ADAMS Template: SECY-067

DOCUMENT DATE: 08/05/1998

TITLE: PR-MISC - 63FR41872 - POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS; POLICY STATEMENT

CASE REFERENCE: PR-MISC

63FR41872

KEY WORD: RULEMAKING COMMENTS

Document Sensitivity: Non-sensitive - SUNSI Review Complete

DOCKET NO. PR-MISC
(63FR41872)

In the Matter of

POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS;
POLICY STATEMENT

DATE DOCKETED	DATE OF DOCUMENT	TITLE OR DESCRIPTION OF DOCUMENT
07/29/98	07/28/98	FEDERAL REGISTER NOTICE - POLICY STATEMENT: UPDATE
09/18/98	09/16/98	COMMENT OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. (SUSAN L. HIATT, DIRECTOR) (1)
09/22/98	09/14/98	COMMENT OF SENATOR FRANK H. MURKOWSKI (2)
09/29/98	09/25/98	COMMENT OF TENNESSEE VALLEY AUTHORITY (MARK J. BURZYNSKI) (3)
10/05/98	10/05/98	COMMENT OF NIAGARA MOHAWK POWER CORPORATION (JOHN H. MUELLER, SR. VP AND CNO) (4)
10/05/98	10/05/98	COMMENT OF NUCLEAR ENERGY INSTITUTE (ROBERT W. BISHOP, VP & GEN. COUNSEL) (5)
10/05/98	10/05/98	COMMENT OF DUKE ENERGY CORP. AND NIAGARA MOHAWK POWER CORP. (ANNE W. COTTINGHAM, ESQ., ET AL.) (6)
10/06/98	10/05/98	COMMENT OF THE NATIONAL WHISTLEBLOWER CENTER (STEPHEN M. KOHN, ESQ., CHAIRMAN) (7)
10/06/98	10/05/98	COMMENT OF CAROLINA POWER & LIGHT COMPANY (D. B. ALEXANDER) (8)
10/08/98	10/02/98	COMMENT OF YANKEE ATOMIC ELECTRIC COMPANY (JOHN M. ODDO, MGR., REG. AFFAIRS) (9)
10/13/98	10/05/98	COMMENT OF FLORIDA POWER & LIGHT COMPANY (RAJIV S. KUNDALKAR, VP, NUC. ENG.) (10)
10/13/98	10/06/98	COMMENT OF SHAW PITTMAN POTTS & TROWBRIDGE & FIVE LICENSEES (PAUL A. GAUKLER, ESQ., ET AL.) (11)
10/15/98	10/07/98	LTR FROM PAUL A. GAUKLER, ESQ., SHAW PITTMAN POTTS & TROWBRIDGE TO SECY ADDING BOSTON EDISON COMPANY TO LIST OF UTILITIES SUBMITTING COMMENTS (COM. 11)

SHAW PITTMAN
POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N Street, N.W.
Washington, D.C. 20037-1128
202.663.8000
Facsimile 202.663.8007

PAUL A. GAUKLER
202.663.8304
paul_gaukler@shawpittman.com

New York
Virginia

October 7, 1998

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on Statement of Policy on Conduct of Adjudicatory Proceedings

Dear Sir:

We are further amending our comments on the NRC's Statement of Policy on Conduct of Adjudicatory Proceedings, to add yet another utility, Boston Edison Company, on whose behalf the comments are submitted. No other changes have been made to the comments.

We would appreciate it if you would substitute the enclosed amended comments for those we filed October 5 and the amended comments filed yesterday, October 6, which added Carolina Power & Light Company.

Sincerely,

Paul Gaukler

Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN POTTS &
TROWBRIDGE

SHAW PITTMAN
POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N Street, N.W.
Washington, D.C. 20037-1128
202.663.8000
Facsimile 202.663.8007

PAUL A. GAUKLER
202.663.8304
paul_gaukler@shawpittman.com

New York
Virginia

October 5, 1998

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on Statement of Policy on Conduct of Adjudicatory Proceedings

Dear Sir:

As provided by the Federal Register notice of August, 1998 (63 Fed. Reg. 41,872), we are submitting written comments on the Nuclear Regulatory Commission's ("NRC") Statement of Policy on Conduct of Adjudicatory Proceedings. These comments are being submitted on behalf of Shaw Pittman Potts & Trowbridge, as well as American Electric Power Company, Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, GPU Nuclear, Inc., and Private Fuel Storage, L.L.C.

We highly commend the Commission's efforts to ensure the prompt and efficient conduct of NRC proceedings through the issuance of its recent Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12. Most of the Commission's directives will expedite its proceedings while ensuring that they remain effective and fair. The Policy Statement -- if fully implemented -- should be a major step towards ensuring that protracted proceedings, such as the LES case, do not reoccur.

While we fully endorse the Commission's objective of prompt and efficient conduct of adjudicatory proceedings, we believe that a few of the directives within the Policy Statement could, contrary to the Commission's objective, inhibit the efficient conduct of its proceedings. We therefore ask the Commission to reconsider these directives (concerning the use of summary disposition and the scheduling of evidentiary hearings), and to either change them or remove them entirely from the Policy Statement. Finally, to further ensure that licensing hearings proceed smoothly and that the guidance in the Policy Statement is implemented consistently, we ask the Commission to modify its procedures for commencing hearings.

The Policy Statement provides that licensing boards should forego the use of motions for summary disposition except upon a written finding that such motions would substantially reduce the number of issues or otherwise expedite the proceeding. We believe that the Commission should reconsider this policy against summary disposition. Summary disposition can be a useful tool for reducing the number of issues to be heard or, even if a motion is not granted, for clarifying and focusing the issues for hearing. Summary disposition is particularly appropriate if large numbers of contentions are introduced for it can reduce the time required for hearings, the subsequent filing of findings of fact and conclusions of law, and the board's issuance of its decision. Summary disposition can be especially effective where a board establishes a schedule that encourages the early filing of summary disposition motions and includes a strict time frame for their resolution. Therefore, we believe that the Commission should change its Policy Statement to endorse the use of summary disposition motions subject to the adoption of schedules by licensing boards that will ensure its prompt and effective use.

The Policy Statement also calls for licensing boards to delay the beginning of evidentiary hearings until the NRC Staff has completed its Safety Evaluation Report (SER) or Final Environmental Statement (FES). We believe that the Commission should reconsider this position and should allow the conduct of hearings prior to the issuance of the SER or FES on issues on which the Staff has completed its review and has developed its position. Holding hearings on groups of issues as the Staff completes its review of them is more likely to expedite the hearing process than postponing the start of hearings pending completion of the SER or FES, as proposed by the Commission. The Commission's proposed approach could result in one or two issues holding up an entire proceeding. For example, a significant cause of the delay in the LES case was the amount of time it took -- four or five years out of a seven-year case --for the NRC Staff to prepare and issue its SER and FES. Similar delays could be experienced in other large cases, such as license renewal proceedings. One potential solution to this problem would be for the Commission to recommend that the Staff prepare partial SERs addressing contested issues so that the evidentiary hearings on those issues could proceed. Boards could also commence evidentiary hearings once the Staff had issued a draft SER instead of waiting for the final report.

Regarding environmental issues, current regulations, 10 C.F.R. § 51.104(a)(1), prohibit the NRC Staff from presenting in a hearing the Staff's position on NEPA matters until the FES is filed with the Environmental Protection Agency. Changing those regulations to allow the separate resolution of factually distinct environmental issues after the Staff had analyzed them could expedite proceedings the same way as the separate resolution of distinct safety issues, without prejudicing the Staff's ultimate environmental findings. Alternatively, boards could expedite proceedings by holding separate hearings concerning the Draft Environmental Statement (DES) and the FES, if the scope of the FES hearing were limited to issues that had not been addressed in the DES hearing. Finally, even under current regulations, holding hearings on safety issues before the issuance of the FES would avoid

SHAW PITTMAN
POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

delays associated with the simultaneous resolution of a large number of issues at the end of a proceeding.

Finally, we are concerned in light of the Commission's recent order, CLI-98-19, in the Calvert Cliffs licensing renewal case (in which it granted additional time to the petitioner to file contentions) that the Commission may fail to consistently implement the Policy Statement guidelines and enforce its related rules for ensuring the prompt and efficient conduct of licensing proceedings. We strongly urge the Commission to apply its rules and guidelines consistently and strictly and not to be hesitant in dismissing parties who fail to comply with them, especially where they simply ignore licensing board orders, as was the case in Calvert Cliffs. One reason that the Commission gave in CLI-98-19 for allowing more time was that the statement in the Notice of Opportunity for a Hearing and 10 C.F.R. § 2.714(b)(1) that parties may file contentions "not later than fifteen days" prior to the first prehearing conference was a potential source of confusion, in that it does not make clear the presiding officer's power to set the schedule for the filling of contentions and the prehearing conference. To eliminate any such potential confusion, the Commission should clarify in any future Notices of Opportunity for a Hearing the presiding officer's scheduling authority and should, if considered necessary, amend the rule itself. Additionally, in the interest of further streamlining the process and avoiding unnecessary effort, we request the Commission to modify its rules such that either 1) presiding officers must rule promptly on the standing of parties to intervene, before the deadline for the filing of contentions or 2) potential intervenors must file their petitions to intervene demonstrating standing and their supplements with contentions simultaneously, at the beginning of the proceeding.

