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PROPOSED RULE PR-2

(46 FR 20215)

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May 4, 1981

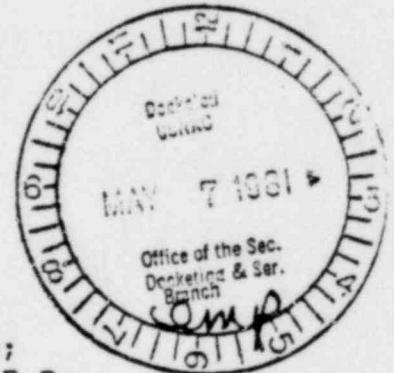
Samuel J. Chilk, Esq.  
Secretary  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Re: "Immediate Effectiveness" Rule;  
Proposed Modification of 10 C.F.R.  
Part 2, Appendix B

Dear Mr. Chilk:

On April 3, 1981, the Commission published for comment a proposal containing two options for the modification of 10 C.F.R. Part 2, Appendix B, with respect to issuance of operating licenses. 46 Fed. Reg. 20215. As attorneys representing a number of utilities and a fuel fabricator involved in the Commission's licensing process we wish to comment on the proposed changes.

It is our position that neither of the two options proposed in the Commission's notice should be adopted. Instead, the Commission should promptly rescind Appendix B to Part 2 in its entirety. Appendix B was adopted by the Commission in 1979 without prior notice and comment and was made immediately effective. 44 Fed. Reg. 65049. It therefore can be rescinded without further formality. In any event, the Commission has had before it



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for some ten months comments concerning Appendix B as it relates to construction permits, and it now is receiving further comments concerning the issuance of operating licenses. There will be ample record support for the Commission's decision if it determines to rescind Appendix B.

The Commission's April 3 notice represents the fifth time that the Commission has requested public comment on the "immediate effectiveness" rule. See 44 Fed. Reg. 33883 (1979); 44 Fed. Reg. 65049 (1979); 45 Fed. Reg. 6873 (1980); 45 Fed. Reg. 34279 (1980). It is indeed difficult to understand what further information the Commission requires prior to taking action.

We respectfully refer the Commission to our extensive prior comments on this issue in our letters of March 17, 1980 and July 7, 1980. Those comments fully support the conclusion that 10 C.F.R. §2.764 should be retained and Appendix B eliminated. Of course, our prior comments were directed primarily to the application of the "immediate effectiveness" rule to initial decisions authorizing the issuance of a construction permit. The same reasoning supports permitting initial decisions authorizing an operating license to become effective immediately. In particular, we would refer the Commission to the information contained in Table B-2 of NUREG-0646. That Table, which is a study of all operating license cases in which a stay was requested by a party or considered sua sponte, shows that there has been no case in which the proponent of a stay has ultimately prevailed on appeal. In addition, the only instance in which a full-term operating license was stayed sua sponte was in 1973, when the Appeal Board ordered a temporary partial derating of Vermont Yankee. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-141, 6 A.E.C. 576 (1973). Thus, the historical record supports the conclusion that there have been no adverse consequences to the public health and safety from permitting operating license decisions to become effective immediately.

In supporting the retention of §2.764, we have previously indicated that it would be permissible to delay the effectiveness of an initial decision authorizing a construction permit for up to 15 business days in order to afford opposing parties a reasonable time in which to seek a stay. In the case of an operating license decision, we do not believe that a similar modification would be appropriate. The cost of delaying operation of a completed

plant for even a single day is large and well documented. No delay in operation beyond the issuance of an initial decision should be tolerated under the Commission's procedures. In addition, the issuance of a full power operating license does not mean that full power operation will begin immediately. Even where the operating license has been preceded by a low-power license, further power testing at ascending levels is required. Accordingly, in the hypothetical case where power testing is commenced under an operating license and a stay is found to be justified a few weeks later, the accumulation of fission products during the interim will have been quite low.

In conclusion, we strongly recommend that the Commission forthwith rescind Appendix B. If the Commission is not prepared to eliminate Appendix B entirely, it should promptly adopt Option B in its April 3 notice and permit operating license decisions to become effective immediately.

Sincerely,

*Le Boeuf, Lamb, Leiby & MacRae*