(9)

DOCKET NUMBER
PROPOSED RULE 2.50
(45 FR 34279)

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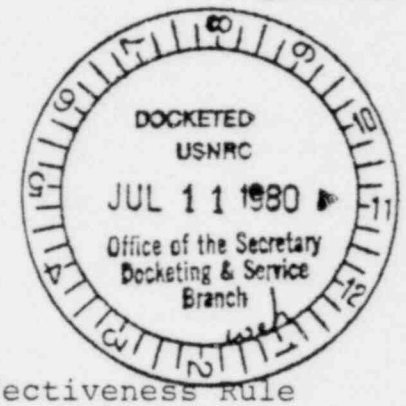
July 7, 1980



Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

RE: Possible Amendments to Immediate Effectiveness Rule

On Thursday, May 22, 1980, the Commission published a notice* that it was considering possible amendments to its "Immediate Effectiveness" rule** and related rules governing the issuance of stays in licensing proceedings. The possible rule changes contemplated by the Commission would affect the issuance of a construction permit or construction authorization subsequent to a hearing and initial decision by an Atomic Safety and Licensing Board. Comments were requested by July 7, 1980, and these comments are submitted, through counsel, on behalf of Public Service Company of Oklahoma ("PSO"). PSO is an applicant for a construction permit for the construction of a nuclear power reactor called the Black Fox Station. Since the Atomic Safety and Licensing Board has not yet rendered its decision on the safety issues from PSO's application, no construction permit has been issued in that proceeding. PSO is therefore vitally concerned with the outcome of the contemplated "Immediate Effectiveness" rule changes.

In its notice, the Commission set forth five options for the operation of its regulations governing when, and after what level of review, an Atomic Safety and Licensing Board initial decision in favor of a construction authorization or permit should lead to the actual authorization of construction. These options range from reverting to the pre-TMI system to making the post-TMI interim system permanent. The five options described in the Commission's

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* 45 Fed. Reg. 34279 (May 22, 1980)
** 10 C.F.R. §2.764

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notice involve three major policy issues. As the options are set forth in the notice, in combined form, the gravity of some of the changes contemplated by several of these options is submerged in complexity. Accordingly the fundamental issues are stated separately here.

The first issue is whether the practice of issuing Limited Work Authorizations ("LWA"), allowing site clearing and non-safety-related foundation work to begin after environmental and site suitability issues are resolved, is to be retained, modified, or abandoned. The second issue is whether the pre-TMI system whereby Licensing Board decisions result in LWAs or Construction Permits ("CP") prior to appellate review by an Appeal Board, and, if necessary, by the full Commission, is to be abandoned in favor of a system requiring full appellate review before effectiveness. The third issue is whether, if full appellate review is not to be required in every case, as a condition precedent, the existing stay mechanism is to be modified.

The Commission's Option A, which is to be implemented by making effectiveness an issue in the licensing proceeding, leaves LWA practice virtually unchanged but modifies both stay practice and appellate practice and in addition makes a change in the licensing board proceeding itself by requiring additional evidence and findings. This option allows 30 days after an initial decision in favor of CP issuance for an appeal seeking a stay to be filed and an additional 30 days for the Appeal Board to resolve the question before the initial decision would become effective. In addition, this option substantially relaxes the test a party seeking to prevent effectiveness must meet.

Option B makes a significant modification to the LWA procedure by adding issues to the site suitability portion of the licensing proceeding and also makes a major change in the appellate review practice by requiring completion of Appeal Board review, and potentially Commission review, before an LWA can issue. Stays with respect to LWAs are abolished as unnecessary.

Option C abolishes LWAs and requires full appellate review, including discretionary Commission

review, of Construction Permits before any construction can begin. This Option also abolishes stays as unnecessary.

Option D retains LWA practice and appeal practice unmodified but alters the mechanism for obtaining stays in two important ways. First, the time period within which a stay must be sought is extended to thirty days and second, the threshold test which a party seeking a stay must meet is significantly relaxed.

Option E, according to the Commission's description, retains the present system. It leaves the Commission's pre-TMI regulations unchanged.

