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PROPOSED NUCLEAR LEGISLATION—SHORTENING THE LEAD TIME

Harry H. Voigt*

I. INTRODUCTION

Dr. Beckjord has done a nice job of introducing and scoping the problem of nuclear licensing, however, I do want to make one preliminary point. Even though the result of the numerous delays in the licensing and construction of nuclear plants may be to double the capital cost of the plant, there is widespread agreement that nevertheless the electricity produced from a nuclear plant is and will be cheaper than electricity from a new coal-fired plant. This is because even though a nuclear plant costs a lot more to build, uranium is still much, much cheaper than coal, particularly if the costs of some of the newly-emerging environmental constraints on the production and use of coal are considered. Consequently, from an economic standpoint, nuclear power does remain an exceedingly viable alternative, even if we cannot solve all of the problems that are leading to long delays and resulting in higher capital charges.

II. ADMINISTRATION LICENSING REFORM

I would like to give you a brief overview of the Administration's proposal to address some of these problems, and then to comment on the ways in which the process might be improved above and beyond what the Administration proposes. The Administration has been working on the reform of nuclear licensing for about nine months.

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During the course of that time, we have seen at least eight drafts of proposed legislation. The Administration's bill was finally introduced on March 21, 1978.¹ The basic tenet of the proposed legislation is a requirement that the Nuclear Regulatory Commission set up a system for open and advanced planning, including public participation, for future nuclear power plans.² It is worth noting that this requirement would only apply to nuclear plants and not to coal or other possible competing methods of generation, and it is clear that, if imposed, it would add another segment of time onto the front end of the licensing process.

The bill as proposed does permit the granting of a combined construction permit and operating license.³ It also contains a provision permitting the Commission to authorize utilities to commence certain forms of construction on the site even before a license is issued.⁴ A separate provision is made to enable a utility that wishes to do so to gain approval for a site before it has actually selected a particular plant to build on this site and made a formal license application. Unfortunately, the bill also requires a finding of a "generic future need for electric power" in connection with the approval of the site at an early time.⁵ If this is intended simply to require a finding that someone, somewhere, someday is going to need more electricity, it is meaningless. If, on the other hand, someone must foretell fifteen or twenty years in advance whether it may be necessary to supply power from that site, the requirement is totally unrealistic.⁶ It would be better to permit the selection and certification of suitable sites without reference to any need for power, leaving that issue to be decided as the time to actually build a plant approaches. The bill also contains provisions for the approval of standardized plant designs and for so-called manufacturing licenses to produce plants in a manufacturing environment, so you have them coming off the assembly line.⁷

The Administration bill not only preserves much of the existing hearing scheme, but it would appear to expand it. It provides for a

1. H.R. 11704 and S.2775, 95th Cong. 2d Sess. (1978). A section-by-section analysis of the Administration's bill appears in 124 CONG. REC. 4265-70 (1978).

2. *Id.* § 101. Section references, unless otherwise indicated, are to H.R. 11704, 95th Cong., 2d Sess. (1978). The section numbers and content of S. 2775 are identical.

3. *Id.* at § 102.

4. *Id.*

5. *Id.* at § 105.

6. *Cf.* A. MURPHY, D. LA PIERRE & N. ORLOFF, *THE LICENSING OF POWER PLANTS IN THE UNITED STATES* 69 (1978) [hereinafter cited as MURPHY STUDY].

7. *See* H.R. 11704, 95th Cong., 2d Sess. § 106 (1978).

mandatory hearing to be provided, even though nobody wants one, at least three stages, the combined construction permit and operating license application, the site approval, and the approval of a standardized design for a plant.⁸ In addition, numerous other opportunities for a hearing on request are provided. Such hearings include a hearing on the granting of a construction permit, if applied for separately from the operating license, a second hearing for the operating license, a third hearing for the authorization to commence site preparation or early construction. There is an opportunity for a hearing on each and every license amendment, and similarly an opportunity for a hearing on the amendment of a site approval previously granted or a standard design previously approved.

The bill includes specific provisions for interim operating authority where a plant is being held up because of the hearing process.⁹ In the case of an interim operating license, the bill as written would require a finding of "urgent public need or emergency." This I view as going beyond a simple finding of economics or benefits to the consumer, and thus perpetuating the present situation where a plant can be held up, even though it is clearly economical and beneficial for the public for it to begin operating.

Another difficulty with the proposed interim operating authority is that it requires the Commission itself to conduct a hearing and make findings. Obviously, the members of the Commission have a great many other matters on their minds, and one wonders how easy it will be to get all five of them to sit down and take a couple of weeks to hold a hearing to determine whether there is one of these emergencies. The good part is that the interim operating authority could be conferred based on informal procedure, but it would be limited to twelve months, subject to extension.

The bill addresses what is probably the most critical problem in licensing today, the interplay between the states and the federal government. It would give new authority to the states to certify the need for the facility, if there is an authority within the state authorized under state law to make such a certification.¹⁰ The state could also elect to determine the need for power and the environmental acceptability of a plant or a site. Those determinations, if the state has a program which met certain prerequisites and has been approved by the federal govern-

8. *Id.* at § 103.

9. *Id.* at § 104.