In conclusion, we fully subscribe to the Commission's goal of making the conduct of NRC proceedings more prompt and efficient. Changing the new policies as suggested above would, we believe, further expedite the resolution of issues and eliminate significant potential for delay. Thus we urge the Commission to act upon our comments to make the agency's proceedings even more efficient while ensuring that they remain effective and fair.

Sincerely,

Paul Gaukler

Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN POTTS &
TROWBRIDGE

(11)

SHAW PITTMAN
POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N Street, N.W.
Washington, D.C. 20037-1128
202.663.8000
Facsimile 202.663.8007

PAUL A. GAUKLER
202.663.8304
paul_gaukler@shawpittman.com

New York
Virginia

October 6, 1998

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on Statement of Policy on Conduct of Adjudicatory Proceedings

Dear Sir:

We are filing amended comments on the NRC's Statement of Policy on Conduct of Adjudicatory Proceedings, filed yesterday, which adds Carolina, Power & Light Company as one of the utilities on whose behalf the comments are submitted. No other changes have been made to the comments.

We would appreciate it if you would substitute the enclosed amended comments for those we filed yesterday, October 5.

Sincerely,

Paul Gaukler

Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN POTTS &
TROWBRIDGE

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date 10/6/98
Copies Received 1
Add'l Copies Reproduced 4
Special Distribution Weisman, Gallagher, PDR, RIDS
Comments submitted on 10/5/98

SHAW PITTMAN
POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N Street, N.W.
Washington, D.C. 20037-1128
202.663.8000
Facsimile 202.663.8007

PAUL A. GAUKLER
202.663.8304
paul_gaukler@shawpittman.com

New York
Virginia

October 5, 1998

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on Statement of Policy on Conduct of Adjudicatory Proceedings

Dear Sir:

As provided by the Federal Register notice of August, 1998 (63 Fed. Reg. 41,872), we are submitting written comments on the Nuclear Regulatory Commission's ("NRC") Statement of Policy on Conduct of Adjudicatory Proceedings. These comments are being submitted on behalf of Shaw Pittman Potts & Trowbridge, as well as American Electric Power Company, Baltimore Gas and Electric Company, Carolina Power & Light Company, GPU Nuclear, Inc., and Private Fuel Storage, L.L.C.

We highly commend the Commission's efforts to ensure the prompt and efficient conduct of NRC proceedings through the issuance of its recent Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12. Most of the Commission's directives will expedite its proceedings while ensuring that they remain effective and fair. The Policy Statement -- if fully implemented -- should be a major step towards ensuring that protracted proceedings, such as the LES case, do not reoccur.

While we fully endorse the Commission's objective of prompt and efficient conduct of adjudicatory proceedings, we believe that a few of the directives within the Policy Statement could, contrary to the Commission's objective, inhibit the efficient conduct of its proceedings. We therefore ask the Commission to reconsider these directives (concerning the use of summary disposition and the scheduling of evidentiary hearings), and to either change them or remove them entirely from the Policy Statement. Finally, to further ensure that licensing hearings proceed smoothly and that the guidance in the Policy Statement is implemented consistently, we ask the Commission to modify its procedures for commencing hearings.

The Policy Statement provides that licensing boards should forego the use of motions for summary disposition except upon a written finding that such motions would substantially reduce the number of issues or otherwise expedite the proceeding. We believe that the Commission should reconsider this policy against summary disposition. Summary disposition can be a useful tool for reducing the number of issues to be heard or, even if a motion is not granted, for clarifying and focusing the issues for hearing. Summary disposition is particularly appropriate if large numbers of contentions are introduced for it can reduce the time required for hearings, the subsequent filing of findings of fact and conclusions of law, and the board's issuance of its decision. Summary disposition can be especially effective where a board establishes a schedule that encourages the early filing of summary disposition motions and includes a strict time frame for their resolution. Therefore, we believe that the Commission should change its Policy Statement to endorse the use of summary disposition motions subject to the adoption of schedules by licensing boards that will ensure its prompt and effective use.

The Policy Statement also calls for licensing boards to delay the beginning of evidentiary hearings until the NRC Staff has completed its Safety Evaluation Report (SER) or Final Environmental Statement (FES). We believe that the Commission should reconsider this position and should allow the conduct of hearings prior to the issuance of the SER or FES on issues on which the Staff has completed its review and has developed its position. Holding hearings on groups of issues as the Staff completes its review of them is more likely to expedite the hearing process than postponing the start of hearings pending completion of the SER or FES, as proposed by the Commission. The Commission's proposed approach could result in one or two issues holding up an entire proceeding. For example, a significant cause of the delay in the LES case was the amount of time it took -- four or five years out of a seven-year case --for the NRC Staff to prepare and issue its SER and FES. Similar delays could be experienced in other large cases, such as license renewal proceedings. One potential solution to this problem would be for the Commission to recommend that the Staff prepare partial SERs addressing contested issues so that the evidentiary hearings on those issues could proceed. Boards could also commence evidentiary hearings once the Staff had issued a draft SER instead of waiting for the final report.

Regarding environmental issues, current regulations, 10 C.F.R. § 51.104(a)(1), prohibit the NRC Staff from presenting in a hearing the Staff's position on NEPA matters until the FES is filed with the Environmental Protection Agency. Changing those regulations to allow the separate resolution of factually distinct environmental issues after the Staff had analyzed them could expedite proceedings the same way as the separate resolution of distinct safety issues, without prejudicing the Staff's ultimate environmental findings. Alternatively, boards could expedite proceedings by holding separate hearings concerning the Draft Environmental Statement (DES) and the FES, if the scope of the FES hearing were limited to issues that had not been addressed in the DES hearing. Finally, even under current regulations, holding hearings on safety issues before the issuance of the FES would avoid

delays associated with the simultaneous resolution of a large number of issues at the end of a proceeding.

Finally, we are concerned in light of the Commission's recent order, CLI-98-19, in the Calvert Cliffs licensing renewal case (in which it granted additional time to the petitioner to file contentions) that the Commission may fail to consistently implement the Policy Statement guidelines and enforce its related rules for ensuring the prompt and efficient conduct of licensing proceedings. We strongly urge the Commission to apply its rules and guidelines consistently and strictly and not to be hesitant in dismissing parties who fail to comply with them, especially where they simply ignore licensing board orders, as was the case in Calvert Cliffs. One reason that the Commission gave in CLI-98-19 for allowing more time was that the statement in the Notice of Opportunity for a Hearing and 10 C.F.R. § 2.714(b)(1) that parties may file contentions "not later than fifteen days" prior to the first prehearing conference was a potential source of confusion, in that it does not make clear the presiding officer's power to set the schedule for the filling of contentions and the prehearing conference. To eliminate any such potential confusion, the Commission should clarify in any future Notices of Opportunity for a Hearing the presiding officer's scheduling authority and should, if considered necessary, amend the rule itself. Additionally, in the interest of further streamlining the process and avoiding unnecessary effort, we request the Commission to modify its rules such that either 1) presiding officers must rule promptly on the standing of parties to intervene, before the deadline for the filing of contentions or 2) potential intervenors must file their petitions to intervene demonstrating standing and their supplements with contentions simultaneously, at the beginning of the proceeding.

In conclusion, we fully subscribe to the Commission's goal of making the conduct of NRC proceedings more prompt and efficient. Changing the new policies as suggested above would, we believe, further expedite the resolution of issues and eliminate significant potential for delay. Thus we urge the Commission to act upon our comments to make the agency's proceedings even more efficient while ensuring that they remain effective and fair.

Sincerely,

Paul Gaukler

Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN POTTS &
TROWBRIDGE

(10)

Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408-0420

L-98-248

October 5, 1998

Mr. John C. Hoyle
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff

Subject: Florida Power & Light Company Comments
Statement of Policy on Conduct of Adjudicatory Proceedings
CLI-98-12, 63 Fed. Reg. 41872 (Aug. 5, 1998)

Dear Mr. Hoyle:

Florida Power & Light Company (FPL), the licensee for the St. Lucie Nuclear Plant, Units 1 and 2, and the Turkey Point Nuclear Plant, Units 3 and 4, hereby submits the following comments on the above-referenced Policy Statement. FPL also endorses the comments of the Nuclear Energy Institute on the Policy Statement.

As explained below, FPL supports the efforts of the Nuclear Regulatory Commission (NRC) to streamline the NRC's adjudicatory process, as reflected in the Policy Statement and in the initial rulings regarding the Baltimore Gas & Electric Company's application for renewal of the Calvert Cliffs Nuclear Power Plant operating licenses. In this regard, the Policy Statement is an important first step. FPL offers additional suggestions on how to further accomplish the important goal of reaching final adjudicatory decisions on nuclear power plant license renewal applications in a timely and efficient fashion.

