be filed in connection with these license amendment requests. The Court's opinion, however, clearly provides an incentive for such filings.

The Commission also has as an alternative but not co-extensive source of authority to issue immediately effective orders where the public health, safety or interest so requires. There is language in Sholly which could be interpreted as requiring a hearing on request prior to the NRC's exercise of its power to take immediately effective action. The second sentence of the proposed amendment clarifies that that is not the case, and the Commission is empowered to take such immediate action despite the pendency of a hearing request.

or grossly simplify the vast bulk of technical specifications which govern the operation of nuclear power plants in order to minimize the number of license amendment actions that must be dealt with.[3] With simplification comes a loss of governmental control, a loss of enforceability, and a loss of detailed assurance in a power plant's method of operation. It is questionable whether acceptance of those kinds of uncertainties best advances the public interest in assuring that nuclear power plants are operated safely. It is just as questionable that such a reading of Section 189(a) is the one that Congress intended.[4]

Proposed Amendment

The Commission believes that the court's interpretation of Section 189(a) was erroneous and that the decision seriously encumbers the regulation of nuclear power by providing leverage to block, through hearing requests, needed license amendments which involve no significant hazards consideration. The Commission proposes to correct this situation through an amendment to Section 189(a) which, if adopted, would confirm the Commission's interpretation that there is no right to a prior hearing before an amendment may be made effective, if it presents no significant hazards consideration. The amendment would also clarify that Section 189(a) does not limit the Commission's authority to issue immediately effective amendments and orders when the public health, safety, and interest or the common defense and security requires. As to this latter point Commissioner Gilinsky believes that the proposed amendment should delete the words "and interest" and empower the Commission to take immediate action only when required by the public health and safety or the common defense and security. Commissioner Gilinsky believes that his proposal more accurately reflects the standard the Commission currently employs and that this is not the occasion to broaden the Commission's immediate effectiveness powers.

The amendment urged by the Commission would effectively end the adverse potential impacts of the Sholly decision. For the reasons described in this memorandum, the Commission urges adoption of the proposed amendment.

3/ Of course, any simplification of technical specifications would itself be a license amendment that under the Sholly decision could not be placed in effect until the completion of whatever hearing or hearings are requested by interested persons.

4/ The court of appeal's decision takes no account of these realities in its interpretation of Section 189. Beyond this, in the NRC's view, the court's decision seriously misreads Congress' intent in passing the 1962 amendments to the Atomic Energy Act and erroneously refuses to give deference to the Commission's consistently held interpretation of its governing statute -- that no prior hearing need be held when a finding is made that a license amendment involves no significant hazards consideration.

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

CHAIRMAN

MAR 1 5 1981

The Honorable George H. W. Bush
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

Transmitted herewith is a Nuclear Regulatory Commission proposal in the form of a draft bill to amend the Atomic Energy Act of 1954, as amended, to authorize the Commission to issue an interim operating license for a nuclear power plant, authorizing fuel loading and low-power operation and testing, in advance of the conduct or completion of an on-the-record evidentiary hearing on contested issues. The proposed legislation, which represents an extraordinary and temporary cure for an extraordinary and temporary situation, is set forth in Enclosure 1. An analysis of the proposed legislation is set forth in Enclosure 2. Enclosure 3 sets forth the proposed legislation in the form of a comparative text.

Under the Atomic Energy Act of 1954, as amended, no person may operate a nuclear power plant without first obtaining an operating license from the Nuclear Regulatory Commission. Under existing law, a formal on-the-record evidentiary hearing must be held, and a decision rendered on the basis of that record, if requested by any person whose interest may be affected, before the Commission may issue an operating license.

In the past, the scheduling and processing of licensing reviews has typically provided sufficient time to enable the hearings to be completed and the license issued by the time the nuclear pla is completed and ready to operate. For the first time, howeve it appears that the hearing process for a significant number of nuclear power plants will last beyond the date when construction should be complete and the plants are ready to operate. This situation is an indirect consequence of the Three Mile Island (TMI) accident, which required a reexamination of the entire regulatory structure. After TMI, for a period of over a year-and-a-half, the Commission's attention and resources were focused on plants which were already licensed to operate and to the preparation of an action plan which specified a discrete set of TMI-related requirements for new operating reactors. During this period, utilities that had received construction permits continued to build the authorized plants.

The severe public interest impact of these delays has been discussed extensively before interested committees in the House and Senate. Although there may be differences of opinion on the precise overall impact of these delays, as well as in the different estimates of the consequences for each of the plants, the delay costs now are generally estimated to range in the tens of millions of dollars per month for each completed plant.

The Commission is making every effort to see that available resources are devoted to the completion of its licensing reviews of these plants, and that unnecessary delays in these hearings are avoided. Under existing law, however, the Commission lacks the authority to authorize fuel loading and low-power operation and testing on the basis of its safety and environmental evaluation; it must instead await the completion of the hearing process. The result, for the plants most affected by TMI-related actions, is likely to be delays of at least several months in ultimate operation of the facilities, absent remedial action by the Congress.

The proposed amendment to subsection 189a of the Act would authorize the Commission, if it finds that such action is in the public interest in order to avoid the consequences of delay in the operation of a completed nuclear power plant, to issue an interim operating license authorizing fuel loading and low-power operation and testing of the plant in advance of the conduct or completion of any required hearing. In all respects other than the completion of the hearing, the Commission would have to find that the requirements of all applicable law have been met prior to allowing such interim operations. Thus, the public health and safety, common defense and security, and environmental findings would still have to be made, even though the public interest finding is made. Furthermore, a hearing would still be held if requested by an interested person under section 189 of the Act. The proposed amendment would simply provide that in such a case, the requested hearing could be held or completed after issuance of the license authorizing fuel loading and low-power operation and testing. Moreover, any interim license issued under this authority would be subject to any subsequent findings and orders of the Commission after the conduct of any required hearing. The authority to issue such interim licenses would expire on December 31, 1983.

The effect of this proposed legislation would be to advance by at least several months the date of operation of the plants most affected by the TMI-related actions, where issuance of the operating license is contested. The savings of time could be much more substantial in cases where testing showed the need for modification

and further testing. By placing a time limit of December 31, 1983 on the Commission's authority to issue such interim licenses, the proposed legislation would assure that the relaxation of licensing requirements would be confined to those plants which have been most directly affected by the Commission's post-TMI actions. Since the risks associated with low-power operation and testing are much smaller than those associated with normal full-power operation, we believe that this authority, limited to the relatively few plants likely to be most affected by our TMI-related effort, represents a minimal intrusion on our usual review and hearing process. The Commission cannot, under existing law, take these measures to reduce the delay in the licensing of the affected plants. The proposed legislation would result in very substantial cost savings for consumers in the service areas of the affected plants.

The proposed legislation deals essentially with matters of licensing procedures and, as indicated, would not alter any of the substantive standards and requirements of the Atomic Energy Act pertaining to the protection of public health and safety and the common defense and security or of NEPA. In light of this, the Commission has concluded that the proposed legislation would not significantly affect the quality of the human environment.

Additional comments by Commissioner Ahearne and myself are enclosed.

Sincerely,

Joseph M. Hendrie

Enclosures:
1. Draft Bill
2. Analysis of Proposed Legislation
3. Comparative Draft Bill
4. Additional Comments of Commissioner Ahearne and Chairman Hendrie

Enclosure 1

DRAFT BILL

To amend the Atomic Energy Act of 1954, as amended to authorize the Commission, upon determination that such action is necessary in the public interest, to issue an interim operating license authorizing fuel loading, low-power operation and testing of a nuclear power reactor in advance of the conduct of a hearing:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that subsection 189a of the Atomic Energy Act of 1954, as amended, is amended by adding after the final sentence in the subsection:

> Notwithstanding any other provisions of this Act, the Commission may, upon determination that such action is necessary in the public interest in order to avoid the consequences of unnecessary delay in the operation of a nuclear power reactor, issue for such a facility an interim operating license authorizing fuel loading, and operation and testing at power levels not to exceed five percent of rated full thermal power, in advance of the conduct or completion of any required hearing: Provided, that any operating license so issued shall be subject to any

subsequent findings and orders of the Commission after the conduct of any required hearing; and provided further, that in all other respects the requirements of the Atomic Energy Act of 1954, as amended, shall be met. Prior to the issuance of any such interim license, the Commission shall publish in the Federal Register a notice of its intent to issue the license, and shall provide an opportunity for parties to the proceeding to comment on whether such action is necessary in the public interest. The authority to issue such an interim license for a nuclear power reactor in advance of the conduct or completion of a hearing shall expire on December 31, 1983.

Enclosure 2

Analysis of Proposed Legislation

Under the Atomic Energy Act of 1954, as amended, no person may operate a nuclear power plant without first obtaining an operating license from the Commission. Under existing law, a formal on-the-record public hearing must be held before issuance of any operating license if requested by any person whose interest may be affected. The proposed amendment to subsection 189a authorizes the Commission, under the circumstances specified therein, to issue an interim operating license authorizing fuel loading and operation and testing at power levels not to exceed five percent of rated full thermal power, in advance of the conduct or completion of hearings on the issuance of the full-term license.

This authority could be used only if all legal requirements applicable to a license for fuel loading and low-power testing and operation have been satisfied, with the sole exception of the requirement that in a contested proceeding, operation can be authorized only after a decision based upon the record of a completed hearing. These legal requirements include the Commission's findings as to public health and safety, the common defense and security, the environment, and antitrust considerations, as mandated by the Atomic Energy Act of 1954, as amended, the National Environmental Policy Act, and other applicable statutes.

Under the proposed legislation, the Commission may exercise the authority to permit fuel loading and low-power operation and testing if it finds that such action is necessary in the public interest in order to avoid the consequences of unnecessary delay in the operation of the facility. This public interest finding would be based on the consideration of the costs, ultimately borne by consumers, of having a completed nuclear power plant standing idle while awaiting the completion of the hearing on the full-term license. These costs include the dollar costs of delay and of obtaining replacement power, and may also include the need for power from the facility and the energy equivalency of fossil fuel.

Any interim license issued under this authority will be subject to any subsequent findings and orders of the Commission after the conduct of the required hearing.

The proposed legislation requires the Commission, before authorizing issuance of a license for fuel loading and low-power operation and testing, to publish notice of its intended action in the Federal Register and to afford an opportunity for parties to comment on whether the intended action is necessary in the public interest.

Any final action of the Commission under this subsection is subject to judicial review.

The authority granted by the proposed legislation will expire on December 31, 1983. For a significant number of nuclear power plants -- those most affected in the review process by Commission efforts to respond to the Three Mile Island accident -- this time period should permit the Commission, with the full cooperation of prospective applicants, to schedule licensing reviews and proceedings so as to avoid, wherever possible, situations in which completed plants stand idle while awaiting completion of licensing proceedings.

Enclosure 3

Comparative Text Draft Bill

Atomic Energy Act of 1954, As Amended

Sec. 189. Hearings And Judicial Review.--

a. In any proceeding under this Act, for the granting, suspending, revoking or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186 c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104 b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a [illegible]ting facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such

thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. Notwithstanding any other provisions of this Act, the Commission may, upon determination that such action is necessary in the public interest in order to avoid the consequences of unnecessary delay in the operation of a nuclear power reactor, issue for such a facility an interim operating license authorizing fuel loading, and operation and testing at power levels not to exceed five percent of rated full thermal power, in advance of the conduct or completion of any required hearing: Provided, that any operating license so issued shall be subject to any subsequent findings and orders of the Commission after the conduct of any required hearing; and provided further, that in all other respects the requirements of the Atomic Energy Act of 1954, as amended, shall be met. Prior to the issuance of any such interim license, the Commission shall publish in the Federal Register a notice of its intent to issue the license, and shall provide an opportunity for parties to the proceeding to comment on whether such action is necessary in the public interest. The authority to issue such an interim license for a nuclear power reactor in advance of the conduct or completion of a hearing shall expire on December 31, 1983.

Enclosure 4

Additional Comments of Commissioner Ahearne

I accept the desirability of low-power interim licensing, given the problems we now face. If improvements in the licensing process cannot be made, then full-power interim licensing may be necessary. However, it is time for fundamental reforms in the role and practice of the hearing process. In particular, the Commission should direct Boards to serve to decide only issues that are raised by the parties, and of those, only those of substance. The threshold for admitted contentions should be significantly raised, sua sponte authority should be limited, and the Boards should be authorized to manage the proceedings with a strong hand. Failing these changes, I expect another Commission will be requesting full-power interim licensing legislation.

Enclosure 4

Additional Comments of Chairman Hendrie

I strongly support the legislative proposal made here for authority to issue interim operating licenses for fuel loading and low-power operation and testing. It would, in effect, advance the operating schedules of the affected units by several months and result in substantial savings for consumers.

But it is also my view that the authority for interim licensing could reasonably be extended to include full-power operation, with a further substantial reduction in cost impacts. This authority would be needed with regard to only a small number of units, I estimate nine at most and more probably no more than six, that are particularly severely affected by the licensing delays following the Three Mile Island accident. For these units, even the low-power interim license authority, together with all the measures the Commission can take under existing law, will probably not be enough to avoid licensing decision delays. Indeed, one of these units is already experiencing such a delay. The full-power interim licensing authority would remedy that situation for most of these units and would minimize the delay for the unit already affected.

QUESTION 1. The Commission has issued for brief public comment proposed rules to modify its hearing procedures that are intended to expedite the hearing process. The NRC proposal includes an Advisory schedule for licensing proceedings. Given the proposed changes, is this a realistic schedule, and should the direction to licensing boards to follow the schedule be more than advisory?

ANSWER.

A realistic schedule based on the possible changes cannot yet be prepared. The Commission does not believe that the schedule should be made binding on the Licensing Boards because the varying circumstances of individual proceedings could well dictate either shorter or longer time periods.

Commissioner Ahearne believes the schedule is very optimistic. He doubts that a schedule alone, without fundamental changes such as raising the level for contentions, will do much good.

QUESTION 2. The Commission has recently issued as a proposed rule its post-TMI requirements for construction permits. It appears that this will have the effect of resolving these issues on a generic basis and therefore, it will not be necessary to litigate the sufficiency of these requirements in each individual licensing proceeding. The NRC did not follow this approach for operating licenses. It appears that post-TMI requirements, including emergency planning, are issues where hearings are to be held on the plants to be completed in 1981 and 1982. Is the rulemaking approach still a useful one for the operating license cases, and if so, should it be pursued now? Is the Commission doing so?

ANSWER.

The rulemaking approach could well be pursued for operating licenses, and the Commission is currently considering a proposed rulemaking prepared by the staff along the lines of the one proposed for construction permits.

QUESTION 3. The NRC report to Congress on measures to address the delay problem included a March 3, 1981, memorandum for the Commission from NRC's General Counsel and Director of Policy Evaluation. This memorandum included several options for modifying the hearing process beyond the changes already proposed by the NRC. What are the Commission's views on each of the following options included in the Bickwit/Hanrahan memo, and does the Commission plan to implement any or all of these?

(a) The Commission could establish a firm discovery schedule and require that it be adhered to, absent a showing of substantial prejudice to an affected party.

ANSWER.

The Commission is presently considering issuing a policy statement which would direct the licensing boards to supervise the discovery process and encourage the boards, in consultation with the parties, to establish time schedules for discovery.

QUESTION. (b) The Commission could establish that normally hearings will start within 30 days after the pertinent staff documents are available.

ANSWER.

After much discussion of hearing schedules it is apparent that it would not be realistic in some cases to start hearings 30 days after issuance of the last staff document. This does not provide for sufficient time for discovery, for filing of revised contentions based on any new information contained in the staff document, holding a prehearing and settlement conference, obtaining a licensing board ruling on the revised contentions and, filing of testimony. In its March 18 Federal Register notice which proposed several rule changes aimed at expediting the licensing process, the Commission sought public comment on a schedule under which hearings would commence approximately 95 days after filing of the last pertinent staff document. Public comments have been received and are being evaluated.

QUESTION. (c) The Commission could encourage presiding boards to meet guidelines for rendering timely decisions.

ANSWER.

When the Commission adopts a proposed schedule for hearings, the schedule will include a suggested time period for issuance of the licensing board decision.

QUESTION 3. (d) The Commission could eliminate all possible licensing and appeal board schedule conflicts.

ANSWER.

The Chief Administrative Judge, Atomic Safety and Licensing Board Panel, has recently made several changes in licensing board assignments in order to eliminate all possible schedule conflicts. Scheduling conflicts have not been a problem for the Atomic Safety and Licensing Appeal Panel.

QUESTION 3. (e) The Commission could consolidate identical, TMI-related issues into a single proceeding.

ANSWER.

Chairman Hendrie and Commissioner Ahearne believe that NRC's experience with this approach (litigating the radon issue) suggests it is inlikely to save time. Consequently the Commission did not adopt this suggestion.

Commissioners Gilinsky and Bradford state the following:

Following issuance of NUREG-0737, which suggested that certain TMI-related requirements be imposed on facilities, the Commission on December 18 issued a policy statement on the treatment of TMI-related issues in NRC proceedings. Because the items listed in NUREG-0737 were merely guidelines, the Commission indicated that the applicant could challenge the necessity of imposing the requirement and that other parties could argue that the proposed requirements did not go far enough. The Commission has directed its staff to prepare proposed regulations which would turn the NUREG-0737 guidelines into binding regulations. Should the guidelines become regulations, parties to the proceeding would not ordinarily be able to challenge the necessity for nor the sufficiency of the requirement.

QUESTION 3. (f) The Commission could use informal hearings as a means of separating out those particular factual issues that require formal examination and cross-examination under the Administrative Procedure Act.

ANSWER.

The Commission believes that this proposal would introduce substantial complexity into the proceedings without clear benefit.

Commissioner Ahearne believes that substantial improvement would be made in NRC procedures were the Commission to use more informal public meetings to clarify issues.

QUESTION 4. The Bickwit/Hanrahan memo also identified the option of placing the burden on intervenors to show after discovery, prior to hearing, a genuine and substantial issue of material fact by available and specifically identified reliable evidence.

(a) Are intervenors now required to present any affirmative evidence to have their contentions admitted for hearing?

ANSWER.

No. The present rule on intervention in NRC proceedings parallels the requirement in the Federal Rules of Civil Procedure in that it does not require an evidentiary showing as a condition to intervention or to admission of contentions. E.g. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2). ALAB-130, 6 AEC 423, 1973).

Commissioner Ahearne notes that although it may parallel the Federal Rules of Civil Procedure to some extent, the present rule does not contain a provision equivalent to FRCP 12(b)(6) which permits a court to dismiss a complaint on the merits.

QUESTION. (b) If not, why shouldn't an intervenor be required to come forward with direct evidence that, if true would prove its contention, before such contentions are accepted for hearing? In essence, this would place the burden of going forward with an issue on the intervenor, although the final burden of proof would still rest on the license applicant.

ANSWER.

To require a would-be intervenor to come forward with direct evidence sufficient to prove his or her contention would be to require that intervenor to present a prima facie case at the outset of a proceeding, many months before any hearing would be held. The staff would likely not be prepared to satisfy the burden at that time assuming, hypothetically, it were required to do so, and there is a legitimate concern that such a burden would be too substantial for the would-be intervenor to bear.

Commissioner Ahearne notes that substantial improvement in the hearing process could be made if the threshold for admitting contentions was raised, although it need not require the "direct evidence" referred to here.

QUESTION: (c) Some of the pending operating license hearings include issues that the NRC staff, the Advisory Committee on Reactor Safeguards and the Commission itself have carefully considered in connection with other applications. Hydrogen control in containment is one example. Particularly in this type of situation, why shouldn't the intervenor in the later case be required to come forward with evidence at the outset that, if true, would show the earlier Commission determination to be incorrect?

ANSWER.

As a general matter NRC cannot curtail substantive review of an issue on license proceedings unless NRC's experience and/or technical understanding is sufficient to resolve the issue generically i.e. a rulemaking with opportunity for public comment.

QUESTION 5. Two issues that appear to be in contention in two of these pending proceedings are the issues of (1) the financial qualifications of the utility, and (2) the need for the power to be generated by the plant and alternative energy sources. Why shouldn't both of these issues be resolved once-and-for-all at the construction permit stage? Particularly with respect to need for power, how is it possible that such an issue can be raised at the operating license stage? For that matter, since virtually every State has a mechanism for determining the power needs of its electric service areas, why shouldn't the law be changed to make those State findings dispositive of the issue before NRC?

ANSWER.

Need for power and financial qualifications issues can, under current NRC regulations, be raised at the operating license stage only in matters which differ from, or which reflect new information in addition to, those matters discussed at the construction permit stage. The Commission is moving in the direction of reducing, or eliminating entirely, the financial qualifications requirement for operating licenses. Proposed rules on this matter are planned for the near future.

