



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

May 29, 1979

MEMORANDUM FOR: Chairman Hendrie  
Commissioner Gilinsky  
Commissioner Kennedy  
Commissioner Bradford  
Commissioner Ahearne

FROM: *EB* Leonard Bickwit, Jr.  
General Counsel

SUBJECT: OPTIONS FOR PLACING LIMITATIONS ON  
REACTOR LICENSING

At the briefing on May 21, the Staff described to the Commission its current freeze on the issuance of operating licenses and construction permits (hereinafter "licenses"). The Commissioners requested the Office of the General Counsel to prepare a memorandum describing the Commission's procedural options for maintaining the Staff's current limitations on reactor licensing. Commissioner Ahearne also requested that the OGC memorandum discuss procedural options for making the issuance of new licenses and the continued effectiveness of current operating licenses contingent on the existence of an emergency response plan concurred in by NRC. In discussions following the briefing, Commissioner Ahearne provided further guidance as to the desired scope of the OGC memorandum.

This memorandum, prepared with assistance from OELD and the Chairman of the Atomic Safety and Licensing Appeal Panel, consists of two parts. Part I describes six options for formalizing, to a greater or lesser degree, the current Staff freeze. Part II deals with issues of a "moratorium" nature which have not yet been taken up by the Commission. These include four options for possible longer-term approaches to limitations on reactor licensing; the implications of a freeze for on-going licensing proceedings and for on-going construction; and the option of making the existence of a concurred-in emergency plan a condition for maintaining current operating licenses in force. Put another way, Part I deals with the narrow question: if the Commission wishes to prevent the issuance of licenses while it considers alternative courses of action, how should it implement that intent? Part

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II deals with the broader question: what alternative courses of action which involve restrictions on the licensing process are available?

### I. Procedural Options for an Immediate Licensing Freeze

There are six basic procedural options available to the Commission for ordering a short term halt to the issuance of new CPs and OLs pending further action by the Commission. Those options, discussed below, are: (1) issuance of an internal agency directive to the Director of NRR directing him not to issue any new licenses during the short term; (2) publication of a general statement of policy announcing that the Commission has determined to issue no further licenses during the short term; (3) suspension for the short term of the rule providing for the "automatic" issuance of licenses (see discussion below); (4) suspension of the automatic issuance rule and promulgation of a new rule explicitly providing for a freeze on issuance of new licenses; (5) issuance of adjudicatory orders in pending licensing proceedings which are nearing conclusion to provide that no license may be issued in the short term; and (6) issuance of non-adjudicatory instructions to the Boards.

At the outset, a brief discussion of the Commission's rules on issuance of licenses may be useful. 10 CFR 2.764(b) provides:

The Director of Nuclear Reactor Regulation ... notwithstanding the filing of exceptions, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

While the language on its face imposes absolute requirements on the Staff, as a practical matter the requirements are less stringent than they appear to be. First, as the briefing of May 21 indicated, the rule has been construed as not applying to the issuance of operating licenses. This is because in operating license proceedings the Licensing Board considers only those issues that have been placed into controversy and those additional issues which the Board has decided it wishes to consider. Once the Board has resolved those issues, the Director of NRR is required to consider all remaining matters, a process which may take considerable time. To construe the rule as applying to operating licenses would fly in the face of this Commission practice, and accordingly the rule has not been so interpreted.

In the case of construction permits, the rule is clearly applicable. Yet even here it may not dictate the issuance of permits even in the absence of formal Commission action instituting a freeze. A freeze could be effected if the Staff in each pending case moved to delay

presentation of its case so that Staff's conclusions resulting from the ongoing TMI investigation could be included. If the Licensing Board in question denied the request and reached an initial decision, Staff could move to reconsider the action, to reopen the record, or to stay the effectiveness of the Board's action. In addition, Staff could seek a stay from the Appeal Board or, alternatively, issue the permit and at the same time issue an order to show cause why the permit should not be revoked.

Commission action thus may not be necessary to blunt the force of the rule. Since there are conceivable circumstances, however, in which the rule could operate to require the issuance of a license, it is appropriate for the Commission to examine the following courses of action with the rule in mind.

A. Internal Memorandum

The advantage of this option is that it would be quick and flexible. There are no procedural requirements for sending a directive to Staff and a decision to do so would not be subject to judicial review. Similarly, the Commission can modify or terminate a directive the moment it decides to do so. The major and decisive disadvantage of this option is that an internal memorandum cannot eliminate or alter rights conferred upon a person outside the Commission by an existing regulation. Since Section 2.764(b) confers upon an applicant a right to a license after a favorable Board decision (subject to the qualifications discussed above), issuance of a directive to NRR would not be deemed sufficient to extinguish that right.

