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February 9, 1981
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- It provides a period of several years for uninterrupted design work by the licensee, the NSSS vendor, and the architect engineer.
- It provides for uninterrupted construction.
- It encourages design innovations which can lead to safety improvements.
- It gives the licensee the option to seek an early NRC review of specific design features by way of a construction permit amendment.

While the licensee proceeds at the risk that the NRC may disapprove portions of the final design, the advantages outweigh this risk by a large measure.

The Advance Notice identifies three alleged "problems" or apparent disadvantages of the current regulatory approach: no clear basis for determining when a change requires a formal CP amendment; no clear basis for enforcement of CP requirements; and encouragement of litigation to bind applicants to many details of the application. Although we do not believe that the first two problems are severe as a practical matter, the alternatives proposed by the NRC could provide more clarity but, as we discuss in our attached detailed comments, at an unacceptable cost. With respect to the third problem, we doubt that any of these alternatives would reduce litigation. On the contrary, they may well increase litigation as to the additional design details that will need to be covered in applications and as to the meaning of the new regulations required to change the two-stage process.

Thus, in our view, the benefits to be achieved by any of the proposed changes in the licensing process would be limited and are far outweighed by the severe problems that would be created. Each construction permit amendment would trigger an opportunity for a hearing. Each hearing would interrupt design and construction and result in delay. A stream of construction permit amendments could add years to the time already required to obtain an operating license. The effect of these disruptions on the economics of the nuclear option would be devastating.

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Based on the foregoing, we believe that all of the alternatives are ill-conceived. A proposal to change the fundamental regulatory process is particularly inappropriate when it is couched in terms of imposing limitations on changes which a construction permit holder can make. If a fundamental change is contemplated, it should be noticed as a proposal to change the basic character of the regulatory process.

We urge the Commission to cease this rulemaking effort, and to devote the resources which would otherwise be used here to identify ways to streamline licensing and to reduce delays.

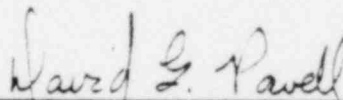
Our detailed comments are attached.

We appreciate the opportunity to comment on this proposal.

Sincerely,

LOWENSTEIN, NEWMAN, REIS & AXELRAD

by



David G. Powell

DGP:jcj
Attachment

Detailed Comments
by
Houston Lighting and Power
and
Puget Sound Power and Light
on the
Advance Notice of Rulemaking:
Design and Other Changes in
Nuclear Power Plant Facilities
After Issuance of
Construction Permits
45 Fed. Reg. 81,602 (Dec. 11, 1980)

Background

In the Advance Notice, the Commission states "that a rule should be considered that would improve the present licensing process and develop specific descriptions of the essential features of a facility (including quality assurance programs and other procedures and staffing requirements) to which the holder of a CP would be bound . . ." According to the Notice, the "key problem" is to clarify and specify the information to which the CP holder is to be bound, the point in the licensing process at which he should be bound, under what circumstances, and through what means.

The Commission expresses a concern that the present licensing system provides no guidance either regarding notification of design changes which an applicant makes after a CP is issued or, even assuming notification is given, the type of NRC Staff response to be made. In the Commission's view, the present system creates three problems. First, the existing process provides "no clear basis upon which [NRR] can assess definitely whether changes in facility design, permittee pro-

cedures, or staffing after issuance of a CP require a formal CP amendment; second, there is no clear basis on which [I&E] can enforce requirements in a CP." Third, the Commission implies that the present process is deficient in some way because, "since it provides no ground rules about the changes CP holders may make" intervenors in CP hearings are required "to litigate many details" of the application in order "to bind applicants" to certain features in the CP.

The rulemaking proceeding is intended to alleviate those problems by addressing the foregoing objectives, alternative means of accomplishing them, and advantages and disadvantages of each alternative. To that end, the Notice discusses five alternatives discussed by the NRC Staff:

- (1) maintain the status quo;
- (2) establish general criteria for determining circumstances requiring notification and CP amendment;
- (3) define "principal architectural and engineering criteria", which would mean that any deviations from the parameters of that definition would require a CP amendment;
- (4) require that all details of the application, including the PSAR, be made conditions of the CP, which also would mean that any deviations from those details would require a CP amendment; or

(5) restructure the licensing process "to require that sufficient plant design details and equipment performance specifications be provided in the PSAR so that the safety analysis can be essentially a final one." Thereafter, upon review and approval, the "important safety-related features of the design would be made conditions of the CP and could not be changed without prior Commission approval." 45 Fed. Reg. 81,603.