The attached papers (SECY-81-69 and SECY-81-208) explain in some detail how and why need for power issues are raised at the operating license stage. The Commission recently agreed that a rulemaking should be initiated as discussed in SECY-81-69. The law could be changed so that State findings on need for power would be binding on and not litigable before the NRC, and NRC has in the past suggested legislation along these lines. However the attached paper (SECY-81-208) suggests that it is the broader "need for the plant" issue as opposed to the narrower "need for power" issue that underlies most contentions at the operating license stage.

January 27, 1981

SECY-81-66

POLICY ISSUE
(Notation Vote)

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: RECONSIDERATION OF ALTERNATIVE APPROACHES TO NRC'S PRESENT PRACTICES IN TREATMENT OF NEED FOR POWER AND ENERGY CONSERVATION

Purpose: Response to the request of the Secretary of the Commission, May 21, 1980 (COMPS-80-15) to prepare an options paper which will consider alternatives to present staff practices in the treatment of need for power, energy conservation, and alternative energy sources.

Issues: This paper will focus on two policy issues associated with need for power and alternative energy source determinations. They are:

1. Should the NRC place greater reliance on State or regional authorities (e.g., Public Service Commissions) and/or other Federal agencies (e.g., Federal Energy Regulatory Commission (FERC)) for analysis and preparation of positions on this issue?

2. Should rulemaking be used to limit the scope of review at the OL stage and to specify acceptable margins for error in need for power determinations?

Issue 1

States' responsibilities for regulating utilities include determining the need for additional generating facilities. In addition, according to a recent GAO report (Electricity Planning - Today's Improvements Can Alter Tomorrow's Investment Decisions), States, in general, perceive it as their responsibility to ensure (1) realistic electricity demand forecasts, (2) development of renewable energy resource potential, (3) power supplies for all customers, (4) evaluation of the costs and benefits of alternative methods of meeting future power needs, (5) the implementation of cost-effective conservation programs, and (6) public participation in electric utility planning and policymaking. Given these State responsibilities, I believe NRC, as a matter of policy and routine practice, should place heavy reliance on and not duplicate the State analyses and determinations in these areas.

In fulfilling our responsibility under the National Environmental Policy Act of 1969 (NEPA), NRC is required before licensing a nuclear power plant to consider the need for power. In my view, this responsibility can and should be satisfied by relying heavily on the State determination in these areas. In those situations where a State does not provide certification or where the State review is determined in the hearing process to be inadequate, the NRC would have to rely on another Federal agency, such as the Federal Energy Regulatory Commission (FERC), or would itself have to perform the review. An Appeal Board decision (ALAB-490, 8 NRC 234, 1978) concluded that NRC could place heavy reliance upon the judgment of local regulatory bodies in making need for power assessments. I note for example, FERC in licensing hydroelectric projects does not perform an independent forecast of the need for power but evaluates the data submitted by the States, utilities, intervenors and other available sources.

Need for power forecasting is subject to a wide range of variance. Accordingly, I am wary of the NRC relying primarily on its own analysis as a basis for denying a construction permit. In fact, a license has never been denied (post NEPA) based on failure to demonstrate a need for power. Even though current analytical capability of some States to independently review need for power has been questioned (see previously referenced GAO report), the States are the most appropriate body for such a decision. The States set and control the economic and development policies for their geographic area. The State has first-hand knowledge of the residential, commercial, and industrial development that is projected for the future. The State is the most logical source of information for the energy needs associated with the projected development. In addition, the State is in a good position to evaluate alternative energy sources to meet the energy needs of the projected development. A State may consider, in addition to the cost comparisons of different energy generation, other State needs and policies. For example, a State confronted with difficulty in complying with the Clean Air Act may evaluate the energy alternatives differently than a State without the air quality problem. Some need for power determinations must be multi-State in scope. Studies have shown, however, that States can work together effectively on such joint efforts. NRC can also rely on such agencies as FERC to provide a regional perspective.

Another significant consideration is the priority of NRC review of need for power in the context of our primary responsibility to protect public health and safety. Both the Kemeny Commission and the NRC Special Inquiry Group believed that NRC should minimize its efforts in areas that are not directly germane to safety. In view of the limited available resources, NRC should focus staff effort and management attention on areas having the highest payoff for public health and safety. To the extent that we can place greater reliance on State or regional authorities or other Federal agencies for need for power and alternative energy sources analysis, this will allow us to focus attention on higher priority safety-related issues.

Given the above, it is desirable from both a policy perspective and a nuclear safety perspective to place greater reliance on State, regional, and other Federal authorities for need for power analyses. Additional discussion of the need for power determination issue is provided in Appendix A.

Issue 2

Rulemaking can improve current NRC practices by limiting the scope of review of need for power and alternative energy sources assessments at the OL, FTOL, reactor restart stages and for other licensing actions where a completed plant exists or is near completion. It is easy to demonstrate on economic grounds that a nuclear plant once constructed is a far superior alternative than all fossil baseload units which have not yet been constructed. The likelihood is low that sufficient low-cost baseload capacity exists on the system to eliminate the economic advantages of operating a new nuclear plant, once constructed. The principal objective of rulemaking would be to preclude, in the absence of new and significant information, the reconsideration at the OL stage of need for power and alternative energy sources which were considered in the CP stage.

This is a well-defined area that could be fairly easily treated by a rulemaking and one where it is unlikely that a strong case could be made against it. There will be a large number of OL licensing actions over the next several years and timely action on a rulemaking could save Commission (or State) resources as well as resources of parties to licensing. A more detailed discussion is provided in Appendix B.

Recommendation: (1) As a matter of policy, the Commission should endorse greater reliance on State assessment of need for power, energy conservation, and alternative energy source analyses to fulfill NRC's NEPA responsibilities. Subsequently, the staff will develop procedures to solicit State and FERC input for the licensing EIS and for testimony before licensing boards.

(2) Rulemaking should be initiated to preclude, in the absence of new and significant information, the reconsideration at the OL stage of need for power and energy alternatives.

William J. Dircks
Executive Director for Operations

Enclosures:
Appendix A - Additional discussion of need for power
Appendix B - Detailed discussion re limiting the scope of review at OL stage

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, February 11, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, February 4, 1981, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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APPENDIX A

Reliance on State or Regional Authorities. Greater reliance on State or regional authorities (e.g., Public Service Commissions) which either prepare electric load forecasts or develop positions on this issue looked quite promising during the preparation of SECY 77-355. Since that time the staff has conducted a number of studies and investigations which confirm that greater reliance on State and regional authorities is feasible and practical.

A pilot study performed by Southern States Energy Board (SSEB)* under contract to the NRC Office of Standards Development, demonstrated the ability of States (South Carolina, North Carolina, and Virginia) to develop need for power forecasts and to work together to develop multi-State forecasts, which correspond to the service area of a given utility company. The forecasts of electricity consumption were developed and information compiled on future growth of residential, commercial, and industrial sectors, by State and by service area. The multi-State need for power forecasts were developed independently of the utility forecasts utilizing econometric modelling techniques. The commercial sector forecasts of the region's two major utilities (Duke Power Company and Carolina Power and Light Company) were used in a comparison of econometric and non-econometric techniques for determining need for power forecasts for several time frames. The results of the two forecasting techniques supported one another. The pilot study demonstrated a technique and procedure for States to collectively develop a regional need for power forecast, while maintaining individual decision-making authority. The procedure developed was reviewed by the member States of SSEB and was refined so that it can be applied in multi-State forecasts in other regions. Performance standards were identified and acceptance criteria were established for the procedure.

*A MultiState Procedure for Determining Need for Power, by Gerald R. Hill, A Report to the U.S. Nuclear Regulatory Commission, Office of Standards Development, October 1979.

In 1977 the staff investigated possibilities for cooperation with a number of States. A cooperative agreement with the State of New York was being developed which would have permitted the State to do a need for power review. Exchange of letters between NRC and New York resulted in a set of guidelines being proposed for handling need for power. An extensive list of items were provided which required an in-depth review of a larger number of likely causal factors of demand growth, other factors which cause need for additional capacity, and recognition of uncertainty in forecasting. (H. R. Denton to Lawrence A. Gollomp, State of NY PUC, March 28, 1977, quoted in NUREG-0398, pp 58-59). Subsequently, the State of New York ceased action on nuclear licensing and withdrew from further participation. The NRC also has a General Memorandum of Understanding with the States of Oregon, Washington, and Indiana which would allow us to rely on them to treat issues such as need for power.

The Office of State Programs in 1977 and 1978 conducted studies on improving regulatory effectiveness in State-Federal licensing actions. The need for power issue was an important part of the overall study. The need for power studies are reported in NUREG-0195 and NUREG/CR-0022. These studies found there is no prevailing set of accepted criteria for determining need. Thus, it would be desirable for NRC to publish generally acceptable guidelines for need for power analyses. The extent of consideration of need for power by States ranges from none to comprehensive (see NUREG/CR-0022, p 8). Determination of adequacy of analysis to make a need for facility finding is mainly done by administrative discretion. About one-fourth of the States provide explicit guidance in need for facility decisions through listing statutory requirements. A lesser number of States have criteria outlined in regulatory procedures, rules, or informal guidelines. Various factors were considered by more than three-fourths of the States, including (1) the geographic area, (2) economic and population growth, (3) dividing demand into residential, commercial, and industrial,

(4) demand projections, (5) reserve margins, (6) phasing out older plants, (7) costs of conventional alternative energy sources, and (8) forecasted trends in fuel prices. Factors considered by less than half the States are: (1) conditions in the electric reliability region, (2) appliance saturation, (3) use of solar, geothermal, etc., (4) peak load reductions, (5) price elasticity in rate structure or rate level changes, (6) potential exchanges outside the power pool or region, and (7) adverse impacts outside the service area of not having the capacity.

The above review, on its face, appears to show a substantial capability in need for power evaluation by many States. However, the majority of States, 28, rely solely on forecasts done by the applicant or a power pool. Others rely heavily on applicant forecasts even though they may meet several of the criteria mentioned above. Consistent with this, the GAO study also found that the need for power forecasting by States should be improved (see EMD-80-112, esp. pp 20-23).

An Appeal Board decision (ALAB-490, 8 NRC 234, 1978) concluded that NRC could rely on State forecasts to satisfy NEPA mandates. The decision stated:

> "We do not wish to be understood as suggesting that in all circumstances the electricity demand forecasts of a State public utilities commission must be presumed to be reliable and thus perforce to provide an acceptable foundation for need for power determinations. Despite that such commissions might be expected to possess considerable familiarity with the primary factors bearing upon present and future demand, they are no more entitled to be treated as infallible than are other government agencies. If therefore must always be open to a party to one of our proceedings to establish that, for one reason or another, the analysis underlying the utility commission's predictions of future demand is in error. By the same token a licensing board must be free to disregard utility commission predictions which it is convinced rest upon a fatally flawed foundation.
>
> "But where a utilities commission forecast is neither shown nor appears on its face to be seriously defective, no abdication of NRC responsibilities results from according conclusive effect to that forecast. Put another way, although the National Environmental Policy Act mandates that this

> Commission satisfy itself that the power to be generated by the nuclear facility under consideration will be needed, we do not read that statute as foreclosing the placement of heavy reliance upon the judgment of local regulatory bodies which are charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands (empnasis added). This is so at least where, as here, the utilities commission not merely has spread on the record a detailed development of the reasons for its conclusions but, as well, has made available for examination by the parties to our proceeding one of the principal participants in the load forecast undertaking."

The Executive Legal Director agrees with the Appeals Board decision that NRC can place heavy reliance on the judgment (forecasts) of local (or State) regulatory bodies responsible for insuring that utilities meet their customers' demands.

If the NRC adopts a policy of relying on State forecasts, the technical staff would disseminate guidelines along the lines of those given in the 1979 SSEB contract or the Denton-Gollomp letter cited above. The States would then be asked to provide certification for use in the NRC EIS which confirmed that the appropriate analyses were conducted. Primary reliance could be placed on this certification to serve NEPA requirements. States would also be asked to provide expert witness for licensing hearings.

The pros and cons of State reliance are summarized below:

Pros: (a) Involvement by the States and regional planning bodies in the nuclear licensing process is consistent with recommendations from a number of sources.

(b) This will reduce duplication of effort where the State analysis is found sufficient for an NRC licensing decision under NEPA.

(c) It may reduce charges of NRC bias in need for power assessments.

(d) Staff effort could be reduced by approximately one staffyear and more will be saved if licensing activity increases in the future.

Cons: (a) If States do not provide certification of the need for power review, the NRC would have to rely on another agency, such as the Federal Energy Regulatory Commission, to provide the review or would have to perform the review itself.

(b) If State reviews are determined in the course of the hearing process to be less than adequate, the NRC would have to rely on another agency, such as the Federal Energy Regulatory Commission, to provide the review or would have to perform the review itself.

APPENDIX B

Rulemaking

Limitation on scope of review of need for power and alternative energy source assessment at the OL, FTOL, reactor restart stages and for other licensing actions where a completed plant exists or is near completion could improve current NRC practices

This option is essentially similar to the one proposed in Enclosure "B" of SECY 77-355, pp 68 to 70. That document pointed out that demand growth may no longer be relevant, since it can be demonstrated that the sum of fuel plus operating and maintenance costs (i.e., variable costs) of a nuclear plant once constructed is a less costly source of electricity than most baseload units in the applicant's system. Thus, the principal objective of rulemaking on the need for operation of the constructed baseload facility at the OL stage would be to develop the test for reasonableness that could be used to define areas of importance for analytical treatment at the OL stage which would, as a minimum, provide a rationale that rules out analysis of the need for demand growth analysis and all its related issues, focusing instead only on an analysis of the least costly variable cost alternatives among the existing baseload units in the applicant's system and the newly constructed unit for which an OL is applied.

While the primary benefit of licensing a nuclear plant at the CP stage is usually the potential additional electrical output to meet demand growth, the benefit at the OL stage may instead by that electricity from the existing nuclear plant will be less costly to generate than from other available means.

Since SECY-77-255 was prepared, a petition was received by NRC and subsequently denied which would have limited the scope of environmental review at the operating license stage to "... those matters of environmental significance which have not been resolved in the environmental review conducted at the construction permit stage." Thus, the proposed amendments would have excluded from consideration at the operating license stage such matters as, "need for power, alternatives to the plant (such as alternative sites and alternative fuels) and other matters which are determined before issuance of a construction permit." (See SECY-79-406, Attachment D, PRM-51-4 pp. 1 and 2.) The petition was denied, a primary reason being that the petitioner closely tied the argument to scope of safety reviews at the operating license stage. (45 F.R. 10492, Boston Edison Company, et al., Denial of Petition for Rulemaking, Docket No. PRM-51-4, February 15, 1980.) It was argued by the petitioners in this regard that issuance of a construction permit required that the Commission eventually issue an operating license upon making only limited additional findings. Furthermore, the petitioners appeared to seek to foreclose Commission consideration of even new significant information.

In its denial, the Commission did not foreclose reconsideration of proper scope of review at the OL stage, but considered PRM-51-4 to be an inadequate basis for doing so. The NRC staff has recommended that the Commission undertake a rulemaking proceeding to improve licensing effectiveness in NEPA operating license reviews by differentiating between issues that (1) could affect an operating license decision and are, therefore, appropriate for review, and (2) issues that are not likely to be of significance in an

operating license proceeding and, therefore might be excluded from consideration under NEPA. (See SECY-78-485, Preliminary Statement on General Policy for Rulemaking to Improve Nuclear Power Plant Licensing, August 29, 1978 Enclosure D Issue No. 7; and Interim Statement of General Policy and Plans for Rulemaking to Improve Nuclear Power Plant Licensing, 43 F.R. 58377, December 14, 1978). Twelve of the fifty-eight comments received on this interim statement specifically mentioned the proposal to clarify the scope of the NEPA review at the OL stage. Most of the commenters believed clarification of the issues to be considered at both the CP and OL stages to be a high priority item. The thrust of the comments was that duplication of effort should be avoided and issues resolved at the CP stage should, in the absence of new and significant information, not be reconsidered at the OL stage. Duplication is not currently required by NRC, however, the comments suggest that the regulations do not clearly make this point. Work on this project (responses to the Interim Statement) was deferred until early 1980 because of TMI (SECY-79-428). It has now been resumed and the public comments on this issue have been evaluated.

It is recommended that rulemaking proceed on this issue. While in SECY-78-485 it was recommended that certain issues, including need for power and alternative fuel be excluded from consideration at the OL stage, the criterion should be directed more toward relevance of the new information to the decision. At the OL stage, need for power and alternative energy sources collapse into one issue., i.e., is operation of the nuclear facility lower cost (including environmental costs) than other available generating systems? If this is true, and it would indeed be rare if it were otherwise, the benefits of the proposed action (issuance of an OL) would have

been shown. Thus forecasting growth in demand and comparison of energy alternatives would not need to be treated at the OL stage to have established benefits for purposes of NEPA. These issues would not be precluded by rule, but rather the rule should clarify that only significant new information be considered. The pros and cons of limiting the scope of review of need for power and alternative energy sources at the OL stage are summarized below.

Pros: (a) Staff and probably Commission resources would be saved, as well as resources of parties to licensing actions.

(b) This is a definable area for a rule, one that is fairly easily treated, and one where it is quite unlikely that a strong case can be made against it. It should be stable, i.e., the staff does not foresee that changed circumstances would negate the rule as a public benefit.

(c) There will be a large number of OL licensing actions for the next several years. Timely action on this alternative will be of immediate benefit.

Cons: (a) Such a rule may be perceived to be undesirably restrictive by intervenors.

OFFICE OF THE SECRETARY

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

IN RESPONSE REFER TO S81-69

April 20, 1981

REVISED

MEMORANDUM FOR: William J. Dircks, Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-81-69 - RECONSIDERATION OF ALTERNATIVE APPROACHES TO NRC'S PRESENT PRACTICES IN TREATMENT OF NEED FOR POWER AND ENERGY CONSERVATION

This is to advise you that the Commission (with all Commissioners approving, except as noted below) has approved the following in regard to SECY-81-69:

1) As a matter of policy the Commission endorses placing substantial reliance on State assessments of need for power, energy conservation, and alternative energy source analyses to fulfill NRC's NEPA responsibilities. The staff should develop procedures to solicit State and FERC input for the licensing EIS and for testimony before licensing boards.

2) Rulemaking should be initiated to preclude, in the absence of very significant new information, the reconsideration at the OL stage of need for power and energy alternatives.

Commissioner Bradford wants public comments as to the correct threshold when the need for power and energy alternatives should be considered at the OL stage. He does not endorse "very significant new information" as the right alternative at this time.

cc: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne
Commission Staff Offices

CONTACT:
A. Bates (SECY)
41410

April 1, 1981

SECY-81-208

RULEMAKING ISSUE
(Notation Vote)

For: The Commissioners

From: Leonard Bickwit, Jr., General Counsel

Subject: GENERIC RULEMAKING

Discussion: OGC, OELD, NRR, the Atomic Safety and Licensing Appeal Panel, and the Atomic Safety and Licensing Board Panel have considered some thirty possible topics for generic rulemaking to reduce OL hearing litigation and agreed that the topic discussed below deserves further serious consideration by staff. It is our intention that the final decision on initiating rulemaking would await further staff study to confirm that the trade-off between time and resources required for rulemaking and OL litigation time and resources savings is favorable. The topic is the comparative environmental effects of nuclear and coal-fired plants.

NEPA requires that environmental impact statements be prepared for "major Federal actions significantly affecting the quality of the human environment." These statements must include both the costs and benefits of the proposed action and the costs and benefits of reasonable alternatives. Moreover, the statement must be considered in the

Contact:
Martin G. Malsch, OGC, 41465

agency review process. Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). Issuance of an operating license for a nuclear power reactor is clearly a major Federal action significantly affecting the quality of the human environment. Thus under NEPA the costs and benefits of the proposed issuance of an operating license and reasonable alternatives to that license must be discussed and considered in the NRC review process. However, at the operating license stage the NEPA review may be different from the review at the construction permit stage because of the fact that the plant is completed. The law is clear that the capital investment in the plant and other sunk costs may be considered. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Calvert Cliffs v. AEC, supra. Thus, in considering the costs and benefits of the proposed action and alternatives at the operating license stage, the financial and environmental costs associated with plant construction may be ignored, with the result that the costs and benefits of the proposed action are merely the environmental and economic costs and benefits of plant operation, and reasonableness of alternatives is judged with reference to a proposal that entails no additional capital or other construction related costs and offers near-term on-line availability.

In considering the costs and benefits of the proposed action under NEPA at the operating license stage, the environmental and economic costs of plant operation are weighed against either the benefit of providing needed electrical energy (the so-called need for power benefit) or the economic and/or environmental benefits associated with retiring older plants from base-load service (the so-called substitution benefits). This weighing comprises the so-called "need for the plant" issue discussed in every impact statement. The NRC has a clearly established principle that failure to meet electrical energy demands would be "unthinkable". Vermont Yankee Nuclear Power Corp., ALAB-179, 7 AEC 159 (1974). Thus, if it can be shown that refusal to allow plant operation would jeopardize reliable electrical service, then a favorable NEPA cost-benefit balance is established conclusively. Contentions which simply assert that the plant should stand idle in the face of blackouts or brownouts can be rejected at the outset without

any litigation on the merits. However, because of declining electrical energy load growths, many, if not most, plants now at the operating license stage are justified under the substitution theory. Under this NEPA benefit theory need for power as a benefit is irrelevant.

