

BE 48xN090 1M15-ml--4618

ATOMIC INDUSTRIAL FORUM, INC.

MAY 16 TO MAY 19, 1978

BRUSSELS, BELGIUM

"INTERNATIONAL CONFERENCE ON REGULATING NUCLEAR ENERGY"

"THE IMPACT OF THE NUCLEAR CRITICS ON THE DEVELOPMENT
OF THE REGULATING PROCESS"

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The impact of the nuclear critics on the development of
the regulating process

I am supposed to present a paper on the impact of the nuclear critics on the development of the regulatory process. Let me tell you very frankly that I do not know who chose this theme. I did not, because I think that is almost impossible to deal with. The reason for this difficulty being that we know too little about the nuclear critics: who are they? And what are their aims?

Who are the nuclear critics?

Two theories are facing each other: the first one could be called the "new politics" theory. According to it, the last decade or so has seen the raise of a new class of liberal intellectuals, provided with all the necessities and the amenities of modern live, doing highly sophisticated and well paid jobs, and politically awakend by the Kennedy era, Vietnam and Watergate. This group is questioning the necessity of economic growth, wishes to preserve nature and the environment, and is fighting for more public participation in major decision making processes. It is in the normal course of events that this group was bound sooner or later to take upon nuclear power and it goes without saying that this description of the nuclear critics is mainly used by American authors.

On this side of the Atlantic, the antinuclear movement seems to be different, less coherent and more complex. Basically three groups can be distinguished: the local opposition, the environmentalists and the militant radicals.

The local movements are generally more antiindustry than antinuclear; they are more afraid of changes in the socio-economic structure of their region than of the dangers of nuclear power.

The environmentalists are the backbone of nuclear opposition. They believe in Rousseau and Lovins and they forget that only the happy few can afford such detachment.

Finally a militant radical minority uses the antinuclear movement as a vehicle to overthrow a capitalistic class society and to replace it by a communist one.

It is difficult to say whether and into what direction the antinuclear movements on both sides of the Atlantic will finally converge or, if not, what the reasons are for these marked differences.

We also know very little about the aims and the motives of the nuclear critics. Is it only in order to gain public attention, recognition, influence, and - last but not least - money - that they act or is their ultimate goal the prohibition of nuclear energy?

For the militant radicals, it is clear that they are not aiming at nuclear energy but at society: and many of the local opponents don't worry a bit about the nuclear menace as long as it is not just around the corner. And moreover, if it were an oil refinery or steelmaking plant to neighbour them, they would protest and oppose it exactly the same way. Most of the local antinuclear movements are in reality an attempt to protect a socio-economic structure based on agriculture against the irruption of modern industrial life with all its inconveniences.

Within the context which we are discussing here - the influence of the opponents on the regulatory process - it can reasonably be assumed that the aims of the antinuclear movements are sincere and realistic ones, i. e. that they neither try to disinvent fission nor to overthrow society, but to protect human life and the environment against the alleged danger of nuclear energy and to submit nuclear power to democratic controls. Each and everyone of you is free to question whether these are the real motives, but it seems to me that, until the contrary is proved, the seriousness and the sincerity of the motives should be assumed.

The regulatory process

The regulatory process which eventually leads or leads not to the licensing of a nuclear installation is a complex system established in order to enable public control over private activities aiming at building and operating such an installation.

Such a system provides

- a set of criteria which the proposed installation can be matched to,
- one or more public authorities in charge of exercising this control, and
- a process following which the public authorities using the criteria come to their final decision.

It can reasonably be claimed that a public control system is that much better as the criteria which it applies and the decision making process it follows are more precisely defined. And we call a system good if and when it leads to generally accepted decisions.

In my following remarks I shall try to describe the impact of the nuclear critics on these three aspects: the criteria, the decisionmakers and the decision making process. When doing so, I shall deliberately set aside the question whether a given impact has been intended by the critics or is just the byproduct or the consequence of the pursuit of a different aim. And I shall try to cover not only purely legal aspects but to include also political questions.

It should however be noted already here that the activities of the nuclear critics have considerable economic consequences by simply delaying construction and operating of necessary nuclear power plants.

