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May 1, 1981

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

Dear Mr. Chilk:

Enclosed please find the "Union of Concerned Scientists Comments on Proposed Amendments to 10 CFR Part 2, Appendix B: The Immediate Effectiveness Rule."

Very truly yours,

Ellyn R. Weiss

ERW/dmw
Enclosure

L-4-1, #2.2

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UNION OF CONCERNED SCIENTISTS
COMMENTS ON PROPOSED AMENDMENTS
TO 10 CFR PART 2, APPENDIX B:
THE IMMEDIATE EFFECTIVENESS RULE

Introduction

The Commission has proposed to rescind 10 CFR Part 2, Appendix B, promulgated after the TMI-2 accident, which requires approval from the Commissioners for issuance of new construction permits and operating licenses. According to the preamble to the proposal, the Commission has decided that post-TMI licensing requirements are "sufficiently settled" that Commission-level review of new licenses "may no longer be necessary." Therefore, "to avoid unwarranted and expensive delays," the Commission proposes two alternatives to Appendix B. The Union of Concerned Scientists believes that neither alternative is acceptable. Option B, returning to the pre-TMI status quo where Licensing Board decisions were immediately effective, is unjust and was discredited long before the TMI accident. Option A, a new two-tiered review process featuring simultaneous Appeal Board and Commission-level resolution of whether the Licensing Board decision should be stayed pending appeal, is unwieldy and unrealistic. Appendix B should be retained in its current form.

Continued Commission Review Is Warranted

The Commission states that its review of new licenses is no longer warranted since the post-TMI requirements are

now settled. It is difficult to discern the basis for this apparent confidence, since the Commission has not yet reviewed even one contested operating license proceeding which presented TMI-related safety issues. The issues are only "settled" to the extent that no outside party has yet challenged them. Moreover, on one of the few cases which has come up for Commission review - Sequoyah - that review resulted in significant changes to the design proposed by the licensee and approved by the staff.

It is wholly incorrect to assume that future operating license cases will present only routine issues. On the contrary, the Commission has yet to face a number of basic safety questions relating to the sufficiency of the TMI-related requirements which will be presented by pending contested cases. The resolution of these questions will require the setting of policy at the Commission level. This is the Commission's responsibility and it cannot be avoided by delegation to the staff, Licensing or Appeal Boards. Thus, there is an important reason why the Commission should affirmatively review all new operating licenses for at least some substantial period of time.

The Two Options Presented Are Unacceptable

This proposal borders on the disingenuous in failing to even acknowledge the fact that the immediate effectiveness rule, the "status quo" to which Option B would return, was under serious challenge well before the TMI accident. As a direct result of the Seabrook decision, the Commission established a special

advisory group chaired by University of Wisconsin Law Professor Gary Milhollin, to study the impact of the immediate effectiveness rule and to recommend such changes as they might believe necessary. After over a year of proceedings, the group published its final report (NUREG-0646) to the Commission. The majority recommended abolishing the immediate effectiveness rule and proposed several possible replacements.

Subsequently, on May 22, 1980, (45 Fed. Reg. 34279) the Commission published a notice of proposed rulemaking, offering several alternatives to the immediate effectiveness rule. All of the alternatives involved significant changes to the immediate effectiveness rule. No final action on this rulemaking has yet been taken by the Commision, yet it now proposes for rulemaking two additional options, including retention of the status quo, without even making reference to the work of the advisory group or the pending rulemaking on the same subject.

The immediate effectiveness rule undermines the integrity of the appellate processes of the Commission in the most fundamental way. Because the record of an evidentiary hearing is long and complex, it is quite simply impossible for any appellate body to determine whether a Licensing Board decision should be stayed until it is either too late for the stay to be effective or until momentum too great to overcome has been generated. The current stay standards require a review of the record which is impossible to make and the presumptions in the standard operate against a stay. If the Commission is serious about the value and integrity of its appellate review process then basic justice demands

that the decisions of the Licensing Boards not be effective until the appellate body is given a fair opportunity to determine whether grounds for a stay exist. We will not reiterate here all of the arguments against the immediate effectiveness rule combined with the current "stay" standards; we urge the Commission at least to review the report of the Milhollin group and the docket of the Proposed Rulemaking of May 1980 before reverting back to the very rule under review there, a rule which was widely discredited long before the accident at Three Mile Island. A copy of UCS's comments on the Proposed Rulemaking of May 22, 1980 are attached.

