NUCLEAR REGULATORY COMMISSION

(Docket No. PRM-51-4)

Boston Edison Company, et al.;

Denial of Petition for Rulemaking

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Denial of Petition for Rulemaking, PRM-51-4

SUMMARY: The Nuclear Regulatory Commission is denying a petition for rulemaking, dated February 8, 1978, submitted to the Nuclear Regulatory Commission by Mr. Robert Lowenstein on behalf of the Boston Edison Co., Florida Power and Light Co., and Yankee Electric Co. (43 FR 9542, published 3/8/78). The petitioners requested that the Commission's regulations be amended to limit the scope of environmental review at the operating license stage to "those matters of environmental significance which have not been resolved in the environmental review conducted at the construction permit stage."

In denying the petition, the Commission found that the petitioners' argument was based on an erroneous assumption concerning the scope of an operating license safety review. In addition, the Commission found that if the proposed amendments were adopted, the result would be to foreclose Commission consideration of even significant new information at the operating license stage, a result which would be undesirable as a matter of law and policy.

Commissioner Victor Gilinsky dissented from the denial. He stated that a rulemaking proceeding should be initiated to determine which environmental matters can sensibly be excluded from reconsideration at the operating license stage.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Nuclear Regulatory Commission has denied a petition for rulemaking submitted by letter dated February 8, 1978 by Mr. Robert Lowenstein on behalf of the Boston Edison Co., Florida Power and Light Co., and Yankee Atomic Electric Co. A notice of the filing of the petition, Docket No. PRM-51-4, was published in the Federal Register on March 8, 1978 (43 FR 9542) and interested persons were invited to comment on the petition by May 8, 1978. Eleven letters of comment were received. Of these, eight supported the petition and three recommended denial. In addition, a comment recommending denial of the petition was received from the Council on Environmental Quality.

Background and Summary of Analysis

The petition requested that sections 51.21 and 51.23(e) of the Commission's regulations [1/] be amended to limit the scope of the environmental review conducted at the operating license stage to "those matters of environmental significance which have not been resolved in the environmental review conducted

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[1/] 10 CFR §§ 51.21 and 51.23(e).

at the construction permit stage." [2] The petitioners' proposed amendments would specifically exclude from consideration at the operating license stage such matters as need for the plant, need for power, alternative sites, and alternative energy sources.

The petitioners' proposed amendments are based largely upon an argument that the safety review performed by the Nuclear Regulatory Commission ("NRC" or "Commission") in an operating license proceeding is quite limited as compared to the safety review performed by the Commission in a construction permit proceeding. Petitioners argue that the scope of the review conducted pursuant to the National Environmental Policy Act [3] ("NEPA") in an operating license proceeding should be determined by the scope of the underlying safety review and concludes that the NEPA review at the operating license stage should be limited because the safety review at that stage is limited. However, as will be demonstrated below, petitioners' argument is premised upon the erroneous assumption that the operating license safety review is limited to a determination of "whether the plant was properly constructed, the adequacy of proposed technical specifications, the manner in which 'open items' were resolved, and the sufficiency of the final design." Contrary to petitioners' assumption, and as will be shown in greater detail below, basic questions of plant operating safety do remain to be finally determined at the operating license stage. Petitioners also cite the "rule of reason"

2/ Petition, at 1.

3/ 42 U.S.C. § 4321 et seq.

under NEPA and the Presidential policy to expedite nuclear power plant licensing as additional justification for limiting the operating license NEPA review. Petitioners give no rationale to support a conclusion that any and all consideration of the cited issues is unreasonable as a matter of law. While it might be legally possible to limit the NEPA review at the operating license stage to new information of significance to the ultimate decision, petitioners appear to go further and seek to foreclose Commission consideration of even significant new information. The Commission does not believe that, either as a matter of law or policy, significant new information can be ignored.