In considering the costs and benefits of reasonable alternatives under NEPA at the operating license stage, the first task is to select the reasonable alternatives. Because of the sunk costs, alternatives requiring large capital or environmental construction costs are seldom proferred. The alternative of abandoning the plant and constructing the same plant on a different site is not per se a reasonable one, and, as far as we are aware, no intervenor has ever proferred such an alternative at the operating license stage. On the other hand, the alternative of deferral of nuclear plant operation in favor of increased energy conservation, or use of existing coal or oil-fired units or other capacity available in the short term is not per se unreasonable. Indeed, many, and perhaps most "alternatives" contentions at the operating license stage are of this type. These "alternatives" contentions are attractive to intervenors because initial operation of a nuclear plant usually results in significant consumer electric rate increases since it is at this point in time that the plant usually goes into the rate base. Deferral of nuclear plant operation is seen by intervenors as a way to avoid both environmental and economic costs -- at least for the short term.

We understand that the staff is currently working on possible rulemaking to establish some threshhold for need for power contentions at the operating license stage. However, given the widespread use of the "substitution" benefit theory at the operating license stage, which renders need for power irrelevant as a benefit, rulemaking on alternatives would seem to have the most impact in terms of reducing hearing litigation. As discussed, the alternatives involving most hearing litigation appear to be those with small capital or construction costs and short-term availability. Thus consideration of possible rulemaking candidates should focus on currently available options, such as oil and coal-fired plants, geothermal, energy conservation, and the like. Further, the rulemaking

would need to focus on either short-term feasibility or the environmental and/or economic effects of the option as compared to nuclear plants. Staff believes that most of these alternatives, including oil, geothermal, and energy conservation, either require resources incommensurate with the benefits of rulemaking or are too region-specific for rulemaking. However, the staff presentation on differential environmental effects of coal-fired and nuclear plants is fairly standard, and could be the subject of rulemaking.

A number of other topics which the group believed appropriate for some rulemaking consideration are already the subject of papers being prepared by staff for the Commission's consideration. These are hydrogen control, TMI-related OL requirements, alternative sites at the OL stage, and (as noted above) need for power at the OL stage. Any further comments on these matters will need to await completion of staff studies. Rules on two other rulemaking topics considered worthwhile, ATWS and financial qualifications, are already pending before the Commission.

Leonard Bickwit, Jr.
General Counsel

SECY NOTE: The General Counsel recommends that the NRC staff prepare a paper for Commission consideration which more thoroughly analyzes the desirability of coal-fired vs. nuclear plants as a subject for rulemaking.

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, April 15, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT April 8, 1981, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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QUESTION 6a. Commissioner Ahearne has recommended that licensing and appeal boards be limited to the issues raised by the parties to the proceeding.

What are the views of each of the Commissioners on the need for, and the benefit to be obtained by, licensing and appeal boards raising issues not raised by parties to an operating license proceeding?

ANSWER: (Chairman Hendrie)

In my view, the Boards should have some limited authority to examine issues not put in contention by the parties. I would return to the 1975 formulation: "Matters not put into controversy by the parties will be examined and decided upon by the presiding officer only in extraordinary circumstances where he determines that a serious safety, environmental, or common defense and security matter exists. This authority is to be used sparingly."

I think it reasonable that the Boards, acting for the Commission in hearings, should be able to examine an issue on their own motion "in extraordinary circumstances." But the Boards should not attempt a de novo review of the application, particularly at the operating license stage and, as the 1975 rule put it, such sua sponte authority should be used sparingly.

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ANSWER (COMMISSIONER GILINSKY'S RESPONSE)

In addition to deciding the disputes between the parties, the Licensing and Appeal Boards act as the Commission's delegates in reviewing the adequacy of the application and the staff's evaluations. The boards should conduct such review as the Commission directs or authorizes.

Peter A. Bradford

Question 6a.

Commissioner Ahearne has recommended that licensing and appeal boards be limited to the issues raised by the parties to the proceeding.

What are the views of each of the Commissioners on the need for, and the benefit to be obtained by, licensing and appeal boards raising issues not raised by parties to an operating license proceeding?

Answer

As agents of the Commission, the Licensing and Appeal Boards must have the authority to examine serious safety issues which have not been raised by any party to the proceeding. Whether the issue is raised in the hearing context, or forwarded to the Commission, this authority is important and is not burdensome.

In this regard, I have enclosed a portion of a recent memo from Alan S. Rosenthal, Chairman of the Atomic Safety and Licensing Appeal Panel, to Commissioner Ahearne on the licensing process. The enclosed portion specifically addresses the question of the sua sponte authority of the boards. I share Mr. Rosenthal's views on this subject.

Commissioner Ahearne

None of the above is intended to imply that the adjudicatory boards are or could be guarantors of safety and environmental protection. Manifestly, the hearing process does not allow for any such guarantee. The boards have neither the assigned duty nor the available resources to embark upon an independent examination of every safety and environmental aspect of reactor construction and operation. To the contrary, they must reach their decisions on the basis of what is placed into an adjudicatory record by the parties. If what is before it suggests the existence of a serious safety or environmental issue not specifically raised or addressed by a party, the board is empowered by the present rules to inquire into that issue on its own initiative. But even in such circumstances, the outcome of the inquiry will hinge upon what is then provided the board on the record. And, needless to say, many potential problems will simply not come to the attention of the board at all. Thus, in the final analysis, the safety and environmental acceptability of a particular reactor depends upon the contribution of every link in the regulatory chain. The adjudicatory boards are but one such link -- even though, we would submit, an important one.

C. It is with the foregoing considerations in mind that the present authority of the adjudicatory boards to raise new "serious" issues sua sponte in operating license proceedings should be appraised. 4/

As I understand it, the principal pragmatic objections to that authority are (1) that it has been promiscuously employed; (2) that, when invoked, it consumes inordinate amounts of staff

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4/ Much has been made by at least one industry spokesman of the November 1979 amendment of 10 CFR 2.760a and 2.785(b)(2). Prior to that amendment, those Sections authorized licensing and appeal boards to exercise their sua sponte authority "only in exceptional circumstances" and went on to direct that the "authority is to be used sparingly". The amendment deleted that restrictive language. In the accompanying statement of considerations, however, the Commission stated that the "amended rules eliminate an apparent constraint on boards as well as more accurately reflect current NRC adjudicatory board practice". 44 Fed. Reg. 67088 (November 23, 1979)(emphasis supplied). And it does not appear that there has been a significantly greater resort to the sua sponte authority since 1979 in reliance upon the amendment. Both before and after the amendment, the boards have invoked that authority if and when, in their judgment, a "serious" safety or environmental issue existed. (The requirement that the issue be a "serious" one had been contained in the pre-1979 version and was retained.)

time which could be better devoted to other pursuits; and (3) its use has produced no substantial contribution to safety. Of the three, it seems to me that only the last might, if valid, provide a sufficient reason for eliminating or significantly curtailing the authority.

As to the first, I am personally unaware of any clear-cut abuses by boards of their sua sponte authority (although reasonable minds might well differ as to the degree of seriousness of any particular board-raised issue). Be that as it may, I am quite confident that there are means of controlling any real abuse problem that may exist without eliminating or gutting the sua sponte authority.

As to the second objection, on April 13 the Executive Legal Director furnished the Commission with a memorandum listing the cases in which (since 1975) adjudicatory boards (licensing or appeal) have raised new issues on their own initiative. The memorandum went on to estimate, inter alia, the time spent by NRR and ELD staffs in responding to those issues. With due respect to the persons responsible for those estimates, I must note that, on their face, several of them seem grossly inflated -- possibly by as much as an order of magnitude. For example, it is most difficult to credit the estimate that 600 professional staff hours (i.e., a total of 15 full weeks) were required to deal with two exceptionally narrow and uncomplicated questions raised by the Diablo Canyon Appeal Board which is considering the adequacy of the applicant's security plan. I might add that the members of that Board were very surprised when their attention was called by me to that estimate. Based upon their intimate knowledge of both the scope of the two questions which they had posed and the nature and extent of the staff's eventual presentation on them, they are unable to comprehend why or how more than a total of 60 hours of technical and lawyer time was expended. 5/

Notwithstanding these misgivings, I am prepared to accept the proposition that, depending upon its nature and scope, the preparation and presentation of the staff's response to a board-raised issue may require the expenditure of considerable effort. But the same is to be said with regard to the fulfillment of the

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5/ It is my understanding that the ELD is in the process of revising some of the estimates contained in his April 13 memorandum. I have been told, however, that the 600-hour estimate for the Diablo Canyon Board-raised security plan issues will be but modestly reduced (to 540 hours).

staff's obligation to develop and present its position on those issues raised by the parties to the operating license proceeding -- issues which very well may be of much less significance in terms of safety or environmental protection. It seems to me that the ultimate question is not whether adjudication is time-consuming for all concerned; for most issues at least, it manifestly is. Rather, the focus should be on whether the time is worth spending.

Thus, I come to the third, and crucial, objection. It would, of course, be fatuous to assert that every sua sponte exploration produces a safety or environmental improvement commensurate with the time or resources utilized in making the exploration. But once again, I do not believe that the worth of inquiring into a particular issue (whether raised by a party or by the board sua sponte) is to be measured either exclusively or primarily in terms of whether the end result is some alteration in the proposal under review. To the contrary, a sua sponte inquiry should be thought to make a sufficient contribution to the fulfillment of this agency's weighty statutory responsibilities even if it does no more than enable the Board to satisfy itself -- before giving approval to the issuance of an operating license -- that a perceived potentially serious safety or environmental problem has received adequate applicant and staff attention and has been dealt with satisfactorily.

The implications of stripping the boards of their current sua sponte authority are brought into particularly sharp focus by a consideration of the security plan phase of the Diablo Canyon operating license proceeding. As earlier mentioned, in that proceeding the Appeal Board raised sua sponte two issues bearing upon the adequacy of the Diablo Canyon security plan which had not specifically been placed into controversy by the parties to the proceeding themselves. Although narrow in scope, those issues were critical to an overall assessment of the adequacy of the plan (indeed, as I understand it, they went to whether the plan conformed to outstanding Commission regulations). Surely, it cannot be seriously maintained that the public interest in insuring a secure (and thus safe) facility would have been furthered had the Appeal Board simply ignored the possible deficiencies in the plan. Further, how could the Board members have been fairly called upon to pass judgment on the adequacy of the plan and, at the same time, deprived of the right to consider all aspects of it having a bearing upon that adequacy? On this score, what is involved is not merely the integrity of the outcome of the adjudicatory process but, as well, the Board members' sense of personal professional responsibility as principal participants in that process.

As Mr. Shapar noted at a recent Commission meeting, even if it were precluded from injecting a new issue into an operating license proceeding, a board would retain the right to bring its concerns to the staff's attention for the latter's consideration. 6/ We regard that alternative as entirely unsatisfactory. Among other things, the board's concern may bring into question some prior action, inaction or determination on the part of the staff. In such circumstances, there would be no reason for a high degree of confidence that the staff would take the same fresh and penetrating look at the issue as might be expected of independent adjudicators not put in the awkward position of having to reexamine (and possibly overturn) previously formulated conclusions. Insofar as the public is concerned, that confidence would likely be total lacking. While the hearing process may not enjoy universal respect, rightly or wrongly it is generally thought to produce more trustworthy decisions than are made in non-adjudicatory contexts. If nothing else, an adjudicatory board must both act upon the basis of a formal record and assign reasons for the conclusions it reaches. The staff is not so obligated.

For the foregoing reasons, the Appeal Panel urges the retention of the adjudicatory board's existing authority to raise "serious" issues on their own initiative in operating license proceedings. It has no objection, however, to the institution of safeguards against the abuse of that authority (assuming that abuse is deemed to be a real or potential problem). Although we do not advocate its adoption, one such safeguard might be a requirment that the board first obtain Commission approval to raise and pursue the new issue or issues. Unless, however, the Commission were able to act promptly upon requests

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6/ Mr. Shapar also suggested that, before moving forward itself on the new issue, the board might be required to bring it to the attention of the Commission (which could then decide whether it wanted the board to pursue the matter). This alternative is addressed later in this memorandum.

for such approval, the result of a requirement along that line might be undesirable delays in the completion of the proceeding. 7/

Attachments:
1. 4/15/81 memorandum (Dr. Buck)
2. 4/10/81 memorandum (Mr. Cho)

ccs w/attachments:
Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
B. P. Cotter, ASLBP
L. Bickwit, OGC
H. K. Shapar, ELD
S. Chilk, SECY

7/ This memorandum is not addressed to any extent to the other sua sponte authority routinely exercised by appeal boards; i.e., the authority to review those portions of a licensing board initial decision (and the record underlying it) which have not been challenged on any appeal which may have been taken from that decision. As I understand it, that quite distinct sua sponte authority is not under current Commission reevaluation. I mention the point only because the ELD's April 13 memorandum includes a reference to the pumphouse settlement aspect of the North Anna operating license proceeding. The Appeal Board did not, however, raise that issue ab initio. Rather, it was first addressed by the Licensing Board. Appeal Board consideration of it was in the context of a sua sponte review of the Licensing Board's initial decision (which was not appealed). See ALAB-491, 8 NRC 245, 247 (1978). In contrast, the still-pending turbine missile issue was raised by the Appeal Board under the sua sponte authority now under consideration (i.e., that issue had not been considered by the Licensing Board at all). Id., at pp. 247-50.

QUESTION 6a. Commissioner Ahearne has recommended that licensing and appeal boards be limited to the issues raised by the parties to the proceeding.

What are the views of each of the Commissioners on the need for, and the benefit to be obtained by, licensing and appeal boards raising issues not raised by parties to an operating license proceeding?

ANSWER: Commissioner Ahearne's response is attached.

John F. Ahearne
April 1, 1981

Purpose of NRC Hearings

In my limited experience, I have seen our hearings described or justified as having any or all of the following purposes:

1. To satisfy the requirements of the Atomic Energy Act and of the Administrative Procedure Act.

2. To contribute significantly to insuring adequate protection of the public health and safety.

3. To build public confidence in and understanding of NRC licensing.

Assuming these purposes, my estimate of their being satisfied is as follows:

1. Yes -- by design, i.e., the hearing process is designed to satisfy these statutory requirements.

2. There are several arguments offered to support this view:

(a) Plants are safer because of items identified in hearings and subsequently corrected. But: this may be true, but I know of no case.

(b) Contested plants are safer because the NRC staff works more thoroughly when they know they will be tested in a hearing. But: are uncontested plants less safe? Are the 46 1/ plants that received operating licenses without a hearing less safe than the 25 1/ plants that went through hearings?

(c) All plants are safer because staff review is toughened by exposure to hearings, causing the staff to articulate their assumptions and their logic, which assures sound reasoning. But: these benefits, even if true, are unmeasurable, and this is a very costly and indirect approach to improving staff practice. Improving staff practice requires clear guidance and good management.

(d) The staff and applicant are not sole possessors of truth. The hearing process allows others to raise significant issues and to challenge the staff and applicant. The Board will discover the truth. But: aside from the question of significance of the issues, the current process is not well geared to accomplish this objective. Standing is essentially a residence requirement, not an expertise test. Our practices on contentions

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1/ Preliminary data.

and discovery seem to invite participants to come and look for issues rather than requiring identified concerns be a prerequisite for participation.

The adversary court model presumes opposing sides which have a direct personal interest. The courts do not recognize the dispute when a party represents a public as opposed to a private interest (i.e., Sierra Club v. Morton). But the NRC hearing process supposedly focuses on legitimate issues rather than personal interest, i.e., on public rather than private interests. For a person with an issue to reside near the plant may be entirely fortuitous.

Unless the objective is to delay, the parties should be looking for a mechanism which assures their issues will be given serious attention and provides a response which describes disposition of the issues and makes clear the basis for that resolution. There should be a better alternative than our current process, which exhausts all parties (e.g., Seabrook seismic pleading).

3. If this is the purpose it obviously is not working and may not be authorized (nor funds appropriated).

The process could be defended as educating the public, particularly those who live near a plant: (1) if you have a plant in your backyard, you are entitled to understand it; (2) the hearing provides a mechanism to get the attention of the NRC and the applicant to get answers; (3) the bureaucracy is often unresponsive. But: this is a very costly way to achieve objectives that could be met by more informal public meetings to air issues and educate the local public.

Other Problems

The process as it now exists is unable to distinguish between trivial and significant issues. This is due in large part to (a) a structure which rarely rewards and often punishes attempts to control a proceeding and (b) a failure to provide clear, consistent, timely, and rational guidelines which can be applied by a Board with confidence in an individual proceeding. The first is inherent in the nature of the appeal process. Since interlocutory appeals are discouraged, review almost always takes place from the perspective of a completed hearing. Complaints that contentions, discovery, or testimony were improperly excluded can be effectively raised at this stage. The affected party argues that it was prejudiced in that "if only X were included, the decision would be different." Complaints that too much was included will be academic -- the prejudice lies in the delay which already will have occurred. Licensing Board members are inclined to be "conservative" in allowing issues to enter the hearing. Errors in excluding items might lead to remand, while errors in including items seem to have little consequence.

The second aspect flows from the Commission collegial decision-making process. Collegial decisions are the result of compromise. A final Commission document is the result of a slow process of coordinating and negotiating different views. Unless the Commission devotes great effort, the product will be imprecise.

Proposed Changes

If hearings are not necessary to assure public health and safety, then fundamental reform is needed. The current process has high costs. If there are few benefits, we should look for a more efficient, effective alternative. It is realistic to expect we can provide significant improvements in the process without radical change to the framework. However, any approach which begins and ends by establishing an envelope schedule or by setting time limits for individual pieces is largely a stab in the dark. The logical approach is to (1) understand the major components of the process, (2) identify at least in qualitative terms the major problems, and (3) then address those problems. Recognizing this is a complex process, we must be prepared to make decisions with imperfect understanding.

A significant amount can be accomplished even without radical change to the current hearing process. Although I agree with the Chairman of the Licensing Board Panel that Board members must be given responsibility and authority to make judgments for individual proceedings, the Commission has the responsibility for setting the general rules.

In light of these considerations I propose that the Commission take the following actions:

-- Support use by the Boards of current authority to control proceedings.

-- Raise the threshold for admitting contentions

-- Clarify responsibility of the Boards.

  - o Modify or eliminate sua sponte authority
  - o Strengthen deference given to judgment of a Board in an individual case
  - o Support sanctions

A. Emphasize current authority of the Boards. We should issue a policy statement which gives strong support for the Boards to use existing authority to control proceedings. The primary utility would be to stem

the trend of the past few years. A policy statement would have a positive effect because we would clarify our expectations of the Boards. We also must be prepared to support Boards when they follow our guidance.

The statement proposed in the March 5th Cotter memorandum is good. Use of existing a[illegible]ority by Boards could significantly shorten and focus proceedings.

B. Raise contention threshold. This very important step is relatively simple, feasible, could be implemented quickly, and directly addresses the failure to distinguish between trivial and significant issues.

We must develop better mechanisms for selecting real issues. Regardless of whether the Allens Creek decision was correct or not (i.e., whether it merely continued a body of practice which originated in 1973 or constituted a departure from past practice), this issue needs to be addressed. (Summary disposition is not a reasonable substitute for adequate screening of contentions. Summary disposition motions require a disproportionate amount of resources and accelerated schedules will make them virtually impractical.)

OGC should work with the various Licensing Board members who expressed concerns in connection with the Allens Creek decision. OGC should also specifically consider Costle v. Pacific Legal Foundation (63 L Ed 2d 329). That decision in combination with Vermont Yankee should be analyzed to help formulate an appropriate, higher threshold.

C. Clarify responsibility of Boards. Is the primary responsibility of a Licensing Board to resolve disputes presented by the parties or to perform an independent technical review? I believe it to be the first but perceive an increasing shift towards the second. I would narrow and strengthen the focus of the Boards on contested issues by the following:

1. Modify or eliminate sua sponte role. Under the current rule a Board is to raise an issue on its own in an OL proceeding when it determines "that a serious safety, environmental, or common defense and security matter exists." The "serious" threshold has been lowered. Boards have read Commission and Appeal Board decisions over the last few years as defining a broader responsibility for them, which increases the pressure to build an all inclusive record. We could take action to counteract the recent expansion of the sua sponte role (e.g., see attached excerpt from my February 23, 1981 memorandum) and reinforce the "serious" threshold.

If uncontested plants are safe enough, only admitted contentions should be debated. I would eliminate the sua sponte role. The hearing

should examine only contested issues, i.e., the ones that make the case different from uncontested cases. The threshold should be high. Public confidence would then be based on real issues being debated.

If there is no support for deleting the sua sponte role, we should restructure the process by which these issues are raised. In particular, a Board should certify to the Commission a question it believes should be raised before requiring parties to address it in a hearing. This would serve to emphasize the unusual nature of such inquiries.

