



SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 12, 2017

COMMISSION VOTING RECORD

DECISION ITEM: SECY-17-0007

TITLE: PETITIONS TO MODIFY A COMBINED LICENSE AND
 PETITIONS TO MODIFY, SUSPEND, OR REVOKE AN EARLY
 SITE PERMIT

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of September 12, 2017.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in red ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Svinicki
Commissioner Baran
Commissioner Burns
OGC
EDO
PDR

VOTING SUMMARY – SECY-17-00XX

RECORDED VOTES

	<u>APPROVED</u>	<u>DISAPPROVED</u>	<u>ABSTAIN</u>	<u>NOT PARTICIPATING</u>	<u>COMMENTS</u>	<u>DATE</u>
Chrm. Svinicki	X	X			X	08/18/17
Cmr. Baran	X				X	05/08/17
Cmr. Burns	X	X			X	08/18/17

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN SVINICKI

SUBJECT: SECY-17-0007: Petitions to Modify a Combined License and Petitions to Modify, Suspend, or Revoke an Early Site Permit

Approved XX In part Disapproved XX In part Abstain _____

Not Participating _____

COMMENTS: Below XX Attached _____ None _____

I approve the staff's proposed guidance on certain matters related to the filing of petitions under 10 CFR 52.103(f). Specifically, I approve the position that the opportunity to file 10 CFR 52.103(f) petitions should begin with license issuance and end with the 10 CFR 52.103(g) finding, and I approve the interpretation of "licensed activity" under this provision to refer to operational activities such as fuel loading, low power testing, and other modes of facility operation. With respect to determinations on the necessity for "immediate action," I approve the staff's use of the standard of reasonable assurance of adequate protection but agree that the staff should also look to the standards for immediate regulatory action found in Commission precedent, where they are reasonably articulated.

I disapprove delegation to the staff of the Commission's decisional authority on petitions under sections 52.39(c)(2) and 52.103(f). I have reviewed the staff's bases for requesting the delegation but assess that the factors advanced by the staff are suggestive of delegation but not compelling. In contrast, Commissioner Burns, in the part of his vote describing the regulatory history of these provisions and the defense of them in litigation, provides the broad contours of the distinguishing elements between these and other, recent, similar delegations. I am persuaded by his reasoning and disapprove the delegations on that basis. In addition, I find the purported "efficiency" and "consistency" imperatives behind the request specious and generally insensitive to the Commission's role in agency decision making.

Entered in "STARS"
Yes No _____



SIGNATURE

08/18/17

DATE

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Baran
SUBJECT: SECY-17-0007: Petitions to Modify a Combined License and Petitions to Modify, Suspend, or Revoke an Early Site Permit

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Entered in "STARS"

Yes
No



SIGNATURE
5/19/17

DATE

**Commissioner Baran's Comments on SECY-17-0007,
"Petitions to Modify a Combined License and
Petitions to Modify, Suspend, or Revoke an Early Site Permit"**

This paper proposes to establish a process for addressing petitions filed under 10 C.F.R. 52.39(c)(2) to modify, suspend, or revoke an early site permit and petitions to suspend a combined license filed under 10 C.F.R. 52.103(f). I approve the staff's recommendation that the Commission delegate to the staff decisions on petitions filed under these provisions. This delegation is consistent with the Commission's delegation to the staff of section 52.103(g) findings and the process for resolving section 2.206 petitions.

Because the full process for addressing these two types of petitions will necessarily be detailed, my vote focuses on the specific high-level elements recommended by the staff. If the Commission approves the core elements of the process, the staff should include the full, detailed procedures in a publicly available draft guidance document. The staff should seek public comment on the draft guidance before finalizing it.

I approve the staff's recommendation that the opportunity to file 52.103(f) petitions should begin with license issuance and end with the 52.103(g) finding. This provides the agency the maximum amount of time to resolve petitions prior to potential operation.

I also approve the staff's recommendation that immediate action determinations under 52.103(f) should focus on the commencement of operation prior to a decision on the petition. As the staff acknowledges, in instances where an immediate action determination may not be initially necessary because fuel load is not imminent, the staff must maintain awareness of fuel-load schedules and the status of all pending petitions in case an immediate action determination becomes necessary in the run up to operation. This will be important if the evaluation of a 52.103(f) petition is time-intensive and the petition remains pending for a significant amount of time. I agree with the staff that, when making an immediate action determination, the correct standard is whether the requirements sought in the petition are necessary for reasonable assurance of adequate protection of public health and safety.

Finally, I approve the staff's recommendation to develop a process for coordinating action on 2.206 petitions, 52.103(f) petitions, and petitions for rulemaking related to certified designs. I also agree with the staff that the 52.103(f) immediate action determination process should be used for these types of petitions when such a petition pertains to the safe operation of a specific facility.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Burns
SUBJECT: SECY-17-0007: Petitions to Modify a Combined License and Petitions to Modify, Suspend, or Revoke an Early Site Permit

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Entered in STARS

Yes

No



Signature

18 August 2017
Date

**Commissioner Burns's Comments on
SECY-17-0007, "Petitions to Modify a Combined License and Petitions to Modify,
Suspend, or Revoke an Early Site Permit"**