Thus, because the major underlying premise for the petition--that the operating license safety review is limited--is incorrect, and because the result which the petition would achieve--disregard for even significant new information at the operating license stage--is undesirable as a matter of law and policy--the Commission has decided to deny the petition.

Analysis of Petition

A. Scope of safety review at operating license stage.

Petitioners argue that the safety review at the operating license stage is far more limited than is the safety review at the construction permit stage. Petitioners reach this conclusion by first citing Section 185 of the Atomic Energy Act of 1954, as amended,[4/] its legislative history, and the Commission's regulations for the proposition that

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4/ 68 Stat. 921, 42 U.S.C. § 2011, § 2235 (1975).

issuance of a construction permit and operating license constitute only one proceeding. Petitioners argue that issuance of a construction permit requires the Commission to eventually issue an operating license upon making only limited additional findings since at the construction permit stage the Commission must find that the plant "can be constructed and operated without undue risk to the public health and safety."[5/]

Section 185 of the Atomic Energy Act, [6/] cited by petitioners states:

> Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant.

Petitioners cite the legislative history of this provision for the proposition that the drafters of the legislation felt a need to give assurance at the construction permit stage that an operating license would issue if certain conditions were complied with. This same argument was addressed by the Supreme Court in Power Reactor Development Co. v. International Union of Electrical, Radio and

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5/ Petition, at 9 (Petitioner's emphasis).

6/ Note 4, supra.

Machine Workers.[7] In PRDC, the Supreme Court looked at Section 185 and the very same provisions of the legislative history cited by the petitioners. It reached a conclusion contrary to petitioners':

> Even a glance at §185 suffices to show that issuance of a construction permit does not make automatic the later issuance of a license to operate. For that section sets forth three conditions, in addition to the completion of the construction, which must be met before an operating license is granted: (1) filing of any additional information necessary to bring the application up to date--information which will necessarily in this case include detailed safety data concerning the final design of petitioner's reactor; (2) a finding that the reactor will operate in accordance with the act and regulations--i.e., that the safety and health of the public will be adequately protected--and with the construction permit itself, which is expressly conditioned upon a full investigation and finding of safety before operation is permitted; and (3) the absence of any good cause why the granting of a license to operate would not be in accordance with the Act [8]

Thus, under long-established judicial precedent, petitioners' assertion that under the Atomic Energy Act issuance of a construction permit requires

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7/ 367 U.S. 396 (1961) [hereinafter cited as PRDC.] Petitioners cite the Commission's decision in PRDC for the proposition that findings at that time at the construction permit stage were, themselves, limited and did not address issues of plant operating safety. This point supports the view that the construction permit and operating license proceedings were not meant by Congress to be one proceeding. Indeed, the Supreme Court in PRDC held that the Commission could defer consideration of plant operating safety issues until after the plant was constructed.

8/ PRDC, note 7, supra, at 411.

the Commission to later issue an operating license upon making certain additional limited findings is incorrect.

Petitioners' second point is that the Commission's regulations themselves show that the Atomic Energy Act has been implemented in such a way that the safety review at the operating license stage is more limited than the review at the construction permit stage. Petitioner here cites the Commission's regulations in 10 CFR §§50.23 and 50.56.[9/] 10 CFR §50.23 merely refers one to 10 CFR §50.56. In §50.56 petitioners focus on language that says "the Commission will ... issue a license" and deemphasize the intervening words "the Commission will in the absence of good cause shown to the contrary issue a license." Yet, these words track the language of the Act and clearly show that the Commission is not obligated to issue an operating license.