At the very least we need to reemphasize the boundaries which were established in the original articulation of the sua sponte rule:

> "The fact that the Boards may inquire into matters that concern them should in no way be construed as a license to conduct fishing expeditions. As a general rule, Boards are neither required nor expected to look for new issues. The power to do so should be exercised sparingly and utilized only in extraordinary circumstances where a Board concludes that a serious safety or environmental issue remains. Normally there is a presumption that the parties themselves have properly shaped the issues, particularly because the hearing follows comprehensive reviews by the regulatory staff and the Advisory Committee on Reactor Safeguards."
> Consolidated Edison Co. (Indian Point Unit 3), CLI-74-28, 8 AEC 7, 9 (1974).

2. Strengthen deference given to a Board's judgment in an individual case. No Board is going to aggressively manage a process if it is concerned that it will be second guessed at a later date. Given guidelines, such as those in the Cotter March 5th memorandum, a Board's judgment should be given great deference. Application of general principles to specific cases will usually turn on the details of the circumstances. The Board is most familiar with those details and has the advantage of personally participating in the ongoing proceedings. A paper record is no substitute for actual presence.

This does not mean we should not follow closely individual cases. I will support efforts to develop better ways to monitor the hearing process.

3. Give sanctions real content. Although authority clearly exists to sanction parties who do not meet their obligations, as a practical matter a Board cannot make a credible threat of sanctions. For example, a Board has no control over the NRC staff. Obviously, the staff has a number of competing priorities. Although in some cases its hearing work should slip, the staff should be prepared to justify those slips.

We sho ld expand the concept suggested by the Appeal Board in OPS, i.e., communication by a Board when the staff does not meet its hearing responsibilities. The EDO should be told of each scheduled commitment by the staff in a proceeding and of any failure to meet such a commitment.

The applicant already has an incentive, in that delay can be very costly. However, if the applicant does not meet deadlines, it should not be heard to complain about the ultimate delay in the process. We should document contributions to delay by the applicant.

With respect to other parties, the penalties described by Cotter should be used. Focusing the hearing on more important issues will help avoid dissipation of intervenor resources as well as staff resources. In addition, clarifying the responsibility of Boards to pursue issues on their own will help make the threat of throwing out a contention more realistic. It is not very effective to strike a contention and then adopt it as a Board question (which has happened).

D. Interim Licensing Legislation. Interim licensing legislation is the wrong solution. The licensing impact problems are due to (1) TMI having deflected staff resources and (2) an inefficient process. Going for interim licensing authority neglects the first and accep the second. It significantly undercuts public credibility, introduces the least efficient part of the licensing process (the Commission) directly into our ongoing proceeding, but, worst of all, accepts all the problems with the current system. If the majority concl des they are unwilling or unable to address making substantive changes to the process, or that such changes would take too long to affect the near term problems, I would not oppose a legislative proposal for low power interim licensing.

Conclusions

Although I question whether the adjudicatory format is appropriate for the resolution of technical issues involving a large degree of professional judgment, I recognize that a fundamental change in the process will not occur without extended debate. We can significantly improve the process without radical change to the framework. The participants in the process are entitled to guidance, and it is the Commission's responsibility to provide it. A pronouncement that "we want the hearing process shortened -- go and do good" is not enough. It fails to address fundamental questions. By not addressing the purposes of the Hearings and the details of the process, we can neither estimate whether the schedule will really be shortened, nor the costs of shortening.

EXCERPT FROM FEBRUARY 23, 1981 MEMORANDUM TO THE COMMISSIONERS FROM MR. AHEARNE, SUBJECT: HEARING ISSUES REQUIRING COMMISSION ATTENTION

. . . UNRESOLVED SAFETY ISSUES

7. The Commission should clarify the Licensing Boards' responsibilities in OL and OL amendment proceedings concerning unresolved safety issues, to make it clear that litigation and findings are required in this area only if a Board determines that a "serious safety environmental or common defense and security matter exist." See 10 CFR 2.760a.

Discussion

I did not object to the Appeal Board decisions in Monticello and North Anna because I expected they would be interpreted as simply cautioning boards to be particularly sensitive about possible issues relating to unresolved safety issues. In other words, resolution of unresolved safety issues inherently is more likely to contain a serious issue. I never thought there was danger that they would be interpreted as an independent mandate to consider those issues since that would be contrary to Section 2.760a. However, apparently the Boards have not seen it my way.

For example, the September Zimmer decision contains the statement (p. 3): "Recent Appeal Board decisions have also re-emphasized the obligation of Licensing Boards in operating license proceedings to make findings concerning the resolution of unresolved generic issues applicable to the particular reactor, whether or not the issues are the subject of contentions." In fact, one Board seemed to find such a responsibility even in an amendment proceeding (see the ASLB decision issued January 26, 1981 in the Dresden spent fuel pool proceeding). That Board sua sponte ordered: "Based on a review and analysis of the various generic unresolved safety issues under continuing study, what relevance is there, if any, to the proposed spent fuel pool modification? Further, what is the potential health and safety implication of any relevant issues remaining unresolved?"

To avoid further expansion of the already unwieldy hearing process, I recommend we clarify this matter. . . .

QUESTION 6. (b) Is the Commission aware of any instances in which licensing or appeal board sua sponte review --- that is, exploring issues not raised by the parties -- , particularly at the operating license stage, has resulted in major safety design changes or other major safety improvements to the plant?

ANSWER.

The Office of the Executive Legal Director, which provides legal advice and services to the staff, including representation in adminstrative proceedings involving the licensing of nuclear facilities and materials, has provided the Commission with the following view:

A review of operating license proceedings completed since 1975 in which safety issues were rasied sua sponte by the Commission's adjudicatory boards indicates that in all cases except Duquesne Light Company, et al. (Beaver Valley Power Station, Unit No. 1), Docket No. 50-334, the adjudicatory board raising the safety matter was eventually satisfied that the matter had been adequately considered and accounted for in the application and/or in the Staff's review of the application. Accordingly, no license condition providing for major safety design changes or other major safety improvements to the plant has been imposed relating to a safety matter raised sua sponte by a board. The sole exception involved a concern of the licensing board regarding operation at various power levels (ranging from 5% to full power) during a one-year period of time until an auxiliary river water system was installed. In granting the full power license, the board included license conditions providing for an interim alternate cooling system (portable pumps) until the auxiliary river water system was installed. This interim alternate cooling system provided an added measure of confidence during the interim period although it should be noted that the board found that the postulated accident requiring the installation of the auxiliary river water system was "most unlikely". Duquesne Light Company, et al. (Beaver Valley Power Station, Unit No. 1) 4 NRC 55 at 58-60 (1976).

The Atomic Safety and Licensing Board Panel, which conducts public hearings and makes such intermediate or final decisions as the Commission may authorize in proceedings to grant, suspend, revoke, or amend NRC Licenses, has provided the Commission with the following information:

An April 13, 1981 study disclosed that sua sponte questions have been asked in only 12 proceedings since 1975. These questions took up 1.5 percent or less of the staff preparation time in contested proceedings during that period. Sua sponte questions have had one of three results: (1) the Board's concern is satisfied and no further action is taken; (2) the parties modify their position or the application as it relates to the concern; or (3) the Board imposes conditions on the license.

In at least three cases the Boards have imposed license conditions:

In Beaver Valley 1, the Board raised two issues: (1) the probability that a gasoline barge might explode and destroy the cooling water intake; and (2) whether steam generator tubes could fail in an accident. As a result, special pumps were ordered to be kept available until an alternate cooling water structure could be built, and special restrctions were ordered regarding primary leak rate and tube plugging. In Davis-Besse 1, the Board questioned the accuracy of dose estimates and imposed the following requirements; (1) expanded preoperational monitoring; (2) review of operational tech specs before operation; and (3) expanded operational monitoring. In Fitzpatrick, the Board questioned the adequacy of ecological monitoring and required Staff and Applicant to agree on a monitoring program before the license issued.

The importance of sua sponte review in operating license proceedings relates directly to the nature of the construction permit proceeding. In the latter, the Board reviews a preliminary design before anything is actually built. Some five or six years elapse between issuance of the construction permit and the operating license. Significant variance between the preliminary design and the plant actually constructed, and new developments, seismic information or the need for hydrogen control identified as a result of the TMI accident, are but two examples of major changes requiring thorough operating license review. The Supreme Court recognized this safety concern 20 years ago, stating that "nuclear reactors are fast developing and fast changing. What is up to date now may not, probably will not, be acceptable tomorrow." Power Reactor Development Co. v. International Union of Electrica. Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 408 (1961).

In fact, the sua sponte authority frequently reduces litigation by causing cases or issues to be settled prior to hearing. This benefit to the licensing process occurs more frequently than Board identification of issues which result in Board imposition of conditions on a license. The application is amended or revised prior to hearing, a fact not usually reflected in the Initial Decision. A recent illustration of the effect of Board questions is described in Attachment I.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

April 28, 1981

MEMORANDUM FOR: B. Paul Cotter, Chief Administrative Judge
ASLBP

FROM: Oscar H. Paris, Administrative Judge
ASLBP

SUBJECT: REDUCTION OF LITIGATION RESULTING FROM SUA SPONTE QUESTIONS RAISED BY LICENSING BOARD

In the Turkey Point Steam Generator Repair Proceeding the Intervenor alerted the Licensing Board to the potentially hazardous method proposed by the Licensee for storing the old, radioactive steam generator assemblies on the plant site. Briefly, the Steam Generator Repair Report proposed to store the assemblies in an earthern-floor "compound" located in the lay-down area. The Board determined from the FSAR that the elevation of the lay-down area was approximately 5 feet MLW (Mean Low Water), and that the predicted maximum storm surge to be expected during a hurricane at the site is 18.3 feet MLW. Consequently, in the Board's Order Ruling on the Petition of Mark P. Oncavage, dated August 3, 1979, Judge Paris asked a series of safety-related questions about the proposed storage method (10 NRC 183, 203-204; see Attachment).

In Revision 7 to the Steam Generator Repair Report submitted in March 1980 the Licensee substantially revised its proposed storage method. It now plans to store the radioactive assemblies in a concrete-floored building founded on engineered fill with a finished grade of 17.5 feet MLW; further, the storage building will comply with the design requirements of the Code of Metropolitan Dade County, Florida, with respect to hurricane wind loadings.

Staff, with the support of Licensee, has moved for summary disposition of a contention which relates to the storage of the steam generatory assemblies. Because of the action taken by Licensee subsequent to the issuance of our order in August, 1979, the Board is granting the motion for summary disposition and will indicate in that order that its own concerns about storage of the radioactive assemblies have been satisfied, also.

Thus, because of the questions raised by the Board in the Order admitting the Intervenor, the Licensee voluntarily modified its plans so as to eliminate the hazardous situation which concerned the Board, and the time and expense of highly technical testimony and litigation associated with it has been avoided. This development is of significance with regard to avoiding delay in the Turkey Point proceeding because Licensee needs to get a decision in time to complete the repair, if it is allowed, before the 1982 peak load and hurricane season.

ATTACHMENT # 1.

ATTACHMENT

Moreover, Petitioner referred to "The Licensee's use of the 10.1 foot storm tide during Hurricane Betsy in 1965 . . ." in his Supplemental Submission (at p. 3, fn. 2). Licensee responded by pointing out that the historical 10.1 foot storm tide was mentioned in the FSAR, not the SGRR nor SER, and went on to indicate that the design of the plant safety systems is based on a predicted maximum flood stage, resulting from the maximum probable hurricane of 18.3 feet M.L.W. (Licensee's Response to Supplemental Submission at 13, fn. 9; see Safety Evaluation for the Operating License, dated March 14, 1972, Section 3.4).[1] With a surge level of 18.3 feet, wave runup to above 22 feet is predicted. *(Ibid.)*. The FSAR indicates that sustained winds exceeding hurricane force (75 mph) can be expected on an average of once every 7 years, and winds greater than 100 mph can be expected once every 25-30 years (FSAR, Section 2.6.6).[2]

The proposed storage compound for the steam generator lower assemblies will be located in the laydown area at the plant. (SGRR, App. A, "Responses to NRC Questions of 1/9/78" at A-46-1). The elevation of the laydown area is 5.0 feet. (FSAR, Fig. 1.2-1). The storage facility will be constructed of reinforced concrete walls which are designed as radiation shields, and it will have a watertight concrete roof. One end of the compound will be left open, presumably to provide access, and this end is to be closed with interlocking "stop logs." (SGRR, App. D, "Responses to NRC Questions of 12/15/78" at D-1-1 and Fig. D.1-1). The dimensions of the facility will be 110 feet by 60 feet by 17 feet high. *(Id.*, Fig. D.1-1). There is no indication that the storage compound will be watertight to floods or that it will be designed to withstand stresses of storm surge, wave runup, or the impact of floating debris such as logs and broken timbers. Finally, I note that Licensee plans to store the steam generator lower assemblies for approximately 35 years before disposing of them off-site. (SGRR, Section 3.4.4).

The foregoing information causes me to believe it reasonable to expect that the steam generator assembly storage compound with the enclosed radioactive assemblies would be subjected to hurricanes about five times during its functional life, and I would further expect at least one of those storms to have winds in excess of 100 mph. Conceivably such a storm could produce the projected 18.3 foot tidal surge with wave runup to about 22 feet. The scenario generated by these considerations is that the storage compound would be inundated in 13 feet of moving water with waves possibly breaking over its roof. This scenario brings many questions to mind. Would the storage compound be watertight, or would the assemblies also be immersed in 13 feet of sea water? Would the walls withstand the stress imposed by moving water and wave action? Would the walls withstand the impact of floating debris thrown against them by waves? How bouyant would the sealed steam generators be?[3] Might they move and consequently impact the wall from within the compound? If the walls should collapse, could the wind driven water move the assemblies away from the compound? The ability of the steam generator storage compound to withstand stresses imposed by hurricanes is not addressed in the SGRR, the SER, or the Environmental Impact Appraisal (EIA).[4]

10 NRC 183, 203-204, footnotes omitted (1979)

QUESTION 6. Commissioner Ahearne has recommended that licensing and appeal boards be limited to the issues raised by the parties to the proceeding.

c. Does the Commission believe that this sua sponte review by the licensing and appeal boards constitutes a necessary, additional layer of technical review beyond that performed by the NRC staff and the ACRS?

d. Particularly given the fact that no hearing at all is required at the operating license stage for uncontested cases, is there any reason why the licensing and appeal boards should have the authority, and in fact be encouraged, to pursue issues not raised by the parties in the contested cases?

ANSWER.

c. In establishing licensing and appeal boards it was never the intention to create an additional layer of technical review in the sense that de novo review of the application would be conducted. However, giving the licensing and appeal boards the authority to raise technical questions not raised by the parties does provide a check on the quality of the staff review process. The boards have always had this authority and therefore it is not possible to compare the results of a review system with this authority with the results of a review system without it. Thus, the question whether the exercise of sua sponte review is necessary is a difficult one to answer.

d. A number of reasons can be offered for maintaining this authority in the licensing and appeal boards. First, as noted in the response to c. above, such authority provides an independent check on the staff review. This independent check could spot issues not included by the staff in its review, suggest incorrect resolution of issues when that occurs, and generally encourage thorough review on the part of the staff. In addition, maintaining this authority would preserve the sense of professionalism on the part of the technical board members. It would be difficult to expect a technical member to simply sit back and ignore technical defect in the presentations made before the board.

Commissioner Ahearne refers to his paper attached as the answer to Question 8.

QUESTION 7. The Commission's report to the Congress on options for reducing licensing delays identifies two options regarding the "immediate effectiveness" issue. One would reinstate licenses, and the other would allow the operating license to issue after a brief opportunity for direct Commission review. What are the views of the Commissioners on these two options, and with regard to the second, what, realistically, could the Commission expect to accomplish during the brief review period?

ANSWER:

Answer (Chairman Hendrie). My preference is for reinstatement of the immediate effectiveness rule, with the present Appendix B, 10 CFR 2, procedure to go in parallel with fuel loading and plant startup. This option minimizes the potential delay due to Commission review. However, the other option does save about two months of the three that I estimate the Appendix B procedure would take, and is much to be preferred to no change at all.

Question 7 The Commission's report to the Congress on options reducing licensing delays identifies two options regarding the "immediate effectiveness" issue. One would reinstate the immediate effectiveness rule for operating licenses, and the other would allow the operating license to issue after a brief opportunity for direct Commission review. What are the views of the Commissioners on these two opetions, and with regard to the second, what, realistically, could the Commission expect to accomplish during the brief review period?

ANSWER (COMMISSIONER GILINSKY'S RESPONSE)

The Commission should decide whether a power reactor license is granted. Such license decisions are the most important decisions made by the NRC. Like any other organization, the agency runs better when top management takes direct responsibility for major decisions.

Peter A. Bradford

Question 7

The Commission's report to the Congress on options for reducing licensing delays identifies two options regarding the "immediate effectiveness" issue. One would reinstate the immediate effectiveness rule for operating licenses, and the other would allow the operating license to issue after a brief opportunity for direct Commission review. What are the views of the Commissioners on these two options, and with regard to the second, what, realistically, could the Commission expect to accomplish during the brief review period?

Answer

Both the Kemeny Commission and our own Special Inquiry Group strongly criticized the Commission's remoteness from the licensing process and consequent lack of responsibility for its results. This brief direct review compels the Commissioners themselves to assume a direct responsibility for the subsequent safe operation of the plant.

Question 7. The Commission's report to the Congress on options for reducing licensing delays identifies two options regarding the "immediate effectiveness" issue. One would reinstate the immediate effectiveness rule for operating licenses, and the other would allow the operating license to issue after a brief opportunity for direct Commission review. What are the views of the Commissioners on these two options, and with regard to the second, what, realistically, could the Commission expect to accomplish during the brief review period?

Answer. Commissioner Ahearne:

If the Commission has provided clear guidance to the Boards as to what kind of issues they should address and the Commission's positions on, and interpretation of, difficult regulations, and then a Board reaches a positive finding on the outstanding issues, I do not believe that Commission review in a short period of time would be anything other than a mechanism to provide the appearance of Commission involvement. If the Commission has not provided such guidance to the Boards, then a short review will not suffice for reaching a Commission conclusion and we should expect a lengthy period to elapse between Board decision and Commission decision. Consequently, I find little real value in maintaining a version of the Appendix B procedure which requires the Commission to formally grant the license based on a brief review. On the other hand, I do believe that since the Commission has now reached a decision on what the TMI requirements will be, it is our obligation to provide clear instructions to the Boards. In case the guidance proves insufficient, we should also put in place a procedure which allows the Commission to reverse the Licensing Board decision, although I see no reason why a plant should not be allowed to operate or begin operation in the interim.

QUESTION 7. The Commission's report to the Congress on options for reducing licensing delays identifies two options regarding the "immediate effectiveness" issue. One would reinstate the immediate effectiveness rule for operating licenses, and the other would allow the operating license to issue after a brief opportunity for direct Commission review. What are the views of the Commissioners on these two options, and with regard to the second, what, realistically, could the Commission expect to accomplish during the brief review period?

ANSWER.

[Part I calls for views of the Commissioners]

The brief direct review period contained in the second option is intended to provide the Commission with an opportunity to review significant safety issues before operation begins. Commission staff offices will have been monitoring the licensing proceedings and will direct Commission attention to issues of particular importance and dispute. Commission review will be limited, then, to significant safety issues and will ensure that the application is in compliance with pertinent legal requirements and policy directives. Operation would be authorized only upon Commission affirmation of the resolution of such major issues. Detailed review of these and other issues by the Atomic Safety and Licensing Appeal Boards would continue as before.

QUESTION 8: Commissioner Ahearne has noted in his views on the Commission's legislative proposal that full-power interim operating authority will be necessary unless improvements in the licensing process can be made. What specific changes would Commissioner Ahearne make? What are the views of the other Commissioners on these proposals?

ANSWER:

Answer (Chairman Andrie). There are about six units that are completed or are close to completion, with hearings under way or about to start, that are going to be delayed unless the Commission is authorized to issue interim full power operating licenses in advance of the completion of hearings. I believe this will be the case even with the proposed low power operation authority we have requested and with all of the improvements in the licensing process I can foresee the Commission being able to agree upon.

QUESTION 8: Commissioner Ahearne has noted in his views on the Commission's legislative proposal that full-power interim operating authority will be necessary unless improvements in the licensing process can be made. What specific changes would Commissioner Ahearne make? What are the views of the other Commissioners on these proposals?

ANSWER: COMMISSIONER GILINSKY's RESPONSE

The Commission is developing a series of proposals to reduce the time during which plants might stand idle unnecessarily. These, together with approval by Congress of proposal for interim fuel loading and low power testing licenses, should make it possible to eliminate most of the projected idle time and associated economic cost. At the same time they would not undermine the hearing process in the way that granting interim full-power licerses would.

Peter A. Bradford

Question 8

Commissioner Anearne has noted in his views on the Commission's legislative proposal that full-power interim operating authority will be necessary unless improvements in the licensing process can be made. What specific changes would Commissioner Ahearne make? What are the views of the other Commissioners on these proposals?

