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December 15, 1997

OFFICE OF THE
COMMISSIONER

MEMORANDUM TO: Chairman Jackson
Commissioner Dicus

FROM: Nils J. Diaz *Nils J. Diaz*
Edward McGaffigan, Jr. *Edward McGaffigan Jr.*

SUBJECT: STREAMLINING NRC ADJUDICATIONS

We recently noted with interest an article in the November 10, 1997 edition of the Washington Post - "On the Fast Track with Alexandria's 'Rocket Docket'", that describes how complex, time-sensitive intellectual property cases are litigated in the Eastern District of Virginia based on streamlined procedures that bring cases to trial in very short order. A similar streamlining of processes is needed to accelerate the lengthy discovery, pre-trial motion practice and protracted hearings that usually attend the similarly complex NRC licensing adjudications before the Atomic Safety and Licensing Boards (ASLB).¹

Although the number of licensing adjudications has steadily declined over the last ten years, the actual licensing proceedings have, for the most part, remained as lengthy and protracted as ever. In fact, the average months on the docket for closed cases increased from about 8 in the early 1990s to more than 12 in the 1996 - 97 period.² Chairman Jackson has acknowledged that some have expressed concerns about the

¹ We recognize that the litigants appearing in the Federal District Courts are represented by attorneys who are well-schooled in the Courts' rules of practice and procedures, and that litigants in NRC licensing adjudications are frequently pro se intervenors whose knowledge of adjudicatory practice and procedure may be limited. As a long-standing rule in NRC practice, lay representatives are not held to the same high standards in adjudications as lawyers. See, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193 (1984); Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487 (1973). Nevertheless, the Commission has made it clear that the right of participation by any party carries with it the duty to comply with, and be bound by, all of the agency's adjudicatory procedures. Three Mile Island, 19 NRC at 1247; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). Thus, it would be entirely appropriate to require reasonably strict adherence to adjudicatory procedures established in the regulations and to deadlines that are set in accordance with those regulations.

² See Memorandum from B. Paul Cotter, Jr., Chief Administrative Judge, to Commissioner Diaz, TIMELINESS OF CASE COMPILATION, August 8, 1997 (copy attached).

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possibility of unnecessarily lengthy hearings in the license renewal process and has suggested that the agency might need to consider modifications to internal processes to address such concerns.³ Senator Murkowski has pointedly expressed concerns about unnecessary delays from "a lengthy, undisciplined hearing process" that might attend NRC consideration of nuclear utility mergers and license transfers resulting from economic deregulation in the industry and has suggested that NRC's adjudicatory processes need to be changed to "[e]nsure that the . . . license transfer process and licensing board proceedings are disciplined and accountable."⁴ In stakeholder comments on NRC strategic planning and rebaselining efforts, DOE, the Organization of Agreement States and other commenters encouraged the NRC to resolve licensing issues before hearings and to evaluate other existing licensing procedures in order to streamline and focus the NRC hearing process.⁵ Similarly, NEI, joined by ABB-CE and Yankee Atomic Electric Company, identified the current adjudicatory hearing process as an area warranting reform,⁶ noting that the burdens and time required for a full adjudicatory hearing under current practice are not always commensurate with the degree of risk associated with the licensing action that is being considered.⁷

Thus, there appears to be a fairly consistent expression of opinion that the protracted NRC adjudicatory proceedings are in need of significant improvements. The Court in the Eastern District of Virginia has shown that even very complex cases can be fully litigated and completed in a most timely manner if the adjudicatory procedures are streamlined and the adjudicatory decision makers require strict adherence to those

³ "The Lighthouse: Regulatory Stability in a Time of Change," presented by Chairman Jackson at the 18th Annual Institute Of Nuclear Power Operations CEO Conference in Atlanta, Georgia, November 6, 1997.

⁴ See Memorandum to Members, Senate Committee on Energy and Natural Resources, Re Electric Power Industry Competition Legislation, October 9, 1997.

⁵ See Phase II Stakeholder Interaction Report, Summary Analysis of Comments on High-level Waste and Spent Fuel, DSI-6, pp. 3-50, 3-52 and 3-56. In addition, stakeholders have noted that the typical protracted hearing process increases the costs of participation in NRC proceedings and makes involvement of members of the public and of groups with interests in the issues less feasible.

⁶ See Summary Analysis of Comments on Operating Reactor Program Oversight, DSI-11, pp. 3-111, 112.

⁷ NEI further argued that, where the full adjudicatory process is determined to be appropriate, the various adjudicatory standards and procedures must be rigorously applied and enforced.

procedures. Anticipating possibly complex power reactor license transfer⁸ and license renewal proceedings in the next few years, we believe that now is an ideal time to study our adjudicatory processes and procedures reflected in 10 CFR Part 2 with a view toward possible modifications to procedures and to ASLB practices that would decrease the time and costs required to litigate and resolve the issues in these complex proceedings. Accordingly, we would propose that:

- (1) a task force be formed, composed of senior members of the Atomic Safety and Licensing Board Panel, the Office of the General Counsel, the Office of Commission Appellate Adjudication, and appropriate program offices that are involved in hearings, with the intent to address the matter of streamlining NRC's adjudicatory practices and procedures; and
- (2) the task force be directed to study the NRC's adjudicatory procedures and practices, including matters such as pre-trial discovery, summary disposition, the length of pre-trial preparation, the NRC staff's preparation of important trial-related materials (e.g., safety evaluation reports, environmental analysis documents), the hearing process itself and past practice in setting deadlines and adhering to adjudicatory procedures and schedules, with the intent to recommend and implement changes to procedures and practices (including regulations)⁹ to streamline the process within the next two years.

SECY, please track.

Attachment: As stated

cc: B.P. Cotter, ASLBP
K. Cyr, OGC
J. Cordes, OCAA
EDO
CFO
CIO

⁸ In her vote on SECY-97-253 - POLICY OPTIONS FOR NUCLEAR POWER REACTOR FINANCIAL QUALIFICATIONS IN RESPONSE TO RESTRUCTURING OF THE ELECTRIC UTILITY INDUSTRY, Chairman Jackson urged the staff to expedite a "paper addressing the issue of the potential impact of the NRC's hearing process on the timely transfer of licenses under 10 CFR 50.80." That paper could serve as some of the input for the study proposed herein.

⁹ It is not intended that the study encompass broader or alternative objectives. Rather, the task force should focus solely on those specific actions that would expedite completion of the prehearing and hearing processes. Achievement of that objective should be of substantial benefit to parties and practitioners, as well as to the agency in meeting its adjudicatory responsibilities.