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LABEL NUMBER **PR-2**
 RECEIVED RULE **46 FR 20215**



May 6, 1981

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

Attention: Docketing and Service Branch

Dear Mr. Chilk:

These comments are submitted on behalf of Commonwealth Edison Company ("Commonwealth") in respect of the NRC's proposed changes to the immediate effectiveness rule. 46 Fed.Reg. 20215 (April 3, 1981). The possible rule changes contemplated by the Commission would affect the issuance of construction permits and operating licenses and related rules governing issuance of stays subsequent to hearings and initial decisions by Atomic Safety and Licensing Boards. Commonwealth is an applicant for operating licenses for three nuclear power plants at LaSalle County, Byron, and Braidwood. Two of these applications, Byron and Braidwood, have been contested and are presently being litigated before Licensing Boards. It now appears that construction of these facilities will be completed before initial decisions authorizing plant operation can be rendered. Therefore, Commonwealth is vitally concerned with the outcome of the contemplated "immediate effectiveness" rule changes, since unless appropriate changes are made, appellate review could lead to months of unjustified additional delay in start up of these facilities.

Commonwealth applauds the Commission's recognition that delays in the NRC licensing process which lead to delays in construction and operation of nuclear power plants can lead to staggering economic waste. We are encouraged by the NRC's apparent resolve to expedite its decision-making process, as reflected in the proposed rule changes. However, instead of the NRC's proposed changes we support outright revocation of Appendix B to 10 CFR Part 2 and a return to the immediate effectiveness rule in 10 CFR §2.764 and the traditional stay criteria set forth in 10 CFR §2.788(e), for the reasons stated below.



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It is essential to recognize that the immediate effectiveness rule only comes into play after an initial, favorable decision by a Licensing Board in a contested proceeding. Often the initial decision represents the end product of years of litigation and months of careful consideration by the Licensing Board. When the issuance of operating licenses is involved, the Advisory Committee on Reactor Safeguards has also approved the safety of the facility. Under existing regulations, of course, licensing boards have authority to stay effectiveness of their own initial decisions pending appellate review or further decision by the Commission, when good cause exists. 10 CFR §2.788. The Appeal Board and the Commission also have authority to issue stays pending appeal. 10 CFR §2.788. Inherent in any suggestion that the immediate effectiveness rule needs to be repealed or limited in some fashion is the assumption that the NRC Staff and the NRC Licensing and Appeal Boards and the ACRS, do not or may not in the future carry out their respective duties. In Commonwealth's experience, there is no foundation for such distrust. The Staff, the licensing boards, and the ACRS are comprised of conscientious and competent persons who perform their function thoroughly and responsibly. Therefore, unless a party can establish that the risk of serious error is so great as to warrant a stay, the initial decision should have immediate effect. This, after all, is precisely the system in effect in the federal judicial system.

Of the two options presented in the Federal Register notice, Commonwealth prefers Option B, which represents a return to the immediate effectiveness rule, subject to certain new limitations. Option A (Expedited Commission Review) is unacceptable. To be blunt, we do not believe the Commission is capable of completing its review of the issuance of a fuel loading/low power testing decision within 10 days, or its review of a full power operating license determination within 30 days. Recent experience clearly supports this judgment. Although proposed Option A states "the parties shall have no right to file pleadings with the Commission with regard to this Commission review

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unless requested to do so by the Commission...", we think it is highly unlikely that the Commission will be able to digest and meaningfully review a record which may represent months or even years of hearings, without routinely asking for help from the parties, resulting in significant further delays.^{2/}

Option B is clearly preferable to Option A. Nevertheless we see two significant problems. First, Option B only restores the immediate effectiveness rule with respect to the issuance of operating licenses. Issuance of construction permits must still await the completion of Appeal Board and Commission review. This delay is not, in our view, justified. More importantly, insofar as Commonwealth Edison is concerned, the standards which the Appeal Board and the Commission will use in granting stays on their own motion in operating license decisions are highly objectionable. Option B states that in deciding stay questions, in addition to the factors set out in 10 CFR §2.788(e), the Appeal Board will give

[P]articular attention to whether issuance of the license or permit prior to full administrative review may prejudice review of significant safety or environmental issues. In addition to deciding the stay issue, the Appeal Board will inform the Commission if it believes that the case raises issues on which prompt Commission policy guidance, particularly guidance on possible changes to present Commission regulations and policies, would advance the Board's appellate review. 46 Fed.Reg. 20217.

Elsewhere the Commission reserves to itself the right, "in a particular case to determine that compliance with existing regulations and policies may no longer be sufficient..." 46 Fed.Reg. 20218. These criteria go too far because they appear to open the door to last-minute

^{1/} Commonwealth also has serious objections to the standards for issuing stays set forth in Option A which are similar to the standards set forth in Option B, discussed below.

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changes in NRC policies and regulations, at a point in the licensing process where it is most likely to cause the most delay and accomplish the least good. Further, we hope the Commission is not suggesting that it can change its regulations or other rules without observing the minimum requirements of the Constitution and the Administrative Procedure Act, for example, without even allowing the parties most affected to comment. In Commonwealth's view, regulations and policies should be changed through careful rulemaking, rather than in the course of expedited stay decisions affecting issuance of individual facility operating licenses.

We appreciate that the Commission feels an obligation to involve itself in the licensing process more than it has in the past. But we believe that it is not realistic or practicable or reasonable for the Commission, at the very last step in the licensing process, to try to learn everything concerning the facility in question and rethink any of its policies and regulations which may be implicated by issuance of the operating license. If regulations and policies need to be changed, or additional guidance is needed, this should be done for all facilities as soon as possible, independent of the exigencies of appellate review of individual licensing proceedings. Commonwealth reiterates its support for returning to the traditional immediate effectiveness rule and the traditional Virginia Petroleum Jobbers stay criteria.

We appreciate the opportunity to submit these comments.

Sincerely,



Vice President

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