

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

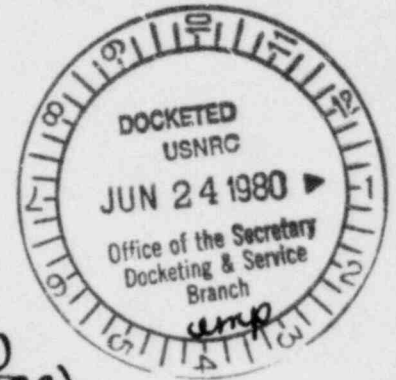
BEFORE THE COMMISSIONERS

In the Matter of)
)
Fire Protection Program for) Rule Making
Nuclear Power Plants Operating) SECY-80-88
Prior to January 1, 1979)
(10 C.F.R. Part 50))

DOCKET NUMBER

PROPOSED RULE

PR-50
(45 FR 36082)



MOTION TO PRODUCE DOCUMENTS FORTHWITH AND
TO EXTEND THE DATE FOR SUBMITTING COMMENTS

KMC, Inc. ("KMC") is a consultant to eleven utilities which have operating licenses or have operating licenses pending before the Nuclear Regulatory Commission ("NRC") which are affected by the Commission's proposed rule on fire protection. KMC moves that the Commission order its Staff to immediately produce certain material requested pursuant to the Freedom of Information Act ("FOIA") and to extend the time for the filing of comments on the proposed rule.

Having considered the fire protection matters since the Browns Ferry fire in 1975, the Commission on April 24, 1980 voted to publish a proposed rule in the Federal Register, as described in the text set forth in SECY-80-88, "Fire Protection Actions," dated February 13, 1980, copies of which were made available at that time to the public.

However, over one month later, on May 29, 1980, the text

of the proposed rule was published in the Federal Register.^{1/}
The published text differed substantially in many areas from that approved by vote of the Commission. Neither the public transcript of the proceeding nor the Statement of Consideration indicates that the Commission authorized the changes except as may be inferred from the separate comments of Commissioners Hendrie and Kennedy.

Because the text of the proposed regulation was manifestly different and because no explanation was given, KMC filed a Freedom of Information Act ("FOIA") request on May 30, 1980, the day after publication, to determine the origin and basis for these changes.

Without this information, neither KMC nor its clients are in a position to make meaningful comments on the proposed regulation. The FOIA request was properly labeled "Freedom of Information Act Request" as provided in 10 C.F.R. §9.8 and was stamped in by the Office of the Secretary on that date (see Attachment 1).

Yesterday, on June 23, twenty-three calendar days (sixteen working days) after the filing of the FOIA request, KMC was advised by a Commission employee that an additional ten working days would be required before the request would be acted upon. According to the staff person, the fact that the FOIA request had been filed with the Office of the Secretary, the Commission's designee for such purposes, was irrelevant, because the time periods specified

^{1/} 45 F.R. 36082

in 10 C.F.R. §9.8 applied only after it had reached her office. The fact that an additional ten working days for production of the material would necessarily extend beyond the final date for filing comments on the proposed rule was also considered irrelevant.

As noted above, the need for understanding the basis for the changes in the proposed regulation is critical to the filing of meaningful comments. This fact prompted the filing of the FOIA request as soon as the changes in the text were discovered. The fact that the Staff was apparently unable to deliver the request to the responsible Office and that the Staff has not been able to act upon the matter more quickly cannot justify the Commission's closing the comment period on June 30, when critical information presumably setting forth the basis for the changes in the proposed Appendix R has not been disclosed.

In this proceeding the Commission provided to the public the Staff paper designated SECY-80-88 as the basis and justification for the proposed fire protection rule. It is patent that, inasmuch as the terms of the proposed Appendix R published in the Federal Register differ from that set forth in SECY-80-88, the basis and/or justification have changed.

Had the Commission not made this Staff paper available as the basis for its actions, it is possible that the Federal Register notice alone might have been sufficient. However, the Commission elected to produce to the public SECY-80-88 as the basis for the

position it adopted in April. It cannot adopt a different position in May without setting forth its reasons. The absence of reasons that permit a rational understanding of the basis for the rulemaking demonstrates a failure to consider the complex issues involved in this proceeding, and the record as it now stands reflects a lack of inquiry appropriate to the changes made.

The Administrative Procedure Act ("APA"), 5 U.S.C. 553, requires that an agency acting in a quasi-legislative capacity must set forth the basis for its action. As stated in Home Box Office, Inc. v. F.C.C., ^{2/} such statements by an agency

are intended to assist judicial review as well as to provide fair treatment for persons affected by the rule . . . To this end there must be an exchange of views, information, and criticism between interested persons and the agency. (emphasis in original) (citations omitted)

The NRC must "publish a statement of reasons that will be sufficiently detailed to permit judicial review" and must "illuminate the process by which [it] arrived at the regulation." ^{72/} ^{3/}

The proposed Appendix R would have a serious impact upon all reactors licensed for operation prior to January 1, 1979 and its requirements would obviously be largely applicable to reactors of later designs. The impact of proposed Appendix R would impose an excessive burden upon the industry, without any demonstrated advantage

^{2/} 567 F.2d 9, 35 (D.C. Cir. 1977).