The Commission states that it "tentatively prefers" implementation of Alternative 3 with a shift to Alternative 5 on June 1, 1983. The Notice indicates that rules based on the concepts of Alternatives 2, 3 or 4 could be imposed immediately, but that Alternatives 2 and 3 could provide an interval for holders of CPs to implement the rule. It acknowledges that Alternatives 4 and 5 could be applied practicably only to new CPs.

The Commission has requested comments on its Advance Notice, and has "particularly sought" comments which discuss advantages and disadvantages of the alternatives, including cost or implementation schedules "and the extent to which any such rule should be applied to existing construction permit holders." Id.

Summary of Position

We have serious reservations regarding whether the present licensing process should be changed at all, particularly with respect to the alternatives suggested by the Commission as being its preference. As discussed in more detail below, this is so for three reasons. First, we question whether there is in fact a need for the Commission to amend its regulations. Put briefly, we seriously doubt that the burdens imposed on both the industry and the NRC in terms of effort, expense, and delays in the licensing process which will result from promulgating and implementing regulations such as those discussed in Alternatives (2) to (5) of the Notice will return a concomitant benefit to the public health and safety. Second, even assuming that there may be benefits to clarifying or otherwise changing existing regulations in some respect, we do not believe that such changes should be applied to CPs which are already in the licensing pipeline, i.e., CPs which have already been issued or applications for CPs which are now pending before the Commission. To so apply such rules would seriously delay, as well as increase the engineering effort for, and the cost of, the ongoing licensing activities with respect to such CPs. We do not believe that prospective benefits would compensate for such delays and disruptions. Third, we believe that if Alternative (5) is to be considered seriously for application to future CPs, such consideration should be in a different context than the current proposals. Such proposal would be one ingredient of doing away with the

two-step licensing proceeding now mandated by the Atomic Energy Act and substituting instead a one-step licensing process. The advantages and disadvantages of such a one-step process need to be considered carefully, and would have to be accompanied by other changes in regulations to assure that the purpose of the one-step process is not frustrated by subsequent regulatory procedures.

No demonstrated need for a change
in the present regulatory scheme.

The Notice contains no clear statement of the benefits to the public health and safety which would be realized by adopting, singly or in combination, any of Alternatives (2) to (5). The Notice does refer to three "problems" which a rulemaking, if undertaken, would be designed to alleviate. However, the Notice does not discuss whether and to what extent these identified problems involve safety questions of a nature which requires implementation of any of the alternatives. Certainly, we see no danger to the public health and safety inherent in the present system, nor do we see any such danger in the three "problems" cited by the Commission.

Before the Commission decides to undertake a rulemaking on this matter, it should carefully weigh the costs to NRC and industry of promulgating and implementing such regulations against the safety benefits (once clearly identified) which will accrue to the public health and safety. To adopt and implement rules covering any of Alternatives (2) to (5) will require a substantial commitment of resources, manpower and

financial, from both the industry and the NRC Staff. The present limited availability and management of resources necessary to respond to post-TMI concerns, participate meaningfully in the many important rulemaking proceedings which are already pending before the Commission, and carry out the normal ongoing licensing reviews cannot be ignored. And if yet another layer of regulatory review is imposed on this framework -- which is what these proposed regulations will do -- the result can only be to diffuse further the resources available to do the job. The industry and the NRC should not be burdened in this fashion, particularly in the absence of a demonstrated need.

During the Commission's analysis of the costs and benefits of the proposed regulation it should keep in mind that, under the present two-step licensing system CP reviews have been conducted, and CPs have been issued, with the understanding that the major part of the detailed design will be done after the CP is issued, and will be reviewed at the operating license stage. However, regulations which would implement any of Alternatives (2) through (5) would result in a single step licensing process, by forcing an applicant (unless he is willing to submit numerous applications for amendments to his CP) to prepare and submit essentially a final design at the CP stage. It makes no sense to restructure radically the licensing process unless there is a real and compelling need, from a safety standpoint, to do so. No such need has been shown, and it is our view that after the Commission performs an assessment

of the costs and benefits of such regulations it will conclude that the costs far outweigh the benefits.

Changes in the licensing process
will have adverse effects.

Should the Commission adopt rules in line with Alternatives (2) to (5) there will be significant adverse effects on CPs which are already in the licensing pipeline. In fact, the problems associated with applying such regulations to current CPs and pending applications for CPs are so serious we do not believe that any such rules should be adopted. Instead, the Commission should retain the licensing status quo. Should the Commission not retain the status quo, and adopt such regulations, the result inevitably will be a substantial delay in an already-lengthy licensing process, as well as increased engineering effort and costs.