FPL Comments

On August 5, 1998, NRC published an update of its 1981 Policy Statement on the conduct of adjudicatory proceedings (CLI-81-8, 13 NRC 452 (1981)) with the stated purpose ensuring "the efficient conduct of proceedings." The update was published in light of expected applications for nuclear power plant license renewal, industry restructuring efforts, and licensing of waste storage facilities. FPL fully supports the Commission's effort. As stated in a letter to the Commission dated June 26, 1998, FPL is currently pursuing development of a license renewal application for its Turkey Point Nuclear Plant, Units 3 and 4. FPL's decision whether to pursue license renewal will depend in large part on the Commission's efficient resolution of technical and environmental issues in the adjudicatory context. In this regard, the Policy Statement is an important first step towards ensuring efficient and timely processing of license renewal applications.

FPL also supports the important steps taken by the Commission to define the scope of the

Calvert Cliffs renewal proceeding, provide guidance on discovery, and to establish milestones for adjudicatory decisions in that proceeding (CLI-98-14, (1998)). The Commission's close oversight of adjudicatory proceedings can help ensure compliance with the Policy Statement and prevent recurrence of protracted proceedings such as the Louisiana Energy Services licensing proceeding, the Vogtle license transfer proceeding, and the Shoreham and Comanche Peak operating license proceedings.

FPL supports the following aspects of the Policy Statement in particular to expedite the adjudicatory process:

Requiring licensing boards to set and adhere to schedules for proceedings;

Establishing procedures for electronic filing;

Appointment of additional presiding officers or licensing boards only where the adjudicatory process could be expedited;

Strict enforcement of parties' obligations by striking material from the record or dismissing a party from the proceeding for failure to comply with the Rules of Practice or with Board or Commission orders;

Require strict adherence with Commission requirements on admissibility of contentions in 10 CFR 2.714(b)(2); and

Require close and efficient management of the discovery process.

FPL notes, however, that many aspects of the Policy Statement are similar to the 1981 Policy Statement. The 1981 Policy Statement did not alone prevent lengthy adjudicatory proceedings in the 1980s and 1990s which have created questions concerning the performance of the Atomic Safety and Licensing Board (ASLB) judges.

FPL offers the following suggestions to further ensure that adjudicatory proceedings are conducted in an efficient manner:

1. Closely monitor compliance with "milestones." FPL strongly supports the Commission in establishing milestones for completion of an adjudicatory proceeding. However, FPL questions whether "milestones" will in fact prevent lengthy proceedings. In fact, the Commission's September 17, 1998 order (CLI-98-19) relaxing the schedule for submittal of contentions in the Calvert Cliffs license renewal proceeding would seem to defeat the purpose of the Policy Statement which is to promote streamlining of hearings. The September 17 order also appears to endorse an intervenor's deliberate failure to comply with a Licensing Board scheduling order. To ensure efficiency in this

process, FPL recommends an amendment to the Policy Statement to require automatic Commission review in the event that any of the schedular milestones are exceeded by an ASLB. FPL also recommends stringent enforcement of schedules set by Licensing Boards.

2. Hold informal hearings. NRC has traditionally afforded formal hearings in reactor licensing proceedings even though such hearings are not required by Section 189 of the Atomic Energy Act, 42 USC 2239(a). While Section 189 requires NRC to provide an opportunity for a "hearing" for certain Commission licensing actions, the words "on the record" does not accompany this requirement, and therefore, formal evidentiary hearings are not required by the Administrative Procedure Act. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 238 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972). The Commission reaffirmed its interpretation of this issue in the recent notice of proposed rulemaking on "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 48644, 48645 (Sept. 11, 1998), and in the case law cited therein. FPL supports issuance of this proposed rule and respectfully suggests that the guidance on informal hearings be specifically endorsed in a revised Policy Statement.

3. Rule on intervenor's standing before briefing on contentions. FPL suggests that Licensing Boards rule promptly on standing issues before briefing on contentions. Addressing standing issues up front could save substantial licensee and Staff time and resources addressing contentions that would otherwise be wasted if the petitioner is found not to have standing.

4. Rigorously enforce the standards applicable to admissibility of contentions and late intervention. FPL suggests that the Commission maintain close supervisory review concerning whether a party has demonstrated at least one litigable contention within the scope of the proceeding, and whether a party seeking late intervention has met the standards for participation as a party in 10 CFR 2.714(a)(1) and (d)(1).

5. Allow the hearing to commence before completion of the Safety Evaluation Report (SER) or Final Environmental Statement (FES). FPL believes that any adjudicatory hearing should commence regardless of whether the Staff has completed the SER or FES. In the case of the SER, the issue in any adjudicatory proceeding is whether the application is sufficient, and not whether the SER is sufficient. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review declined, CLI-83-32, 18 NRC 1309. One way to resolve this issue is for Staff to prepare partial SERs addressing contested issues so that the evidentiary hearings on those issues could proceed. Such hearings could expedite resolution of contested technical issues without waiting for completion of Staff reviews of all issues in question.

In the case of the FES, current regulations (10 CFR 51.104(a)(1)) prohibit the Staff from presenting in a hearing the Staff's position on National Environmental Policy Act (NEPA) issues until the FES is filed with the Environmental Protection Agency. There is no requirement in NEPA or in the implementing guidance of the Council on Environmental Quality that would require starting a

hearing only after completion of the FES. FPL suggests that NRC amend this regulation to allow the separate resolution of factually distinct environmental issues after the Staff has analyzed those issues. This would expedite proceedings in the same way as the separate resolution of distinct safety issues.

6. Exercise interlocutory review over novel questions. As noted in the Commission's order referring the request for intervention on the Calvert Cliffs license renewal proceeding, the Commission should exercise interlocutory review on an expedited basis where novel legal or policy questions have been raised. Such review could help sharpen issues and resolve controversial questions before a proceeding becomes delayed.

7. Evaluate performance of ASLB judges on a continuous basis. In addition to the close monitoring of adjudicatory proceedings, NRC should evaluate the performance of each ASLB judge concerning compliance with schedules and other Commission orders on an ongoing basis.

8. Make "Significant Hazards Considerations" findings and take licensing actions regardless of the pendency of a hearing. NRC is authorized by Section 189 of the Atomic Energy Act to make a finding whether a proposed license amendment involves "significant hazards consideration." 42 USC 2239(a)(1)(A); 10 CFR 50.92(c). A finding of "no significant hazards consideration" is merely a procedural device that permits the Commission to issue a proposed license amendment prior to the resolution of any hearing request on the application, and implies no finding on the merits of the application. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 6 n. 3 (1986), reversed in part on other grounds, San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir.1986); see Georgia Power Co. (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-5, 41 NRC 321, 322 (1995) (Staff not precluded from issuing amendment despite pending hearing). In practice, however, significant hazards consideration findings are rarely made where a hearing has been requested. This practice injects significant and unnecessary delay into the processing of license amendment requests. FPL suggests that the Commission follow the Act and its regulations and make "significant hazards consideration" findings and issue licenses and amendments, as appropriate, on the same schedule as if no hearing had been requested.

9. Use motions for summary disposition to narrow the scope of the proceeding. In its Policy Statement, the Commission indicated that the ASLB should limit the use of summary disposition motions only to those cases where the proceeding could be expedited. FPL believes that summary disposition motions can be useful in cases where numerous contentions have been admitted to narrow the scope of the proceeding if such motions and the schedule for resolution are carefully controlled by the ASLB. FPL suggests that the Commission change its recommendation and endorse the use of summary disposition motions and encourage licensing boards to set hearing schedules that will enable the prompt and effective use of such motions.

10. Apply the standards of admissibility in the Federal Rules of Evidence to Scientific Testimony. Another way to streamline NRC adjudicatory proceedings is to require that expert testimony on scientific issues meet the admissibility and reliability standards set forth by the Federal Rules of Evidence, Rule 702,[1] and by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). The purpose of Rule 702 is to ensure such evidence is relevant and reliable, and the Supreme Court ruled in Daubert that the judge acts as a "gatekeeper" in screening such evidence. FPL believes that these standards should be rigorously applied to ensure that only "relevant, material, and reliable evidence" (10 CFR 2.743(c)) is admitted in NRC adjudicatory proceedings.

FPL appreciates the opportunity to comment on the Policy Statement.

Very truly yours,

Rajiv S. Kundalkar

Rajiv S. Kundalkar
Vice President
Nuclear Engineering

[1]NRC adjudicatory boards look to the Federal Rules of Evidence for guidance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).

YANKEE ATOMIC ELECTRIC COMPANY

Telephone (508) 779-6711
TWX 710-380-7619

580 Main Street, Bolton, Massachusetts 01740-1398

(9)

October 2, 1998
BYR 98-036

The Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Attention: Rulemakings and Adjudications Staff

Subject: Comments: Policy Statement Update, Statement of Policy on Conduct of Adjudicatory Proceedings (63 Fed. Reg. 41872, August 5, 1998)

Enclosed are Yankee Atomic Electric Company's comments on the policy statement update regarding NRC's Conduct of Adjudicatory Proceedings in response to the subject notice.

