

2011 REGULATORY INFORMATION CONFERENCE

**REMARKS BY MARTIN G. MALSCH
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THIS IS NOT LITIGATION ON A DIFFERENT PLANET, BUT SOMETIMES IT SEEMS LIKE IT: STATE PERSPECTIVES ON HOW NRC LICENSING PROCEEDINGS ARE CONDUCTED

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- THE REMARKS HERE ARE NOT OFFERED ON BEHALF OF ANY PARTICULAR STATE, BUT REFLECT MY PERSONAL OPINIONS BASED ON EXTENSIVE EXPERIENCE IN REPRESENTING STATES IN NRC LICENSING PROCEEDINGS
- THE TITLE OF THESE REMARKS IS INTENDED TO BE PROVOCATIVE; NRC'S RULES OF PRACTICE, ON THEIR FACE, COMPLY WITH FUNDAMENTAL PRINCIPLES OF U.S. ADMINISTRATIVE LAW
- HOWEVER, STATE OFFICIALS, EXPERIENCED IN FEDERAL COURT LITIGATION, ARE OFTEN VERY SURPRISED BY SOME ASPECTS OF NRC'S HEARING PRACTICE; SOMETIMES PARTICIPATING IN AN NRC LICENSING SEEMED TO THEM LIKE PARTICIPATING IN A PROCEEDING ON A PLANET OTHER THAN PLANET EARTH

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WHY IS THIS?

TWO ASPECTS OF NRC'S HEARING PRACTICE STAND OUT: CONTENTION REQUIREMENTS AND NRC STAFF'S PARTICIPATON

- EXPERIENCED STATE LITIGATORS, AND ADMINISTRATIVE LAW EXPERTS GENERALLY, WOULD AGREE THAT ADJUDICATORY HEARINGS, ESPECIALLY FORMAL ONES WITH DISCOVERY AND CROSS-EXAMINATION, SHOULD BE LIMITED TO GENUINE AND MATERIAL ISSUES OF FACT
- STATES ALSO RECOGNIZE THAT NRC'S LICENSING PROCESS MUST BE BOTH EFFECTIVE AND EFFICIENT, AVOIDING UNDUE DELAYS
- THEREFORE, IN PRINCIPLE, NOTHING IS WRONG WITH NRC'S STRICT CONTENTION REQUIREMENTS (A CONTENTION IS ADMISSIBLE ONLY IF IT IS REASONABLY SPECIFIC, RAISES A MATERIAL ISSUE, FALLS WITHIN THE SCOPE OF THE PROCEEDING, AND IS SUPPORTED BY SUFFICIENT FACTS OR EXPERT OPINIONS TO CREATE A GENUINE ISSUE)

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BUT THE USUAL DEADLINES FOR SUBMISSION OF CONTENTIONS APPEAR TO BE TOO SHORT

- APPLICANT GETS YEARS TO PREPARE AN L.A.; NRC STAFF GETS A YEAR OR MORE TO REVIEW IT: BUT A STATE (OR OTHER PETITIONER) USUALLY GETS ONLY 60 DAYS TO REVIEW THE ENTIRE L.A. (AND ALL SUPPPORTING MATERIALS) AND FILE CONTENTIONS
- THIS IS A VERY DEMANDING SCHEDULE
- DEADLINES ARE NOT ROUTINELY EXTENDED EVEN WHEN DOING SO WOULD NOT PREJUDICE ANYONE, INCLUDING APPLICANT
- IT IS THIS LATTER ASPECT THAT STATES OFTEN FIND INCOMPREHENSIBLE – WHAT IS WRONG WITH AN EXTENSION IF NO ONE WILL BE HARMED AND THE PROJECTED DATE FOR THE CONCLUSION OF THE PROCEEDING WILL NOT BE AFFECTED

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BUT DOES NRC PRACTICE HERE ACTUALLY DENY A FAIR HEARING?

- PROBABLY NOT – BUT THIS REQUIRES ACCEPTANCE OF THE PROPOSITION THAT CONTENTION PREPARATON TIME BEGINS WITH TENDERING OF THE L.A., NOT DOCKETING – EFFECTIVELY ADDING SEVERAL MONTHS OR MORE
- STATES FIND IT HARD TO UNDERSTAND WHY THEY SHOULD BEGIN TO ASSEMBLE A TEAM OF TECHNICAL AND LEGAL EXPERTS TO REVIEW AN L.A. BEFORE IT IS NOTICED FOR HEARING

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MODEST PROPOSAL: ISSUE THE NOTICE OF HEARING (OR HEARING OPPORTUNITY) WHEN THE L.A. IS TENDERED

- THE NOTICE WOULD INDICATE WHEN STAFF'S ACCEPTANCE (COMPLETENESS) REVIEW WOULD BE COMPLETED AND SET A DEADLINE FOR PETITIONS THAT WOULD BE 60 DAYS AFTERWARDS
- IF THE L.A. IS NOT SUFFICIENTLY COMPLETE AND RETURNED TO THE APPLICANT, THE NOTICE WOULD BE RECINDED, AND THE NOTICING PROCESS WOULD BEGIN ANEW WHEN THE L.A. IS RE-SUBMITTED (BUT PRESUMABLY WITH A MUCH SHORTER ACCEPTANCE REVIEW TIME)
- THE NOTICING PROCESS WOULD BE MORE COMPLICATED, BUT WOULD BETTER REFLECT THE REALITIES OF THE NRC REVIEW PROCESS
- MAKE SURE THE TENDERED L.A. IS READILY ACCESSABLE FOR REVIEW