Option A is an administrative nightmare. It is highly unlikely that in 30 days, without either the benefit of any briefing by the parties or any prior knowledge of the record, the Commissioners could make a reliable assessment of whether the Licensing Board decision should be stayed. Meanwhile, at the same time that the Commission is making its decision without benefit of briefing, the parties are to be briefing the stay issues to the Appeal Board, but the Commission decision is to come before the Appeal Board's. This is not only wasteful and duplicative, it is also unreasonable to suppose that the Appeal Board would overrule the superior body.

Moreover, the standard for a stay at the Commission level raises very troubling questions. Option A would permit the Commission to stay an operating license only "if it determines that operation would prejudice correct resolution of serious

safety issues." Thus, the clear presumption is that an applicant has an absolute right to operate a new plant even if the Licensing Board was incorrect so long as changes could be made later. This standard is fundamentally inconsistent with the principle that operating licenses are to be granted only to applicants who meet all of the requirements for a license. Since virtually all errors can eventually be corrected, by plant shutdown if nothing else, this standard would operate to effectively preclude the granting of stays without regard to the magnitude of the safety issues involved or the amount of time that the issue might remain unresolved. Thus, in reality Option A is virtually the same as Option B, with immediate effectiveness attaching to a Licensing Board decision at the end of 30 days instead of the customary 10 days required for issuance of a license subsequent to a Licensing Board decision.

Conclusion

The Commision estimates that review pursuant to Appendix B takes approximately 80 days. Option A could allow a new plant to go into full power operation 50 days earlier, while Option B could allow operation 70 days earlier. Considering the 40 year lifetime of a plant and the period of approximately 10 years for design, construction and licensing, this period of time is a miniscule price to pay for Commission review prior to the operation of new plants in the aftermath of Three Mile Island. It is infortunately symptomatic of the current pressure to

stampede the issuance of new licenses that the Commission would consider reverting to the old immediate effectiveness rule or a variant thereof in order to get plants into operation 50-70 days earlier than they would otherwise be. Appendix B should be retained.

Respectfully submitted,

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Counsel for the Union of
Concerned Scientists

DATED: May 1, 1981

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSSION

Proposed Rule Making

UNION OF CONCERNED SCIENTISTS
COMMENTS ON POSSIBLE AMENDMENTS
TO "IMMEDIATE EFFECTIVENESS" RULE

By Federal Register notice dated May 22, 1980 (45 Fed. Reg. 34279), the NRC proposed four alternative modifications to those sections of 10 CFR Parts 20 and 50 comprising the so-called "immediate effectiveness rule." The Union of Concerned Scientists ("UCS") believes Option C, repeal of the rule, is the most appropriate action. The other options would improve the current system and are preferable in descending order: B, A, D.[1/] Retention of the present rule would be, in our view, wholly unacceptable.

There can be no serious doubt that the immediate effectiveness rule in its present form is grossly unfair both in actual effect and in appearance, undermines the basic integrity of the licensing process and is inconsistent with generally-accepted practice in the large majority of other federal agencies particularly those which provide for an automatic appeal as of right.