Should you have any questions regarding our comments, please do not hesitate to contact me at (978) 568-2767.

John M. Oddo
Manager, Regulatory Affairs

DY/

Enclosure

c: J. Grant

ENCLOSURE

Section	Comment
General	The subject policy statement update (63FR41872, 8/5/98) cites existing authority which is sufficient to conduct these types of proceedings fairly and efficiently. What is required is full enforcement of the revised policy and consistent enforcement of the Rules of Practice in 10 CFR Part 2. For example, the NRC policy statement highlights a number of broad powers the presiding officer has at his or her disposal to control the proceedings (10 CFR 2.718). Included in these powers is the power to "regulate the course of the hearing and the conduct of the participants." From the outset, the NRC must demonstrate a willingness to fully implement its authority. Recent actions, such as directing the Atomic Safety and Licensing Board (ASLB) overseeing Calvert Cliff's license renewal to adopt an expedited schedule for considering a request for hearing, hopefully indicate that full implementation of the policy has begun. We urge that such implementation continue, thereby ensuring an improved, credible, and more consistent hearing proceeding process.

(8)

CP&L

Carolina Power & Light Company
PO Box 1551
411 Fayetteville Street Mall
Raleigh NC 27602

CP&L Letter: PE&RAS-98-078
October 5, 1998

The Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Attention: Rulemakings and Adjudications Staff

Subject: **Comments on the NRC Policy on Conduct of Adjudicatory Proceedings (63 FR 41872 - August 5, 1998)**

Dear Sir or Madam:

Carolina Power & Light Company (CP&L) provides these comments on the updated NRC Policy on Conduct of Adjudicatory Proceedings, which was published at 63 Federal Register 41872 on August 5, 1998.

CP&L supports the updated policy as an example of where the Efficiency Principle of Good Regulation can be successfully applied to benefit the American taxpayers, the rate-paying consumers, and the licensees with no detriment to the public health and safety. In particular, CP&L believes that a disciplined process provides greater opportunity for the public, the NRC and the licensee to focus on genuine issues and real disputes as opposed to unsupported contentions.

However, the real measure of the success of the policy will be in its implementation. CP&L advises the NRC to be diligent in monitoring the upcoming adjudicatory proceedings to ensure that the policy is implemented consistent with the its intentions.

Please contact me at (919) 546-6901 if you have questions.

Sincerely,

D.B. Alexander

D.B. Alexander, Manager
Performance Evaluation & Regulatory Affairs

HAS

Comments on the NRC Policy on Conduct of Adjudicatory Proceedings
(63 FR 41872 - August 5, 1998)

cc: Mr. L.A. Reyes, Regional Administrator - Region II
Mr. J.B. Brady, USNRC Senior Resident Inspector - SHNPP, Unit No. 1
USNRC Resident Inspector - HBRSEP, Unit No. 2
Mr. S.C. Flanders, NRR Project Manager - SHNPP, Unit No. 1
Mr. C.A. Patterson, USNRC Senior Resident Inspector - BSEP, Unit Nos. 1 and 2
Chair J.A. Sanford - North Carolina Utilities Commission
Mr. R. Subbaratnam, NRR Project Manager - HBRSEP, Unit No. 2
Mr. D.C. Trimble, Jr., NRR Project Manager - BSEP, Unit Nos. 1 and 2

(7)

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of the Commission's Policy Statement on Conduct of Adjudicatory Proceedings.	**No. CLI-98-12**

Comment of National Whistleblower Center

Stephen M. Kohn, the undersigned, and as Chairman of the National Whistleblower Center ("NWC"), located at 3233 P Street, NW, Washington, DC, offers and files the following comments in response to a notice of the Commission's Policy Statement on the Conduct of Adjudicatory Proceedings, published in the Federal Register, Volume 63, page 41872, on August 5, 1998.

The facts and circumstances working against the Commission's adoption of the proposed Policy Statement are as follows:

I. The Commission's subtle change in the standard for granting parties to proceedings extensions of time, from the proper "for good cause" standard to an "only when warranted by unavoidable and extreme circumstances" standard, is untenable, in that it:
   a. Violates the provisions of the Administrative Procedure Act;
   b. Violates the Commission's own published rules;
   c. Violates the established law of the United States Court of Appeals for the District of Columbia Circuit;

II. The Commission offers that powers granted under 10 C.F.R. § 2.718, are "sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing." This general statement may hold in certain circumstances, but is not true with regard to the discrete items mentioned therein. Specifically, the Commission and the Atomic Safety Licensing Board (ASLB) are bound by the rules published at 10 C.F.R. §§ 2.714(a)(3) and (b)(1), governing the intervention petition amendment process. For the Commission to suggest otherwise is plainly

wrong and a violation of well-settled law.

III. The Commission's guidance with regard to Board-admitted contentions, including those issues raised *sua sponte*, establishes a standard that is violative of federal law, of sound public policy, and of concern to the public health and safety.

IV. The Commission purports to authorize the setting of "reasonable schedules," but as has become clear in the context of the current *Baltimore Gas & Electric* license extension application matter, the Agency instead supports the setting of unreasonable schedules, particularly as applied against intervenors acting in the public interest. That the result of the Commission's Policy Statement has been borne out in practice mitigates against the Commission publishing such a statement that offers a hollow promise and effectively masks the true result of its purported policy.

V. The Commission asserts that the measures contained within the Policy Statement can be accomplished within existing rules, but then proceeds to establish guidance for Atomic Safety Licensing Board action -- under what can only be termed changed rules and standards. The incongruity between this statement and its application, in the form of the guidance given to the Board, evinces a fundamental disregard for both established procedural rules and the public health and safety.

VI. The entire tone of the Commission's Policy Statement is misguided, in that it unreasonably and without apparent justification emphasizes expediency over safety, as illuminated by the Commission's repeated referrals to "speed," "efficiency" and "expediency," without voicing similar concerns for the public health and safety.

I. Standard for Granting Extensions of Time[1]

The proper standard under the law for granting a request for extension of time is

---

[1] It is unclear to the NWC whether the Commission's policy statement is technically "rulemaking," in that the actual application of the standards mentioned therein remains unclear. If, for example, the Commission intends to adhere to the "unavoidable and extreme circumstances" standard in the conduct of actual adjudications, it is quite clear that this would be rulemaking and would violate the Administrative Procedure Act. The relevant section of that Act, 5 U.S.C. § 553(b) requires that notice of proposed rules includes: reference to the legal authority under which the rule is proposed, § 553(b)(2), and reference to the terms or substance of the proposed rule or a description of the subjects and issues involved, § 553(b)(3). The Commission's policy statement does neither, explicitly, and it is only implicitly that an inference is raised that this might be "rulemaking."

published in 10 C.F.R. § 2.711(a), which states that "except as otherwise provided by law...the time fixed or the period of time prescribed may *for good cause* be extended..." This standard comports with the mandate of the Administrative Procedure Act, whereas the "unavoidable and extreme circumstances" standard clearly violates the letter and the spirit of well-established administrative, statutory and case law authority.

The Administrative Procedure Act requires that agencies conduct proceedings in a fair and just manner, and with consideration of the convenience and necessities of the parties or their representatives. *See, e.g., 5 U.S.C. §§ 554(b), 558(c).* While the Act uses the word "necessities," it is clear at the most rudimentary level that the term exists to qualify the circumstances pertinent to a given party, not to establish some minimum level of process that will be given them. To use the term in a manner that works against a party -- the intended beneficiary of the plain language of the statute -- is to clearly err and evidences an arbitrary and capricious construction of the Act. The NWC cannot allow such a prejudicial statement of Commission policy to stand without negative comment.

Further, and in that the Commission's own rules clearly state the proper standard, the Commission has suggested an alternative standard that violates the long-established law of the D.C. Circuit, and any attempt to rule under such a standard will be unenforceable and will constitute reversible error.[2] Beyond the rule promulgated by the D.C. Circuit in the *Union of Concerned Scientists* case is the fact that the Commission's

---

[2] *See, Union of Concerned Scientists v. N.R.C.*, 711 F.2d 370 (D.C. Cir 1983) (refusing deference to the N.R.C.'s suspension of notice and comment on suggested rule, where agency's interpretation of its own rules "flies in the face of the language of the rules themselves."). *See also, San Luis Obispo Mothers for Peace v. N.R.C.*, 751 F.2d 1288, 1310 (D.C. Cir 1984); *Guard v. N.R.C.*, 753 F.2d 1144, 1149 (D.C. Cir. 1985); *Ohio Power Co. v. F.E.R.C.*, 880 F.2d 1400, 1413 (D.C. Cir. 1989); *Ohio Power Co. v. F.E.R.C.*, 954 F.2d 779, 783 (D.C. Cir. 1992).

statement of policy is internally inconsistent and can thus be seen as both arbitrary and irrational. In the *Federal Register* notice of August 5, 1998, the Commission states that it continues to "endorse the guidance of its current policy, issued in 1981, on the conduct of adjudicatory proceedings." *63 F.R. 41872, 41873.* The 1981 policy to which the Commission refers is published at *46 F.R. 28533, 28544*, and includes a statement of the "for good cause" standard. Inasmuch as the Commission reiterates its support for that policy, and in that the 1981 policy remains codified at *10 C.F.R. § 2.711(a)*, the Commission's current position is internally inconsistent with regard to its suggestion of a new, "unavoidable and extreme circumstances" standard.