As a preliminary matter, PSO does not believe that the Commission should either abolish the LWA system, as in Option C, or make serious changes in the LWA system, as in Option B, without a major policy review directed specifically at the LWA issue alone. There are many factors relevant to the issue of whether, and on what conditions, to issue LWAs, factors which are simply outside the scope of the "Immediate Effectiveness" issue. Such an important change as possibly abolishing LWAs should not be made as a collateral change while dealing with another issue but should, if necessary, be reviewed on its own merits. PSO therefore urges the Commission to set aside options B and C on that ground alone.

It would be feasible and appropriate for the Commission simply to reinstate its pre-TMI regulations unchanged (Option E) or to reinstate but modify the application of those regulations. In fact, adequate solution of the "Immediate Effectiveness" problem could be achieved by making straightforward changes in the system of granting stays which would bring the Commission in line with recent judicial practice. The Commission could reinstate its current regulations but issue new guidance to Licensing Boards as to the interpretation of its guidelines for the issuance of stays.* This guidance would in effect relax the test for obtaining a stay without making any rule changes.

There are two difficulties with either approach. PSO recognizes that reverting to preexisting regulations would appear to reflect a "business as usual" approach

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* 10 C.F.R. §2.788

on the Commission's part and is therefore probably not appropriate in the post-TMI era. More importantly, however, keeping present regulations would not respond to a real problem with the pre-TMI system beyond that of the standard for issuing stays, namely, that the time period allowed for seeking a stay is too short.

For the reasons stated below, PSO believes that the Commission's standards for granting stays should be relaxed. However, one of the Commission's alternatives, Option A, which is described as relaxing the stay standards, actually makes a major change in the licensing system by bringing major new issues regarding construction schedules, including the related discovery and presentation of evidence, into the licensing proceeding. PSO believes that this system would be both unnecessary and unduly cumbersome, since it would add an additional layer of complexity to an already complex and cumbersome licensing process. In addition, Option A shifts both the burden of going forward and the burden of proof from the party seeking the stay to the Applicant in the proceeding. PSO as noted further below, believes that the traditional balancing of equities required for injunctive relief should be retained as part of the stay procedure. The party best able to present equitable interests is the party having those interests. PSO therefore believes that both the burden of seeking a stay and the burden of proof regarding stay issues should remain on the party best able to present its interests, namely the party seeking the stay, not the Applicant. This alternative does have one attractive feature, however, in that it adds an additional thirty days to the delay period for effectiveness during which the Appeal Board considers and rules on the question of effectiveness.

In view of the multitude of difficulties inherent in the other Options, PSO recommends to the Commission that it adopt a modified version of Option D, i.e., relax the standards for issuance of stays of effectiveness. The Commission's Option D, which in essence extends the time period for applying for a stay and substitutes a single "substantial question" test for the four previous standards used to determine stay applications, is a step in the right direction but should be substantially improved as described below.

The Commission's current standards in its rule governing stays* are as follows:

> In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
>
> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties; and,
>
> (4) Where the public interest lies.

Option D would substitute the following for all four criteria for stays relating to construction:

> An application for a stay pending appeal of an initial decision [in favor of a CP or LWA] shall be granted if the appeal presents a substantial question concerning an issue related to the commencement of construction. (Emphasis added.)

This single criterion goes too far because it removes the balancing of equities which should be an important part of decisions for injuctive relief.

It is helpful in this regard to compare the §2.788(e) standards with the full text from which they were taken, namely the standards for granting stays in judicial reviews of administrative action which are laid down by the D.C. Circuit in Virginia Petroleum Jobbers.** The court stated and explained the criteria for such equitable intervention as follows:

> Essentially, four factors influence our decision: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without

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* 10 C.F.R. §2.788(e)

** Virginia Petroleum Jobbers Association v. F.P.C., 259 F. 2d 921, 925 (D.C. Cir. 1958)

> such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . Injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits. (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probably success and irreparable injury on the part of petitioner, the issuance of an stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgement that a stay represents. (4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. The public interest may, of course, have many faces - favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expenditing administrative or judicial action and preserving orderly procedure. We must determine, these many facets considered, how the court's action serves the public best.

With respect to the latter three factors, the NRC and its subsidiary boards must, in executing their statutory responsibilities, inevitably make judgements as

to these matters and cast a balance weighing the interests of the party seeking a stay, the interests of the Applicant, and the interests of the public. It is no particular hardship to require a Board or the Commission to determine a balance of these interests, which it must inevitably make in the course of the licensing process in any event.

