

ARIZONA



PUBLIC SERVICE COMPANY

P. O. BOX 1666 PHOENIX, ARIZONA 85036

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ANPP-15875-EEVBJr

PROJECT NUMBER

PR-250

12

PROPOSED RULE

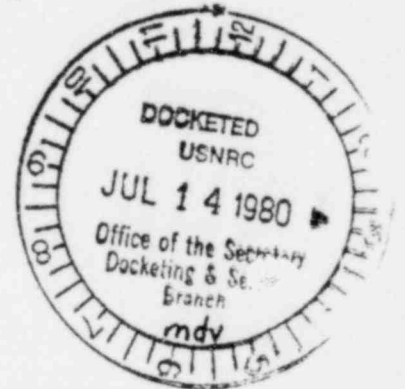
(45 FR 34279)

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rulemaking Concerning Amendments to  
"Immediate Effectiveness" Rule  
45 Federal Register 34279 (May 22, 1980)

Dear Sir:



The purpose of this letter is to provide the comments of the Arizona Public Service Company (APS) on the Nuclear Regulatory Commission's proposed rulemaking on possible amendments to the Commission's "immediate effectiveness" rule (10 C.F.R. 2.764). The proposed rulemaking, which was published in the Federal Register on May 22, 1980, consists of alternative amendments to the rule. The Commission is also considering retaining the present rule unchanged.

The alternative amendments to the rule are the results of a study performed by the Federal Advisory Committee (Committee), which was established by the Commission in January of 1979. The study is documented in "Report of the Advisory Committee on Construction During Adjudication", NUREG-0646 (December, 1979).

The options discussed in the proposed rulemaking can be summarized as follows. Option A requires the Licensing Board to make a separate ruling on the question of whether its initial decision should be immediately effective. Option B requires a final decision on construction related issues before construction can begin. Option C requires a final decision on all issues before construction can begin. Option D retains the present rule but with significantly loosened standards for obtaining a stay. Option E retains the present rule unchanged.

In NUREG-0646, the committee lists fifteen findings resulting from the research it had conducted. These findings, which have been reproduced from NUREG-0646 and are attached hereto (Attachment 1), serve as the basis for the Committee's proposed alternative amendments. In examining the Committee's

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findings, it appears that five of them support the consideration of a change in the immediate effectiveness rule. These are Findings Nos. 2, 5, 6, 10, and 13.<sup>1/</sup> The remainder of the findings either suggest reasons why the rule should not be changed, or are generally neutral with respect to the need for a change.

If a change in the present rule is warranted by the results of the Committee's study, presumably it would be on the strength of one or more of the five findings listed above. However, for the reasons set forth below, it is the position of APS that the five findings do not present a convincing case for a change in the immediate effectiveness rule.

Finding No. 2

"The immediate effectiveness rule, together with the current stay standards, creates an adverse public perception and detracts from public confidence in the licensing process. Once full-scale construction gets underway and the site is cleared it is difficult for a layman to believe that subsequent appellate review could stop the plant."

Response. Finding No. 2 identifies two factors which lead to an adverse public perception and lack of public confidence in the licensing process--the immediate effectiveness rule and current stay standards. As pointed out in Finding No. 9, the stay criteria of Virginia Petroleum Jobbers, which are the same as those applied by the courts in judicial review of administrative proceedings, have never been met in NRC proceedings. However, and as also pointed out in Finding No. 9 "no proponent of a stay has ever prevailed ultimately on the merits." Thus, there is no evidence to suggest that the stay criteria have barred the granting of a well-founded stay request, and there is no basis to change the stay criteria.<sup>2/</sup>

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<sup>1/</sup> Finding No. 9 at first glance may suggest need for a change. However, to the extent a change should be considered, it should be associated with a change in the stay criteria, and not a change in the immediate effectiveness rule. The need for a change in the stay criteria is addressed in the response to Finding No. 2, infra.

<sup>2/</sup> In spite of the Virginia Petroleum Jobbers criteria, the Appeal Board and/or Commission have granted stays in construction in some cases. The Committee indicates that in a study of published NRC decisions through March, 1979, there were 31 requests to stay construction. Of those 31 requests, 4 were granted, although none of the 4 has granted under Virginia Petroleum Jobbers. (NUREG-0646 at 4-14) The Committee does not indicate what formed the basis for the decisions in the 4 cases where a stay was granted.

With respect to the reversal of an initial decision once construction has commenced, it is clear that a Licensing Board's initial decision is not a final decision. Both the Appeal Board and the Commission can substitute their own views for those of the Licensing Board, even though the Licensing Board's opinion is based on substantial evidence and is not clearly erroneous. Although it may be difficult for a person opposed to construction to believe that subsequent appellate review could stop the plant after construction gets underway, the fact is that Commission practice does provide for the termination of construction if such is warranted.

The problem of adverse public perception may be based in part on the apparent difficulty faced by the losing party in making a timely application for a stay pending the outcome of an appeal. (See Finding no. 10). As suggested in the response to Finding No. 10, this problem can be rectified by providing a suitable period following issuance of the initial decision for the party opposed to construction to prepare and file an application for a stay.