^{3/} Alabama Association of Insurance Agents v. Board of Governors of the Federal Reserve System, 533 F.2d 224, 236 (5th Cir. 1976) ["AAIA"].

to safety.^{4/} To adopt this rule without allowing meaningful comment would be prejudicial to the rights of the regulated industry.

On timeliness, had the FOIA Request been acted upon promptly, KMC, on behalf of the utilities it represents, might have had sufficient time to prepare comments by June 30. It had, in fact, scheduled a meeting for that purpose with representatives of each utility for today, June 24. However, the fact that no information was forthcoming from the Commission necessitated the cancellation of the meeting. It will be necessary to review the bases for the changes in the proposed Appendix R in order to discuss and determine what comments will be made. Moreover, under existing Commission procedures both for review of this motion and for the production of documents, it is unlikely that the requested information can be made available in time for meaningful comments to be filed by June 30.

For these reasons, KMC moves that the Commission

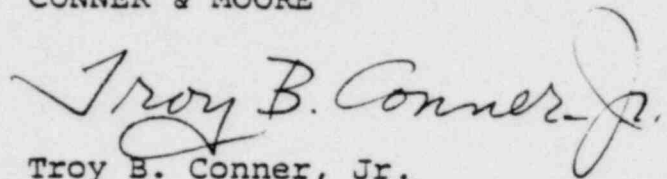
1. order the production forthwith of the information requested by KMC in its letter of May 30, 1980; and
2. extend the date for submitting comments on the proposed rule from June 30, 1980 until at least thirty days following the date that

^{4/} It is of some significance that in the five years since Browns Ferry, there have been no reactor fires having any radiological health and safety impact.

the information requested in the May 30,
1980 FOIA Request is made available to
KMC for review and copying as provided in
the regulations.

Respectfully submitted,

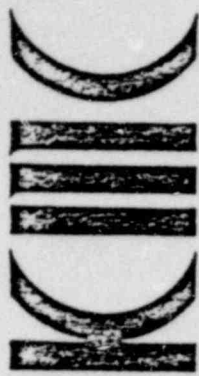
CONNER & MOORE

A handwritten signature in cursive script that reads "Troy B. Conner, Jr." with a large, stylized flourish at the end.

Troy B. Conner, Jr.
Counsel for KMC, Inc.

June 24, 1980

A77.1



May 30, 1980

RONALD F. KNUTH
President

Director, Office of
Administration
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Freedom of Information Act Request

Dear Sir:

KMC, Inc. is a consultant to eleven utilities in the area of fire protection of nuclear power stations and intends to participate on the rulemaking proceeding on Fire Protection. On April 24, 1980, the Commission voted to publish in the Federal Register a proposed rule whose text was contained in SECY-80-88. Copies of that document were made available on that date to members of the public attending the public meeting. On May 29, 1980, the proposed rule was published in the Federal Register. It was substantially different in many areas from that approved for publication by vote of the Commission. The public transcript of the proceeding does not indicate that the Commission authorized any change in the text from that presented in SECY-80-88.

KMC, Inc. requests, pursuant to the Freedom of Information Act, 5 USC 552 and 10 CFR Part 9, that all memoranda documents or other records which requested, directed or discussed any changes to the rule, as attached to SECY-80-88 and/or provided bases, opinion or mention of those changes be made available to us pursuant to your regulations. In addition, we would request that the record of the Commission's vote (pursuant to Section 201 of the Energy Reorganization Act of 1974) regarding these changes prior to the transmittal of the proposed rule to the Federal Register be made available to us.

Sincerely,

Donald F. Knuth
Donald F. Knuth

AFFIDAVIT

District of Columbia, ss.

I, Donald F. Knuth, am the President of KMC, Inc. and do hereby swear that all of the facts contained in the attached "Motion to Produce Documents Forthwith and to Extend the Date for Submitting Comments," are true and correct to the best of my knowledge and belief.

Donald F. Knuth

Subscribed and sworn to before me this 24 day of June, 1980.

:

Joe L. Hershey
Notary Public

My Commission expires on the 14 day of April, 19 81.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion to Produce Documents Forthwith and to Extend the Date for Submitting Comments," dated June 26, 1980, in the captioned matter, have been served upon the Secretary of the Commission by delivery to the Public Proceedings Branch, and upon Howard K. Shapar, Director, Office of the Executive Legal Director by deposit in the United States mail this 26th day of June, 1980.


Troy B. Conner, Jr.