Given that the Commission's statement will necessarily inform and compel the actions of any given licensing board, the NWC must urge the Commission to withdraw such a statement in the name of consistency, economy, and consideration for the fair exercise of the rights of all parties involved in adjudicatory proceedings.

II. The Commission's Powers Under 10 C.F.R. § 2.718

The Commission's statement, that § 2.718 grant licensing boards power to regulate the course of proceedings, is only a partial reflection of the true state of the law. Where that power is used in the context of an intervenor's amendment to petition to intervene, for example, that power or discretion is limited by the plain language of §§ 2.714(a)(3) and (b)(1). Under § 2.714(a)(3), an intervenor has the freedom to amend his petition, *without prior approval of the presiding officer*, at any time up to fifteen days prior to a § 2.751(a) "special prehearing conference" or, where no such particular conference is held, the holding of the first prehearing conference. This language clearly

and unequivocally limits the extent to which the presiding officer's authority may encroach upon a petitioner's freedom to amend their petition.

Inasmuch as the Commission's policy statement does not accurately reflect the limits imposed by § 2.714(a)(3), the NWC must object to the portion of the statement suggesting that the Commission, board or presiding officer possesses unbridled authority. The mandate of the *Concerned Scientists* case, and the litany of relevant case law that follows it, make it clear that an agency's interpretation of its own rules will be afforded no deference when that interpretation flies in the face of the plain language of the rules. The result is that if the Commission or Board were to attempt to operate under the assumption that the policy statement somehow "trumps" the limits placed by § 2.714, the decision to so act would be reversible on appeal. This statement introduces confusion into the adjudicatory process, and could very well cause parties to incur great financial and emotional costs of litigating under an illegal regime only to vindicate upon appeal what should have never been an issue. As a result, the NWC cannot in good conscience support a policy statement that so clearly amounts to an abuse of agency discretion.

III. Standard Governing Board-admitted Contentions

Under the Atomic Energy Act, the standard for admitting a contention in an intervenor-initiated proceeding is whether the contention is needed to "provide adequate protection to the health and safety of the public." *See,* 42 U.S.C. § 2232(a), *Commonwealth of Massachusetts v. N.R.C.*, 924 F.2d 311, 315 (D.C. Cir. 1991). Contrary to the "under extraordinary circumstances" and involving "serious safety, environmental, or common defense and security matters" standard that the Commission

suggests, the legal standard actually encompasses all contentions which include any matter material to the public health and safety. *See, Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437 (D.C. Cir. 1984).

History teaches us that those who fail to learn from their mistakes are doomed to repeat them. It is obvious from this most recent policy statement that the NRC has failed to learn from the 1979 Three Mile Island (TMI) incident, one mistake that the people of this country can ill-afford to have repeated. According to a commission created by President Carter to report on the TMI incident, the shortcomings of the TMI plant were due to "the utility, to suppliers of equipment, and to the federal commission that regulates nuclear power" (*Report of the President's Commission on the Accident at Three Mile Island* (1979), 11 [*hereinafter President's Commission*]) and these shortcomings combined to make that incident or one like it "eventually inevitable." *Id.* It is most unfortunate that the proposed statement of policy and the existing regulatory scheme fit the same pattern as the one decried in the report of that Commission.

"We find that the NRC is so preoccupied with the licensing of plants that it has not given primary consideration to overall safety issues." *President's Commission at* 51. As noted above, the Commission's proposed statement of policy cites health and safety once even as it cites expediency, efficiency, and fairness almost 2 dozen times. Furthermore, the Commission's eagerness to rely on its own previous rules even as it seeks to rewrite them demonstrates that the NRC retains a "preoccupation with regulations." *Id. at* 9, 20. Even the NRC itself has recognized that "Operating license hearings do not address all issues germane to a facility's readiness to operate, however, only those raised by a party to the proceeding. *Public Service Company of New*

Hampshire, 31 N.R.C. 219, 224 (1990).[3] One would think that faced with the prospect of a "number" of re-licensing applications in the next few years, all of which will involve aging and potentially outdated reactors and novel, complex issues regarding the depreciation of these facilities, the NRC would welcome help from intervenors in deciphering and digesting the morass of relevant data in a search for concerns to public health and safety. Instead, the NRC's "critical reassessment" leads it to "reiterate[] its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision." 63 F.R. 41872-03. In this conclusion we see concern for speed, for potential appellate review, and for some vague notion of fairness[4], but nowhere is there a mention of what should be the overriding concern of public safety. For this and the preceding reasons, we must agree with the findings of a 19 year old Commission and "conclude that there is no well-thought-out, integrated system for the assurance of nuclear safety within the current NRC." *President's Commission at 21.* As such, and in that the policy statement flies in

---

[3] As noted by the proposed statement, 10 CFR 54.4 limits review to "plant systems structures and components...that will require an aging management review for the period of extended operation requested by the applicant." Though this is certainly not a new aspect of the NRC's regulatory scheme, at some point, the Commission might consider "critical reassessment" of this limitation. This is so because the potential for age related weaknesses and the added complexity of retrofitting aged reactors creates unique technical and personnel issues in the continued operation of a plant even as the extended operation period may create complex and novel environmental issues. This concern will certainly be magnified as the Commission is forced to consider relicensing applications by "numbers" of uniquely situated facilities. Again we point to the lessons of history: "While some compromises between the needs of safety and the needs of an industry are inevitable, the evidence suggests that the NRC has sometimes erred on the side of the industry's convenience rather than carrying out its primary mission of assuring safety." *President's Commission at* 19.

[4] Which apparently can also be sacrificed in the name of swift resolution of application proceedings. *See Baltimore Gas and Electric.*

the face of settled law and prudent public policy considerations, we urge the Commission here to decline to adopt its August 5 statement of policy, CLI-98-12.

IV. Establishment of Reasonable Schedules

The Commission writes its policy statement in such a way as to suggest, without saying, that it is equally concerned with the prospect of fairness to intervenors and with public safety in general. An example of this is the Commission's hollow promise that it will support the establishment of "reasonable" schedules. In fact, and in light of the present proceeding involving the NWC's petition to intervene in the *Baltimore Gas and Electric* matter, it is clear that the Commission only pays lip service to the idea of "reasonable" schedules.

What has in fact occurred is that the Commission has suggested for the Board a timetable created before any contentions and their scientific bases were even presented to the Board. This suggests that the Commission has a particular agenda which it wishes to advance, without considering the novel legal or scientific issues that may be presented herein. When coupled with the unfair and unlawful standards the Commission has proposed, the practical effect is that timetables, though unreasonable at their inception but curable through fair application of proper rules, now work to effectively harry this and all future intervenors. This effectively strips 10 C.F.R. § 2.714, the intervention provision of the Commission's rules, of its value and works to exclude intervenors -- representing strong public interests -- from meaningful participation in the process. This violates the express intent of Congress and raises concern about the Commission's commitment to public safety, and the public's voice in the issues which insure that safety.

V. The Incongruity Between Commission Statements and Their Effect

As discussed, *supra*, the Commission pays brief lip service to the idea of fair adjudicatory process and proceedings. However, it is more clear that the practical effect of the four elements discussed above is to skew the process against intervention by the public. This effect is in violation of the principles for which the N.R.C. purports to stand, and is in contravention of sound public policy that allows the public a voice, both in determining issues which affect its safety and in bringing to light possible safety concerns. For this reason, the NWC urges the Commission to reconsider the effect of its policy statement and to reissue a statement more in line with the purpose the agency is purported to serve.

VI. The Tone of the Commission Policy Statement

The staff of the NWC counts, at a minimum, fifteen references to speed, expedience and efficiency in the policy statement. In contrast, the same statement includes only two references to safety, and one of those is a generic use of the term, not connected with any expression of the Commission's concern for the same. This is troubling. This Commission has been under a mandate since its inception, particularly in light of the concerns brought to light with the Three Mile Island incident in 1979, to regulate in a way that maximizes the health and safety of the public. This policy statement stands in direct opposition to this mandate, again in that it is more focused on expediting proceedings than on ensuring that those who represent the public are able to best present safety concerns to the Board. The Commission does so in light of the predicted growth in the rate of new re-licensing applications. The NWC and those whom

it represents feel that the Commission has it exactly wrong. It is precisely because more and more nuclear plants will be requesting license extensions that now is the time for renewed prudence with regard to public health and safety. For this and the reasons stated above, the National Whistleblower Center cannot agree that the Commission's policy statement is based in concern for the public health and safety, and it is for these reasons that we urge the Commission to reconsider its stance.