Finding No. 5

"The immediate effectiveness rule creates a risk of serious economic and social dislocation due to temporary stays or reversals on the merits after construction has begun. The Seabrook licensee has given one estimate of the substantial economic cost it incurred because of the Commission's stay of construction in 1978".

Response. The concerns identified in this finding must be viewed in perspective. Although there is a risk of economic and social impact, the risk is an acceptable one. No site has ever been ultimately refused by a Licensing Board or an Appeal Board. (See Finding No. 1 at 1-1; NUREG-0646, subsection 3.5.2(2) at 3-54). Thus, it is unlikely that an initial decision on the site location would be reversed on the merits. With respect to the economic risks, the money committed during the first six to nine months after issuance of the construction permit is small compared to money spent before and after that period. (See NUREG-0646, subsection 3.5.1(5) at 3-52). In any event, the economic risk of a temporary stay after construction has begun is acceptable when compared to the certain costs of delay associated with a repeal of the immediate effectiveness rule or a significant relaxation in the standards for a stay.

The Committee points to the Seabrook decision as illustrative of the magnitude of the potential costs involved when a stay is granted. The problem with citing Seabrook is that the decision represents a highly exceptional case. A change in the immediate effectiveness rule should not be based on such exceptional cases where the change would result in unnecessary financial impact to the vast majority of nuclear power plants.

Finding No. 6

"The immediate effectiveness rule makes it likely that substantial environmental impacts will occur before the administrative process is complete".

Response. The Commission's rules provide that after service of an initial decision, any party may file an application for a stay of effectiveness pending the filing of and decision on an appeal. (10 C.F.R. §2.788). Furthermore, in those cases where such action is warranted, the Licensing Board, Appeal Board or Commission may grant a temporary stay to preserve the status quo without waiting for the filing of any answer to the application for a stay. (Id. §2.788(g)).

The stay could remain in effect during the time a reviewing body determines on the merits whether the Licensing Board's initial decision should be reversed. Thus, the Commission's present regulations do provide protection against the risk of immediate high environmental impact.

It must also be kept in mind that by the time the Licensing Board has reached its initial decision, the application for a construction permit has gone through extensive review. This review includes a detailed review by the regulatory staff, the opportunity for public input through the NEPA EIS process and the construction permit hearing, and the Licensing Board's own review. In view of this extensive review and the competency of the licensing boards, it is not surprising that "no construction permit has ever been refused on appeal from a Licensing Board decision". (NUREG-0646 at 1-1) Thus, there is no evidence that environmental impacts should not be permitted on the basis of initial decisions.

Finding No. 10

"Under the present system, the losing party to an initial decision does not have a fair opportunity to file a stay motion. The staff can issue the construction permit or limited work authorization and site clearing can begin before the losing party's attorney receives a copy of the opinion, or has time to read it, analyze it, and formulate an intelligent stay motion. In Seabrook, the applicant was able to state that the issue of clearing the site had become moot by the time the stay was argued because the site had already been cleared".

Response. Although the problem identified in this finding appears to be meritorious, it can be rectified without any radical change in the immediate effectiveness rule. The solution was identified by participants in the July, 1979 workshop conducted by the Committee and discussed in NUREG-0646 at pages 3-51 to 3-55. The solution consists of providing some fixed period of time after the initial decision for the party opposing construction would be permitted. A period of 20 days would seem to be ample time for this purpose. If no party opposes immediate effectiveness, the period could be dispensed with.

Finding No. 13

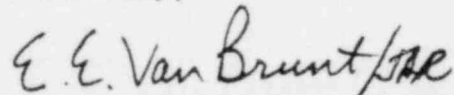
"The present system makes it unlikely that the Commission itself will be able to review any case until substantial construction has occurred. This complicates the Commission's alternate site review because of the sunk costs rule. Also, it may cause the Commission to feel pressure during its review".

Response. It must be reiterated that the present system does provide the opportunity for Commission review where such review is warranted. Through the stay mechanism, including, where appropriate, the opportunity for a temporary stay based on an oral application, an opponent to construction can, if the standards for a stay are met, obtain a stay in construction pending review by the Commission.

In those cases where a stay is not obtained, and the opponent's objection has some merit, a utility would most likely defer making significant expenditures. The utility realizes that if it proceeds to incur costs in the face of an appeal, or, for that matter, while an application for a stay is being considered, it does so at its own risk. Proceeding with construction provides no guarantee that the initial decision will not be reversed. The accumulation of sunk costs provides no such guarantee. Furthermore, sunk costs are already significant at the time of an initial decision. As already noted, construction costs during the first six to nine months after the construction permit is issued are small compared to what it spent before and after that period.

Based on the foregoing, it is APS' position that if the findings made by the Committee show a need for a change in the immediate effectiveness rule, the only change required would be to provide the party opposed to construction time in which to file an application for a stay after issuance of an initial decision. The radical changes to the immediate effectiveness rule suggested by the proposed rulemaking are not warranted.

Sincerely,



E. E. Van Brunt, Jr.  
APS Vice President  
Nuclear Projects  
ANPP Project Director

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