

Title 10 - Energy

CHAPTER I - U.S. NUCLEAR REGULATORY COMMISSION

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING  
PROCEEDINGS

Modified Adjudicatory Procedures

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Suspension of 10 CFR 2.764 and Statement of Policy  
on Conduct of Adjudicatory Proceedings

SUMMARY: As a result of the Three Mile Island accident, the Commission has decided to make interim modifications to the procedures by which it supervises and reviews adjudicatory licensing decisions involving power reactors. It has decided to suspend until further notice 10 CFR 2.764 which is its rule of practice on issuance of licenses after adjudicatory decisions.<sup>1/</sup> Furthermore, it has specified the procedures by which new licenses, permits and authorizations may be issued. As provided in the Interim Statement on Policy and Procedure, 44 Fed. Reg. 58559 (October 10, 1979), this action will not affect non-adjudicatory proceedings or other adjudicatory matters including enforcement and license amendment proceedings, appellate decisions and partial initial decisions not authorizing issuance of new licenses or permits. This suspension of 10 CFR § 2.764 and the related statement of policy deal with Commission Rules of Practice. For that reason, and

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<sup>1/</sup> The Commission currently has underway a study of whether, apart from this temporary measure, the immediate effectiveness rule should be retained, modified, or abolished. Nothing in today's action is intended to prejudice the outcome of that study.

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because prior notice and comment and delayed effectiveness would further delay adjudicatory decisions from being rendered and from being addressed by the Commission, and so would be contrary to the public interest, this suspension and statement of policy shall be effective without prior public notice and comment and good cause exists for making the suspension and statement effective upon publication. However, the Commission will consider any public comments on these modified procedures which are filed with the Secretary of the Commission within 30 days of publication of this notice.

The actions described herein constitute the Commission's final action on the petitions it has received in the Black Fox and Skagit proceedings.

EFFECTIVE DATE: November 9, 1979

SUPPLEMENTARY INFORMATION:

The Commission's Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (October 10, 1979), indicated that the Commission would subsequently decide the procedures by which it would exercise increased supervision over adjudicatory licensing decisions in the aftermath of the investigations of the Three Mile Island accident. That Statement also indicated that new construction permits, limited work authorizations and operating licenses for power reactors would be issued "only after action of the Commission itself."

The Commission has now determined that, until further notice, adjudicatory proceedings will be conducted as described below. The Commission has adopted this approach because it achieves the objective of increased Commission supervision of licensing actions while (1) avoiding undue delay and duplication of effort by adjudicators and parties; and (2) allowing the Commission maximum flexibility in terms of deciding whether, in light of its other responsibilities, particular proceedings or issues warrant its early intercession or can appropriately be left to the ordinary adjudicatory processes (subject, of course, to ultimate Commission review at the conclusion of the proceeding).

1. Atomic Safety and Licensing Boards

Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would otherwise authorize. The Boards' decisions shall not become effective until the Appeal Board and Commission actions outlined below have taken place.

In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. As provided in paragraph 3 below, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission

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regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which, in their judgment, present issues on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

2. Atomic Safety and Licensing Appeal Boards

Within sixty days of the service of any Licensing Board decision that would otherwise authorize licensing action, the Appeal Board shall decide any stay motions that are timely filed.<sup>2/</sup> For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Appeal Board and Commission action described herein. If no stay papers are filed, the Appeal Board

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<sup>2/</sup> Such motions shall be filed as provided by 10 CFR 2.788. No request need be filed with the Licensing Board prior to filing with the Appeal Board. Cf. Public Service Company of New Hampshire, (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10 (1976).

The sixty-day period has been selected in recognition of two facts. First, allowing time for service by mail, close to thirty days may elapse before the Appeal Board has all the stay papers before it. Second, the Appeal Board may find it necessary to hold oral argument.

shall, within the same time period (or earlier if possible), analyze the record and decision below on its own motion and decide whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard.