ANSWER

As an end in itself, expedited licensing is wrong and has little to do with the real problems of nuclear power. I would not approve any such effort which jeopardized or delayed a significant NRC safety program, or which affects the integrity of the hearing process. We are already seeing slippages in a number of projects (the Standard Review Plan, the definition of what constitutes construction permit conditions, and the Systematic Evaluation Plan) that have a potentially significant impact on safety. Of course, expedited licensing alone will do little to help nuclear power and may, if done in a manner that compromises safety or inspires public distrust, do considerable harm.

Other improvements should flow from a study of the type committed to in the 1977 National Energy Plan (p. 72), but never conducted. Such a review, involving diverse participants would lessen controversy and assure balanced change.

Question 8. Commission Ahearne has noted in his views on the Commission's legialative proposal that full-power interim operating authority will be necessary unless improvements in the licensing process can be made. What spe_ific changes would Commissioner Ahearne make? What are the views of the other Commissioners on these proposals?

Answer. Commissioner Ahearne:

Attached is the latest version of a set of my proposals. I believe the Commission must address the fundamental question: What is the proper role for the hearing process?

John F. Ahearne
April 1, 1981

Purpose of NRC Hearings

In my limited experience, I have seen our hearings described or justified as having any or all of the following purposes:

1. To satisfy the requirements of the Atomic Energy Act and of the Administrative Procedure Act.

2. To contribute significantly to insuring adequate protection of the public health and safety.

3. To build public confidence in and understanding of NRC licensing.

Assuming these purposes, my estimate of their being satisfied is as follows:

1. Yes -- by design, i.e., the hearing process is designed to satisfy these statutory requirements.

2. There are several arguments offered to support this view:

(a) Plants are safer because of items identified in hearings and subsequently corrected. But: this may be true, but I know of no case.

(b) Contested plants are safer because the NRC staff works more thoroughly when they know they will be tested in a hearing. But: are uncontested plants less safe? Are the 46 1/ plants that received operating licenses without a hearing less safe than the 25 1/ plants that went through hearings?

(c) All plants are safer because staff review is toughened by exposure to hearings, causing the staff to articulate their assumptions and their logic, which assures sound reasoning. But: these benefits, even if true, are unmeasurable, and this is a very costly and indirect approach to improving staff practice. Improving staff practice requires clear guidance and good management.

(d) The staff and applicant are not sole possessors of truth. The hearing process allows others to raise significant issues and to challenge the staff and applicant. The Board will discover the truth. But: aside from the question of significance of the issues, the current process is not well geared to accomplish this objective. Standing is essentially a residence requirement, not an expertise test. Our practices on contentions

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1/ Preliminary data.

and discovery seem to invite participants to come and look for issues rather than requiring identified concerns be a prerequisite for participation.

The adversary court model presumes opposing sides which have a direct personal interest. The courts do not recognize the dispute when a party represents a public as opposed to a private interest (i.e., Sierra Club v. Morton). But the NRC hearing process supposedly focuses on legitimate issues rather than personal interest, i.e., on public rather than private interests. For a person with an issue to reside near the plant may be entirely fortuitous.

Unless the objective is to delay, the parties should be looking for a mechanism which assures their issues will be given serious attention and provides a response which describes disposition of the issues and makes clear the basis for that resolution. There should be a better alternative than our current process, which exhausts all parties (e.g. Seabrook seismic pleading).

3. If this is the purpose it obviously is not working and may not be authorized (nor funds appropriated).

The process could be defended as educating the public, particularly those who live near a plant: (1) if you have a plant in your backyard, you are entitled to understand it; (2) the hearing provides a mechanism to get the attention of the NRC and the applicant to get answers; (3) the bureaucracy is often unresponsive. But: this is a very costly way to achieve objectives that could be met by more informal public meetings to air issues and educate the local public.

Other Problems

The process as it now exists is unable to distinguish between trivial and significant issues. This is due in large part to (a) a structure which rarely rewards and often punishes attempts to control a proceeding and (b) a failure to provide clear, consistent, timely, and rational guidelines which can be applied by a board with confidence in an individual proceeding. The first is inherent in the nature of the appeal process. Since interlocutory appeals are discouraged, review almost always takes place from the perspective of a completed hearing. Complaints that contentions, discovery, or testimony were improperly excluded can be effectively raised at this stage. The affected party argues that it was prejudiced in that "if only X were included, the decision would be different." Complaints that too much was included will be academic -- the prejudice lies in the delay which already will have occurred. Licensing Board members are inclined to be "conservative" in allowing issues to enter the hearing. Errors in excluding items might lead to remand, while errors in including items seem to have little consequence.

The second aspect flows from the Commission collegial decision-making process. Collegial decisions are the result of compromise. A final Commission document is the result of a slow process of coordinating and negotiating different views. Unless the Commission devotes great effort, the product will be imprecise.

Proposed Changes

If hearings are not necessary to assure public health and safety, then fundamental reform is needed. The current process has high costs. If there are few benefits, we should look for a more efficient, effective alternative. It is realistic to expect we can provide significant improvements in the process without radical change to the framework. However, any approach which begins and ends by establishing an envelope schedule or by setting time limits for individual pieces is largely a stab in the dark. The logical approach is to (1) understand the major components of the process, (2) identify at least in qualitative terms the major problems, and (3) then address those problems. Recognizing this is a complex process, we must be prepared to make decisions with imperfect understanding.

A significant amount can be accomplished even without radical change to the current hearing process. Although I agree with the Chairman of the Licensing Board Panel that Board members must be given responsibility and authority to make judgments for individual proceedings, the Commission has the responsibility for setting the general rules.

In light of these considerations I propose that the Commission take the following actions:

-- Support use by the Boards of current authority to control proceedings.

-- Raise the threshold for admitting contentions.

-- Clarify responsibility of the Boards.

  - o Modify or eliminate *sua sponte* authority
  - o Strengthen deference given to judgment of a Board in an individual case
  - o Support sanctions

A. Emphasize current authority of the Boards. We should issue a policy statement which gives strong support for the Boards to use existing authority to control proceedings. The primary utility would be to stem

the trend of the past few years. A policy statement would have a positive effect because we would clarify our expectations of the Boards. We also must be prepared to support Boards when they follow our guidance.

The statement proposed in the March 5th Cotter memorandum is good. Use of existing authority by Boards could significantly shorten and focus proceedings.

B. Raise contention threshold. This very important step is relatively simple, feasible, could be implemented quickly, and directly addresses the failure to distinguish between trivial and significant issues.

We must develop better mechanisms for selecting real issues. Regardless of whether the Allens Creek decision was correct or not (i.e., whether it merely continued a body of practice which originated in 1973 or constituted a departure from past practice), this issue needs to be addressed. (Summary disposition is not a reasonable substitute for adequate screening of contentions. Summary disposition motions require a disproportionate amount of resources and accelerated schedules will make them virtually impractical.)

OGC should work with the various Licensing Board members who expressed concerns in connection with the Allens Creek decision. OGC should also specifically consider Costle v. Pacific Legal Foundation (63 L Ed 2d 329). That decision in combination with Vermont Yankee should be analyzed to help formulate an appropriate, higher threshold.

C. Clarify responsibility of Boards. Is the primary responsibility of a Licensing Board to resolve disputes presented by the parties or to perform an independent technical review? I believe it to be the first but perceive an increasing shift towards the second. I would narrow and strengthen the focus of the Boards on contested issues by the following:

1. Modify or eliminate sua sponte role. Under the current rule a Board is to raise an issue on its own in an OL proceeding when it determines "that a serious safety, environmental, or common defense and security matter exists." The "serious" threshold has been lowered. Boards have read Commission and Appeal Board decisions over the last few years as defining a broader responsibility for them, which increases the pressure to build an all inclusive record. We could take action to counteract the recent expansion of the sua sponte role (e.g., see attached excerpt from my February 23, 1981 memorandum) and reinforce the "serious" threshold.

If uncontested plants are safe enough, only admitted contentions should be debated. I would eliminate the sua sponte role. The hearing

should examine only contested issues, i.e., the ones that make the case different from uncontested cases. The threshold should be high. Public confidence would then be based on real issues being debated.

If there is no support for deleting the sua sponte role, we should restructure the process by which these issues are raised. In particular, a Board should certify to the Commission a question it believes should be raised before requiring parties to address it in a hearing. This would serve to emphasize the unusual nature of such inquiries.

At the very least we need to reemphasize the boundaries which were established in the original articulation of the sua sponte rule:

> "The fact that the Board may inquire into matters that concern them should in no way be construed as a license to conduct fishing expeditions. As a general rule, Boards are neither required nor expected to look for new issues. The power to do so should be exercised sparingly and utilized only in extraordinary circumstances where a Board concludes that a serious safety or environmental issue remains. Normally there is a presumption that the parties themselves have properly shaped the issues, particularly because the hearing follows comprehensive reviews by the regulatory staff and the Advisory Committee on Reactor Safeguards."
> Consolidated Edison Co. (Indian Point Unit 3), CLI-74-28, 8 AEC 7, 9 (1974).

2. Strengthen deference given to a Board's judgment in an individual case. No Board is going to aggressively manage a process if it is concerned that it will be second guessed at a later date. Given guidelines, such as those in the Cotter March 5th memorandum, a Board's judgment should be given great deference. Application of general principles to specific cases will usually turn on the details of the circumstances. The Board is most familiar with those details and has the advantage of personally participating in the ongoing proceedings. A paper record is no substitute for actual presence.

This does not mean we should not follow closely individual cases. I will support efforts to develop better ways to monitor the hearing process.

3. Give sanctions real content. Although authority clearly exists to sanction parties who do not meet their obligations, as a practical matter a Board cannot make a credible threat of sanctions. For example, a Board has no control over the NRC staff. Obviously, the staff has a number of competing priorities. Although in some cases its hearing work should slip, the staff should be prepared to justify those slips.

We should expand the concept suggested by the Appeal Board in OPS, i.e., communication by a Board when the staff does not meet its hearing responsibilities. The EDO should be told of each scheduled commitment by the staff in a proceeding and of any failure to meet such a commitment.

The applicant already has an incentive, in that delay can be very costly. However, if the applicant does not meet deadlines, it should not be heard to complain about the ultimate delay in the process. We should document contributions to delay by the applicant.

With respect to other parties, the penalties described by Cotter should be used. Focusing the hearing on more important issues will help avoid dissipation of intervenor resources as well as staff resources. In addition, clarifying the responsibility of Boards to pursue issues on their own will help make the threat of throwing out a contention more realistic. It is not very effective to strike a contention and then adopt it as a Board question (which has happened).

D. Interim Licensing Legislation. Interim licensing legislation is the wrong solution. The licensing impact problems are due to (1) TMI having deflected staff resources and (2) an inefficient process. Going for interim licensing authority neglects the first and accepts the second. It significantly undercuts public credibility, introduces the least efficient part of the licensing process (the Commission) directly into our ongoing proceeding, but, worst of all, accepts all the problems with the current system. If the majority concludes they are unwilling or unable to address making substantive changes to the process, or that such changes would take too long to affect the near term problems, I would not oppose a legislative proposal for low power interim licensing.

Conclusions

Although I question whether the adjudicatory format is appropriate for the resolution of technical issues involving a large degree of professional judgment, I recognize that a fundamental change in the process will not occur without extended debate. We can significantly improve the process without radical change to the framework. The participants in the process are entitled to guidance, and it is the Commission's responsibility to provide it. A pronouncement that "we want the hearing process shortened -- go and do good" is not enough. It fails to address fundamental questions. By not addressing the purposes of the Hearings and the details of the process, we can neither estimate whether the schedule will really be shortened, nor the costs of shortening.

EXCERPT FROM FEBRUARY 23, 1981 MEMORANDUM TO THE COMMISSIONERS FROM MR. AHEARNE, SUBJECT: HEARING ISSUES REQUIRING COMMISSION ATTENTION

. . . UNRESOLVED SAFETY ISSUES

7. The Commission should clarify the Licensing Boards' responsibilities in OL and OL amendment proceedings concerning unresolved safety issues, to make it clear that litigation and findings are required in this area only if a Board determines that a "serious safety environmental or common defense and security matter exist." See 10 CFR 2.760a.

Discussion

I did not object to the Appeal Board decisions in Monticello and North Anna because I expected they would be interpreted as simply cautioning boards to be particularly sensitive about possible issues relating to unresolved safety issues. In other words, resolution of unresolved safety issues inherently is more likely to contain a serious issue. I never thought there was danger that they would be interpreted as an independent mandate to consider those issues since that would be contrary to Section 2.760a. However, apparently the Boards have not seen it my way.

For example, the September Zimmer decision contains the statement (p. 3): "Recent Appeal Board decisions have also re-emphasized the obligation of Licensing Boards in operating license proceedings to make findings concerning the resolution of unresolved generic issues applicable to the particular reactor, whether or not the issues are the subject of contentions." In fact, one Board seemed to find such a responsibility even in an amendment proceeding (see the ASLB decision issued January 26, 1981 in the Dresden spent fuel pool proceeding). That Board sua sponte ordered: "Based on a review and analysis of the various generic unresolved safety issues under continuing study, what relevance is there, if any, to the proposed spent fuel pool modification? Further, what is the potential health and safety implication of any relevant issues remaining unresolved?"

To avoid further expansion of the already unwieldy hearing process, I recommend we clarify this matter. . . .

QUESTION 9. Our witnesses last week, both for the nuclear industry and for the Union of Concerned Scientists, advocated the use of a combined construction permit and operating license -- the so-called one-stop licensing option -- as a means of resolving issues at the construction stage and avoiding the kinds of operating license hearing delays now being experienced.

(a) What are the Commission's views on this option?

ANSWER.

The Commission generally favors the concept of one-step licensing for nuclear power plants, recognizing that this would require submission of final designs at the construction permit stage.

QUESTION. (b) What can the agency do to pursue this option under existing law?

ANSWER.

Under current law the Commission could not go completely to a one-step licensing regime. Section 185 of the Atomic Energy Act mandates a two-step licensing process. However, if final design information were to be submitted at the construction permit stage, then the operating license review could focus only on new information since the construction permit review. Thus current law would allow a narrowing, but not a complete elimination, of the operating license review stage. This general approach was included in an advanced notice of rulemaking on a related subject which the Commission issued in December, 1980. (Attached)

> 45 FR 81602
> Published 12/11/80
> Comments must be received by 2/9/81. Comments received after 2/1/81, will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments filed on or before 2/1/81.

10 CFR Part 50

Domestic Licensing of Production and Utilization Facilities; Design and Other Changes in Nuclear Power Plant Facilities After Issuance of Construction Permit

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Nuclear Regulatory Commission is considering amending its regulations to define more clearly the limitations on a construction permit holder to make changes in a facility during construction. This advance notice of proposed rulemaking is being published to invite comments, suggestions, or recommendations on the content of the proposed amendment. There will also be opportunity later for additional public comment on the proposed rule, if any, that may be developed by the Commission.

DATES: Comments must be received by February 9, 1981. Comments received after February 1, 1981, will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments filed on or before February 1, 1981.

ADDRESSES: Written comments, suggestions, or recommendations should be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Services Branch. Copies of comments received may be examined at the NRC Public Document Room at 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Warren Minners, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Phone: 301/492-7581.

SUPPLEMENTARY INFORMATION:

Background

The Atomic Energy Act of 1954, as amended, and the regulations of the Nuclear Regulatory Commission (NRC) provide a framework for issuance of construction permits (CPs) for nuclear power plants, but do not define precisely the commitment to which a permittee is legally bound when the NRC grants it a CP. As a result, there are conflicting opinions concerning the requirements associated with a CP, particularly with regard to whether a permittee is bound by representations made in its application, including the Preliminary Safety Analysis Report (PSAR), and on the hearing record. Because of this, for many years the NRC staff has been faced with the problem of not having clear guidelines for regulating changes in facility design, or in the permittee's procedures and staffing, between the time a CP is issued and a Final Safety Analysis Report (FSAR) is filed by the permittee as part of its Operating License (OL) application. Therefore, the staff's actions and practices (as well as those of holders of CPs) in this matter have developed on a case-by-case basis over the years.

The problem arises because the applicant is not required to supply initially all of the technical information required to complete the application and

support the issuance of a CP which approves all proposed design features, so long as the Commission is able to make the requisite findings under Section 50.35(a) of 10 CFR Part 50.

As noted in a 1970 rule change with respect to Section 50.35 (35 FR 5317, "Backfitting of Production and Utilization Facilities, Construction Permits and Operating Licenses," March 31, 1970), one reason for not having defined previously an applicant's CP commitments was an awareness that "the rapidly expanding technology in the field of atomic energy means that new or improved features or designs that may enhance the safety of production and utilization facilities are continually being developed." This echoed the Supreme Court's decision in *Power Reactor Development Co. v. Electrical Union*, 367 U.S. 396 (1961). Thus, the judgment was made that a permittee should only be bound by the "principal architectural and engineering criteria."

The present system provides no guidance regarding notification of design changes made after issuance of a CP or the type of staff response to be made. CP holders have informed NRC of design changes from the PSAR in various ways: transmittal of letters and PSAR amendments, submittal of informal drafts and oral communications, and delay of notification until submittal of the FSAR. The NRC staff's responses to notifications of such changes have most commonly been a defer detailed review until the OL application is reviewed. However, where the staff has considered a proposed design change significant and judged that the matter must be resolved before construction proceeds too far, it has undertaken detailed review. In those cases, safety evaluations or letters to CP holders have been written stating the staff's views about the proposed change.

The existing process has led to three major problems. First, there is no clear basis upon which the Office of Nuclear Reactor Regulation (NRR) can assess definitely whether changes in facility design, permitted procedures, or staffing after issuance of a CP require a formal CP amendment; second, there is no clear basis on which the Office of Inspection and Enforcement (IE) can enforce requirements in a CP. And third, the present process simply provides no ground rules about the changes CP holders may make, on occasion prompts litigants (other than applicants) in CP hearings to litigate many details of the application in order to bind applicants.

An attempt to resolve some of these problems was made by the Atomic Energy Commission in a rule proposed in 1969 (34 FR 8540, April 16, 1969) that would have added, among other things, a new section defining the "principal architectural and engineering criteria," departure from which would have required a CP amendment.

Most commenters on the proposed rule criticized the definition for being so broad and so all-inclusive as to lead to the conclusion that the proposed rule would make it mandatory that the design of the facility, as well as the quality assurance program, should be essentially complete and not subject to change at the CP stage, unless an applicant were willing to continually propose changes and amendments to its CP (thereby undergoing frequent and time-consuming scrutiny by the NRC staff).

In promulgating the final rule (36 FR 5217, March 31, 1971), the Atomic Energy Commission deleted the proposed definition saying that it required further study.

Since 1970, two staff studies were made in order to specify clearly what a holder of a CP could and could not change to provide a regulation that would be enforceable and to substitute a new mode of doing business that would not cause a proliferation of CP amendments for minor changes. The results of the first study were reported in December 1971 and the results of the second in March 1977.[1] In both studies the staff tried to provide definitive guidance as to changes that would require a CP amendment by attempting to define the "principal architectural and engineering criteria" and establishing guidelines to determine when a proposed change would not fall within these criteria.

The first study proposed to make the "Design Features" section of the Technical Specifications a binding part of the CP, in the same way that the entire Technical Specifications are made part of an OL. In specifying the "Design Features," principal reliance would be placed on use of the Standard Review Plan, the General Design Criteria, Regulatory Guides, Branch Technical Positions, and industry criteria, codes, and standards to the extent necessary.

In the second study, the staff proposed that the term "principal architectural and engineering criteria" reference the General Design Criteria of Appendix A to 10 CFR Part 50 and have the same meaning as the term "principal design criteria" as used in § 50.34(a)(3)(ii). The study proposed that the acceptance criteria provided as part of the Standard Review Plan sections (sometimes, in fact, the principal design criteria) should be used to develop a document consisting of a list of the "principal architectural and engineering criteria." The study also proposed (1) several other changes that would require a CP amendment, (2) these twelve items related to changes in the major features or components of a facility. Proposed guidance was provided to assist in determining when a proposed change would require a CP amendment.

Although both reports were subject to some peer review, no formal action was taken because of time pressures, difficulties of definition similar to those of the rule proposed in 1969, and the feeling that the present system was workable.

Commission Intentions

It is clear from a review of the present procedures, the 1969 rulemaking, and the two studies cited, that a rule should be considered that would improve the present licensing process and develop specific descriptions of the essential features of a facility (including the quality assurance program) and other procedures and staffing requirements to which the CP holder would be bound (whether under the rule, license conditions, or through a Licensing Board decision). The key problem, then, is to clarify and specify to what information the CP holder should be bound, at what point in the licensing process, under what circumstances, and through what means. There is also a need to control the way in which a CP holder implements NRC criteria.