The NRC staff proposes that the Commission delegate to the staff the authority to grant or deny 1) petitions to modify a combined license (COL) under 10 CFR 52.103(f) and 2) petitions to modify, suspend, or revoke an early site permit (ESP) under 10 CFR 52.39(c)(2). Although such petitions are quite similar to petitions for action under 10 CFR 2.206 (and indeed are to be handled in accordance with section 2.206), the Commission intentionally provided in its promulgation of 10 CFR Part 52 that the Commission itself would decide such petitions. See Final Rule, *Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors*, 54 Fed. Reg. 15372, 15383 (18 Apr. 1989).¹ Moreover, agency counsel emphasized this point in defending the rule before the court of appeals that the Commission itself would decide such petitions, particular those under section 52.103. *Nuclear Information and Resource Service v. NRC*, 918 F.2d 189, 195 n.12 (D.C. Cir. 1990), *vacated and rehearing en banc granted*, 928 F.2d 465 (1991), *petition for review denied*, 969 F.2d 1169 (1992). Although the validity of Part 52 does not turn on whether the Commission itself decides such petitions in connection with an ultimate determination to permit operation to proceed under a COL, the record does underscore the anticipated decision-making role of the Commission itself on such petitions in contrast to the usual handling of section 2.206 petitions, which have been, since the initial promulgation of the rule in 1974, matters for initial staff determination, subject to the Commission's supervisory power over the staff.

The staff now proposes, with no petitions having been filed under either 10 CFR 52.39(c)(2) or 52.103(f) during the more than 25 years after the promulgation of Part 52, that the Commission delegate its authority in order to "promote efficiency" and to "ensure coordination with related regulatory decisions."² I am not convinced that the delegation requested by staff is warranted at this time or necessary to achieve the proffered objectives, particularly in the absence of historic practice demonstrating how such petitions could be processed more efficiently or the identification of structural problems in the rules that will cause inefficiencies if the Commission is the arbiter in the first instance of such petitions.

The Commission has recently and long demonstrated that it is capable of timely resolution of matters related to initial licensing authorizations, similar to the petitions at issue here, in rendering decisions on mandatory hearings, immediate effectiveness reviews in contested licensing proceedings, or other petitions brought before it. See, e.g., *Duke Energy Carolinas, LLC* (W.S. Lee III Nuclear Station, Units 1 & 2), CLI-16-19, 84 NRC 180 (2016) (Commission decision on the uncontested hearing on W.S. Lee III Nuclear Station, Units 1 & 2); *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 73 NRC 141 (2011) (denying multiple requests to suspend licensing, adjudicatory, and rulemaking proceedings after the accident at Fukushima Dai-ichi); *Calvert Cliffs 3 Nuclear Project LLC*, CLI-12-16, 76 NRC 63 (2012) (denying multiple requests to suspend adjudicatory and licensing proceedings as a result of the D.C. Circuit Court of Appeals vacation and remand of the Waste Confidence decision and rule); *Philadelphia Electric Co.* (Limerick Generating Station, Unit 2),

¹ At the time of Part 52's original promulgation in 1989, such petitions were provided under 10 CFR 52.103(b).

² I note that SECY 17-007 does not discuss the treatment under the proposed delegation of a presiding officer's referral under 10 CFR 2.340(c), leaving some ambiguity as to whether referrals would be delegated to the staff for determination or initially require the Commission's review.

CLI-89-17, 30 NRC 105 (1989) (immediate effectiveness review of operating license). Such decisions often require the Commission's awareness and careful integration of both adjudicatory and non-adjudicatory aspects of its decision-making role, and we are well positioned to do so with the assistance of the Office of Commission Adjudication, the Office of the General Counsel and the agency's technical staff as appropriate. I do not see a delegation of decision-making on section 52.103(f) petitions as a necessary outgrowth of the Commission's delegation in 2013 to the staff of the determination under section 52.103(g) regarding operation. Much like the staff's decision-making on a issuing a COL or other license, the appropriate staff official must make the determination under section 52.103(g) in concert with or upon consideration of Commission decisions bearing on the determination.

Although I disapprove delegation of decisional authority to the staff on petitions under sections 52.39(c)(2) and 52.103(f), I do approve the staff's proposed guidance on specific matters related to the filing of petitions under 10 CFR 52.103(f), specifically:

- the opportunity to file 10 C.F.R. 52.103(f) petitions should be interpreted to begin with COL issuance and end with the 10 C.F.R. 52.103(g) finding; and
- the term "licensed activity" should be interpreted for purposes of the regulation as referring to operational activities such as fuel loading, low power testing and other modes of facility operation. This interpretation is not intended to preclude the filing of other petitions that would otherwise fall within the ambit of 10 C.F.R. § 2.206.

The staff also requests that the Commission endorse its articulation of how the need for immediate action (i.e., issuance of an immediately effective order) is determined. Although I generally concur with the staff's characterization of the legal standard for issuing immediately effective orders under our rules and in the context of petitions at issue here, staff should rely on Commission precedent on this issue and not the abstract discussion of the standard contained in the SECY paper. Commission precedent on the bases for immediate regulatory action is well articulated in Commission decisions. See, e.g., *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400 (1978); *Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285 (1994).

The staff also recommends that it establish processes for coordinating action on various types of petitions, such as those under section 2.206, petitions for rulemaking, and petitions under section 52.103(f). The proper disposition of petitions requesting action that may be subject to multiple procedural routes has long been an issue for the agency to resolve, whether at the Commission or staff level. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), DD-79-21, 10 NRC 717 (1979)(disposition of section 2.206 petition raising issues more appropriately addressed in rulemaking or licensing proceedings). To the extent that staff believes it needs to clarify its internal guidance on the handling of matters under Part 52 in coordination with sections 2.206 and 2.803 or other procedural mechanisms, it should do so.



Stephen G. Burns
18 August 2017