In deciding these stay questions, the Appeal Board shall employ the procedures set out in 10 CFR 2.788. However, in addition to the factors set out in 10 CFR 2.788(e), the Board will give particular attention to whether issuance of the license or permit prior to full administrative review may: (1) create novel safety or environmental issues in light of the Three Mile Island accident; or (2) prejudice review of significant safety or environmental issues. In addition to deciding the stay issue, the Appeal Board will inform the Commission if it believes that the case raises issues on which prompt Commission policy guidance, particularly guidance on possible changes to present Commission regulations and policies, would advance the Board's appellate review. If the Appeal Board is unable to issue a decision within the sixty-day period, it should explain the cause of the delay to the Commission. The Commission shall thereupon either allow the Appeal Board the additional time necessary to complete its task or take other appropriate action, including taking the matter over itself. The running of the sixty-day period shall not operate to make the Licensing Board's decision effective. Unless otherwise

ordered by the Commission, the Appeal Board will conduct its normal appellate review of the Licensing Board decision after it has issued its decision on any stay request.

3. Commission

Reserving to itself the right to step in at any earlier stage of the proceeding, including the period prior to issuance of the Licensing Board's initial decision, the Commission shall, promptly upon receipt of the Appeal Board decision on whether the effectiveness of a Licensing Board decision should be further delayed, review the matter on its own motion. The parties shall have no right to file pleadings with the Commission with regard to the Appeal Board's stay decision unless requested to do so.

The Commission will seek to issue a decision in each case within 20 days of receipt of the Appeal Board's decisions. If it does not act finally within that time, it will state the reason for its further consideration and indicate the time it anticipates will be required to reach its decision. In such an event, if the Appeal Board has not stayed the Licensing Board's decision, the initial decision will be considered stayed pending the Commission's decision.

In announcing the result of its review of any Appeal Board stay decision, the Commission may allow the proceeding to run its ordinary course or give whatever instructions as to the future

handling of the proceeding it deems appropriate (for example, it may direct the Appeal Board to review the merits of particular issues in expedited fashion; furnish policy guidance with respect to particular issues; or decide to review the merits of particular issues itself, bypassing the Appeal Board). Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

#### 4. Application of Procedures

The above procedures apply only to matters considered in adjudicatory proceedings for the issuance of nuclear power reactor construction permits (including limited work authorizations) and operating licenses. They do not govern the issuance of an operating license (a) where no formal adjudicatory proceeding has been conducted on the merits of the application for the license or (b) to the extent that some of the matters considered in the course of the staff review of the operating license application have been neither placed in issue before nor determined by the Licensing Board or Appeal Board in the formal adjudicatory proceeding which was conducted on the application. Further, these procedures will not apply to appellate decisions in cases where a complete initial decision has been issued by a Licensing Board before the effective date of this Statement of Policy, or to partial initial decisions not authorizing issuance of new permits or licenses.

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When no formal adjudicatory proceeding has been conducted on an application for an operating license for a power reactor, and insofar as issues have not been placed in controversy or determined by the Licensing Board or Appeal Board in a formal adjudicatory proceeding on such an application, the Commission will informally review the recommendations of its staff on license issuance and any such license will be issued only after action of the Commission itself. In conducting such an informal review, there will be due regard for rights to a hearing as provided under present law.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended and Sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10 Chapter 1, Code of Federal Regulations, Part 2, are published as a document subject to codification.

1. Section 2.764 of 10 CFR Part 2 is amended by adding a footnote 1 at the end thereof to read as follows: "The temporary suspension of this rule in certain proceedings and related matters are addressed in Appendix B to this part."

2. 10 CFR Part 2 is amended by adding an Appendix B at the end thereof to read as follows: "Appendix B - Suspension of 10 CFR § 2.764 and Statement of Policy on Conduct of Adjudicatory Proceedings".

(Sec. 161, Pub. Law 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201, as amended, Public Law 93-433, 88 Stat. 1243, Public Law 94-79, 89 Stat. 413

(42 U.S.C. 5841)).

Dated at Washington, D. C. this **5<sup>th</sup>** day of November 1979.

FOR THE NUCLEAR REGULATORY COMMISSION

A handwritten signature in black ink, appearing to read "Samuel J. Chilkot", written over a horizontal line.

SAMUEL J. CHILKOT  
Secretary of the Commission