

March 30, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-98-296

TITLE: AGENCY POLICY REGARDING LICENSEE RECAPTURE OF LOW-POWER TESTING OR SHUTDOWN TIME FOR NUCLEAR POWER PLANTS

The Commission (with Chairman Jackson and Commissioners Diaz and McGaffigan agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of March 30, 1999. Commissioners Dicus and Merrifield approved in part and disapproved in part.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of March 30, 1999.

Andrew L. Bates
Acting Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-98-296

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON	X				X	2/10/99
COMR. DICUS	X	X			X	1/19/99
COMR. DIAZ	X				X	1/11/99
COMR. McGAFFIGAN	X				X	2/2/99
COMR. MERRIFIELD	X	X			X	1/8/99

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation to allow Grand Gulf, and similarly situated plants, to recover time spent in

low power testing within their full power operating license provided a separate full power operating license was issued. Chairman Jackson and Commissioners Dicus, Diaz, and Merrifield requested additional information on whether it is possible to also allow licensees without separate FPOLs to seek recapture of time spent in extended low power conditions through license amendment requests. All Commissioners also approved the staff's recommendation to continue to grant license amendment requests to amend the expiration dates of licenses to recover time spent in construction in cases where the 40-year license term began with the construction. Chairman Jackson and Commissioners Diaz and McGaffigan approved the staff's recommendation to deny license amendment requests to amend the expiration date of the license to recapture time spent in a shutdown condition. Commissioners Dicus and Merrifield disapproved this action and would have preferred additional information prior to deciding the issue. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on March 30, 1999.

Commissioner Comments on SECY-98-296

Chairman Jackson's Comments on SECY-98-296

I approve of the staff's plans to allow the Grand Gulf Nuclear Station to recapture the time spent in low power testing within its Full Power Operating License. I also approve of allowing similarly licensed facilities to recapture the time spent between the issuance of a Low Power Operating License and a Full Power Operating License when the term of operation is based on the date of issuance of the Low Power Operating License.

I join Commissioner Merrifield in requesting a legal analysis that may provide a basis for parity within the power reactor industry with respect to the date considered to begin the term of operation (i.e. a review to determine whether, under the Atomic Energy Act [AEA], the term of operation for a given reactor plant licensee can be considered to begin with the authorization for full power operation, as opposed to the issuance of a license for low power operation). Such an analysis may provide a basis which would allow facilities licensed under Section 103 of the AEA, and whose license terms begin with the issuance of a Low Power Operation License, to recover the time spent in low power operation without violating AEA requirements (that such licenses limit the operating term to 40 years). This would be accomplished by moving the start date of the operating term to the point at which NRC authorized full power operation, thus eliminating the inequity between these facilities and AEA Section 104b licensees (which do not have fixed operating terms under the Act and, thus, can recapture such operating time without violating an AEA limit on the period of operating terms). Should the staff find no remedy for this situation within the AEA, the staff should provide, in its communication to the Commission, recommendations for legislative approaches to solve this problem (including, as appropriate, a proposed approach to correct the apparent "loophole" which exists in AEA Section 104b with respect to the unspecified term of licenses issued under this section). I approve of the continued practice of allowing licensees to recapture time spent in the construction phase into their operating licenses.

I approve of the staff's recommendation not to allow the recapture of time spent in extended shutdowns by facilities licensed under Section 104b of the AEA. Such an action would result in an inequity between AEA Section 104b facilities, for which the AEA provides no specified operating term, and those licensed under Section 103 of the AEA, which are limited to a 40-year operating term; an inequity which is not supported by the technologies employed by the respective facilities. Even if this fundamental issue of legal inequity (an inequity which is different from that described above in that it involves the recapture of time spent *during* an operating term rather than the *start date* of that term) could be overcome, expending NRC resources in support of such recapture requests could have the net effect of redirecting agency resources away from activities of greater safety benefit, as the staff could, potentially, be called upon to evaluate a variety of different shutdown durations and types. Additionally, inasmuch as many of the extended shutdowns for which recapture might be sought were the result of poor performance on the parts of licensees, I do not find a compelling basis for pursuing such an initiative (with its attendant resource implications). In general, I believe that the *possibility* of an extended shutdown due to failures to meet regulatory requirements or the discovery of a limiting safety issue differs little from the *certainty* of refueling outages in terms of what may be expected in the course of operating a nuclear power plant (i.e. both types of outages represent losses of generation which were, or should have been, foreseen and accepted by prospective licensees when considering whether to proceed with construction of a facility). Thus, I find little motivation for considering the recapture of time spent in either of these non-power-producing conditions (extended shutdowns or refueling outages). Licensees seeking such additions to their terms of operation could do so under the auspices of the License Renewal Rule, for which the necessary NRC infrastructure has been established.

