May 18, 1981 SECY-81-311

RULEMAKING ISSUE
(Commission Meeting)

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: Proposed Rule Amending Part 2

Discussion: Attached for your consideration is a draft Federal Register Notice soliciting public comment on several proposed changes to 10 CFR Part 2. These amendments would require a person seeking intervention in formal NRC hearings to set forth the facts on which he bases his contention and the sources and documents he uses to establish those facts, limit the number of interrogatories that a party may file on another party in an NRC proceeding, and permit the Board to require oral answers to motions to compel and service of documents by express mail. OGC, the Chairman of the ASLAP, the ASLBP and OELD concur in the proposed draft.

Leonard Bickwit, Jr.
General Counsel

Attachment:
Draft Proposed Rule

Distribution:
Commissioners
Commission Staff Offices
EDO
ACRS
ASLBP
ASLAP

CONTACTS:
Trip Rothschild, OGC
4-1465

C. W. Reamer, OGC
4-1493

[7590-01]

NUCLEAR REGULATORY COMMISSION

[10 CFR Part 2]

RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

Modifications to the NRC Hearing Process

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY: The Nuclear Regulatory Commission is considering several amendments to its Rules of Practice to facilitate expedited conduct of its adjudicatory proceedings. These amendments would require a person seeking intervention in formal NRC hearings to set forth the facts on which he bases his contentions and the sources or documents which he uses to establish those facts, limit the number of interrogatories that a party may file on another party in an NRC proceeding, and permit the boards to require oral answers to motions to compel and service of documents by express mail.

DATES: Comment period expires on _____ (20 days after publication in the Federal Register). No requests for extensions of time will be granted.

ADDRESSES: All interested persons who desire to submit comments in connection with the proposed amendments should send them to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of comments on the proposed amendments may be examined at

the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Martin G. Malsch, Esq., Deputy General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (202-634-1465).

SUPPLEMENTARY INFORMATION: In recent weeks the Commission has been examining its hearing process to determine if there are means to expedite the hearing process without reducing its quality or fairness. As a result of this review the Commission has sought comment on several proposed amendments to 10 CFR Part 2, the Commission's Rules of Practice (46 Fed. Reg. 17216, March 18, 1981) and issued a "Statement of Policy on the Conduct of Licensing Proceedings". The Commission is soliciting comments on the following additional changes to the Commission's Rules of Practice:

1. Intervention in NRC Proceedings

Formal administrative hearings are always conducted by NRC as part of its proceedings on applications for construction permits for nuclear power plants and frequently on applications for operating licenses and license amendments. Any member of the public whose interest may be affected by the proceeding is entitled to participate in NRC hearings under 10 CFR 2.714 and section 189a of the Atomic Energy Act (42 U.S.C. 2239a).

The Commission is concerned that its present intervention process is not satisfactorily serving the public's interest in efficient resolution of nuclear plant licensing issues. Trial-type hearings are generally acknowledged as best-suited for the resolution of contested factual issues. Thus, one means to more efficient decisionmaking is to reduce the possibility that time and resources may be expended by the parties and hearing tribunals in a proceeding on issues that do not involve material factual disputes. To this end, the proposed amendment seeks to relate the Commission's rules on intervention (10 CFR 2.714) more clearly and directly to the fact-oriented character of NRC licensing hearings. Under the proposal, a person who petitions to intervene and request a hearing would be required to set forth at the outset the facts on which he bases his contention and the sources or documents which he has used or intends to use to establish those facts. This requirement would help deter intervenors who do not intend to litigate actively their claims and would give other parties early notice of an intervenor's case so as to afford opportunity for an early motion for summary disposition where there is no factual dispute. The Commission official designated to rule on intervention questions could dismiss or otherwise impose a sanction respecting any petition, request, or contention that could be determined not to a satisfy the requirement.

The Atomic Energy Act of 1954, as amended (42 U.S.C. 2239a) provides that "the Commission shall grant a hearing upon the request

of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." Commission rules for intervention (10 CFR 2.714(b)) further provide that a person who petitions to intervene in a proceeding must later submit "a supplement to his petition to intervene which must include a list of contentions which petitioner seeks to have litigated ... and the bases for each contention set forth with reasonable specificity." To participate as a party, the petitioner must advance at least one contention that satisfies this requirement. The requirement of a list of contentions was intended to serve as the mechanism by which a would-be intervenor informs the parties to the proceeding and the hearing tribunal of the issues upon which he wishes to be heard. The list of contentions, in turn, was intended to crystallize the question whether such issues are germane to matters properly within the scope of the proceeding as set out in the notice of hearing or notice of opportunity for hearing. Admitted contentions are included as matters in controversy in a proceeding and, thus, govern the scope of administrative discovery under 10 CFR 2.740(b)(1).