The rulemaking proceeding will address the objectives of such a regulation, the alternative means of accomplishing the objective, and the advantages and disadvantages of each alternative. The areas to be addressed would include: (1) alternative descriptions of the essential features of the design, procedures, and staffing of a facility to which a CP holder would be bound; (2) identification of which changes would require no action, which would require notification, and which would require prior approval; and (3) the form of requirement, whether through rule, license condition, Licensing Board decision, or CP amendment.

The following five alternatives have been suggested:[2]

1. Maintain the status quo.

[1] These studies are described in Staff Paper SECY-80-66 (February 15, 1980) which is available for inspection in the Commission's Public Document Room.

[2] These alternatives are described more thoroughly in SECY-80-66 (February 15, 1980), which is available for inspection in the Commission's Public Document Room.

2. Drawing on § 50.55(e) of 10 CFR Part 50 (dealing with notifications of significant deficiencies having safety significance) and § 50.59 (dealing with changes to previously approved designs having safety significance), adopt a rule that establishes general criteria for determining circumstances requiring notification and CP amendment.

3. Adopt a rule defining "principal architectural and engineering criteria" (in effect reviving the 1969 rulemaking on this subject), using information learned to date.

4. Adopt a rule that all details of the application, including the PSAR, be made conditions of the CP and may not be changed without prior Commission approval.

5. Restructure the licensing process to require that sufficient plant design details and equipment performance specifications be provided in the PSAR so that the safety analysis can be essentially a final one. Upon review and approval, the important safety-related elements of the design would be made conditions of the CP and could not be changed without prior Commissioner approval. Staff review at the OL stage would then be primarily a matter of confirming that the "as built" plant conformed to the CP-stage safety analysis.

The Commission tentatively prefers implementation of Alternative 3 with a shift to Alternative 5 on June 1, 1985. Rules based on the contents of alternatives 2, 3, or 4 could be imposed immediately. Alternatives 2 and 3 could provide some specified interval to allow the holders of construction permits to develop a list and description of the features or other changes subject to the rule. Alternatives 4 and 5 could be applied practicably only to new CPs.

Comments, suggestions, or recommendations on a proposed rule that would clarify the bounds on a construction permit holder during the course of construction are invited from all interested persons. Comments which discuss advantages or disadvantages, including cost or implementation schedules and the extent to which any such rule should be applied to existing construction permit holders, are particularly sought.

QUESTION 9.c. What legislative changes, and what improvements in the stability of licensing requirements, are needed to pursue this option?

ANSWER.

The Atomic Energy Act is unequivocally framed in terms of a two-stage process for nuclear reactor licenses. Therefore, an amendment of the Act would be necessary to authorize the Commission to grant combined construction permits-operating licenses.

The Atomic Energy Act's two-stage requirement is rooted in the context of a period when nuclear technology was still in its infancy and was evolving rapidly, and when every facility involved a custom design, not available in final form at the construction permit stage. The concept of the combined CP/OL reflects the fact that, in a more mature technology, applicants may be able to submit the final design at the CP application stage, thereby significantly reducing the importance of a principal purpose behind the OL review. The rationale is that if the Commission can make a determination on the final design of a plant early in the licensing process, it should do so, and should not be required to perform the same exercise a second time. In addition to concerns of efficiency and reducing unnecessary delay, the combined CP/OL has been seen as a means of encouraging the use of standardization and early site review. Of course, substantial time savings in reactor licensing schedules would only be possible under the CP/OL if applicants are prepared to submit virtually final reactor designs at the construction permit stage. Additional time can be saved in the NRC review if the current practice of developing a custom-fitted plant for each application is discontinued. As the question suggests, maximum benefits in time savings also would require NRC licensing requirements to remain stable throughout the licensing process. We believe that such stability can be achieved. Again, however, the essence of achieving such a goal is the early submission of a nearly completed reactor design early in the licensing process.

QUESTION 10. The Commission's legislative proposal for interim operating authority is limited to low-power operation -- not more than 5 percent of full-power. At least two of the Commissioners appear to believe that interim operating authority at greater than 5 percent levels may well be necessary.

(a) For what period of time would the low-power testing limitation be useful for a plant?

ANSWER.

For the average plant, the authorization to test and operate at low power levels should reduce by about two months the delay due to the licensing review. Should the low-power testing reveal problems requiring corrective action and further review, the time savings could be as much as six months.

QUESTION. (b) Will this authority, together with the other actions taken thus far by the Commission, be sufficient to eliminate the presently-expected delays for the plants in 1981, 1982, and 1983?

ANSWER.

No. Using industry's estimates for construction completion, this authority would eliminate licensing delays altogether for one of the ten affected plants. However, about 2 months would be reduced from each of the other licensing schedules, totaling a 19 month reduction in licensing delays.

QUESTION. (c) Why shouldn't the Commission be given the discretion, on a case-by-case basis, to allow interim operation at levels above 5 percent of full-power?

ANSWER.

A majority of the Commission does not presently believe that authorization of operation and testing above the 5 percent level should be permitted in advance of the completion of any required hearing.

QUESTION 10. (d) For those Commissioners who oppose giving the Commission discretion to allow interim operation at higher power levels, what is the basis for this objection?

ANSWER.

Balancing the desirability of reducing delay against the desirability of minimizing the intrusion on the Commission's usual regulatory process, and the rights available to participants in that process, Commissioners Gilinsky and Bradford do not believe that operation beyond the 5 percent of full power level should be permitted in advance of the completion of any required hearing.

Commissioner Ahearne: As I stated in my answer to Question 8: "Interim licensing legislation is the wrong solution. The licensing impact problems are due to (1) TMI having deflected staff resources and (2) an inefficient process. Going for interim licensing authority neglects the first and accepts the second. It significantly undercuts public credibility, introduces the least efficient part of the licensing process (the Commission) directly into our ongoing proceeding, but, worst of all, accepts all the problems with the current system. If the majority concludes they are unwilling or unable to address making substantive changes to the process, or that such changes would take too long to affect the near term problems, I would not oppose a legislative proposal for low power interim licensing." Full power licensing legislation would be bad public policy.

Question 10d For those Commissioners who oppose giving the Commission discretion to allow interim operation at higher power levels, what is the basis for this objection?

ANSWER (COMMISSIONER GILINSKY'S RESPONSE)

The interim full power license proposal would undermine the hearing process to a degree that is out of proportion to the possible gain. If we are to modify the hearing process, we should do so directly and not by means of proposals such as this one.

Peter A. Bradford

Question 10(d).

For those Commissioners who oppose giving the Commission discretion to allow interim operation at higher power levels, what is the basis for this objection?

Answer

My principal concern is safety: both the fire at Browns Ferry and the accident at Three Mile Island occurred early in the life of those plants. Furthermore, authorizing full-power operation pending final resolution of safety matters would make NRC's licensing proceedings appear a sham.

QUESTION 11. The Commission's proposal calls for a termination of the interim operating authority at the end of 1983. How confident are you that the root-causes of the licensing delay problem can really be corrected by the end of 1983, thus obviating the need for further interim operating authority beyond that date?

ANSWER.

The Commission recognizes that to eliminate licensing delays, the authority to grant interim low-power operating licenses must be coupled with internal reforms in the Commission's processes. In addition, it should be noted that the Commission's request for interim licensing authority extending through December, 1983 was based on the assumption that no unforeseen events during that time would necessitate major reallocation of resources and thereby create unexpected delays. If the authority is needed beyond that date, extention should not be difficult.

Commissioner Ahearne believes that the Commission's reluctance to address the more fundamental questions makes it unlikely that the problems will disappear.

QUESTION 12. In our hearing last week, industry witnesses advocated extending the Commission's legislative proposal for interim operating authority to include operating license amendments.

(a) Two years ago, the Commission described a growing backlog in processing license amendments. What is the extent of the operating license amendment delay problem, apart from the Sholly situation?

ANSWER.

There is still a backlog in processing license amendments, although reduced from the levels of two years ago, and for the most part involving relatively minor alterations in facility technical specifications. The NRC staff, in reviewing requests for license amendments, gives highest priority to those with a potential for requiring shutdown of an operating reactor or for delaying restart of a shut down reactor. The result is that the backlog of operating license amendments does not have a significant effect on actual reactor operation (assuming that Sholly does not require a prior hearing).

QUESTION. (b) Do we face the potential for frequent shut-downs of operating reactors as a result of delays in processing operating license amendments?

ANSWER.

No, for the reasons indicated above under (a).

QUESTION. (c) Is there a need to extend the Commission's proposal to include amendments as well? Would the same justification apply here as well?

ANSWER.

In view of the way the system presently operates, as indicated above under (a), we do not believe there is a present need to extend the Commission's proposal to include operating license amendments (again, provided that a hearing is not required under Sholly). However, the Commission is seeking legislative relief from the potential impacts of the Sholly decision.

QUESTION 13. As part of the FY 1980 NRC Authorization bill enacted last year (Public Law 96-295), the Congress required a determination that there exists adequate off-site emergency preparedness prior to NRC's issuance of a new power plant operating license. Principal responsibility for working with the States, localities, and utilities on off-site planning seems to rest with FEMA in accordance with the arrangements worked out by the two agencies. It appears that FEMA is now charged with the responsibility to work with the States and localities, and to assess the adequacy of their plans. At the same time, emergency planning is emerging as an issue in many of these operating license proceedings. This seems to be an issue in the licensing hearings for 9 of the 13 plants expected to be completed in 1981 and 1982.

(a). If FEMA completes a review and determination on the adequacy of the State and local plans, why should this be an issue in NRC's licensing proceeding -- in essence, why shouldn't the FEMA determination be binding on the NRC?

ANSWER

The NRC must determine whether the proposed plant satisfies its requirements before it may be licensed. Unlike site-related issues which are principal concerns at the CP stage, emergency preparedness is important for an operating facility and that determination is made at the OL stage. That determination consists of two parts: NRC findings on-site and FEMA findings off-site, followed by an NRC overall determination on compliance with its rules. 10 CFR 50.47(a). In its final rules on emergency planning, the NRC affords FEMA's findings and determinations presumptive validity, that is, unless someone can show why the FEMA findings should not be followed, the findings will constitute the final word on the adequacy of off-site preparedness. 10 CFR 50.47(a)(2).

Commissioner Ahearne believes the FEMA determination should be binding and should not be an issue in NRC's licensing proceeding (similar to treatment of EPA's dterminations under the Federal Water Pollution Control Act).

Question 13(b). Last year, the Commission forwarded to this Committee proposed legislation to clarify the respective roles of NRC and FEMA for off-site emergency planning. Is legislation needed to resolve this problem, and is the Commission's legislative proposal still appropriate?

ANSWER

That legislative proposal was intended to transfer all NRC authority over off-site emergency preparedness to FEMA while, at the same time, not providing FEMA a de facto veto authority over NRC licensing decisions. Under the proposal, FEMA findings would be binding on the NRC but NRC would still make the overall determination. This differs only slightly, in the NRC's view, from the present situation. At this time the NRC and FEMA have concluded several Memoranda of Understanding on areas of responsibility and cooperation for emergency planning. 45 Fed. Reg. 5847 (January 24, 1980), as extended 45 Fed. Reg. 82713 (December 16, 1980). These Memoranda are consistent with the approach of both agencies on emergency planning and indicative of close cooperation. The NRC believes that no new legislative initiatives are necessary at this time.

Commissioner Ahearne believes that the proposed legislation is still needed (copy attached) and that, if enacted, the situation would be different.

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

CHAIRMAN

April 30, 1980

The Honorable Alan K. Simpson
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
Washington, D.C. 20510

Dear Senator Simpson:

Following up on the recent NRC FY 1981 authorization hearings, we have drafted legislation, with the assistance of FEMA, to clarify the respective roles of NRC and FEMA in the review and approval of State and local plans and preparedness for off-site emergency response to nuclear accidents.

In his December 7 statement in response to the recommendations of the President's Commission on the Accident at Three Mile Island, the President directed FEMA to take the lead for all off-site nuclear emergency planning and response. However, under current law, NRC continues to have responsibility for a review of State and local emergency plans insofar as these plans are significant to licensing decisions. NRC has proposed rules which would as a general matter require NRC approval of appropriate State and local emergency plans as a condition to granting licenses. In the event that NRC does not approve such plans effecting an operating plant, the proposed rules present alternatives for NRC action which could include eventual shutdown of the plant. Further, the adequacy of such plans will be an open issue in NRC licensing and enforcement proceedings, irrespective of the findings and determinations of FEMA. Thus, there is a possibility of continuing duplicative efforts by FEMA and NRC.

To remedy this problem of duplicative efforts, legislation would be desirable to provide for the transfer to FEMA of all NRC functions with respect to State and local plans and preparedness for off-site emergency response, incident to NRC's licensing and regulatory responsibilities under the Atomic Energy Act and Energy Reorganization Act. Legislation should also describe the respective roles of FEMA and NRC in emergency response planning and preparedness in light of the transfer of functions. If enacted in this session of Congress, the effective date of the transfer could be October 1, 1980. FEMA informs us that it will be prepared to assume the responsibility on this date. Upon such a transfer, NRC's authority and responsibility would cease, and FEMA would have exclusive authority to make determinations respecting the sufficiency of State and local plans and preparedness. FEMA's determinations would not be subject to review in NRC proceedings. However, NRC would retain authority to make any assessment or determination with respect to emergency plans and preparedness of any NRC applicant or licensee.

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At FEMA's request, the draft legislation gives FEMA discretion to prescribe the public participation procedures for its evaluation and approval of State and local plans and preparedness. Under NRC policy, a member of the public who intervened in a licensing proceeding to contest the adequacy of a State or local plan would receive an adjudicatory hearing. If the proposed legislation were enacted, the issue of procedures would be up to FEMA. The Commission takes no position on the question of FEMA procedures.

If we may be of further assistance, please do not hesitate to call on us.

Sincerely,

John F. Ahearne

Enclosure: Draft Legislation

cc: The Honorable Gary Hart

Transfer of Functions to FEMA

The Energy Reorganization Act of 1974 as amended (42 U.S.C. 5801 et seq.) is amended --

1. By redesignating subsection 201(f) as paragraph (1) of subsection 201(f); and

2. By adding a new paragraph (2) to subsection 201(f) to read as follows:

"(2) There are transferred to the Director of the Federal Emergency Management Agency all functions of the Commission with respect to State and local radiological emergency response planning and preparedness for offsite emergency response in connection with facilities and activities which are required to be licensed under this Act and the Atomic Energy Act of 1954 as amended and which the Commission determines to have the potential for significant accidental offsite radiological releases. Such functions shall be exercised in accordance with Section 276 of the Atomic Energy Act of 1954 as amended. The transfer of functions under this paragraph shall be effective on October 1, 1980."

Chapter 19 of the Atomic Energy Act of 1954 is amended by adding the following new section at the end thereof:

"Sec. 276. AUTHORITY AND RESPONSIBILITY OF FEMA AND NRC RELATING TO RADIOLOGICAL EMERGENCY PLANNING AND PREPAREDNESS. --

"a. In accordance with the transfer of functions in Section 201(f)(2) of the Energy Reorganization Act of 1974 as amended, the Director of the Federal Emergency Management Agency (hereinafter in this section referred to as the Director) shall have the exclusive authority and responsibility to carry out functions under this Act relating to State and local radiological emergency response planning and preparedness for offsite emergency response in connection with facilities and activities which are required to be licensed under this Act and the Energy Reorganization Act of 1974 as amended and which the Commission determines to have the potential for significant accidental offsite radiological releases. Such functions shall be carried out in consultation with the Commission in accordance with interagency agreements entered into by the two agencies. Such interagency agreements shall facilitate coordination between the two agencies and avoid duplication of effort to the maximum extent practicable. No action or decision of the Director shall be subject to review by the Commission or in any Commission proceeding.

"b.(1) The Director shall, in carrying out the functions under subsection (a), conduct a program for offsite emergency

response planning which shall include, but not be limited to, the following activities --

"(A) promulgate regulations containing criteria for State and local radiological emergency response plans and preparedness to the extent that such plans and preparedness relate to offsite emergency response,

"(B) evaluate the adequacy of such plans and preparedness for protection of the public health and safety in the event of an emergency and, upon determining that such plans satisfy the criteria promulgated pursuant to subparagraph (A), approve same,

"(C) assess, on a continuing basis, the adequacy of approved State and local radiological emergency response plans and preparedness,

"(D) provide emergency preparedness training to Federal, State and local officials,

"(E) provide technical assistance upon request to States for developing the State and local radiological emergency response plans and preparedness,

"(F) develop and issue an updated series of inter-agency assignments which delineates respective agency capabilities

and responsibilities and clearly defines procedures for coordination and direction for both emergency planning and response,

"(G) establish policy for and develop and promulgate a National Contingency Response Plan for dealing with all aspects of offsite nuclear emergency preparedness and response, including that of other Federal agencies,

"(H) conduct such research as the Director determines is appropriate to carrying out the functions under this section.

"The Director shall consult with the Commission in the conduct of the activities described in this paragraph, and shall permit the Commission an adequate opportunity to review and comment on the regulations referred to in subparagraph (A) before final promulgation thereof and to review and comment on the findings of the Director before making any final determination under subparagraph (B), including the Director's findings on (i) the significance of any deficiency in such plans and preparedness with respect to the capability of State and local officials to take protective actions, and (ii) whether alternative actions which have been or will be taken promptly compensate for any such deficiency.

"(2) Nothing in this subsection shall impair the authority of the Commission to make any assessment or determination with respect to the emergency plan and preparedness of any applicant or licensee. Before making any such assessment or determination and before adopting any rule, regulation, or policy affecting emergency preparedness, the Commission shall consult with the Director and shall provide the Director an adequate opportunity to review and comment.

"(3) The regulations promulgated by the Director under paragraph (1)(A) shall --

"(A) provide for the periodic review of the criteria set forth in the regulations, and

"(B) provide for exercises and tests of the emergency preparedness of the State and local authorities concerned and provide for coordination between these exercises and tests with related exercises and tests required by the Commission to be conducted by the licensee,

"(C) provide for public notice and procedures for public participation in the review of State and local emergency response plans and preparedness.

"c. The Director is authorized and directed to develop and carry out, with the assistance of the Commission, public information programs relating to radiological emergency response. Such programs shall be carried out pursuant to an interagency agreement between the Director and the Commission which shall set forth the respective functions of the two agencies concerning public information. The programs shall provide for procedures for dissemination of information during an emergency.

"d. A final regulation promulgated under subsection b(1)(A), or a final action under subsection b(1)(B) shall be subject to judicial review upon the petition of any interested person in the United States Court of Appeals for the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. Any such petition shall be made within sixty days from the date of such regulation or final action. No such regulation or such approval or final action shall be subject to judicial review in any other proceeding.

Question 13(c). Under the Commission's legislative proposal for interim operating authority, would NRC be able to allow interim operation prior to receiving FEMA's determination that off-site emergency planning is adequate, whether or not emergency planning is an issue in the operating license hearing? Should the Commission be authorized to allow interim operation in such circumstances?

ANSWER

Interim operation under the Commission's proposal could be authorized without FEMA findings on the overall state of off-site preparedness on the same basis as such operation has been authorized in the past. Such operation at low power constitutes very little off-site threat and is conditioned on findings (1) that the State plan had received NRC "concurrence" under the previous emergency preparedness system or that the off-site plans satisfied the essential planning elements of NUREG-75/111, as revised (the predecessor to the current criteria document, NUREG-0654); and (2) that the applicant satisfy 10 CFR Part 50, Appendix E and Regulatory Guide 1.101. In the NRC's view, this constitutes sufficient protection for the public and was the basis for the issuance of low-power OLs in FY 1980.

Question 13(d). Does the litigation of emergency planning in these individual licensing proceedings detract from NRC's and FEMA's efforts to work with the States and localities in developing adequate emergency plans, not only for these new license applicants but also for the large number of existing plants?

ANSWER

Litigation preparation and testimony must often proceed in parallel with review of emergency preparedness. While additional resources would be helpful, the current system has not had an adverse impact on NRC.

Chairman Hendrie and Commissioner Ahearne add that FEMA has in the past noted that with severely limited resources it is very difficult if not impossible to both participate in litigation and to conduct plan reviews.

QUESTION 14. You have indicated in your testimony that, over the last 4 years, the NRC has issued more than 1600 license amendments based upon a "no significant hazards consideration" determination, an average of 400 such license amendments per year. In how many of those cases was there a request for a hearing?

ANSWER

Excluding the licensing action related to the venting of krypton-85 at TMI-2, which precipitated the Sholly decision, we have not found any instance of a request for hearing in connection with operating license amendments issued over the last 4 years based upon "a no significant hazards consideration" determination.

QUESTION 15. It appears as if there has been very little interest in the past in requesting hearings in cases that the NRC has determined pose "no significant hazards consideration." To what do you attribute the low number of hearing requests?