Sincerely,

Stephen M. Kohn*

Chairman,
National Whistleblower Center
3233 P Street, N.W.
Washington, DC 20007
smk@whistleblowers.org
(202) 342-6980

October 5, 1998

*Received via E-mail

(6)

WINSTON & STRAWN

35 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60601-9703

200 PARK AVENUE
NEW YORK, NY 10166-4193

1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502

(202) 371-5700

FACSIMILE (202) 371-5950

'98 OCT -5 P3:48

OFFICE OF SECY
RULEMAKINGS AND
ADJUDICATIONS STAFF

8 RUE DU CIRQUE
75008 PARIS, FRANCE

43, RUE DU RHONE
1204 GENEVA, SWITZERLAND

October 5, 1998

Office of the Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

SUBJ: NRC Statement of Policy on Conduct of Adjudicatory Proceedings
63 Fed. Reg. 41872 (August 5, 1998)

The following comments on the Nuclear Regulatory Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, published at 63 Fed. Reg. 41872 (August 5, 1998), are submitted on behalf of Duke Energy Corporation and Niagara Mohawk Power Corporation. This policy statement outlines certain measures to be taken by the Commission and by presiding officers of the NRC Atomic Safety and Licensing Board ("Board") designed to improve the efficiency, timeliness, and predictability of NRC adjudicatory proceedings. We view this policy statement as a laudable effort by the Commission. In this regard, we concur with, and support, the comments on the policy statement being submitted by the Nuclear Energy Institute ("NEI").

Our comments have a somewhat different focus from those of NEI. While we generally agree with the policy statement as drafted, we believe that its benefit to NRC license applicants (including license renewal applicants) would be enhanced if the policy went further in certain areas. Accordingly, in addition to the policies and actions outlined in the policy statement, we urge the Commission to explore certain additional measures, including those outlined below, either generically through the policy statement or on a case-specific basis.

An Active Supervisory Role for the Commission

Perhaps the most novel aspect of the policy is the Commission's announced willingness to exercise its inherent supervisory authority in particular proceedings, "including its power to assume part or all of the functions of the presiding officer in a given adjudication . . . ." We would welcome more active Commission involvement in contested licensing proceedings, particularly with respect to the scope of issues and the schedule, provided that the effect is to increase the efficiency with which the proceeding is conducted. Currently, there is evidence of such proactive Commission involvement in several ongoing licensing proceedings.[1/] In this regard, the Commission's invitation to boards in license renewal proceedings to refer rulings or certify questions involving "novel issues," and its stated intention to respond "promptly" to adjudicatory matters placed before it, are commendable.

Summary Disposition

In our view, experience with summary disposition motions is such that we generally support judicious use of the summary disposition process to facilitate the overall efficiency of the licensing process. We believe some issues may still be appropriate for summary disposition. Thus, we would not want to see that avenue eliminated entirely. The policy statement advocates foregoing the use of motions for summary disposition, "except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding." We believe that this new standard for using summary disposition is too stringent. While the Commission can urge prudent use of this procedural option, we suggest that the parties and licensing boards be allowed to decide whether or not to invoke the summary disposition process, based upon the facts of their particular proceeding.

Discovery

The Commission's proposal to apply informal discovery procedures consistent with the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure

---

1/ See North Atlantic Energy Service Corporation (Seabrook Station Unit No. 1), CLI-98-18, __ NRC __ (slip op. Sept. 17, 1998); Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, __ NRC __ (slip op. Sept. 17, 1998).

seems a good one, although subject to refinement based on trial and experience. Generally, we favor informal discovery if it will expedite the schedule.

On a related topic, the policy statement would suspend discovery against the NRC Staff on safety and environmental issues until the issuance of the safety analysis report (SER) and the final environmental impact statement (FES), respectively. In its current form, this prohibition seems overly broad. We recognize the need to avoid over-burdening the NRC Staff with discovery requests during the time that agency resources are stretched to ensure the timely completion of the safety and environmental documents needed for the proceeding to move forward. However, delaying all discovery against the NRC Staff until the completion of the SER (or SER supplement) and the FES creates a possibility that the commencement of the hearing will be delayed. Moreover, implementation of this policy would seem to countermand the accepted tenet that all of the parties to an adjudicatory proceeding, including the intervenor, should be pressed to proceed with discovery based on the application.

The Commission should consider adopting a modified policy in this regard. Essentially, the NRC Staff's position will be articulated in the SER and the FES. There should be no reason, either before or after completion of these documents, for the NRC to provide drafts, internal positions, and the like. On the other hand, discovery should be allowed on the relevant Regulatory Guides, Branch Technical Positions, and other acceptance criteria, and on any final Staff positions reached prior to formal publication of the SER and the EIS. Likewise, the intervenors can attend open meetings, such as EIS scoping meetings, as the review continues. Then, when the final documents are complete, they should be made public. There should be no need for additional discovery against the NRC Staff that could otherwise have been taken during this earlier phase.

Use of Initial "Scoping Orders"

We urge the Commission to continue in all cases its practice (recently exercised in the two ongoing license renewal proceedings) of preparing an initial order addressing the scope and conduct of the proceeding. Issues addressed by the scoping order should include, at a minimum, (1) the scope of the hearing (e.g., what kinds of contentions are admissible?); (2) procedures to be followed at the hearing (e.g., what kinds of discovery will be allowed? Under what conditions will motions for summary disposition be permitted? What, if any, limits will be imposed on cross-examination?); and (3) the schedule for accomplishing various milestones. (This schedule should include a date for issuing a final decision on the requested licensing action.) By addressing up front Commission expectations in all of these areas, excesses and inefficiencies can be avoided.

Commencement of Hearings before Issuance of SER

The policy statement offers parties some flexibility to begin evidentiary hearings before completion of the SER, if the presiding officer finds that beginning earlier "will expedite the hearing, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner." In our view, the policy should allow greater flexibility on this point. The Commission should consider ways to make it easier to commence hearings on safety issues (perhaps on a limited basis) before issuance of the SER or SER supplement. For example, if a discrete safety issue raised by an intervenor can be effectively adjudicated before issuance of the SER, doing so might well expedite the hearing without straining NRC resources.

Existing case law and other guidance confirms that the application is what is in dispute, not the NRC's safety review. Fundamentally, intervenors should be held to the requirement of putting on a case of their own, rather than simply attacking or mimicking the NRC Staff's review.

Limits on Intervenor Cross-Examination

In our view, the Commission should provide stronger guidance indicating that cross-examination is not always necessary and that limits on cross-examination are appropriate and defensible. The parties to NRC licensing proceeding (including applicants, the NRC Staff, and any intervenors) should be held to an obligation to make a case affirmatively. They should not be allowed to attempt to make a case through cross-examination (as, for example, the intervenors attempted unsuccessfully to do in the Diablo Canyon license recapture case).

Expediting Issuance of a Final Board Decision

In the policy statement, the Commission "strongly encourages" presiding officers to issue decisions within 60 days after all proposed findings have been submitted by the parties. While this is a step in the right direction, such an exhortation lacks teeth. One of Congress's recent concerns regarding NRC adjudicatory hearings focused on the length of time it took to complete the Louisiana Energy Services proceeding. In that light, we believe the Commission is justified in adopting a more aggressive policy. Indeed, such a policy is currently in effect under 10 CFR Part 2, Appendix D, for proceedings on applications to license a high-level radioactive waste repository. If a presiding officer is to be held to a 90-day schedule for issuing a decision regarding the licensing of a HLW repository, then NRC licensing boards in other, less complex contested licensing proceedings should all be held to a 60-day schedule for issuing decisions. The Commission should be prepared to monitor licensing boards' performance in this regard.

Failures by licensing boards to adhere to this schedule should be addressed by the Commission itself.

Expedited Adjudicatory Review

The policy statement commits the Commission to respond "promptly" to interlocutory appeals before it. This policy could be strengthened by adding language that commits the Commission to respond to such appeals within a certain length of time (seven days, for example). In addition, the existing standard for interlocutory review should be relaxed. The track record of adjudications at the NRC strongly indicates that aggressive Commission supervision will ultimately be the key to achieving expeditious and efficient adjudicatory hearings.

Possible Need to Amend the Existing Regulatory Structure

The policy statement reflects the Commission's position that it is not necessary to amend existing NRC regulations to ensure that proceedings are conducted efficiently: "The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice." The Commission exhorts hearing boards and presiding officers to continue to use existing techniques to "instill discipline in the hearing process" and "ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings." While this language reflects a commendable intention, it leaves unanswered the question of whether this will be sufficient to compel meaningful improvements in the adjudicatory process.