B. General Statement of Policy

A general statement of policy is a formal Commission pronouncement, normally published in the Federal Register, that announces a future course of action the Commission will pursue. However, a separate order or regulation is usually necessary before that policy can be effectuated in a particular case. The major advantage of this option over the first one is that it is a more public and formal method of announcing a short term freeze. However, it has the same controlling disadvantage, since a statement of policy cannot legally be used to alter an existing regulation, such as Section 2.764(b). Nevertheless, we should note that the Commission successfully imposed a freeze on all licensing by use of a general statement of policy in 1976 after the Court of Appeals' Vermont Yankee decision, and there was no criticism of or legal challenge to that action.

### C. Suspension of Automatic Issuance Rule

The Commission can eliminate the Section 2.764(b) constraint by suspending the regulation in question. This action would itself be in the nature of a rulemaking and would therefore be subject to judicial review. Although a suspension would have to comply with the Administrative Procedure Act, we believe that there is sufficient flexibility in the APA to allow such a regulation to be made immediately effective without prior notice, comment and publication of the rule. The major advantage of this option is that it would clearly avoid the requirements of Section 2.764 (b) while allowing the resumption of licensing later on without the need for additional rulemaking. The only disadvantage is that, by itself, it fails to state the nature of the Commission's policy.

### D. Imposition of a Short Term Freeze by Rule

This option is similar to the previous one except that the rulemaking, in addition to suspending 2.764 (b), would set forth the Commission's intended course of action. That it would do so is its advantage over the previous option.

A possible disadvantage relates to the need ultimately to revoke the rule when the Commission is prepared to resume licensing. While the arguments are strong that the APA would permit waiver of prior notice, comment and publication in a rulemaking to revoke the rule, they are not as strong as in the case where the rule is originally adopted. Some small litigation risk is thus presented if resumed licensing, when proposed by the Commission, is to be made immediately effective.

This risk can be avoided by making the licensing freeze rule self-terminating after a fixed period such as one month. The time period selected, however, could inhibit flexibility if it is too long, or could require repeated extension of the rule if too short.

### E. Issuance of Adjudicatory Orders

Instead of issuing regulations, the Commission could use its plenary adjudicatory authority to step into on-going licensing proceedings nearing conclusion. In such proceedings it could order that no licenses be issued for the short term or, alternatively, it could stay initial decisions reached by the Boards. Such orders would be effective in eliminating any possibility of license issuance.

There are a few disadvantages, however, which are associated with such a course of action. First, there is a presumption that adjudicatory orders in licensing proceedings are based on evidence already in the record and on which all parties have had an opportunity to comment. Commission orders not to issue licenses could possibly be viewed as inconsistent with those principles -- although in each case a plausible argument could be made that the absence of evidence in the record on the impact of TMI was itself determinative. Second, separate orders would be a fragmented method of announcing a decision that was properly reached on a generic basis. Third, by acting in an adjudicatory capacity the Commission would be creating a situation where the ex parte and separation of functions rules might apply. This might tend to impair the freedom of the Commission to consult with Staff, licensees, and other interested persons in connection with a possible lifting or modification of the freeze.

#### F. Non-Adjudicatory Instructions to Licensing Boards

The Commission, instead of issuing orders in pending cases, could simply instruct its Licensing Boards, by way of policy statements or memoranda, not to reach initial decisions. This course would have the advantage of simplicity and would obviate the need for suspending section 2.764(b).

There are both legal and practical disadvantages to this course of action, however. Legally, it is questionable whether it is appropriate for the Commission, acting other than in an adjudicatory or normal rulemaking capacity, to issue mandatory instructions to its independent Boards. Practically, the suspension of initial decisions would prevent Appeal Board review of issues to which the Three Mile Island experience is not relevant. We are unaware of policy interests that would be served by stopping such reviews.

#### Conclusion

Our view is that, if the Commission wishes to give greater formality to the Staff freeze, a combination of options B (Policy Statement) and C (Suspension of Rule) is the preferred course. The promulgation of an immediately effective rule suspending 2.764(b) would eliminate all possibility that Staff would be required to issue a license. With that requirement removed, a statement of policy announcing a freeze would bind Staff. In that respect, this course would be preferable to option A (Internal Memorandum) or options B or C taken by themselves.