These effects would arise notwithstanding which of the suggested alternatives the Commission might choose to adopt. Though the majority of the comments which follow are directed to the impacts of a rule which would reflect the Commission's expressed preference (a combination of Alternatives (3) and (5)), similar problems also exist with respect to Alternatives (2) and (4).

For example, though Alternative (2) appears on its surface to be the least disruptive of any of the four alternatives, its adoption would require substantial commitments by applicants and NRC Staff. As the Commission is well aware, under

the present licensing system CPs are issued with much of the final design of the facility not completed. Alternative (2) would establish "general criteria" for determining "circumstances" under which notification and CP amendments are required. However, any such criteria are likely to be meaningless without substantial design details against which to apply them. Therefore, we believe that the result of adopting such criteria would be to force more and more final design features to completion at the CP stage. And because it would be the Commission's intent to apply such a rule immediately, the impacts of such requirements on current and pending CPs would be substantial.

Adoption of Alternative (4) would also be unacceptable. Alternative (4) would result in a rule which would simply require that all details of an application including, but not limited to, the PSAR be made conditions of the CP, which then could not be changed without prior Commission approval. Although the Commission believes that a rule along the lines of Alternative (4) could be imposed immediately, it acknowledges that such a rule could practicably be applied only to new CPs. In our view such a rule cannot be applied to existing CPs and should not be applied to pending or future CP applications. It would force CP applicants either to prepare an "OL" level PSAR or to accept the necessity of filing a myriad of CP amendments with the Commission. Therefore the consequences of such a rule on pending and future applications for CPs would be substantial and intolerable. We discuss those effects in more detail below (pp. 12-13).

As the Commission discussed in its Advance Notice, it is inclined to adopt a procedure which would take effect in two steps. The first step would be a rule (presumably effective immediately) defining "principal architectural and design criteria" (Alternative (3)). The second step (effective after June 1, 1983) would be a rule requiring an essentially final design to be submitted for review and approval at the CP stage (Alternative (5)).

The impacts of the first on current CPs can only be described as formidable, for they would be directly and immediately affected. The Atomic Energy Commission previously attempted to define such criteria in 1969. The comments on that proposal made it clear that such a rule would of necessity be so broad and inclusive as to require that the design of the facility be complete at the CP stage, unless an applicant were willing to apply continually for CP amendments. In light of those comments the AEC determined that the proposed definition required "further study." 45 Fed. Reg. 81,602-81,603. Now, however, the Commission proposed to revive that earlier rulemaking, using "information learned to date." Id. The "information learned to date" is presumably that reflected in the 1975 and 1977 Staff studies cited in the Advance Notice, since nothing else is referred to. An examination of such studies shows that the later information has not cured the earlier infirmities associated with promulgation of any such rule. If anything, such later developments have only served to highlight the problems associated with arriving at such a

definition. For example, the 1977 Staff study proposed developing the "principal architectural and design criteria" utilizing the acceptance criteria of the Standard Review Plan. In the view of the Staff, such a process would result in a final list containing more than seven hundred "principal architectural and design criteria." "Response to Staff Requirements Memorandum (Affirmation Session 79-40) With Respect to Post-CP Design and Other Changes," SECY-8-90, (Feb. 14, 1980), p. 10. If this definition were adopted, no changes could be made in any of these criteria without first obtaining an amendment to the CP.

The added regulatory burden inherent in this Notice stands in stark contrast to the Commission's Advance Notice of Proposed Rulemaking published in the Federal Register on July 8, 1980 concerning changes to its regulations pertaining to the technical specifications (tech specs) for operating reactors. (45 Fed. Reg. 45,916) The Commission noted that the ever-increasing volume of tech specs for operating reactors may be reducing the needed focus on matters of importance to safe reactor operation. The Commission acknowledged that the increasing volume and detail of tech specs and the resultant increase in the number of change requests that must be processed has greatly increased the paperwork burden on both licensees and NRC Staff without a corresponding health and safety benefit. Therefore the Commission announced its intent to find a way to limit the coverage of tech specs to real safety questions in order to minimize the need for unnecessary amendments which detract from

safety. The current proposals to define "principal architectural and design criteria" and thus create the potential for numerous additional reviews and licensing proceedings, inexplicably run directly counter to the intent of that enlightened Commission approach.