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NRC STAFF ROLE

- FOR MOST STATES, NRC STAFF'S MOST VISIBLE ROLE IS AS A PARTY IN LICENSING PROCEEDINGS
- STATES UNDERSTAND STAFF'S ROLE TO ADVISE LICENSING BOARDS ABOUT THE MEANING OF COMMISSION REGULATIONS AND POLICIES; THIS HELPS ACHIEVE A PREDICTABLE AND EFFICIENT LICENSING PROCESS
- STATES ALSO UNDERSTAND STAFF MUST PROTECT THE INTEGRITY AND EFFECTIVENESS OF ITS REVIEW

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STATES DO NOT UNDERSTAND WHY NRC STAFF MUST PLAY AN ACTIVE ROLE IN LIMITING OR DENYING HEARINGS WHEN NEITHER OF THESE FUNCTIONS IS AFFECTED

- AN ESPECIALLY PERPLEXING EXAMPLE: STAFF SIDES WITH APPLICANT IN OPPOSING A CONTENTION AS UNSUPPORTED EVEN WHEN NO NEW ISSUES OF LAW OR POLICY ARE PRESENTED, STAFF'S SER WILL NOT BE AFFECTED, AND STAFF IS ACTIVELY PURSUING THE SAME SAFETY ISSUE PRESENTED IN THE CONTENTION
- THIS CAN BE EXPLAINED AS NOT CONSTITUTING STAFF PRE-JUDGMENT, BUT IT LOOKS LIKE IT TO SOMEONE NOT INTIMATELY FAMILIAR WITH NRC PRACTICE
- STAFF CREDIBILITY IS OFTEN SEVERELY UNDERMINED

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MODEST PROPOSAL: THE COMMISSION SHOULD REVIEW THE SCOPE OF STAFF'S ROLE IN LICENSING PROCEEDINGS

- STAFF'S ROLE COULD BE LIMITED TO ADVISING ABOUT NOVEL ISSUES OF LAW OR POLICY, PROTECTING THE INTEGRITY AND EFFECTIVENESS OF ITS REVIEW PROCESS, DEFENDING ITS SER WHEN CHALLENGED, AND RESPONDING TO LICENSING BOARD QUESTIONS

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PENDING CHANGES TO NRC RULES OF PRACTICE

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- PROPOSAL TO ALLOW THE GOVERNOR AS WELL AS OTHER STATE OFFICIALS TO APPEAR WHEN THE STATE CONSTITUTION ALLOWS MORE THAN ONE AGENCY TO REPRESENT THE STATE IS A STEP IN THE RIGHT DIRECTION
- BUT NRC SHOULD EXTEND THIS TO STATES WHERE MULTIPLE REPRESENTATION IS ALSO CONTEMPLATED BY STATE STATUTE
- ALSO, NRC SHOULD NEVER FORCE AN UNWILLING STATE TO CONSOLIDATE ITS CASE WITH ANOTHER INTERVENOR; STATES TYPICALLY VIEW THIS AN UNWARRANTED INFRINGEMENT ON STATE SOVEREIGNTY

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SHOULD LICENSING BOARD DECISIONS REJECTING OR ADMITTING CONTENTIONS BE IMMEDIATELY APPEALABLE?

- CURRENT PRACTICE: APPLICANTS MAY APPEAL IMMEDIATELY ONLY BY CHALLENGING EVERY ADMITTED CONTENTION; PETITIONERS MAY APPEAL IMMEDIATELY ONLY IF EVERY CONTENTION HAS BEEN DENIED; EFFECT IS TO DISALLOW SELECTIVE APPEALS
- FOR APPLICANTS, REVIEW OF ADMISSIONS AFTER THE INITIAL DECISION IS NOT AN EFFECTIVE REMEDY
- IN A TYPICAL CASE, WHERE SOME BUT NOT ALL CONTENTIONS ARE ADMITTED, APPLICANTS MAY APPEAL IMMEDIATELY BUT PETITIONERS MAY NOT

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**REQUIRING IMMEDIATE APPEALS OF CONTENTION
ADMISSIONS AND REJECTIONS MAY BE A GOOD IDEA**

- POSSIBLE ALTERNATIVE: MAINTAIN CURRENT PRACTICE EXCEPT THAT IF AN APPLICANT APPEALS IMMEDIATELY ON THE BASIS THAT NO CONTENTION SHOULD HAVE BEEN ADMITTED, A PETITIONER MAY DEFEND ITS ADMISSION AS A PARTY BY BOTH DEFENDING AGAINST APPLICANT'S APPEAL (ARGUING SOME OR ALL CONTENTIONS WERE PROPERLY ADMITTED) AND CROSS-APPEALING (ARGUING SOME OR ALL CONTENTIONS SHOULD NOT HAVE BEEN REJECTED)
- CONSISTENT WITH THE CONCEPT THAT THE FUNDAMENTAL QUESTION WHETHER A CONTESTED HEARING SHOULD BE HELD AT ALL SHOULD BE IMMEDIATELY REVIEWABLE

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