The difference in costs between nuclear power and coal or oil power being in Europe in the order of 15 mills per Kwh, one month of delay in a 1200 MW station costs the utility \$ 10 - 12 M per month. And a project like Brokdorf in Germany where construction work is halted since October 1976 costs the utility in the form of project management, site protection, interests escalation, e. a. some \$ 5 M per month.

If the opponents had succeeded to obtain a complete nuclear moratorium - which fortunately they did not - the economic consequences would have been disastrous: for France, Lille University had calculated that a nuclear moratorium would cost the nation between now and the end of the century almost \$ 10 billion plus an increase in unemployment of some 85 000 persons. For Germany, Deutsches Atomforum, has estimated the number of unemployed to raise by some 200 000 until 1985.

These figures should always be firmly kept in mind when discussing the necessity to improve the safety standard of nuclear industry and to guarantee the democratic rights of the citizens.

The criteria

First I shall turn to what I call the criteria and what is understood here to cover all legal and technical rules and regulations defining the level of precautions taken to assure safe operation of a nuclear installation. Their legal qualities may be different, but they all have a double aim: they are meant to protect the public against the damage emanating from the installation and they are also meant to give the designer a frame within which he can develop a coherent, logical and balanced system of functions as well as the investor a guideline for envisaging the kind of safety devices he will have to spend his money on.

Changing these criteria therefore always has a triple consequence: while on the one hand the level of precautions for that particular part of the installation is increased it may, on the other hand, jeopardize the overall safety of the plant by disrupting the interior equilibrium of the system. And, thirdly, frequent modifications of criteria are the safest way to discourage investors who can no longer calculate their risk.

Modifications of basic criteria continue to be a permanent feature of the nuclear scene. The design of the emergency core cooling system, mixed oxide recycling, and maximum permissible doses are examples from the US. Here in Europe, the most recent example is the necessity for the plant operator to provide long term plans for the disposal of spent fuel elements which is now mandatory in most European countries.

The question remains, however, open whether and to what extent these modifications can be imputed to nuclear critics who normally do not dispose of the technical know-how necessary to prove the necessity of such an aggravation in the design or operating requirements. It can therefore easily be shown that it is always the nuclear community itself which brings forward the new requirement. The critics never carry the charge of the proof, they can limit their role to asking questions. It is always the licensee who has to show the

compliance of the plant with the criteria - and moreover - the compliance of the criteria with the basic requirements of safety, health physics and environmental protection. The applicant thus is in the situation of a man accused of having killed an unknown victim and having to present evidence that he is not the murderer. Such a negativ proof being practically impossible, all applicants will remain in this uncomfortable and uncertain situation as long as a defined level of safety requirements for nuclear installations is not fixed. Such a definition can only be given by national legislation or - better - by international conventions and it should place the risks of nuclear energy in the context of other risks of human civilization in modern industrial society.

The decision makers

The controlling body is another target the nuclear critics can work on in their fight against nuclear power. In all western democracies, the public control of nuclear power is, within the framework given by the law, the job of the executive branch of government. They are the decision makers. The critics here have basically three possibilities of action and they make broad use of all of them: they can try to influence the decision makers, they can try to change them and they can even try to replace them.

Influence upon decisions of the Administration is exercised by public opinion and - indirectly - by lobbying in Parliament. Both technics are abundantly used by the nuclear opposition. Public opinion has been frequently raised against nuclear power in general and - regionally - against certain installations. And the media have not always acted only as an echo to public opinion. The media can also create public opinion. Fairness, however, requires to acknowledge that such antinuclear movements in the media are more often

than not caused by insufficient information efforts provided by the nuclear community itself. Whenever the information provided by the nuclear community is complete, timely and understandable, the work of the nuclear critics becomes much more difficult.

Apart from public opinion, there are a few - very few fortunately - examples where the critics have tried to put direct pressure upon Administration. I'm glad to say that this is not the normal course of action of the antinuclear movement.

It is difficult to judge which results the influential work has. On the one hand, the Administration does not live in a vacuum and has to take public opinion into account in all its activities. On the other hand, no license or permit has ever been refused under the pretext of opposing public opinion.