Under present practice, the Commission official designated to rule on intervention questions examines each contention to determine whether (1) the contention is stated with the requisite specificity, (2) the basis is adequately delineated, and (3) the issue sought to be raised is cognizable in an individual licensing

proceeding. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216-17 (1974).

The examination is limited to what appears within the four corners of the contention as stated. No inquiry is made into the merits of the contention. All that is required is that the petitioner "state his reasons (i.e., the basis) for his contention ...." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980). The petitioner is under no obligation to demonstrate the existence of some factual support for a contention, as a precondition to its acceptance under 10 CFR 2.714. That obligation currently arises later in the proceeding, either in opposition to a motion for summary disposition filed by another party (10 CFR 2.749) or at the evidentiary hearing. ALAB-590 supra, 11 NRC at 549-51.

Under the proposed amendment, an interested person petitioning to intervene in an NRC licensing proceeding and requesting a hearing must set forth in the supplement required by 10 CFR 2.714(b) a concise statement of the facts supporting each contention together with references to the specific sources and documents which have been or will be relied on to establish such facts. Thus, the amendment would strengthen one of the purposes of the present rule, which is to give notice to the parties and the adjudicatory board of a would-be intervenor's concern, by also requiring notice of (1) the facts on which the concern is based, and (2) the sources

or references which have been or will be used to establish those facts. Reference to lengthy or general studies and reports would not suffice. If, for example, the BEIR Report or the Reactor Safety Study is relied upon, specific pages, sections or portions of the document must be referenced.

The amendment would permit the staff or applicant to seek and presiding NRC official to compel a more specific or definite statement if the would-be intervenor (1) fails to submit any facts, sources, or references at all, or (2) submits purported facts, sources, or references which are so vague as to give inadequate notice. The presiding officer would have the authority to impose appropriate sanctions against a person whose supplement failed to satisfy the proposed requirement, including the power to dismiss a contention. As under existing practice, a person who fails to file a supplement which satisfies the requirement with respect to at least one contention would not be permitted to participate as a party. See 10 CFR 2.714(b).

The proposed change does not permit the NRC official authorized to rule on petitions for intervention to consider whether the facts, sources, or references contained in a supplement are legally sufficient to prove the contention. However, an obviously insufficient factual or evidentiary basis could prompt the staff or applicant to move early for summary disposition.

In recognition that one purpose of the contention process is to help frame the scope of subsequent proceedings, an intervenor admitted to a proceeding would not be permitted, absent good cause, to seek or establish facts or rely on sources as to which notice was not given when the contention was admitted. However, an intervenor would not be limited to the facts, sources, and references identified in his supplement if he can show good cause such as, for example, newly discovered facts, sources, or references not reasonably available when the contention was admitted.

The Commission believes that the proposed amendment would not unlawfully restrict the intervention rights provided by the Atomic Energy Act of 1954 (42 U.S.C. 2239a) or the Administrative Procedure Act (5 U.S.C. 554-557). The amendment is intended to curtail an intervenor's right to participate only on those issues where the intervenor fails to identify the facts, sources, and references on which he has or will rely for his contention. Under such circumstances, the time and resources expended on such a contention cannot be justified.

A member of the public has no absolute or unconditional right to intervene in a nuclear power plant licensing proceeding under the Atomic Energy Act. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974). Section 189a of the Act which provides for intervention is subject to the Commission's rulemaking power under

section 161p and, thus, to reasonable procedural requirements designed to further the purposes of the Act. BPI v. Atomic Energy Commission, supra, 502 F.2d at 427, 428; see also American Trucking Ass'ns, Inc. v. United States, 627 F.2d 1313, 1320-23 (D.C. Cir. 1980). Furthermore, the right to intervention under section 189a for a member of the public is explicitly conditioned upon a "request." The proposed amendments would, in effect, provide that a "proper request" by a member of the public shall include a statement of the facts supporting each contention together with references to the sources and documents on which he relies to establish those facts. Finally, the Administrative Procedure Act creates no independent right to intervene in nuclear licensing proceedings. See Easton Utilities Commission v. Atomic Energy Commission, 424 F. 2d 847, 852 (D.C. Cir. 1970) (en banc); cf. National Coal Operators' Assn. v. Kleppe, 423 U.S. 388, 398-99, 46 L. Ed. 2d 580, 96 S. Ct. 809 (1976) (statutory words "opportunity for hearing" may be keyed to a "request").