The Seabrook proceeding provides the starkest example of the injustice of the present rule. In that case, the Appeal Board

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1/ The unfortunate acronym is entirely unintentional.

denied intervenors initial requests for a stay of construction. By the time the Appeal Board was able to review the factual record, upon which basis it reversed the Licensing Board's decision on site-related issues, the plant was already substantially into construction and the site had been cleared and bulldozed. As the crowning injustice, the Commission later ruled that, in weighing Seabrook against alternatives, the money spent during construction pursuant to a legally incorrect and later reversed Licensing Board decision would be counted as an advantage of Seabrook and a detriment to all other alternatives. This ruling, which is presumably still good NRC precedent, gives the lie to the assertion that pre-appeal construction is at the "peril" of the applicant. The peril, of course, is to the public interest, and to the ability of the Appeal Board and the Commission to render an unbiased decision on the basis of the evidence on the record, all of which becomes hostage to the speed of construction.

A nuclear project is a long and complex one, subject to the processes of federal, state and local law, to the restraints of the financial community, and to the vagaries of suppliers, vendors and labor. Every objective study done on the length of time required to put a nuclear plant on line has shown that the NRC adjudicatory process is not a dominant factor in lengthening lead time. It is specious to maintain that an additional period of perhaps six months

to review the correctness of licensing decisions will have a substantial impact on the cost of a project. As compared to the present impact on construction schedules of labor and supply problems, of slowed demand growth and of a balking financial community, this additional time is trivial. One need only look at the history of plants currently under construction to confirm this fact.

Moreover, it costs far less to defer the beginning of construction for six months than to suspend construction at a later date for that same six months, after a substantial labor force has been hired. In our opinion, the utilities so strongly support immediate effectiveness not because it makes projects less costly but because they recognize as we do that the onset of construction hopelessly prejudices subsequent appeals and makes the project a fait accompli. This is not a legitimate regulatory purpose.

UCS believes that Option C, calling for repeal of the immediate effectiveness rule, is the best one. Since the Appeal Board is required by the regulations to review every case, it makes no sense to prejudice that appeal by allowing construction to begin while it is pending. In addition, this approach is clearly the least cumbersome, since it eliminates the need for briefing, argument and review of a separate and additional set of issues related to whether interim construction should be permitted. Freed of the need to rule on such stay-related issues, the Appeal Board should be able to expeditiously review the merits of appeals within six months.

Option B, mandating a final decision on LWA issues prior to construction, is less desirable than Option C, but still an improvement over present practice. Our basic objection is that it would add a substantial amount of work for all parties and the Board and would tend to fragment the process for a questionable gain to applicants. It would seem dubious at best, considering the additional time required to brief, argue and decide the LWA-related issues, that Option B would result in a significantly quicker decision on construction than Option C.

Option A, adding effectiveness as an additional issue for the Licensing Board is, again, an improvement over the current rule. However, it is even more cumbersome than Option B and will drain the resources of the parties and the Licensing and Appeal Boards. It is our firm view that this system would end by actually increasing over Option C the amount of time from the beginning of construction permit hearings to the date at which the decision is made on whether to begin construction. The minimum time required to build a record before the Licensing Board on the schedule for construction and to brief, argue and decide the issue of whether a "substantial question" on site-related issues has been presented, plus the time for Appeal Board review of the ASLB's findings on these questions, would be substantial. It would be quicker and certainly far more efficient to simply repeal the immediate effectiveness rule and move directly to the merits before the Appeal Board,

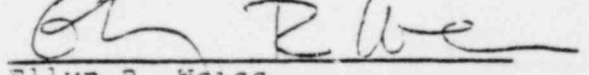
as provided by Option C.

Option D, calling for retention of the present system with loosened "stay" standards is a minimal improvement over present procedure. Any system which requires the Appeal Board to make the crucially important decision on whether construction may begin on the basis of only a preliminary and, by necessity, cursory review of the record is unsatisfactory. In addition the thirty days which this Option would allow for the intervenors to review the record and brief the stay issues and for the Appeal Board to review the pleading and record, and to decide the issues, is wholly inadequate.

Conclusion

UCS urges the Commission to adopt Option C, repealing the immediate effectiveness rule. This option is the fairest, least complex and most efficient of the resources of all involved.

The Union of Concerned Scientists

By: 

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