Visible results were obtained by the critics in their attempt to change the licensing authority: practically in all western democracies, the nuclear opposition has succeeded in dismantling the traditional nuclear organizations which were in charge of promoting and licensing as well. In Germany and in the US these two functions were separated as early as 1972, other countries followed, the latest being Japan where there is just now a bill before Parliament proposing the creation of a completely independent licensing authority. Despite many problems raised by the separation - problems of manpower and of communication in particular - it is today generally recognized as a wise move.

It did, however, not satisfy the critics. They continued to investigate ways and means to shift the decision making power from the Administration either to the courtroom or into Parliament.

As far as justice is concerned, they scored some very fine successes until the Supreme Court halted them only a few weeks ago. Until then, they had - and Germany they still have - succeeded in turning the courts into superlicensing authorities: each and every construction permit or operating license granted by the Administration is attacked in court. This would have been perfectly acceptable if the courts had limited themselves to the control of alleged violations of the plaintiff's individual rights, in particular his right of fair procedure. In fact, the courts went - and still go - far beyond this traditional role: upon request of the plaintiff and with help from an army of experts they review the complete licensing procedure and the license itself.

This brings them to reconsider also those criteria which are not the work of government but of administrative or technical bodies and it makes them review all questions pertinent to public interest in the plant, in particular the question whether and when there is a need for the power to be produced by the plant. Under German law, only if this need prevails over the possible violation of individual rights, the licensee can start construction work immediately upon receipt of the construction permit. Otherwise he has to wait until it enters into force, i. e. practically until all appeals are exhausted. This may take several years. The construction of two nuclear power stations in Germany is thus stopped by court injunctions and pending the final decision of the cases.

Moves to put the decision on nuclear power in general or on individual installations back upon Parliament were made but were unsuccessful with the exception of one very particular case.

No Parliament - except the Danish one to my knowledge - ever voted a clearly antinuclear motion. And - with the exception of the Swedish Centre Party - all major political parties

in Europe have withstood the pressure from the environmentalists and have refused to take an antinuclear stand. Attempts by environmentalists to stand for election were not very successful: even in the Brokdorf area, where they stood for the County Council they only reached a meager 7 % score. They will, however, try again and so called "Green Lists" appear on the ballot for several German State Diets this summer.

In order to shift responsibility for individual plants from the Administration it has repeatedly been proposed to have nuclear power stations licensed by Parliament. This idea has always been rejected, one of the main reasons being that parliamentary decisions are without appeal but always open to modification. It is however my personal conviction that Parliaments should take a more active part in siting all the major human activities - housing, industry, energy generation, recreation - in their country. These general orientations for optimum land use in a country are important political choices which should in my view be taken by Parliament.

The one exception I mentioned concerns the fast breeder in Germany. Here nuclear opponents have succeeded in making government prepare a bill excluding commercial fast breeder reactors from the normal licencing procedure and thus requiring new parliamentary action in the event of such a reactor going to be applied for. It is for the time being unlikely that this bill will pass both houses of Parliament.

Finally, but still under the same heading, the nuclear opponents have tried to replace the licensing authority. They are actively promoting referenda on nuclear power in general and, on a local basis, on individual stations. Whereas the latter idea has been unanimously rejected because local decision making for major but unpleasant industrial installations would make their siting practically impossible, nuclear referenda have taken place in several American states and are scheduled for Switzerland and - may be - Sweden.

Nuclear power has won all referenda up to now and I'm confident that the Swiss and the Swedish people will not foreclose voluntarily this important option for their energy future.

The decision making process

After having reviewed the possibilities to gain influence on nuclear power decisions by modifying the criteria and by attacking the decision maker, I shall turn now to the decision making process: what is the role of nuclear opposition can play here and how has it developed thanks to their action?

To make a long story short: this is the point where they have had the best results: the reason for this is simple: if you want to attack the criteria you need know-how, if you want to change the decision makers, you need a majority, but if you want to intervene in the process you can exploit the basic respect of democracy for minorities and individual rights. So if you have neither know-how nor a majority, you use your democratic rights.

What can you do? You can block the procedure, you can participate in the procedure and you can try to overthrow the procedure. Let us review these three possibilities.