In addition, petitioners' argument regarding practice under the regulations ignores another portion of the Commission's regulations, 10 CFR §50.35c, which states:

> (c) Any construction permit will be subject to the limitation that a license authorizing operation of the facility will not

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9/ 10 CFR § 50.23 reads as follows: "A construction permit... will be issued prior to the issuance of a license..., and will be converted upon due completion of the facility and Commission action into a [an operating] license as provided in Sec. 50.56". 10 CFR § 50.56 reads as follows: "Upon completion of the construction or alteration of a facility, in compliance with the terms and conditions of the construction permit and subject to any necessary testing of the facility for health or safety purposes, the Commission will, in the absence of good cause shown to the contrary issue a license of the class for which the construction permit was issued or an appropriate amendment of the license, as the case may be.

> be issued by the Commission until (1) the applicant has submitted to the Commission, by amendment to the application, the complete final safety analysis report, portions of which may be submitted and evaluated from time to time, and (2) the Commission has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the regulations in this chapter.

This provision indicates that issuance of an operating license entails much more than just a determination that the plant has been built in compliance with the construction permit. It indicates that major findings of plant operating safety are left to be finally made at the operating license stage.

In support of its argument that little remains to be resolved at the operating license stage, petitioners also assert that the list of outstanding issues in recent safety analysis reports is small. Whether the list is small or large is open to debate, depending on how one views the significance of some of the safety issues involved. What is clear is that it is quite common for resolution of at least some significant safety questions to be postponed until the operating license stage. It is not true that the operating license review is limited in the sense suggested by petitioners.

Finally, petitioners argue that Section 50.109 of the Commission's regulations regarding backfitting supports the view that the Commission considers most safety issues to be resolved at the construction permit state. That provision states:

> As used in this section, " backfitting" of a production or utilization facility means the addition, elimination or modification of structures, systems or components of the facility after the construction permit has been issued.10/

While petitioners' argument regarding this provision is not clearly set forth, it appears that petitioners are arguing that the backfitting rule reflects a licensing framework in which all major issues are finally resolved at the construction permit stage. This is not the case, as seen from the discussion above. The backfitting rule was never intended, and is not now used, to define the scope of review at the operating license stage.

In summary, petitioners' argument regarding the scope of the operating license safety review is without merit. The scope of the safety review at the operating license stage is not limited in the sense suggested by petitioners. Basic findings of the safety of plant operability remain to be finally made at the operating license stage. In fact, the Commission must there make a full-fledged safety finding that it has "reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the regulations ..."11/

B. Scope of NEPA review at the operating license stage.

Petitioners argue that the scope of the NEPA review at the operating

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10/ 10 CFR § 50.109(a).

11/ 10 CFR § 10 CFR § 50.35c.

license stage should not exceed the bounds of the underlying health and safety review of the application at this stage. Thus, as petitioners' argument goes, since the scope of the safety review at the operating license stage is limited the scope of the NEPA review should be similarly narrowed. However, in the preceding section, petitioners' argument that the scope of the safety review is limited is shown to be incorrect. It would follow, then, that the NEPA review cannot be limited on these grounds to exclude consideration of issues such as need for power, alternate sites and alternate energy sources.

There remains petitioners' argument based upon the "rule of reason." Our present regulations acknowledge that the NEPA review at the operating license stage must include consideration of new information or information different from that considered prior to issuance of a construction permit. Our present regulations also recognize that duplicating at the operating license stage the environmental review conducted at the construction permit stage is unnecessary. Thus, Section 51.23(e) of the Commission's regulations provides that:

> A draft environmental impact statement prepared in connection with the issuance of an operating license will cover only matters which differ from, or which reflect new information in addition to, those matters discussed in the final environmental impact statement prepared in connection with the issuance of the construction permit.