We do not necessarily concur with the Commission's assertion that no amendments to the existing regulations are needed. Moreover, the agency's recent publication of a proposed rule that would amend 10 CFR Part 2 to streamline the hearing process for NRC license transfers suggests that the NRC is aware of the need for rulemaking changes in some instances.[2/] The Commission states that it "may consider" more substantial procedural reform "as appropriate to enable additional improvements to the adjudicatory process." We urge the NRC to adopt additional reforms. For example, the policy statement assumes that license renewal proceedings will be conducted as formal proceedings under 10 CFR Part 2, Subpart G. Since the Commission is willing to propose the use of legislative-style hearings in connection with license transfer applications, it should also consider the use of legislative or other, less formal, proceedings in connection

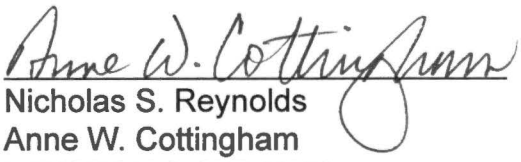
---

2/ See 63 Fed. Reg. 48644-48653 (September 11, 1998), "Streamlined Hearing Process for NRC Approval of License Transfers."

with other approvals, including license renewal, enforcement hearings, or even license amendment proceedings. Another, more revolutionary approach might be to re-examine the entire licensing board structure, with a view toward making Commission oversight of adjudicatory proceedings more direct and pervasive.

Overall, we commend the Commission for its proactive efforts to inject efficiency and predictability into NRC adjudications. Reforms have been needed for many years because some adjudications have been so time-consuming and costly that licensees have been denied due process of law. The Commission takes an important first step to rectify the problem in its policy statement. But the proof will be in how effectively the policy is followed by the licensing boards and monitored by the Commission. We are encouraged by the early returns.

Respectfully submitted,



Nicholas S. Reynolds
Anne W. Cottingham
WINSTON & STRAWN

NUCLEAR ENERGY INSTITUTE

(5)

Robert Willis Bishop
VICE PRESIDENT &
GENERAL COUNSEL

October 5, 1998

Mr. John C. Hoyle
The Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop 0-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

ATTN: Rulemaking and Adjudications Staff

SUBJECT: Policy on Conduct Of Adjudicatory Proceedings; Policy Statement
(63 Fed. Reg. 41872 – August 5, 1998)

Dear Mr. Hoyle:

On July 28, 1998, the Nuclear Regulatory Commission updated its 1981 Policy Statement on the conduct of adjudicatory proceedings. The Commission restated its expectation that the Atomic Safety and Licensing Boards (Licensing Boards) will adhere to and ensure that all parties in a licensing proceeding similarly adhere to the Commission's rules and regulations to achieve the prompt and fair resolution of contested issues. To achieve that objective requires a disciplined licensing process. The Commission recognized that the prospect of license renewal applications, restructuring of the electric utility industry, and licensing of waste storage facilities provided impetus to restate the Commission's view of the need for agency proceedings to be conducted efficiently.

This policy statement represents a very positive development that will improve the effectiveness of the NRC's licensing processes. Nuclear energy can and should play a major role in meeting our nation's electricity needs, and an efficient hearing process will well serve the NRC, the industry, and the public by more effectively focusing on real issues, getting directly to pertinent facts, and quickly reaching sound judgments based on those facts.

The principles that the Commission has articulated in the Policy Statement are sound. Requiring Licensing Boards to set reasonable schedules for proceedings and using innovative techniques to expedite schedules (e.g., electronic filing) will be

1776 I STREET, NW SUITE 400 WASHINGTON, DC 20006-3708 PHONE 202.739.8139 FAX 202.785.4019 www.nei.org

obligations to meet deadlines and to support their positions with a factual basis or legal authority simply is sound management of the licensing process. So, too, is an improved discovery management process to ensure that all parties have access to relevant material early in the process. Critical to the effective conduct of licensing proceedings is the Commission's underscoring that contentions should only be admitted if an intervenor demonstrates that a genuine dispute on a germane issue exists. Although, eliminating perfunctory summary disposition proceedings makes sense, requiring Licensing Boards to make a written finding that summary disposition motions will expedite the process may be too stringent a criteria. Licensing Boards should be allowed to make these decisions as they deem appropriate in individual proceedings, consistent with the goals articulated in the Policy Statement. Finally, it is appropriate for the Commission to monitor ongoing proceedings and provide guidance to Licensing Boards as necessary.

Coincidentally, the Federal Energy Regulatory Commission (FERC) recently announced that it had completed a four-month study on how to streamline that agency's proceedings to keep pace with rapid industry changes. FERC Chairman James Hoecker described the reform effort as "our way of acting strategically to make regulation efficient and beneficial where it is required and less intrusive or even unnecessary where it is not." It is heartening that the NRC also has decided to exercise leadership and provide greater accountability through its Policy Statement on the hearing process. This initiative helps to address concerns related to the predictability, objectivity and timeliness of NRC processes and decisions expressed in the Senate Subcommittee hearing July 30, 1998.

The discipline that the Policy Statement would impose clearly is within the Commission's authority under the Atomic Energy Act, the Energy Reorganization Act, and the Administrative Procedure Act. It also complies fully with all applicable Commission rules and regulations. As a result, it can be implemented immediately without further regulatory or legislative action.

The best intentions notwithstanding, the real test will be whether the principles articulated in the Policy Statement are implemented in a manner consistent with the Commission's expectations. For example, Licensing Boards currently are considering two license renewal applications and one license transfer application. Actions taken by the Boards handling these applications will provide early indications of whether the focus and discipline envisioned by the Commission through the Policy Statement is being imposed.

Thus, the nuclear energy industry encourages the Commission to monitor those proceedings carefully and to respond promptly to any indications that the

Commission's expectations are not being met. In this context we are encouraged by the Commission's order of September 17, 1998, in the North Atlantic Energy Service Corporation (Seabrook Station Unit No. 1 - Docket No. 50-443-LA), which demonstrates the Commission's intent to ensure that the positions articulated in the Policy Statement are implemented.

The Commission should be commended by all prospective participants in licensing proceedings for initiating licensing reform through the issuance of the Policy Statement. The Commission's action is most timely.

If you have any questions about our views on this important subject, please call.

Sincerely,

Ellen C. Ginsberg for Robert W. Bishop

Robert W. Bishop

BY COURIER

Niagara Mohawk

(4)

John H. Mueller
Senior Vice President and
Chief Nuclear Officer

Office: (315) 349-7907
Fax: (315) 349-1321
e-mail: muellerj@nimo.com

October 5, 1998
NMP1L 1367

Mr. John C. Hoyle
Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

Attn; Rulemaking and Adjudications Staff

Dear Mr. Hoyle:

On August 5, 1998, the Nuclear Regulatory Commission published for comment an update of its Policy on Conduct of Adjudicatory Proceedings: Policy Statement (63 Fed. Reg. 41872). The purpose of this letter is to endorse the comments of the Nuclear Energy Institute and Winston & Strawn and to provide Niagara Mohawk Power Corporation's own brief comments.

We applaud the Nuclear Regulatory Commission's efforts to improve the effectiveness and efficiency of its adjudicatory proceedings. We too believe that the Commission's increased monitoring of adjudicatory proceedings will enhance the fairness and timeliness of the licensing process. We would ask the Commission, however, to remain vigilant to ensure that the worthy principles espoused in the policy statement do not become mere platitudes. It is incumbent upon the Commission in this era of deregulation and change to ensure that its adjudicator proceedings are a forum to promptly address and resolve issues rather than a weapon to disrupt, delay and obfuscate.

Sincerely,

John H. Mueller
Chief Nuclear Officer

JHM/GDW/lmc

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date 10/7/98; 10/5/98 Fax
Copies Received 1
Add'l Copies Reproduced 4
Special Distribution Weisman
Gallagher, PDR, RIDS

(3)

DOCKET NUMBER
PROPOSED RULE PR MISC
(63FR41872)

DOCKETED
USNRC

'98 SEP 29 A9:38

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

TVA

Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

September 25, 1998

Mr. John C. Hoyle, Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

Dear Mr. Hoyle:

NUCLEAR REGULATORY COMMISSION - REQUEST FOR COMMENTS ON UPDATED POLICY STATEMENT - POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

TVA is pleased to provide comments on the subject updated policy statement published at 63 *Federal Register* 41,872 (August 5, 1998). As stated in the "Summary" portion of the policy statement, NRC is updating its policy on the conduct of adjudicatory proceedings in view of the potential institution of a number of proceedings in the next few weeks to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities.

NRC's original policy statement on the conduct of adjudicatory proceedings was issued in 1981 and was published at 46 *Federal Register* 28,533 (May 27, 1981).

TVA has reviewed NRC's updated policy statement and agrees with the comments submitted by the Nuclear Energy Institute (NEI), in particular, that the updated statement represents a very positive development in improving the effectiveness of the NRC's programs and processes. TVA is wholly supportive of the NRC's efforts to set reasonable schedules to expedite the hearing process and to focus that process on genuine issues in dispute. While we are also supportive of the NRC encouraging licensing boards to consider the use of new technologies to expedite proceedings, we believe the greatest efficiencies can be attained by the licensing boards, themselves, exercising greater discipline in the hearing process to ensure a prompt, yet fair, resolution of valid issues.

SEP 30 1998
Acknowledged by card .....