It is by blocking the procedure that the opponents scored their first successes. Most western legal systems foresee the possibility to intervene in the procedure. When you build a home, this procedure is meant to give your neighbours the opportunity to voice their opinions. Usually there are four of them. The authority can listen to them and let them know what he thinks of the points they make.

If - like in the case of nuclear power stations in Germany - 60 to 90 000 persons intervene, this procedure is blocked and becomes ridiculous, impossible, or illegal. Legislators

on both sides of the Atlantic had to cope with this problem and have found different solutions for it: in the US, mass intervenors are forced to select groupheads who than are solely entitled to actively participate in the licensing process. Germany treats all mass intervenors equally, but distantly: only public announcements inform them on the licensing procedure they claim to be interested in.

Participation of concerned individuals in the licensing procedure is conceivable during the preparation of the decision, in taking the decision and in reviewing it. A recent study on this subject done by Pelzer and Bischof and published in the May 77 issue of OECD's Nuclear Law Bulletin shows that "in Europe only Germany, France and the Netherlands have relatively elaborate systems for public inquiry or participation in nuclear licensing procedures". They all cover only the preparation of the decision. Here intervention of individuals and of groups claiming the violation of their rights or the defence of public interest is broadly admitted. The decision of British government to voluntarily hold a public inquiry on BNFL's demand to enlarge their Windscale Works has been a premier and will probably serve as a precedent for further applications for nuclear installations in Great Britain. You may call this a victory for the nuclear opposition, I would say that this decision to hold the inquiry was a matter of good political common sense. There have been news that Canada is about to install a similar systems. Generally speaking, public participation in the preparatory stage of the decision making process is playing an important role for public acceptance of nuclear power.

Participation of the public in the decision itself is being asked for repeatedly by antinuclear groups. One long forgotten idea had conceived the licensing procedure as a sort of football match between competing expert teams with the public represented by the environmentalist organizations counting the scores and the Administration serving as a

notary recording the result. It goes without saying that any such construction tending to take the burden of decision away from the democratic institutions and placing it even partly on the shoulders of selfestablished defensors of pretended public interests would overthrow the balance of power in democracy and is therefore unacceptable.

An issue which is heavily debated in Germany concerns public participation in a possible juridical review of the Administration's decision. It is a basic human right for each individual or group that they can bring an administrative decision before court if they claim their rights to be violated by the decision or its application. But can public interest groups, citizens' initiatives as they call themselves, also appeal against administrative decisions? Or, maybe, only if they are antinuclear groups and the decision concerns nuclear power? To put the question in this general way shows that the answer can only be "no".

The courts' role is to protect the citizens against violations of their rights by the Administration. The courts role is not to see if the decision is in the best interest of the nation. On this point, the Administration responds to Parliament and only to Parliament. Even the most well meaning public interest group can therefore only go to court in order to defend their vested interests and those of their members, but not the public interest, whatever that may be. Nobody without the legitimation of an established democratic selection process can rightfully claim to defend the public interest. Therefore, public interest groups can and should actively participate in preparing the decision but they can not be allowed to attack this decision on the grounds of an alleged violation of public interests.

Any other construction would place the Administration in a double dependency from Parliament and from a multitude of selfestablished defensors of the public interest. This, again, would deeply disturb the balance of power in democracy.

My last remark concerns the opposition's possibility to simply override the established decision making process. There has been one such case in Germany where a state government faced with naked violence by local opposition entered into an agreement with their representatives binding government not to pursue a licencing procedure unless certain conditions set up by the opposition were fulfilled. Here a new, clearly illegal licencing procedure has been established in order to protect public order and internal peace. Violence had succeeded in overthrowing law. Let us hope that this remains a unique case.

As a resumé I would say that public control over private activities in the nuclear field is a necessity requiring precise criteria, a transparent decision making process and an independent decision making authority as well as the full respect of individual democratic rights.

The activities of the nuclear critics have made us even more conscious of these necessities. They may have led to several important modifications in the control system, but they have never succeeded in questioning the basic choice in favour of the peaceful uses of nuclear energy.

The economic consequences of the delays in licencing called by the critics should, however, always be kept in mind when trying to improve the protection of individual rights. Careful spending of a nations limited financial resources is one way to protect its citizens from want.