ANSWER

Chairman Hendrie and Commissioner Ahearne:

The low number of hearing requests can primarily be attributed to the following:

- A notice of an amendment involving a no significant hazards consideration is not placed in the Federal Register until after the amendment has been issued. Thus, public notice of a proposed change is not made until the change has been approved; the plant licensee may, at that time, implement the change. Under the existing rule this implementation would be permitted even if a hearing has been requested. Those opposed to an approved change would have to be successful at the requested hearing and at any subsequent appeal before their position could prevail. The intervenor groups may have judged the success of overturning the NRC technical staff to be small and thus not worth their time and effort.

- Generally the fundamental concern expressed by members of the public who intervene in NRC licensing proceedings is that nuclear power plants should not be built nor operated and seldom is focused on a narrower, more detailed issue related to an amendment of an operating license.

However, the Sholly decision would require the NRC to hold a hearing, if one were requested, on each "no significant hazard" amendment prior to the issuance of a change in the operating license no matter how insignificant the change. For some license amendments, this would provide an opportunity for anyone opposed to the operation of a particular plant, for any reason, to cause a significant interruption in plant operation (e.g., shutdown or power de-rating) while the hearing process was being conducted.

Commissioners Gilinsky and Bradford:

Petitioners are aware that in order to obtain a hearing on an NRC initiated license amendment (either before or after the fact) they must show that their health and safety is less protected with the amendment than without it. Wisconsin Electric Power Company, (Point Beach, Unit 1), CLI80-38, 12 NRC 547 (1980). This eliminates from consideration in the hearing the item of real concern, which is that the proposed amendment does not go far enough in protecting the public health and safety.

Commissioner Ahearne notes further that Section 189a refers to "any application for an amendment ... upon a determination by the Commission that the amendment involves no significant hazards consideration" [emphasis added]. While the Commission has limited litigation of actions initiated by the Commission for reasons discussed in Marble Hill (CLI-80-10, 11 NRC 436 (1980); as reaffirmed in Point Beach), neither the decision nor the underlying reasoning apply to a proceeding on an application for an amendment.

QUESTION 16. In those cases where a hearing was requested and convened, are you aware of any instances in which the Commission reversed its original decision on the license amendment?

ANSWER

As noted in our Answer to Question 14, there have been no hearing cases on operating license amendments based on "no significant hazards" consideration finding by the Staff issued over the last four years (except Sholly).

QUESTION 17. Of the approximately 400 "no significant hazards consideration" license amendments that the NRC approves each year, in how many cases do you anticipate there to be a request for a hearing as a result of Sholly?

ANSWER

Based on a preliminary screening of license amendments involving "no significant hazards consideration" which were being processed on the date of the Sholly decision, about 1% of the actions had docketed public correspondence which might be interpreted as a request for a hearing. This screening would suggest about 4 license amendment hearings per year would be anticipated based on our past experience. It is impossible to predict what effect, if any, the Sholly decision would have on the number of hearing requests filed if that decision is upheld. However, Chairman Hendrie would add that if the Sholly decision is seized upon by members of the public on a large-scale basis, as a means of disrupting our review process, the impact could be far more substantial although not presently predictable.

QUESTION 18. On the average, how long will it take from the time such a hearing is requested until issuance by the hearing officer of a decision?

ANSWER

Based on a timetable derived from the Commission's regulations, a decision by the presiding Atomic Safety and Licensing Board would be expected a minimum of about 455 days after a request for hearing is filed. This time period is, of course highly dependent on the number of intervenors who are admitted to the proceeding and the number and complexity of the issues raised.

QUESTION 19. Would such a decision be subject to appeal to the Appeal Panel and then to the Commission, and, if so, how much additional time would this add?

ANSWER

Such a decision would be subject to appeal to an Atomic Safety and Licensing Appeal Board and then to the Commission. However, the Licensing Board decision is not automatically stayed.

QUESTION 20: Does the Sholly decision require the NRC to publish notice of "no significant hazards consideration" license amendments?

ANSWER: The Sholly decision did not reach the question whether the NRC was to publish advance notice and offer a hearing on applications for amendments which present "no significant hazards consideration." The Commission had in fact given notice of the fast purge license amendment prior to the time the purge began but after the amendment became effective. The court did state that, in Section 189(a), "Congress did indeed intend to disentangle the two requirements of notice and hearing." Slip opinion at 15 (footnote omitted). However the court also noted; there may be some type of notice and publication in the Federal Register--implicit in the opportunity to see judicial review of determinations of 'no significant hazards consideration.' Moreover, our decision today does not reach the question whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fourteenth Amendment or the Administrative Procedures Act notwithstanding a finding of 'no significant hazards consideration.'" Slip opinion at 17a n. 20.

QUESTION 21: Is there an independent notice requirement for such hearings under either the Administrative Procedure Act or the due process clause of the Constitution?

ANSWER: The Sholly decision did not reach the question whether some notice of the NRC's intention to issue an amendment involving "no significant hazards consideration" was required by the Administrative Procedure Act or the due process clause and the Commission does not think there is such a requirement. As the court noted, however, NRC did concede that there may be some type of notice required for the purpose of seeking judicial review of "no significant hazards consideration" determinations. Slip opinion at 16, n. 20. (Commissioner Ahearne notes that this concession was made by a staff lawyer in oral argument. The Commission had not addressed the issue, and he at least disagrees.) This may be the case if serious irremediable consequences are involved. The precise dimensions of this notice are not clear.

QUESTION 22. If there is a notice requirement, how much additional time does this add to the hearing process?

ANSWER

In light of our Answer to Question 21 above, no additional time would be added.

QUESTION 23. Based upon your estimate of the number of hearing requests that you will receive and the time required to conduct a hearing in each of these cases, what additional resources will be required by the NRC for the conduct for these hearings?

ANSWER.

The impact of the Sholly decision cannot be estimated with confidence based on any existing records, as explained in the NRC responses to Questions 45. However, if one assumes that ten per cent (10%) of the anticipated license amendment applications result in hearings based on one or more requests, then about 40 additional hearings would be conducted. Some 60 cases are now current. This would require the employment of about 20 additional attorneys and seven secretaries for the NRC Executive Legal Office, and the following estimated additions for the Licensing Board:

Panel members	15
Secretarial and docket personnel	13
Legal and technical advisors	5
Management and administrative	1
Total	34

Additional technical staff resources would be involved, of course, but for reasons outlined in Answers 24 and 25, below, specific numbers cannot be developed.

Commissioner Ahearne questions the accuracy of this estimate.

QUESTION 24 To what extent will the reallocation of NRC staff to hearings required as a result of Sholly result in further licensing backlog - in particular, will the licensing boards, as well as the technical and legal staff, now responsible for licensing, be further burdened by the Sholly requirement of a hearing, upon request, prior to the amending of a license?

ANSWER

We are not able to determine how great the effect of the Sholly decision will be on the technical staff. However, the additional workload created by the Sholly decision cannot be totally compensated for in the short term by adding or transferring such personnel. With the Sholly decision, experienced technical personnel who would otherwise be available to help with new reactor licenses must be retained for operating reactor matters. This could have an adverse effect on the schedules for issuing operating licenses. For the impact on legal staff resources, see the response to Question 23, above.

QUESTION 25. Where a licensee's technical specifications or license conditions call for NRC approval prior to taking a certain action, would the granting of NRC approval constitute a "significant change in the operation of a nuclear facility"?

ANSWER

Each license amendment would have to be viewed on a case-by-case basis. In most instances, NRC approval follows verification that there has not been a significant change in the operation of a nuclear facility. A small number of cases may occur in which this is not true (i.e., approvals which authorize activities not previously permitted or which significantly alter a previously permitted course of operation).

QUESTION 26. Would the reinstatement of some preexisting authority by, for instance, the lifting of a suspension order, constitute a license amendment?

ANSWER

In the NRC's view, it would not constitute a license amendment.

Commissioners Gilinsky and Bradford note, however, that in the Court of Appeals' view, it probably would.

QUESTION 27. To what extent do the NRC's regulations require that a person requesting a hearing on a "no significant hazards consideration" license amendment first specify the basis for such request?

ANSWER

The Commission's regulations, in 10 C.F.R. § 2.714, require that a person requesting a hearing establish his or her legal interest in the proceeding, the affect on such interest that might result from the outcome of the proceeding, and the aspect(s) on which intervention is sought. In addition, such persons must set forth, with reasonable specificity, contentions (issues) and supporting bases, related to the subject matter of the licensing action.

QUESTION 28. Do the NRC's current regulations provide an adequate framework within which to distinguish a "request for a hearing" from:

- An expression of interest which simply seeks information or offers comment on a proposed Commission action?
- A generalized request dealing with continued or future construction or operation of a particular facility?

ANSWER

The NRC's current regulations relating to license amendment applications deal only with requests for hearing and petitions for leave to intervene. They do not provide a framework within which to distinguish a "request for a hearing" from an "expression of interest" or "generalized request" in instances where the latter is not made clear by the correspondent.

QUESTION 29. In ruling that Section 189a requires the NRC to hold a hearing, upon request, even though the NRC has determined that a license amendment posed "no significant hazards consideration," did the Sholly court indicate whether Section 189(a) requires a formal adjudicatory hearing?

ANSWER.

The Sholly court did not decide what kind of hearing would be required. In NRC practice, a hearing on power plant license amendments provided by Section 189 of the Atomic Energy Act has always been an adjudicatory hearing.

Commissioner Gilinsky believes that it would be desirable to provide for informal hearings in minor license amendment cases since the more complex procedures of adjudicatory hearings are probably needed for the resolution of the issues presented.

QUESTION 30. To what extent, if any, does the court's decision also affect the NRC's authority to issue immediately effective amendments or orders which can be justified on public health and safety or common defense and security grounds?

ANSWER

We do not think the Sholly decision was meant to impair the NRC's authority to issue immediately effective amendments or orders. However, there is language in the opinion that, if interpreted broadly, could affect the exercise of NRC's authority in this regard, especially if such action effects a "significant change" in the operation of a facility. For this reason, the NRC favors adoption of the language in the proposed amendment clarifying that this interpretation is not intended under Section 189.

Question 31: To what extent does the fee currently assessed applicants for operating licenses and construction permits cover the cost of staff and resources used for reviewing licenre applications?

Answer: Based on FY 1980 data, the estimated cost of reviewing a construction permit application for a single unit located at a site ranges from $2.4 to $3.4 million. The estimated cost of reviewing an operating license ranges from $2.8 to $3.3 million.

The fee currently assessed for a construction permit review for a single unit at a site is approximately $1 million. The fee currently assessed for an operating license review for a single unit at a site is approximately $1 million.

Question 31(a): Has the Commission considered increasing fees for both pending and prospective applications to finance any additional staff and resources needed to expedite licensing reviews?

Answer: The Commission intends to reassess the costs of licensing and inspection in the near future and to adjust the fee schedule to more completely cover NRC's costs. The fee schedule currently used in assessing fees is based on FY 1977 data.

QUESTION 32. To what extent have applicants' failures promptly to submit information requested by the NRC staff for its licensing reviews contributed to licensing delays?

ANSWER.

The current licensing delays are a direct consequence of the TMI accident and of the need to reexamine carefully the way in which the NRC and the nuclear industry fulfill their shared responsibility for safety. As a consequence of that accident, we were forced to slow our licensing process for more than a year while staff resources were used to develop and evaluate safety requirements based on lessons learned from TMI. This substantial licensing pause occurred while plant construction continued. As a result of the accident at TMI, certain procedural and safety changes were made which have resulted in an extended hearing process and have placed the NRC on the critical path for operation of many near term plants.

To compensate for the extended hearing process, accelerated review schedules were recently established and resulted in the staff needing information sooner than orginally planned for most near term OL review applications. The accelerated staff review schedule is being affected by the inability of some applicants, for example Waterford, Shoreham, and Susquehanna, to supply the needed analysis on an accelerated basis.

To help prevent further delays from occurring as a result of the applicant's failure to promptly submit information requested by the staff, the Office of Nuclear Reactor Regulation (NRR) has requested that each affected utility have appropriate staff near NRR offices during the two weeks preceding the scheduled technical input deadlines for safety evaluation reports so that open issues can be resolved promptly.

QUESTION 33. Has the Commission reviewed the proposals of B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel, for improving the efficiency of licensing proceedings? If so, what is the status of that review?

ANSWER.

On February 25, 1981, Chairman B. Paul Cotter, ASLBP, made six recommendations to the Commission to resolve anticipated problems and improve the management of the Atomic Safety and Licensing Board Panel. The Commission has given full support in effecting the six recommended courses of action as follows:

1. The three full-time and two part-time Administrative Judges appointed but caught in the freeze have all been processed and are at work. Two lawyer chairmen are already working on assigned cases. Assignments to the remaining administrative judges have also been completed.

2. All Commissioners endorsed issuance of a draft statement of policy. Following internal review and revision, the Commission expects to issue the statement.

3. The Commission is currently reviewing proposed revisions of certain sections of Part 2. The Panel has participated fully in the preparation of these proposals. Any more extensive Panel review of Part 2 will await the outcome of the current effort.

4. The Commission authorized the requested increase, as revised, in the personnel ceiling of the Panel. Notices of vacancies for four full-time administrative judges, two legal and two technical, four full-time law clerks, and three legal secretaries were posted on Monday, March 23, 1981. However, the Panel does not expect to fill the full-time administrative judge positions before July 30, 1981, because of the time needed to adequately advertise the vacancies and convene the Advisory Screening Committees that must interview the applicants and recommend appointments to the Commission. The Panel does expect the law clerk and legal secretarial positions to be filled within 60 days.

5. Funds requested for travel and training have already been reallocated and will be available as needed.

6. Pursuant to Commission authorization, the Panel has already consulted with the Office of Administrative Law Judges concerning the qualification of existing Panel members as ALJs and obtaining authority to use prior Panel members, now ALJs in other agencies, as needed.

Other Commission action on recommendations include: (1) approval of an ASLBP management change creating two Vice Chairmen, Executive and Technical; (2) assignment of an attorney/legal counsel to the TMI Restart Board; (3) the furnishing of modern word processing equipment to expedite drafting and issuing final decisions; and (4) the addition of a Technical Advisor for environmental matters to support generic Panel work as well as individual boards.

QUESTION 34. Has the Commission considered hiring law clerks to aid licensing boards in carrying out their responsibilities?

ANSWER.

The Commission has approved the hiring of four law clerks for this purpose.

QUESTION 35. Would legislation similar to section 192 of the Atomic Energy Act granting the Commission temporary licensing authority adequately address the problem of licensing delays? If not, why not?

ANSWER:

Section 192 of the Atomic Energy Act was not limited, as is the present legislative proposal, to low-power testing and operation. Although enactment of legislation similar to section 192 would significantly reduce licensing delays for the plants most affected by the Commission's post-TMI efforts, a majority of the Commission does not believe that such authority is desirable, when the benefits of reducing delay are balanced against the intrusion on the Commission's legal framework for licensing nuclear power plants to operate.

Commissioner Bradford's principal concern with this approach is safety; both the fire at Browns Ferry and the accident at Three Mile Island occurred early in the life of those plants. Furthermore, authorizing full-power operation pending final resolution of safety matters would make NRC's licensing proceedings appear a sham.

Question 36. Commissioner Ahearne, in the written testimony presented to the Subcommittee, you recommended that the licensing boards "manage proceedings with a strong hand." What does that mean?

Answer.

Under the Administrative Procedure Act and the regulations of the Commission, which are modeled on standards of good practice in the Federal court system, the presiding officer can move a hearing if he or she acts with firmness. This includes holding all parties to the rules, requiring schedules to be met, and not allowing extensive dilatory tactics. I believe that over the last several years, in large part due to lack of a clear Commission position on a range of issues, the Boards have gradually allowed the hearings to become unfocused. They also have allowed participants to extend significantly the time for the process to reach completion. This extension is not caused by any one party. It has occurred due to actions taken by intervenors, license applicants, and the NRC staff.

QUESTION 37: How would each of the Commissioners define the "public interest" as used in the two draft statutory amendments submitted to the Subcommittee?

Chairman Hendrie:

The term "public interest" in my view embraces a multiplicity of considerations, including and extending beyond the Commission's statutory obligations to consider public health and safety, the common defense and security, and the environment. In particular, inclusion of the phrase would give the Commission the authority to consider the possibility of brownouts or blackouts; the relative economic costs of different fuel sources; and the maintenance of system reliability. It would permit the Commission to consider both the interests of those living close to the plant and the much larger population served by the electricity produced by the facility. In my view, the inclusion of the phrase is designed to provide -- appropriately and realistically -- a broadening of the range of public interest factors which the Commission may take into account. It should not be taken as suggesting that economic factors would be permitted to outweigh public health and safety considerations.

Question 37 How would each of the Commissioners define the "public interest" as used in the two draft statutory amendments submitted to the Subcommittee?

ANSWER (COMMISSIONER GILINSKY'S RESPONSE)

Precisely because I am unsure of what this term may come to mean, I would limit the proposed standard to "the public health and safety or the common defense and security", the Atomic Energy Act's standard for NRC licensing decisions.

Peter A. Bradford

Question 37

How would each of the Commissioners define the "public interest" as used in the two draft statutory amendments submitted to the Subcommittee?

Answer

The type of situation in which I could imagine applying the "public health, safety and interest" test is similar to the events at TMI last spring. There the Commission was reluctant to say that the public health and safety in and of themselves required the immediate venting of the krypton from the containment building, but it did seem to us to be a good idea. It seemed that the public health and safety would not be adversely affected and there were a variety of public interests to be served by getting the krypton out of the plant and getting on with the cleanup.

This was not the kind of situation in which one could say the public health and safety absolutely required the krypton be vented at that time, because there was no imminent hazard. But it did seem that the longer term public health, safety and interest required a decision to allow Met Ed to proceed. This standard would make it easier to do that.

Furthermore, this language would certainly make more explicit our authority to weigh economic considerations together with the public health and safety. My own concurrence in this is limited to the entire phrase "public health, safety and interest." The Commission should not be free to define the public interest independently from the public health and safety. If the standard was public health safety or interest, it would not be acceptable to me. I consider the three elements to be interrelated and in effect a cumulative test.

Question 37. How would each of the Commissioners define the "public interest" as used in the two draft statutory amendments submitted to the Subcommittee?

Answer. Commissioner Ahearne:

First, the phrase "public interest" in the proposed amendment is picked up from a similar usage in the Administrative Procedure Act. Second, assuming there is no significant public health and safety impact where a decision involves balancing competing interests, inclusion of this phrase will enable the Commission to consider the overall impact on the citizens of the area around the plant or the broader area served by the plant or associated plants. This would allow consideration of such issues as possible "brown outs" or "black outs," economic viability of the system, or stability of the grid network. One should note that the proposed amendment does not say "or the public interest." It says "and the public interest." So it is not to be used as a single factor; it is a factor only in conjunction with public health and safety.

Some of these points were made in a 1980 Commission letter to the Chairman of a Senate Appropriations Committee [attached].

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

OFFICE OF THE
COMMISSIONER

April 16, 1980

The Honorable J. Bennett Johnston, Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On February 27, 1980, the Commission testified before your Subcommittee on NRC's FY 1981 appropriation request. During the hearing we discussed with you and Senator Schmitt the desirability of amending the Atomic Energy Act to provide NRC explicit authority to allow for public interest considerations in setting safety standards or resolving safety questions. You invited draft langurge that would establish such a requirement and resolve the present ambiquity on this point in our statutory charter.

As Senator Schmitt pointed out, the Feceral Aviation Administration (FAA) is similar to NRC in that its primary responsibility is to regulate a potentially hazardous industry. However, the FAA in regulating civil aviation is permitted by statute to consider the public interest in setting safety standards. We believe it highly desirable that NRC be provided similar explicit statutory authority to take into account public interests in assuring that the civilian nuclear industry operates safely. Accordingly, we have enclosed draft statutory language which we believe will accomplish this result.

Under the Atomic Energy Act, activities involving nuclear facilities and materials are regulated in order to provide adequate protection of the health and safety of the public and to assure that such activities are carried out in a manner that would not be inimical to the common defense and security. It is clear that these statutory standards do not require zero risk and, so long as some risk may be tolerated consistent with these statutory standards, decisions on "how safe or secure is enough" may properly entail some balancing of safety or security risks against public interest factors, specifically energy needs and economic impacts. Thus, we view this draft legislation as confirming authority the NRC now has, authority to make prudent and sensible safety and national security judgments based upon safety or security as a paramount consideration, but also giving some consideration to appropriate public interest factors.

However, there has been some confusion on this point, and legislation would be highly desirable in order to help avoid future confusion and to make explicit in the Act what is at present only implicit.

Finally, we emphasize that this proposal is not intended to reduce the current standards of protection but rather to permit future decisions to be taken on a more rational basis with all considerations explicitly stated.

Please do not hesitate to call on us if we can be of further assistance in this matter.