An element of irreparable injury (criterion 2) is present in almost any case involving environmental issues. Surely the construction work involved in building a nuclear power plant would constitute irreparable injury should the construction permit prove to have been erroneously granted. On the other hand the injury may be slight if the error is small and curable, so that the ultimate legality of the issuance is not in doubt.

Moreover, the issuance of a stay would virtually always cause injury to the opposing party (criterion 3), the applicant, and to its shareholders and the ratepayers which depend on applicant for electrical service. The applicant has a statutory duty to provide adequate electrical service. Any delay caused by a stay will be reflected in increased expenses, delayed construction schedules, and higher cost electrical power or insufficient capacity to meet demand. As the Jobbers court notes, the tribunal must, in deciding whether to issue a stay, balance detriments to one party against detriments to another. Such a balancing is also an inherent part of the environmental side of the licensing process in any event, and should not prove insuperable to Boards in deciding whether to grant stays. Similarly, determination of where the public interest lies (criterion 4) is a necessary part of a licensing decision on environmental issues and must inevitably be balanced against the interests of the applicant and those of the intervenors.

The difficulty in administering these criteria arises almost solely because the required showing of likelihood of success on the merits (criterion 1) is too stringent for NRC administrative processes. The Commission requires a "strong showing" of likelihood of success on the merits. Requiring a "strong showing" is tantamount to requiring the party seeking a stay to ask a Licensing Board or its reviewing Appeal Board for a finding that the Licensing Board made a clearly erroneous decision with respect to a particular issue. The Licensing Board, with the evidence before it freshly considered, is unlikely in

the extreme to make such a finding; since the work of Licensing Boards is carefully done, Appeal Boards are only slightly less likely to make such a finding.

The use of such a high standard is probably inappropriate for an internal administrative procedure. The Jobbers court implied that its primary motivation for establishing such a high standard for injunctive relief was avoidance of judicial interference with orderly administrative procedure. This motivation is not compelling for Commission and Appeal Board orders with respect to decisions of their own inferior tribunals. The Commission has plenary power over its own procedures and need not remain at arms length, as a reviewing court should.

The D.C. Circuit itself recognized that strict application of the Jobbers criteria leads to difficulties and accordingly refined those criteria in 1977.* In this case the applicant for a stay had the balance of equities under the second, third, and fourth Jobbers criteria in its favor but had failed to make a showing of probable success on the merits. The court here held:

> [U]nder Virginia Petroleum Jobbers a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even through its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.**

It can not be emphasized too strongly that the court did not substitute the "substantial case" test for all four of the Jobbers criteria; rather, it substituted the "substantial case" test for the "strong showing" test. Thus, according

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* Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977).

** Id. at 843 (emphasis added).

to the court, the equities of the final three criteria should still be balanced along with the showing of a "substantial case" on the merits.

PSO urges that the Commission adopt the D.C. Circuit approach to the question of stays for construction authorizations or permits by amending 10 C.F.R. §2.788(e)(1) for those cases to incorporate the "substantial case" or "substantial question" test but preserve §§2.788(e)(2) through (4) intact. In addition, however, to remove the element of unfairness inherent in the short time period for application for a stay, PSO recommends that the Commission extend the application period to 30 days as option D would, but in addition, provide, as did Option A, for an additional 30 days within which Appeal Board would be required to rule on the stay request.

The Commission's inquiry here flows out of its comments in its Seabrook opinion of January 6, 1978.* As the Commission itself acknowledged in its directive that a study be made of the problems in the Seabrook case, the effort was directed at taking up "site-related issues in potentially troublesome cases . . . . before large sums of money are committed and sites irrevocably altered." Although Seabrook presented a number of troublesome procedural problems, the fact remains that Seabrook is an isolated case, and the Commission should avoid the over-reaction that is inherent in Options A, B, and C.

The basic procedures of the licensing process, including the immediate effectiveness rule and the procedures for obtaining a stay, are sound. If the Commission relaxes, in the appropriate way, its standards governing the issuance of stays so that they are no longer inappropriate to an administrative appellate procedure, anachronistic, in the sense that they are no longer followed by the Court which laid them down, and unfair in the sense that they require definitive action in too short a time frame, it will have remedied

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* Public Service Company of New Hampshire (Seabrook Units 1 and 2), 7 NRC 1, 7.

the problem it set out to solve without creating more difficult problems in its place.

Sincerely,

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