10. *Id.* at §§ 102, 202.

ment, would be binding upon the Nuclear Regulatory Commission, and, theoretically at least, would cut down on both the scope and length of the federal review. There is, however, no provision in the draft legislation for putting any time limit on how long a state would have to perform its certification responsibilities.¹¹ Assuming that a state does not have a federally approved program, it may still under the proposed legislation make findings, but these would not be binding on the federal government and would be subject to further review. In either case, the Nuclear Regulatory Commission would retain exclusive jurisdiction over all aspects of radiological health and safety, and the environmental effects of radiation would not be open to inquiry by the states. So there is an effort here to separate out and say the states will do this, and the federal government will retain that, but it is not clear exactly how some of these separate determinations are doing to interface.

The bill would further provide for intervention funding in all Commission proceedings, although the NRC would retain the discretion as to whether it would provide the funding for intervenors in rulemaking.

III. PROPOSED IMPROVEMENTS

Now let me list some ways in which the Administration's proposed legislation might be improved. First, the provisions for federally controlled advanced planning should be eliminated. If a state desires to have advance planning, that should be the state's option. If the state does not want it, there is no real reason for the federal government to impose it. Second, mandatory hearings today really do not make any sense.¹² They date back to twenty years ago, when Congress wanted to educate the public about nuclear power. It may have been a good idea at the time, but clearly the climate has changed, and there is no particular purpose in having a mandatory hearing today. Further, a hearing, if held, should be strictly limited to those issues on which someone wants a hearing, and if there is an intervention granted on one issue, let the hearings be limited to that one issue, and let the other matters in the application be disposed of by NRC staff review.

In addition, I submit that there must be only one opportunity for a hearing on any single set of issues. For example, once a site has been determined to be a suitable one, that ought to be the end of it, and one

11. *Id.*

12. See MURPHY STUDY, *supra* note 6, at 51-52.

ought not to be able to litigate the suitability of the site over and over again. This could be accomplished by delegating site suitability to the state, and making the state determination binding, or by letting the state make certain findings, and then have them be conclusory in any subsequent federal proceedings.

With respect to the approval of standard designs, the proposed legislation looks toward rulemaking on a standard design, but an adjudicatory hearing on a manufacturing license. The only reason I can think of for this is that this is the way it is being done now¹³ but clearly if a rulemaking hearing is good enough for a standardized design, it ought also to be good enough for a manufacturing license.

It should be recognized that adjudicatory hearings are part of the American tradition, and I think they serve a useful purpose and so would provide one opportunity for an adjudicatory hearing. That hearing ought to be on the general subject of site suitability, because that is what most people are really concerned about and what they want to hear about. The technical design issues of a nuclear plant are simply too complicated for the average person to get deeply involved in. The real issue in most of these hearings is "I don't want it in my back yard," so let us have an adjudicatory hearing on site suitability, and let the public have a chance to have its say on that issue. If site suitability has not previously been determined, then the adjudicatory hearing would be on the construction permit. I can see no policy reason for any hearings after that time. One can get a federal license to build a big dam which, if it breaks, is likely to kill a lot more people in certain settings than a nuclear plant, and there is no requirement for another hearing. One can go and get a license to build an LNG plant that could blow up, and there is never another hearing. Once a utility is given a license to build a nuclear plant, it should be up to the federal inspectors and regulators to see that it is built right. A nuclear plant is the only instrumentality that is licensed where you have to come back and have a second hearing before you can operate. It is very difficult in my mind to justify this.¹⁴ The second hearing has been a source of delay in many cases and tremendous expense because the plant is already built, it is ready to run, so why hold it up at that point. The go/no go decision has to be made at the beginning, and once it has been made, I believe there should be no further opportunity for public hearings.

13. See 10 C.F.R. § 50, App. M (1977).

14. See MURPHY STUDY, *supra* note 6, at 30.

Now let me briefly talk about the federal/state division of responsibilities. As I have indicated, this is probably the most difficult area that we as a nation have to address and try to solve. There are a number of ways that it can be done. One is to give each state exclusive jurisdiction to determine local things, such as the need for power within the state, the best way to get the power, and the best place to put the plant. It is possible to do this by setting up a system similar to that which we now have under the Federal Water Pollution Control Act, under which the state is required to give a certificate before one can get a federal license, the state having one year in which to so certify, and if the certificate is not given within a year, it is waived. Maybe we could work something out along those lines that would give the states the opportunity to make a binding certificate to the federal government. A second possibility is to give everything that does not have to do with nuclear safety to the states, and let them do their own thing. A third possibility is to go completely to the other side of the scale and preempt everything and let the NRC or the Department of Energy make all of the determinations, completely freezing the states out of the process. A fourth possibility, which is where the Administration bill seems to be heading, is to create an Air Act or Water Act type of regime where the federal government sets up certain standards, the state has to show that its program complies with those standards, and having done so, it then acquires the authority to control certain parts of the process. The only difficulty with that is that in the bill right now there are no efficiency standards. Further, there is no contemplation of efficiency standards. So the state could create a program that might take four or five or six years. I suggest that if we are going to have a state/federal combined program, there ought to be time limits and efficiency standards before a state can qualify.