Petitioners themselves recognize that NEPA requires that "each agency decision-maker has before him, and takes into proper account, all environmental impacts of a particular project."[12/] Courts have held that an adequate NEPA review must be based upon the best information reasonably available at the time of the proposed action[13/] and that a new or supplemental environmental impact statement may need to be prepared where there are new or changed effects of significance to the environment associated with a proposed federal action.[14/] Indeed, the D. C. Circuit in Calvert Cliffs[15/] follows this view and states clearly that environmental impacts must be considered at the operating license stage but implies that this review need not duplicate the NEPA review at an earlier stage "absent new information or new developments, at the operating license stage."[16/] While it might be possible to limit the NEPA review to new information of significance to the ultimate decision on the proposed action, petitioners appear to go further and seek to foreclose Commission consideration of even significant new information. Such a result would be reached if, as petitioners suggest, the NEPA review at the operating license stage were confined to issues left unresolved at the construction permit stage and no account could be taken of new information that had been developed on the issues considered to be resolved.

12/ Petition at 17 citing Environmental Defense Fund v. TVA, 339 F.Supp. 806, 810 (E.D. Tenn., 1972) [Emphasis added].

13/ State of Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978).

14/ Essex City Preservation Ass'n v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976).

15/ 449 F.2d 1109, 1128 (D.C. Cir. 1971).

16 Id.

The premise here seems to be that no new information regarding these matters could ever be of any significance to the operating license decision. While this may be true, in some cases, petitioners offered no data or detailed argument to support the proposition, and we are reluctant to proceed on this matter without more information. While this would ordinarily lead us to defer action on the petition rather than to deny it, three special considerations here lead us to denial. First, present NEPA law allows the Commission to dismiss an alternative or other NEPA matter summarily if detailed consideration is not warranted, and new information regarding need for power, alternative fuels, and alternative sites could ordinarily be dealt with summarily at the operating license stage unless there is something about the case that suggests that a detailed review would produce some conclusions that would be of significance to the operating license decision. Second, the Commission does not now have resources to devote to the further study of these matters. We do have under separate consideration proposed rules that will address alternative site reviews at the construction permit and operating license stages. It is possible that, as a practical matter, there can be no significant new information as to alternate sites at the operating license stage. If we so conclude in the context of that rulemaking, we may then limit the scope of alternate site reviews in OL proceedings to the maximum extent permitted by law. While a reallocation of resources might be warranted at this time if the petition alleged that the promulgation of a new rule was required to protect health and safety or the environment, this is not the case here. Finally, the NEPA "rule of reason" argument is a subsidiary one in the petition. The heart of the petition is petitioners' argument regarding the scope of safety reviews at the operating license stage--an argument that we have rejected. Thus

we are denying the petition. When the Commission's own proposed rules on NEPA alternative site reviews are published for comment, petitioners are of course free to present us with additional information regarding alternative site reviews at the operating license stage in that context.

By letter dated October 4, 1979 petitioners requested an oral hearing on the petition. The Commission believes that the various papers before it, which include the petition, several letters of comment thereon, and a staff analysis, provide a full discussion of the legal policy issues raised by the petition. In view of this, the Commission has decided that oral hearings would not serve a useful purpose, and is denying the request. 17/

Commissioner Gilinsky dissented in the denial of the petition, as follows:

> "I am surprised that Commissioners who have so often called for regulatory reform have, when confronted by an opportunity to rationalize the Commission's procedures, opted to perpetuate a mindless bureaucratic exercise. I agree with the petitioners that it appears futile to reconsider matters such as the need for the plant and alternative sites at the operating license stage when the plant has been substantially completed. Preservation of this type of review seems to be a waste of time and money for the Commission and for those affected by our proceedings. I believe that we should grant the petition and initiate a rulemaking proceeding to determine which environmental matters can sensibly be excluded from reconsideration at the operating license stage."

17/ Commissioner Kennedy would have preferred that petitioners be given the opportunity to present their arguments orally to the Commission.

Copies of the petition for rulemaking, the comments thereon, and the NRC's letter of denial with Commissioner Gilinsky's dissent are available for public inspection and copying in the NRC Public Document Room at 1717 H Street, NW., Washington, D.C.

Dated at Washington, D.C. this 11th day of February, 1980.

For the Nuclear Regulatory Commission

Samuel J. Chilk
Secretary of the Commission