We agree with NEI that the real test will be whether the principles articulated in the updated policy statement are implemented consistent with the NRC's expectations. We also urge the NRC to closely monitor upcoming licensing board proceedings to ensure that expectations are being met.

Once again, we are fully supportive of the NRC's commitment to the expeditious completion of adjudicatory proceedings in a fair manner. We appreciate the opportunity to respond to the subject updated policy statement.

Sincerely,

Mark J. Burzynski

Mark J. Burzynski
Manager
Nuclear Licensing

cc: U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

U.S. Nuclear Regulatory Commission
Region II
Atlanta Federal Center
61 Forsyth Street, SW, Suite 23T85
Atlanta, Georgia 30303

Mr. A. W. De Agazio, Senior Project Manager
U.S. Nuclear Regulatory Commission
On White Flint, North
111555 Rockville Pike
Rockville, Maryland 20852

Mr. R. W. Hernan, Senior Project Manager
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852

cc: Continued on page 3

cc: Mr. R. E. Martin, Senior Project Manager
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852

NRC Senior Resident Inspector
Browns Ferry Nuclear Plant
10833 Shaw Road
Athens, Alabama 35611

NRC Resident Inspector
Sequoyah Nuclear Plant
2600 Igou Ferry Road
Soddy Daisy, Tennessee 37379

NRC Resident Inspector
Watts Bar Nuclear Plant
1260 Nuclear Plant Road
Spring City, Tennessee 37381

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150
WWW.SENATE.GOV/~ENERGY

(2)

September 14, 1998

The Honorable Shirley Ann Jackson
Chairman
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Madam Chairman,

I have noted with great interest the Commission's recent Statement of Policy on Conduct of Adjudicatory Procedures, which you recently issued to the Atomic Safety Licensing Boards. I commend you on this initiative. I am optimistic that this decisive action to "instill discipline" in the licensing processes of the Nuclear Regulatory Commission will be a key to developing a licensing system that will allow the NRC to protect health and safety while responding to the needs of a changing electricity industry.

When we met last March, we discussed the ongoing restructuring of the electricity industry in general, and its impact on the nuclear industry and its regulators, in particular. At that time, I was assured that you intended to assert your leadership to ensure that the first license renewal proceeding, for the Calvert Cliffs plant, would be completed within two to three years. I see now that a second nuclear plant has applied and that five more have communicated their intent to renew their nuclear operating licenses. I also note that a "first time ever" sale of a nuclear plant is underway with the AmerGen-GPU agreement regarding the Three Mile Island facility, and that the companies will submit the license transfer submission within ninety days. This transfer action would appear to be a very straightforward process and should serve as an opportunity to successfully implement the Commissioners' Policy Statement. I will watch this process with great interest.

Again, I commend you on taking this important step to clarify proper role of the licensing boards and the direction of licensing efforts. I urge you and your fellow Commissioners to continue to work to ensure that the Commission is able to provide a regulatory structure that allows the nuclear industry to adapt successfully to the new competitive climate. I look forward to hearing from you soon.

Sincerely,

Frank H. Murkowski
Chairman

(1)

September 16, 1998

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE") ON POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS; POLICY STATEMENT, 63 FR 41872 (AUGUST 5, 1998)

OCRE is opposed to the expansion of this policy statement. The proposals therein are not consistent with fairness or due process of law.

OCRE would particularly question why this policy should be applied to license renewal proceedings and why the Commission has directed the ASLB in the Calvert Cliffs renewal proceeding to adopt an expedited schedule. Unlike in an operating license proceeding (1), prolonged hearings in a license renewal are unlikely to prevent plant operation in the renewal period, if the licensee has submitted its renewal application in a timely manner. A licensee can submit an application for license renewal up to 20 years prior to the expiration date of the operating license. 10 CFR 54.17(c). Furthermore, if a licensee files its renewal application at least 5 years prior to the license expiration date, the timely renewal provision of the Administrative Procedure Act is applied, and the current license will not expire until the application has been finally determined. 10 CFR 2.109(b). Most adjudications on initial operating license proceedings do not exceed 5 years, and it is inconceivable that a renewal proceeding could last 20 years. The only way for a renewal proceeding to prevent operation of a nuclear power plant beyond the license expiration date is if the licensee lacked the diligence to file its renewal application in a timely manner. In that case, the licensee would be faced with a problem of its own making.

In the case of Calvert Cliffs, the operating license will not expire until 2014 for Unit 1 and 2016 for Unit 2. So why does the Commission need to expedite the hearing schedule such that the decision can be issued in about 2.5 years? The only plausible answer is that the NRC desires to reduce the renewal hearing

---

(1) If the operation of a nuclear plant is delayed due to hearings, it is because the applicant has not met its burden of proof that the plant is safe to operate. It is a sign that the system is working, not that it has failed.

to a pro forma exercise which creates the illusion of a meaningful opportunity for public participation, but which in reality is a sham with a predetermined outcome.

There is a resource inequity between most intervenors, on one hand, and utilities and the NRC on the other. The latter have legions of lawyers, engineers, and support personnel. Intervenors are usually individuals or small non-profit organizations. If it takes 5 person-years to effectively participate in a proceeding, then an entity with 5 persons devoted to the task can do it in a year, while a single individual intervenor will need 5 years. This is why expedited schedules are so devastating to intervenors; it amounts to a denial of due process.

The use of multiple boards to preside over discrete issues simultaneously will similarly have a devastating effect on intervenors. Establishing these kinds of procedures without regard to the resource burden on the parties and the ability of parties with limited resources to effectively participate, in OCRE's view, violates the due process clause of the 5th Amendment of the Constitution.

The Commission claims these procedures are necessary in view of "the potential institution of a number of proceedings in the next few years . . ." for license renewal, etc. The impact of the instant proposal is that many prospective intervenors won't even bother to participate, given the obvious attempt by the NRC to expedite hearings at the expense of fairness. Perhaps that was the NRC's purpose here? Why adopt draconian practices for a potential problem? Why not wait until a number of proceedings are actually instituted? This policy statement is nothing more than a preemptive strike against intervenors. As such, it is contrary to the Commission's Principles of Good Regulation (openness: nuclear regulation is the public's business) and Section 189a of the Atomic Energy Act, which reflects the intent of Congress that "the public, as well as the NRC staff," has a role in assuring safe operation of nuclear power plants. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984).

This policy statement should be withdrawn.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt, Director, OCRE
8275 Munson Rd.
Mentor, OH 44060
440-255-3158

7590-01-P

NUCLEAR REGULATORY COMMISSION

Policy on Conduct Of Adjudicatory Proceedings; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy Statement: Update.

SUMMARY: The Nuclear Regulatory Commission (Commission) has reassessed and updated its policy on the conduct of adjudicatory proceedings in view of the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities.

DATES: This policy statement is effective on [~~date of publication in the Federal Register~~] August 5, 1998, while comments are being received. Comments are due on or before [~~60 days after publication in the Federal Register~~] October 5, 1998.

ADDRESSES: Send written comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Rulemakings and Adjudications Staff. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 am and 4:15 pm, Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

Pub. on 8/5/98

FOR FURTHER INFORMATION CONTACT: Robert M. Weisman, Litigation Attorney, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415-1696.

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

CLI-98-12

I. INTRODUCTION

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings within the framework of its existing Rules of Practice in 10 CFR Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. *Statement of Policy on Conduct of Licensing*

Proceedings, CLI-81-8,13 NRC 452 (May 20, 1981); 46 FR 28533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. SPECIFIC GUIDANCE

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, pre-filed testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 CFR 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under § 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied "as otherwise ordered by the presiding officer." Boards should exercise their authority under these options and 10 CFR 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, *e.g.*, by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. *Private Fuel Storage, L.L.C.* (Private Fuel Storage Facility), CLI-98-7, 47 NRC __ (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met

and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. Parties' Obligations

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 CFR 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or

fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in § 2.714(b)(2). *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The Commission re-emphasizes that licensing boards should continue to require adherence to § 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 CFR 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 CFR Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 CFR 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. *See* 10 CFR 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1427, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants." *See* 10 CFR 55.71(d) and 51.95(c).

---

[1] "[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." *Rules of Practice for Domestic Licensing Proceedings–ProceduralChanges in the Hearing Process, Final Rule*, 54 FR 33168, 33171 (Aug. 11, 1989).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 CFR 2.760a. Such authority is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). The board may not proceed further with *sua sponte* issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise *sua sponte*.

Currently, 10 CFR 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 CFR Part 54 may arise as the staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 CFR 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct

certification of such particular questions under 10 CFR 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pre-trial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the staff. *See, e.g.,* 10 CFR 2.720(h), 2.744. Under the existing practice, however, the staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the staff, such orders shall provide only that the staff identify the witnesses whose testimony the staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 CFR 2.1231. Accordingly, the staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the staff until the staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the staff before the staff's review documents are issued will expedite the hearing, discovery against the staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, *e.g.*, by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular, the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. CONCLUSION

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

Dated at Rockville, Maryland, this 28th day of July, 1998.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Assistant Secretary of the Commission.