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SOME COMMENTS ON REGULATORY REFORM *

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Good evening. You might think that the sixth speaker on the subject of future directions of nuclear regulation would find himself with little to say. However, that would not take account of the well-known ability of regulatory chairmen to speak at length in almost any circumstance.

But cheer up. I shall respond to the mute but ever so eloquent expressions on your faces by being brief.

My comments will concern nuclear regulatory reform. Since I have ascended to the happy position of no longer being responsible for the conduct of regulatory affairs, I can only tell you what ought to be done, or at least seriously considered. Others will have to take up the chore of implementation. I wish them Godspeed.

Nuclear regulatory reform is divided into two parts. The first part contains all those matters for which new legislation is required. The second part concerns all those matters that are within the power of the Commission under existing statutes.

There is, of course, a certain blurring along the boundary line. For instance, there may be some matters that are within the Commission's nominal authorities but which would be so controversial to carry out that the Commission could hardly do them without the impetus of legislative action of some kind. But no matter, we do not have time to quibble. For us, nuclear regulatory reform has two parts, new legislation on the one hand and on the other all those things the Commission already has authority to control.

Now new legislation is just dandy if you can get it, in the form that you want it, when you want it. I am not sanguine about new legislation as a path for nuclear regulatory reform.

I recall too well that it took me four years to get a minor change in the Atomic Energy Act so that we could protect plant security information without having to classify it as national security material. And this after both Congressional oversight subcommittee chairmen had agreed with me that it was the right and proper way to go. I also recall our fruitless struggles to get licensing reform legislation passed in 1977 and '78.

There are various legislative proposals now going around that would be useful if they could be enacted. The Atomic Industrial Forum has one, DOE periodically threatens to produce a version, and the NRC is reasonably close to asking for public comment on some propositions they want to make. Most of what is, or will be proposed has to do with subjects that have been discussed for a long time. These include the authority to issue a combined construction permit and operating license...the so-called one-stop or one-step licensing process, early site reviews and site permits apart from construction permit applications, standardization, elimination of the requirement that NRC make an independent determination of the need for power from a plant, and assorted other good things.

I am all for these legislative propositions but we ought to recognize that they really are not going to be applicable to the current generation of plants. First of all, it is going to take a couple of years to get any form of licensing legislation passed, if it can be passed at all. And the sorts of provisions that are in these legislative proposals have more to do with new orders and new applications in the future than they have to do with

plants currently under construction and coming up for operating licenses. I am, you will gather, not wildly enthusiastic about new legislation as getting very far in terms of current problems and needs.

Now let us look at the other part of nuclear regulatory reform, that part under the control of the Commission under its existing authorities. Here we find a rich vein indeed. If there is to be much useful movement in nuclear regulation in the near term, say the next two or three years, I think it must surely come in this area.

The Commission's existing authorities are very substantial. They are, in fact, sufficient for the Commission to change, control, revise or whatever might be the appropriate response to all of the complaints and all of the recommendations that you have heard from my colleagues earlier in this session. There is, of course, a caveat. While the Commission's formal authorities are indeed formidible, the Commission's political strength and its ability to act within the governmental framework in which it finds itself are quite limited. So the Commission must do a certain amount of tiptoeing as it attempts to use those authorities. I am pleased to see that the present Commission under Chairman Joe Palladino is doing a lot less tiptoeing than I found it necessary to do a few years ago.

Now, what are some of these things under the Commission's control? Let me cite just two of the many and make some recommendations. The first is the enforcement policy. The aim of an enforcement policy in nuclear regulation is improved safety

by providing incentives to avoid errors and to correct them promptly and completely when they occur. Enforcement policy is not a body of criminal law, under which society demands retribution from transgressors who have deliberately and maliciously performed acts of violence. Unfortunately, there are some who think revenge is a proper role of enforcement and even more unfortunately, some of these people head NRC oversight committees of the Congress.