This approach is preferable to option D (Imposition of Freeze by Rule) in that it eliminates the small litigation risk associated with a future rulemaking lifting the freeze if that would be conducted in the absence of prior notice, comment and publication. The policy statement we suggest is arguably a "rule" within the meaning of section 553 of the APA, and thus would also be subject to certain rulemaking requirements at the time of its announcement and its revocation. However,

since statements of policy are expressly exempted from the prior notice, comment and publication requirements of that section, procedural requirements should not be a serious problem.

We prefer the proposed course to option E (Adjudicatory Orders) because it better reflects the generic nature of the Commission's action and avoids the other problems mentioned above which are associated with adjudicatory activity. A combination of options B and E would eliminate the first of these considerations but not the other potential difficulties.

We recommend against option F for the reasons outlined in the above discussion of that option. While it is our view that a policy statement ought not to be used to direct a suspension of initial decisions by Licensing Boards, that is not to say that the statement should be devoid of guidance to the Boards. It might be stated, for instance, that the statement should not be construed as constituting a Commission directive to stop initial decisionmaking. Boards might nonetheless be advised that new treatment of TMI-related issues is anticipated in the future and that Board efforts focused on extensive review of such issues may be wasted. The statement might further encourage the Boards to move forward in their reviews of other issues. Further discussion of the options with respect to review procedure may be found in Part II B of this memorandum.

## II. Further Issues

Whether or not the Commission adopts one of the procedural options described in Part I, a number of issues involving the licensing process would remain to be considered. The following description of such issues is not exhaustive. In describing substantive options for the Commission, we have not attempted in each case to set forth the procedural approaches to implementing those options. As is apparent from Part I, the procedural choices are in most cases numerous.

### A. Longer-term Options on Issuance of New Licenses

For the somewhat longer term, we believe the Commission has essentially four major options. First, the Commission could adopt no formal policy. Second, it could provide for an absolute freeze on licensing. Third, it could make the resumption of licensing (either licensing in general or the issuance of specific licenses) contingent on particular findings by the Staff. Finally, the Commission could make the resumption of licensing contingent on findings by the Commission.

1. Adoption of No Formal Policy on License Issuance

Under this approach, the Commission would take the position that the Staff's current analysis and freeze is a satisfactory approach to the issues raised by Three Mile Island. It would implicitly express the Commission's confidence that the Staff would not issue any new license that did not provide adequately for the public health and safety. The Commission's supervisory authority over the Staff, and its power to review adjudicatory decisions of its Boards, would provide assurance that new licenses could not be issued contrary to the Commission's wishes. The information derived from Three Mile Island would thus be treated qualitatively like new information derived from any other source, to be taken account of in the licensing process as appropriate. This approach would have the virtue of simplicity, but it would provide less guidance to the Staff, applicants and the public than would alternative approaches.

2. Absolute Freeze on Licensing

The Commission could provide for an absolute freeze, either for a specified length of time or until further order of the Commission. The specified time period could conform to the Staff's estimated three months or be longer or shorter.

Setting a specific length of time for the freeze would have the virtue of providing parties and other interested persons with a definite schedule of Commission action. It has the disadvantage, however, that the Commission may not know until the TMI-related analysis is well under way how long a freeze may be required. Of course, the Commission could always extend any established date for lifting the freeze if that action later appeared to be warranted, but at some risk that interested persons might rely to their detriment on the Commission's originally announced schedule.

3. Licensing Contingent on Further Staff Findings

Under this approach, the Commission would direct the Staff to maintain a freeze on issuance of new licenses until Staff could make certain findings with respect to the licensing process as a whole or with regard to particular licenses. These findings might be phrased generally, e.g. "until the Staff is satisfied that all health and safety issues raised by the event at Three Mile Island have been satisfactorily resolved with respect to the proposed license in question". Alternatively, the Commission might specify the areas in which it required that the Staff be satisfied, such as emergency response

planning, instrumentation, operator training, or communications. Still greater specificity might be required through insistence on particular standards of conduct in those areas.

This approach would have the advantage of making clear to all concerned the areas of particular interest to the Commission and the Commission's intention of making a resumption of licensing conditional. The difficulty of course is in deciding on the nature of the conditions in the absence of a thorough analysis of the accident.