Commissioner McGaffigan's Comments on SECY-98-296

I approve the recommendation to grant the Grand Gulf license amendment request to amend the expiration date of the license to recover the time spent in an extended low-power testing condition before receiving the FPOL.

I approve the recommendation to grant similar requests from other licensees provided that 40-year license term began with the LPOL and a separate FPOL was issued.

I approve the recommendation to continue to grant requests to amend the expiration date of the license to recover time spent in construction in cases where the 40-year license term began with the construction date.

I also approve the recommendation to deny granting license amendment requests to amend the expiration date of the license to recover time spent in a shutdown condition. In addition to the staff's reasoning for denying such license amendment requests, I would note the clear possibility that allowing recovery of time spent in a shutdown condition would, in many circumstances, constitute a policy of rewarding licensees for poor performance. It also strikes me that allowing recapture of time spent in a shutdown condition could create undesirable complexities for license renewal aging determinations.

Commissioner Merrifield's Comments on SECY-98-296

I approve the staff's recommendations in part and disapprove them in part. Specifically,

1. I **Approve** the staff's recommendation to grant the Grand Gulf license amendment.
2. I **Approve** the staff's recommendation to grant similar requests from other licensees provided the 40-year license term began with the LPOL and a separate FPOL was issued.
3. I **Approve** the staff's recommendation to continue to grant licensee requests to amend the expiration date of the license to recover time spent in construction where the 40 year license term began with the construction permit date.
4. I **Request** that a legal analysis be developed by OGC and provided to the Commission regarding those plants in which the LPOL was amended to allow full-power operation and no separate FPOL was issued. Specifically, I request that OGC provide analysis of the following:

Is it consistent with the Atomic Energy Act (AEA) to conclude that the initial operating license begins to run when the staff authorizes full-power operation, irrespective of whether the grant of that authority was accomplished through a separate license (FPOL) or through an amendment to the LPOL?

The staff's position on Grand Gulf license amendment request, with which I agree, is that the 40-year license term for a plant issued a separate FPOL should commence with the authorization for full power operation and not with authorization of low power. In contrast, for licensees who were not issued a separate FPOL the staff reaches the opposite conclusion. As the staff recognizes, this regulatory scheme results in an inconsistent approach for similarly situated licensees. If two licensees were authorized on the same day to operate at full power, and only one was issued a separate FPOL, one license would reach the end of its 40-year term before the other, perhaps years earlier. I believe this scheme is inappropriate and arguably inconsistent with the spirit of the Grand Gulf decision, which discussed the implications of authorizing full-power operation. CLI-84-19, 20 NRC 1055 (1984).

In Grand Gulf , the Commission acknowledged that its practice with respect to how it actually authorized full-power operation was inconsistent: in some cases it was accomplished by amending the low power operating license and in others by issuing a separate full-power license. The basis for this inconsistent practice was not explained, but the Grand Gulf decision suggests that the Commission amended the low-power license simply as a matter of administrative convenience. Id at 1058-59. The Commission expressly stated that in any case the operating license proceeding ends with the authorization of full power, and not with the interim low-power authorization. Id. at 1059. I recognize that Section 103 of the AEA limits the term of a license to 40 years, but the term "license" is not defined in the AEA and I question whether it need be interpreted so strictly as to preclude the Commission from arguing that a full-power operating license commences with the grant of the authorization to operate at full power.

5. I **Disapprove** the staff's recommendation to deny granting license amendment requests to amend the expiration date of the license to recover time spent in a shutdown condition. The issue of recapture for shutdown time is not squarely presented by the facts of this paper. Although the staff mentions two plants that may wish to recapture shutdown time, all circumstances under which a recapture of this type might be requested are not clear. Consequently, I do not believe it would be appropriate to decide this issue as a generic matter, in the context of a paper addressing a completely different situation. My decision to disapprove the staff's recommendation is not dispositive of how I would act on such a recommendation in the future. I simply do not believe I have sufficient information to support the staff's recommendation.