I think the Commission made a mistake several years ago when it adopted the present enforcement policy by denying itself the flexibility to forego monetary civil penalties in cases where the violation had been discovered by the licensee and promptly and effectively dealt with. Licensees who try to do the right thing when they discover that errors have been made in plant operation are permitted some modest benefit under the present enforcement policy, but civil penalties are still required in substantial amounts for all of the higher class violations. I think the system would work better if licensees who discover problems in their operations and report and fix them promptly did not also have to suffer civil penalties along with the normal citations of violation. I think the Commission ought to revisit the enforcement policy and make alterations of this kind.

Another subject under the Commission's control, and dear to all of our hearts, is the hearing process. My distinguished predecessor at the Nuclear Regulatory Commission, the Hon. Marcus Rowden, has given considerable thought of late to the hearing process and has written a paper under the auspices of the Atomic Industrial Forum that I recommend to you. Rowden has made a number of recommendations

for changes in the hearing process that ought to get the most serious attention by the Commission.

The problem with the present hearing process is that it is obsolete. It was adopted in a much different time and at a much earlier stage of the technology, and with essentially no experience in nuclear regulation underlying its design. Over the years the hearing process has accumulated assorted legal trappings, becoming more formal and more a lawyer's game than a mechanism to resolve disputes over safety and environmental issues. In fact, the hearing does not work very well for this one purpose which the Congress clearly intended it to have -- the adjudication of issues in dispute. The hearing is simply encumbered with too many legal trappings to be an effective mechanism for getting at the heart of disputes over complex technical issues.

Mark Rowden's recommendations to improve the situation go along the following lines. First, hearings should be limited to resolving disputes. The two sides of this are that the Commission should amend its rules to permit intervention only where there are legitimate issues of substantial and material nature. Contentions should be supported by a prima facie evidenciary showing of substantial and specific facts. The other side of this recommendation is that the Hearing Boards should stick to consideration and resolution of matters properly placed in contention by the parties. This means that the present power of Boards to raise issues on their own behalf should be limited. Of course, if a Board comes across what it feels might be a significant safety matter, it can refer that matter on the record to the regulatory staff for review

and the staff would then be expected to supplement its review and its public statements accordingly.

A second recommendation is that for most hearings, a single hearing officer, who would be an administrative law judge, would be sufficient and more efficient than the three-person boards that are now used. Boards with technical members could still be used in especially complex cases where special circumstances would indicate their usefullness.

A third recommendation is to make the role of the Appeal Board consistent with that of the Licensing Boards, that is, resolution of matters properly in dispute.

A fourth recommendation is that the decisions of hearing tribunals should be made immediately effective, barring a stay granted by a Board or the Commission on a proper showing.

A fifth recommendation is that the staff should not appear as a full party in the licensing hearings. The staff safety evaluation report would be available to the Board and all parties. Further, if the presiding officer felt that staff views were important in an issue, staff participation could be called for by the hearing officer. Staff members could present testimony and submit to cross-examination where the presiding officer wanted that done. But the staff would not be a full party in the hearing as it is now.

There appear to be some real advantages to removing the staff as a party in the hearings. Better utilization of staff technical resources would certainly result. And removal of the staff from the role of an advocate at the hearing would make it possible for

the Commission and for the hearing and appeals board to receive informal advice from the staff. At present, ex parte considerations limit the contacts between the Commission and the Hearing Boards on the one side and the regulatory staff on the other.

A sixth recommendation, one which has often been repeated, is to resolve more issues on a generic basis by rule-making.

A seventh recommendation is to start moving the hearing process toward less formal and legalistic forms. Portions of the present hearings might well be done on a legislative hearing format, that is, where parties file their briefs on an issue and simply present their statements of position. The Board then may question the parties as desired and then move on to a decision. When the Congress passed the current language of the Atomic Energy Act with regard to hearings, it expected the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedures Act. That has certainly not turned out to be the case and the present format of hearings is a highly formal and legalistic one. But the present hearing format is not required by the Atomic Energy Act or the Administrative Procedures Act and the Commission could well begin to move towards more informal proceedings.

So, here are a number of recommendations that I think are worthy of serious consideration by the Commission. I hope they will get proper attention in due time. Thank you.