#### 4. Licensing Contingent on Further Commission Findings

The Commission could take the position that no further licenses would be issued except by the Commission itself. The Commission could go on to specify particular findings which would be required for license-issuance in the manner outlined in option 3. The Staff could be instructed to propose a resumption of licensing only when satisfied that the specified conditions had been met. This approach would place primary reliance on the Staff's analysis, but would leave the ultimate decision in the hands of the Commission. The Commission is familiar with the advantages and disadvantages of requiring Commission approval of Staff judgments.

#### B. Implications of a Freeze for On-going Licensing Proceedings and for Construction in Progress

Since the occurrence of the Three Mile Island accident, parties to NRC licensing proceedings have been raising, in a variety of ways, the issue of the relevance of the TMI events to the proceedings in which they are involved. The Staff's May 21 description of its current freeze has underscored the issue. Put simply, if the Staff does not propose to issue a license even when authorized to do so by a Board, one must ask whether it is desirable for the Board to issue such an authorization. Likewise, in the absence of Commission guidance on how TMI-related issues (e.g., emergency plans) should be handled, there is a possibility that significant time will be wasted (if proceedings have to be reopened later) and that different Boards may reach contradictory results.

In this regard, the Commission would appear to have several options. It could decide not to address the issue, thereby implicitly leaving the issue of how to proceed to the Boards' discretion. A second option would be to state explicitly that it is up to the Boards to exercise their discretion about how TMI-related issues should be handled in light of the facts of a particular case. A third option



would be to identify for the Board and the parties those issues on which the Commission expects it will not be fruitful to hold hearings or issue decisions at this time, pending further notice from the Commission. A fourth option would be cessation of licensing proceedings altogether, pending further evaluation of these issues.

The Three Mile Island events also raise the question of whether construction -- either construction generally, or that implicated by TMI events -- should be suspended, and whether guidance from the Commission in this area is desirable. The Commission would appear to have four major options in this area. First, it can take no action, relying on the fact that licensees know that construction is at their own risk -- that is, that there is no guarantee that they will receive an operating license, and that the Commission might in the future require them to change or upgrade the facility before being allowed to operate. Second, the Commission could state explicitly that continued construction takes place at the risk of the licensee. Third, the Commission could direct the halt of construction on specific portions of facilities, where the TMI events indicate those aspects to be potentially in need of redesign. Fourth, the Commission could simply call a halt to all construction in progress pending further evaluation of the TMI events and their relevance to on-going construction.

C. Making Continued Effectiveness of Current Operating Licenses Contingent on the Existence of Concurred-in Emergency Plans

Should the Commission decide that, after a certain date, the effectiveness of current operating licenses should be contingent on the existence of a concurred-in emergency plan, it would appear to have two major options. First, it could issue an amendment to Part 50 of its rules stating that no facility will be permitted to operate beyond a certain date unless the State in which it is located has an emergency plan concurred in by NRC by that date. Such a rule would require notice and comment procedures, but would not require an oral hearing.

Secondly, the Commission could impose, as a license condition for each facility located in a state presently lacking a concurred-in emergency plan, the requirement that it shut down unless NRC concurs in such a plan by a certain date. This approach was taken when the safeguards upgrade was effected. Since this procedure may require an amendment to a license and one which involves significant hazard considerations, 30 days' notice and an opportunity for a hearing may be required with respect to each license. The facilities would be able to operate during the amendment process, however, since their continued operation would be consistent with the terms of the existing licenses.

cc: OPE  
OCA  
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SECY

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PIPING REANALYSIS STATUS REPORT AS OF 5/29/79

	BEAVER VALLEY	FITZPATRICK	SURRY 1	SURRY 2
REANALYSIS TO PERFORM	83*	96	72	**
COMPLETED WITHIN ALLOWABLE (QA ACCEPTED RESULTS)	80	46	29	**
COMPLETED ABOVE ALLOWABLE (HARDWARE CHANGE REQUIRED)	3	0	0	**
PIPING SUPPORTS TO EVALUATE	741	1156	873	**
COMPLETED WITHIN ORIGINAL DESIGN (QA ACCEPTED RESULTS)	623	0	118	**
COMPLETED ABOVE ORIGINAL DESIGN (HARDWARE CHANGE REQUIRED)	15	0	0	**
REANALYSIS ESTIMATED COMPLETION DATE (LICENSEE ESTIMATE)	6/11/79	6/10/79	6/15/79	**

\*PLUS 18 ADDITIONAL PROBLEMS WHICH WERE ANALYZED FOR WATER HAMMER  
+ SSE BUT NOT OBE.

\*\*UNKNOWN

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