According to the Advance Notice, Alternative (3) could be imposed immediately, with some unspecified allowance for transition for CPs which have already been issued. Holders of existing CPs would be expected to develop lists and descriptions of features subject to the rule. 45 Fed. Reg. 81,603. Imposition of this rule would have a significant effect on holders of CPs, who would be required to divert their attention from ongoing engineering and design work in order to prepare the list of criteria required by the rule. That preparation would involve, among other things, the meshing of the developing and developed detailed design and engineering features with the items on the list. Once the list is prepared, the NRC Staff presumably would have to review and approve it, which would involve further commitment of resources on the part of both applicant and the Staff. And once this list is adopted, the CP holder would be precluded from making changes in any of some seven hundred different criteria, absent a CP amendment.

These problems would be severe for all CP holders and CP applicants. Whatever benefits Alternative (3) would achieve -- and we see very little -- would be particularly outweighed in

instances where the CP holder has filed or is about to file an FSAR. Certainly nothing could possibly be gained under those circumstances by forcing the applicant and the NRC Staff to laboriously produce and review a lengthy list of criteria containing no substantive information which would not be necessarily contained in the FSAR. Surely this would entail only meaningless labor and potential delay with no compensating safety benefit. Another significant problem, and one on which the Advance Notice is totally silent, is the matter of CP amendments themselves, which would involve substantial uncertainties. Under the Sholly decision (Sholly v. NRC, ___ F.2d. ___ (D.C. Cir., Nov. 19, 1980), mandate stayed, January 8, 1981.) regardless of pre- or post notice, any application for amendment to a CP requires a hearing to be held if one is requested. Moreover, no CP amendment may be issued until the hearing is completed. Therefore, if Sholly represents applicable law the potential exists for each amendment to a CP to be litigated prior to its issuance.

Thus, Alternative (3) has the potential of not only creating numerous unnecessary licensing reviews, but also for endless litigation and potentially serious disruptions of construction for no significant benefit.

Although the Commission notes that Alternatives (4) and (5) can practicably be applied only to new CPs, it is silent concerning whether this would include currently pending

applications. As we discuss below, whether such a change to a one-step licensing process should be adopted even with respect to new applicants should be considered in a wholly different framework. However, under no circumstances should such Alternatives be applied to pending applications.

Such applications were prepared and filed in reliance on the licensing process which has been in effect since the first regulations were adopted implementing the Atomic Energy Act. These applications have had extensive NRC Staff review, some are in the midst of an active licensing process, including hearings. Depending how Alternatives (4) and (5) are applied, such applicants might have to upgrade the PSAR to FSAR status before receiving a CP. Not only would the manpower and cost to prepare and review such an upgraded filing be enormous, but the licensing delay, including hearing disruption, would be intolerable. If, alternatively, such applicants are bound to every detail contained in the PSAR and can make no implementing or refining change without a CP amendment regardless of safety significance, the potential future delays in finalizing design or in completing construction would similarly be intolerable. Obviously, both alternatives are senseless and inequitable.

Thus, for the reasons discussed above, the potential effects of rules in accordance with Alternatives (2) to (5) on CPs in the licensing pipeline would be substantial. Such

rules would significantly delay either issuance of a CP or design and construction of a facility, increase the cost to applicants, and divert significant resources of both applicant and the NRC Staff from other, more important duties, without making any additional contribution to public health and safety.

"One-step" licensing should
be considered separately.

As mentioned above, we are concerned that if the Commission implements rules in accordance with Alternative (5) the result will be to require a "one-step" licensing process, whether or not an applicant wishes to complete his design prior to NRC approval of a CP. If such a radical restructuring of the current licensing system is to be done, then the NRC should consider the matter in a separate proceeding. The task would be a complicated one, for clearly many conforming changes would have to be made in the regulations. Indeed, the Commission may conclude, after considering the matter, that the difficulties in implementing a true "one-step" licensing process by regulation are so formidable that appropriate legislation should be considered. In any event, a change of this magnitude cannot be cavalierly considered under the guise of improvement of the licensing process concerning enforcement of construction permits.

Conclusion

For the reasons set forth above, the Commission should evaluate carefully the issues inherent in undertaking a rule-making proceeding to adopt any of Alternatives (2) to (5). The evaluation should include a weighing and assessment of health and safety benefits to be realized as opposed to costs to be incurred. We believe that when the Commission completes its assessment it will conclude that the present licensing process should remain unchanged and that no rulemaking proceeding should be undertaken at this time.

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