Sincerely,

Joseph M. Hendrie
Commissioner

Richard T. Kennedy
Commissioner

Victor Gilinsky
Commissioner

Enclosure:
As stated

cc: Sen. Mark O. Hatfield
Sen. Harrison Schmitt

DRAFT BILL

The Atomic Energy Act of 1954, as amended, is amended by revising the title of Chapter 2. to read "Definitions and Policy," and by adding a new section 12 to read as follows:

"Sec. 12. Policy. -- In the domestic licensing and regulation of facilities and materials under this Act the Commission shall regard minimizing risks to public health and safety and the common defense and security as the paramount consideration, but the Commission shall recognize that absolute safety or security may be unattainable as a practical matter and give appropriate consideration to economic impacts and to meeting energy needs. This policy shall guide the Commission in applying the domestic licensing and regulatory standards of this Act, including the standards of adequate protection to the health and safety of the public in section 182a. and non-inimicality in section 103d."

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QUESTION 38. Please specifically identify the possible health and safety consequences, if any, of permitting a) fuel loading and b) low-power operation prior to completion of any required hearing.

QUESTION 39. Please specifically identify the possible health and safety consequences, if any, of permitting a) fuel loading and b) low-power operation prior to the conduct of any required hearing.

ANSWER

The proposed interim licensing legislation would authorize the Commission to issue a fuel loading and low power license before the start or completion of any required hearing. This interim licensing would only occur subsequent to the staff's review of the applicant's Final Safety Analysis Report; issuance of the NRC Safety Evaluation Report and applicable Supplements; concurrence of the Advisory Committee on Reactor Safeguards; and approval by the Commission. The staff cannot specifically identify any possible health and safety consequences of permitting fuel loading and low power operation prior to the conduct or completion of a required hearing.

The staff has considered the safety implications of plant operation at low power in terms of risk, potential accidents and plant capability when compared to operation at full power. These aspects are summarized for a Pressurized Water Reactor.

Since the publication of the Reactor Safety Study (WASH-1400), the NRC staff has continued its study of risk to the public from potential severe accidents at nuclear power plants. This effort has confirmed that the event scenarios dominating accident risks are generally the same for different PWR designs, i.e., small break loss of coolant accidents (LOCAs) and transients. We have reexamined the dominant scenarios to estimate the reduction in the probability of the event because of the additional time available during low power operation for the reactor operators to correct the loss of important safety systems needed to mitigate the event or to take alternate courses of action. Similarly, we have calculated the reduced fission product inventory for operation of an initially unirradiated core at 5% power for 6 months and have determined the reduction in potential public exposure via reduction in potential realease magnitudes. Risk is roughly inversely proportional to the probability of severe accidents (which lose the heat sink) and directly proportional to the fission product inventory in the core. From these factors we have estimated that the overall reduction in risk to the public should be a factor of 400 to 1500 if a plant is operated at 5% power from initial startup for 6 months compared to continuous full power operation.

QUESTION 40. Please justify the Commission's request for authority to permit interim licensing prior to conduct of any required hearing. Would authority to grant an interim license prior to completion, but not prior to conduct, of a required public hearing adequately address the problem of licensing delays? If not, why not?

ANSWER.

The Commission believes that permitting low-power testing and operation in advance of the conduct or completion of any required hearing is a step which can advance the date of ultimate operation of facilities most affected by the Commission's post-TMI actions, and which at the same time represents a minimal intrusion on the legal framework by which plants are licensed to operate. From an analytic standpoint, the key event in the adjudicatory hearing is the decision by an independent Licensing Board at the conclusion of the hearing. Thus if low-power operation and testing are to be authorized in advance of the completion of the hearing, there would be little to be gained by requiring that low-power testing and operation could commence only after the adjudicatory hearing had begun.

QUESTION 41. Are there some licensing cases, such as the Diablo Canyon case, in which the very issue in controversy (e.g. seismic uncertainties) suggests that health and safety risks could result from fuel loading or low-power operation? Please explain. If such cases are conceivable, is it desirable for the NRC to have the authority to grant an interim license prior to the conduct of a public hearing in which those issues could be raised? Please explain.

ANSWER.

The hearings in a licensing case may involve issues associated with fuel loading and low power operation, as well as issues associated with full power operation of the facility. The Commission's decision to issue the interim license will consider the pertinent issues in controversy. The decision to issue an interim license will be based on the Commission's finding that the substantive standards and requirements of the Atomic Energy Act pertaining to public health and safety and the common defense and security have been met and the requirements of the National Environmental and Policy Act have been met.

Authorization of full power operation still would be contingent on conduct and completion of any required public hearing and the license would be subject to any findings of fact and law concerning the issues in controversy.

QUESTION 42. Please provide the following information for the period from 1974 to November 19, 1980 (the date of the Sholly decision):

a) the annual number of applications for license amendments;
b) the annual number of license amendments issued by the NRC;
c) the annual number of license amendments which the NRC determined involved "no significant hazards consideration";

(d) the annual number of license amendment applications for which one or more requests for a public hearing were received;
(e) of the number in d), the specific identity of the persons requesting a public hearing along with their claimed interest in the license amendment;
(f) the annual number of license amendment applications for which the NRC denied requests for a public hearing;
(g) a detailed breakdown of the number in f) into various categories of refusals, including as a separate category refusals made expressly on the grounds that the license amendment involved "no significant hazards consideration."
(h) for each case under g) in which the NRC denied a request for a hearing on the grounds that the license amendment involved "no significant hazards consideration," a copy of the hearing request and a copy of the document communicating the denial of the hearing and the express reasons for the denial.

ANSWER.

The responses to questions 42 (a), (b) and (c) is provided in the table below.

	1974	1975	1976	1977	1978	1979	1980 (to 11/19)
a)	Note 1						
b)	186	379	566	547	553	523	391
c)	157	309	468	483	488	450	358

Note 1: Annual number of applications for license amendments are included in the total number of operating reactor licensing actions and are not compiled separately.

ANSWER.

The responses to questions 42 (d) - (h) is provided below:

(d) the annual number of license amendment applications for which one or more requests for a public hearing were received;

ANSWER

1974	3
1975	5
1976	2
1977	8
1978	7
1979	3
1980	1

The above represents only operating license amendment applications and excludes amendment actions initiated directly as the result of a Commission order or other special proceeding (e.g., one initiated as the result of a request under 10 C.F.R. § 2.206). It also excludes one proceeding in 1974 and one in 1978 in which a state filed a request for hearing contingent upon a hearing being requested by another person. Each of these cases was terminated since no other request was filed. Also excluded are the three amendment proceedings related to amendment of the TMI-2 operating license (post-accident) since each was initiated by a Commission order.

(e) of the number in (d), the specific identity of the persons requesting a public hearing along with their claimed interest in the license amendment;

ANSWER

Beaver Valley Unit 1 - spent fuel pool modifications

1977 - Petitioner - City of Pittsburgh (waste disposal in municipal area)

Big Rock - spent fuel pool modification

1979 - Petitioner - Northeast Coalition and John A Leithauser (accidents in spent fuel pool and impacts thereof on lakes and streams)
- John O'Neill, II (radiation from storage of more spent fuel rods)
- 24 individual residents of which only 4 (Christa - Maria, Joanne Biers, Jim Hills and Barbara Mills remained) -- (integrity of south wall of spent fuel pool)

ANSWER 42(e) (Cont'd)

Browns Ferry - post-fire operating license amendments

1975 - Petitioner - William Garner (technical qualifications of TVA)

Dresden Units 2 and 3 - spent fuel pool modification

1978 - Petitioner - State of Illinois (effects of storing damaged fuel and occupational hazards)

Fort Calhoun - stretch power amendment

1979 - Petitioner - Natural Resources Committee of the Citizens Advisory Board by Alan H. Kirshen (thermal discharges and accidents)

Request for hearing withdrawn and proceeding dismissed prior to ruling on request.

Humboldt Bay - amendment to remove operating restrictions imposed by 1976 order

1977 - Petitioner - Joint petition by Thomas K. Collins, Elmont Honea, Frederick P. Cranston, Wesley Chesbro, Demitrios S. Mitsanas and Six Rivers Branch of Friends of the Earth, later joined by Sierra Club (risks due to geologic/seismic conditions at site)

Indian Point Unit 2 - amendment to extend for 2-year period Unit 2 operation with once-through cooling.

1975 - Petitioner - New York Atomic Energy Council (health, safety and environment)

- Hudson River Fisherman's Association (recreation; social impact; economic impact; fish and aquatic life)

Indian Point Unit 2 - amendment to approve the licensee's determination that a closed-cycle natural-draft cooling tower system is preferred alternative

1975 - Petitioner - New York Atomic Energy Council (health, safety and environment)

- Hudson River Fisherman's Association. Interested if hearing held

Indian Point Unit 3 - cooling towers

1976 - Petitioner - New York State Atomic Energy Council (health, safety and environment)

ANSWER 42[e] (Cont'd)

- Hudson River Fisherman's Association and Save our Stripers, Inc. (impact on: environment; fish and aquatic life; recreation; social, economy)

Indian Point Unit 3 - spent fuel pool modification

1980 - Petitioner - New York Public Interest Research Group (accidents).

- State of New York (New York State Energy Office) (interested state)

Kewaunee - spent fuel pool modification

1977 - Petitioner - Lakeshore Citizens for Safe Energy and Safe Haven Ltd. by Mary Lou Jacobi (loss of cooling water accident in spent fuel pool)

Proceeding dismissed based on stipulated withdrawal of petition after petition granted.

LaCrosse - modification of irradiated fuel storage pool

1977 - Petitioner - Society Against Nuclear Energy (food chain; seismic design of additional fuel storage racks; health, security and safey risks)

- Dave Simpson (environment; blackmail; sabotage; food chain; economic impact of accidents; costs to consumer; evacuation plans; qualifications of the Staff; health of Staff; reason for not bolting racks; boral sheeting; inventory and record keeping; failure of ECCS; accidents; still operating under provisional license; meeting IEEE standards; abnormal occurrences; krypton release, demineralization; system for cleanup if accident; fuel damage; alternatives)

Proceeding dismissed based on stipulation among parties.

1978 - spent fuel pool amendment

Petitioner - Coulee Region Energy Coalition (water chemistry effects on spent fuel components; cask drop accidents; radiation releases; storage of failed fuel)

Proceeding dismissed on basis of summary disposition.

ANSWER 42(e) (Cont'd)

Maine Yankee - increase spent fuel storage capacity

1979 - Petitioner - Sensible Maine Power (alternatives not adequately considered; liquid and gaseous emissions not adequately considered; spent fuel pool cannot withstand Class 9 accident; occupational exposures; technical qualifications; material and structural integrity; seismic effects; aircraft hazard; spent fuel handling accidents; health effects; pool cooling loss; emergency planning)

- State of Maine - (interested state)

Monticello - increase spent fuel pool capacity

1977 - Petitioner - Minnesota Pollution Control Agency (agency of State of Minnesota) (air and water quality; public health and safety; alternatives; environmental effects; irreversible commitment of resources; financial cost; removal of spent fuel or de facto long range storage; human error; social effects; sabotage; modification procedures for racks; decontamination; accidents; waste treatment system; monitoring; offsite impacts; occupational radiation dosage; integrity of spent fuel assemblies)

Proceeding dismissed on basis of agreement among parties.

North Anna - spent fuel pool modification

1978 - Petitioner - Potomac Alliance (radioactive emissions; increase in missile accident consequences; material integrity; occupational exposure levels; alternatives)

- Citizens Energy Forum (thermal consequences of additional heat; radioactive emissions; corrosion problems)

Proceeding terminated by summary disposition.

Oconee - McGuire - transportation of spent fuel

1978 - Petitioner - NRDC (Commission rules bar action; environmental impact statement required; alternatives; need; sabotage; not ALARA; cask accident)

- Safe Energy Alliance (EIS required, alternatives)

ANSWER 42(e) (Cont'd)

- Carolina Action (alternatives; environmental impacts; EIS required; emergency planning technical qualifications of applicants)

- Davidson Chapter of North Carolina PIRG (emergency planning)

- Carolina Environmental Study Group (environmental impacts; alternatives; EIS required; cask accident)

Pilgrim Unit 1 - Technical specification changes with respect to 8x8 reload fuel

1974 - Petitioner - Daniel Ford (fuel design and proof testing; quality assurance of reload fuel; emergency core cooling system; EIS needed)

Point Beach - spent fuel pool expansion

1977 - Petitioner - State of Wisconsin (interested state)

- Lake Shore Citizens for Safe Energy (corrosion; spent fuel filter cartridges and resins; radiological monitoring systems; radioactive releases; thermal effects and seismicity; disposal of old racks; deterioration of neutron absorber plates; effects on ground water; low-level waste; return of waste stored at West Valley)

Prairie Island - modify spent fuel pool storage

1977 - Petitioner - Northern Thunder (feasibility; economic costs; environmental consequences; alternatives; radiation exposure from sabotage)

- Minnesota Pollution Control Agency (quality of human environment; long-term environmental impacts; removal of spent fuel; financial capability for long-term care; alternatives; cost/benefit; seismology; ability of plant to handle additional burden; waste treatment system; radiological consideration is inadequate (i.e., source terms); offsite impacts; occupational radiation dosage to workers; thermal burden; heat removal system inadequate; overburdening of backup heat exchangers; heat to environment; fuel rod integrity; criticality in spent fuel pool; presence of fissile plutonium;

ANSWER 42(e) (Cont'd)

improper spacing and accidents damaging spent fuel and causing exposure of fuel; rack installation damage)

Quad Cities - transshipment

1978 NRDC and Citizens for Better Environment (CBE) (away from reactor storage; alternatives; quantity of spent fuel to be moved; exposure to public and workers; health and safety of the public; long-term storage; one-core discharge standard compliance; sabotage and hijacking; emergency planning need)

- State of Illinois (same as NRDC - CBE, plus lack of transportation studies; conformance with DOT regs and State laws and Part 71 requirements (type of license, QA program, package design, method of transportation, identification of proposed fissile class); criticality computations for shipment; radiological effects; accidents; economic impacts)

Salem - spent fuel pool modification

1978 - Petitioner - Sun People (health effects; long range storage; sabotage; handling, storage and reprocessing)

- Township of Lower Alloways Creek (public health, safety and welfare; alternatives; long term storage; storage of spent fuel from other units; hazards created by unloading spent fuel; radiation releases; corrosion leakage; sabotage; impact on cooling system; heat removal system; boral plates and rack integrity; surveillance; spent fuel pool criticality caused by natural events)

- Alfred and E. Coleman - (radiation release and contamination; geologic/seismologic and structural conditions; unresolved generic and safety issues; heat load effect; long term storage; proof of handling ability; environmental impact statement; surveys and monitoring; examination to determine effect of combining fuel from different plants; aircraft hazards; criticality; emergency planning; emergency core cooling system accidents; storage)

ANSWER 42(e) (Cont'd)

- State of New Jersey (interested state)

Trojan - spent fuel pool

1977 - Petitioner - Susan Garrett/Coalition for Safe Power

- David McCoy (individual)

- Sharon McKeel (individual)

- State of Oregon

(All four parties had interests in, and contentions related to, quality assurance; corrosion; structural matters; repairs and maintenance; accidents; criticality; cooling systems; thermal impacts; radiological impacts; adequacy of environmental impact appraisal; alternatives and need for spent fuel pool expansion)

Turkey Point - amendment for repair of steam generators

1977 - Petitioner - Mark Oncavage (impact statement is required; occupational exposure; releases to unrestricted areas including those that would result if storm struck; impact of demineralization; costs of repairs; radiation monitoring during repair; fire protection during repairs)

Vermont Yankee - change in fuel assemblies and technical specification change

1974 - Petitioner - New England Coalition on Nuclear Pollution (technical specification change to lower gaseous releases)

Petition to intervene by New England Coalition denied for failure to satisfy Commission requirements. No hearing ordered.

Vermont Yankee - revise provisions of low-pressure injection system (ECCS)

1974 - Petitioner - State of Vermont (unresolved safety hazards - modifications and surveillance differ from FSAR; undue risk to public health and safety).

State of Vermont withdrew petition to intervene; proceeding dismissed.

Vermont Yankee - revise technical specifications on linear heat
1975 generation rate operating limits.

ANSWER 42(e) (Cont'd)

1975 - Petitioner - State of Vermont (undue risks to health and safety).

Stipulation and Order terminating proceeding.

Vermont Yankee - spent fuel pool modification

1977 - Petitioner - State of Vermont (public health and safety; environmental report needed; assurance that proposed rack design is safe in safe shutdown earthquake).

- New England Coalition on Nuclear Power Conservation, Conservation Society of Vermont and Vermont Public Interest Research Group (public health and safety; margin of cooling capacity; demineralization; strength of new racks; seismic design and stress on new racks; mechanics of moving spent fuel; effect of long term storage; integrity of fuel rods; boral seal effectiveness; materials and fabrication differences; pool temperatures; costs related to replacement power, proposed modification and exposure; ultimate waste disposal)

Zion - modification of spent fuel pool

1974 - State of Illinois (environment; against policy position prohibiting non-emergency licensing of any existing storage facilities prior to adoption of long-term policy; has not shown communities served by Zion would be adversely affected; alternatives; monitoring procedures; accidents; pool boiling; adequacy of heat removal system; corrosion; rack material durability and performance; use of damaged or defective racks; criticality; radiation dosage to workers)

(f) the annual number of license amendment applications for which the NRC denied requests for a public hearing;

ANSWER

Although individual requests for a hearing have been denied on a variety of grounds, we have been able to identify only one situation (except in those instances in which the requestor voluntarily withdrew its request) in which a hearing was not ordered. In a

ANSWER 42(f) (Cont'd)

number of instances, no hearing was held as a result of a stipulation among all parties to terminate the proceeding after a hearing was ordered but before the hearing commenced or as a result of a Board granting motions for summary disposition disposing of all issues raised. In no instance were we able to identify a license amendment proceeding in which no hearing was ordered based on rejection of all requests for a hearing on the basis of a "no significant hazards consideration" finding.

(g) a detailed breakdown of the number in (f) into various categories of refusals, including as a separate category refusals made expressly on the grounds that the license amendment involved "no significant hazards consideration."

ANSWER

Except as stated in our answer to (f) above, no hearing was refused in its entirety; i.e., at least one request for a hearing was initially granted. In the only instance in which no hearing was granted, the basis for rejecting the sole petition for leave to intervene filed pursuant to 10 C.F.R. § 2.714, was the failure of petitioner to satisfy the requirements for leave to intervene.

(h) for each case under (g) in which the NRC denied a request for a hearing on the grounds that the license amendment involved "no significant hazards consideration," a copy of the hearing request and a copy of the document communicating the denial of the hearing and the express reasons for the denial.

ANSWER

Not applicable in light of our answer to (f) above.

QUESTION 43. Please provide the same information requested in paragraphs a) through n) for the period from November 19, 1980 (the date of the Sholly decision) to the present.

ANSWER

The responses to questions 43 (a), (b) and (c) is provided in the table below.

	1980 (from 11/19 to 12/31)	1981 (to 4/8)
a)	Note 1	
b)	78	220
c)	68	198

Note 1: Annual number of applications for license amendments are included in the total number of operating reactor licensing actions and are not compiled separately.

ANSWER

The responses to questions 43(d) - (h) is provided below.

Since the Sholly decision (November 19, 1980) we have identified no request for hearing in connection with any new license amendment application. In one instance, [Maine Yankee], a supplemental notice was published (on January 20, 1981), in response to which one party already admitted to the proceeding indicated its intention to raise new issues and the State of Maine filed a petition for leave to intervene expressing interest in occupational hazards, accident considerations, and alternatives.

QUESTION 44. What criteria will the NRC use to determine that a license amendment involves "no significant hazards considerations"?

ANSWER

The criteria used by the NRC to determine whether a license amendment involves "no significant hazards consideration" are whether the proposed action involves:

1. a significant increase in the probability or consequences of an accident previously considered, or;
2. a significant decrease in a safety margin.

QUESTION 45. What evidence does the NRC have that the Sholly decision will lead to a "flood of interventions? Even if there is an increase in interventions, what evidence does the NRC have that these interventions will delay the operation of nuclear power plants?

ANSWER

Based on our experience in the approximately six months since the Sholly decision, there is no evidence to suggest that there will be a "flood of interventions." However, it should be recognized that its effect has been stayed essentially since it was issued and the NRC has not been obliged to follow it. Thus, while the decision might lend itself to use by intervenors for purposes of delay, the period since its issuance is not a useful measure of its potential impact.

Based on a preliminary screening conducted immediately after the Sholly decision, about 50 of 745 then-pending license amendment requests which the Staff believed involved "no significant hazards consideration" involved dates (generally a few months in the future) by which the amendment had to be issued to prevent plant shutdown or curtailed operation.

QUESTION 46. To what extent, if at all, did the decision in Brooks v. AEC, 499 F.2d 1069 (D.C. Cir., 1973) lead to an increase in requests for public hearings on license amendment applications involving "no significant hazards consideration"? Please provide specific information to substantiate your answer.

ANSWER

No requests for public hearings on operating license amendment applications involving "no significant hazards consideration" can be attributed to the decision in Brooks v. AEC, 499 F.2d 1069 (D.C. Cir. 1973). This may be due to a belief that the decision did not hold that the NRC would have to conduct a prior hearing on a request for hearing in instances involving "no significant hazards consideration."

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