2. Limit on Interrogatories

Currently, parties to NRC proceedings may file interrogatories on the other parties without any specific limit. The Commission is requesting comment on a proposed rule which would provide that unless leave to file additional interrogatories is granted by a licensing board, parties may not file more than 50 interrogatories on another party in a single NRC proceeding. This rule would

apply to hearings on construction permit and operating license applications, license amendment proceedings, antitrust hearings, and enforcement proceedings. For purposes of the rule, in determining what constitutes an interrogatory, each subpart of a question (whether or not designated as such) would be considered as an interrogatory, except that requests for supporting reasoning relied upon or the name of a witness who will testify on a matter covered by an interrogatory response will not count as separate interrogatories. The rule would be applied in NRC proceedings prospectively. Thus, regardless of how many interrogatories a party has filed prior to the effective date of the rule, it could still file an additional 50 interrogatories on each party if the period for discovery has not been closed.

The Board would not grant requests to file interrogatories exceeding the limit set forth in the rule unless it determined that: (a) a response to the extra interrogatories is essential for the party to adequately prepare its case, taking into account the number of contentions in the proceeding, the complexity of issues, and timing of issuance and number of staff/applicant documents; (b) the information sought is not otherwise reasonably available; and (c) the party was not improvident in its use of its first 50 interrogatories. This rule, if adopted, would be designed to curtail abuse of the discovery process and to alleviate strains placed on the resources of the participants in NRC proceedings when an inordinate number of interrogatories are filed. In recent

years, more than 20 United States district courts have adopted rules which similarly limit the number of interrogatories that may be filed on a party without leave of the court.

Even if this rule is adopted the NRC staff would continue its practice of voluntarily making pertinent staff documents available to the public, and responding to requests for production of documents under 10 CFR 2.741 and the Freedom of Information Act.

3. Motions to Compel Discovery

Under the Commission's current regulations, parties may file responses to motions to compel. To expedite NRC proceedings, the Commission is proposing amendments to its regulations which would provide the Boards with the discretion to order that the responses be made orally in a conference telephone call or other prehearing conference, rather than in writing.

4. Service

The Commission is also proposing to permit its licensing boards to require service of documents by express mail (next day delivery). Currently, the Commission's rules provide five days for service of documents. Use of express mail in limited circumstances could reduce this time to two days.

The Commission would expect express mail delivery to be required only in those proceedings where it appears that construction of

a facility may be finished prior to the completion of the operating license proceedings, or other similar circumstances where expedition is especially important. Because of the expense of express mail delivery, parties should be required to use that form of service only on those parties who are required to respond to the pleading being served. For example, a party may be required to file interrogatories on a party by express mail, but should not be required to express mail copies of the interrogatories to the Board or to the parties to the proceeding which are not being asked to respond to the interrogatories. Alternatively, if a party prefers not to use express mail, when so ordered by the Board, it could use first class mail and file its document three days earlier.

REGULATORY FLEXIBILITY ACT: In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule affects the Commission's rules of practice and procedures by permitting expedition of the licensing process.

PROPOSED REGULATORY CHANGES: Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Part 2 are contemplated.

Part 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. In § 2.714, subsection (b) is revised to read as follows:

§ 2.714 Intervention.

* * * *

(b) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity. The supplement must set forth a concise statement of the facts supporting each contention together with references to the specific sources and documents and portions, sections or pages thereof which have been or will be relied upon to establish such facts. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

2. § 2.710 is revised to read as follows:

§ 2.710 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added when a document is served by air express.

3. In § 2.712, subsection (c) is revised to read as follows:

§ 2.712 Service of papers, methods, proof.

* * * * *

(c) How Service may be made. Service may be made by personal delivery, by first class, certified or registered mail including air mail, by telegraph, or as otherwise authorized by law. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer may require service by express mail.

* * * * *

4. In § 2.720, subsection (h) is revised to read as follows:

§ 2.720 Subpoenas.

* * * * *

(h) * * *

(2) * * *

(ii) In addition, a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the staff answer the interrogatories. The limits on the number of interrogatories that may be served on a party pursuant to § 2.740b apply to the staff.

* * * * *

5. In § 2.730, subsection (h) is added which reads as follows:

§ 2.730 Motions

* * * * *

(h) Where the motion in question is a motion to compel discovery under this section or § 2.740b, parties may file answers to the motion pursuant to paragraph (c) of this section. The Board, in its discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing.

* * * * *

6. In § 2.740b, subsection (c) is added which reads as follows:

§ 2.740b Interrogatories to parties

* * * *

(c) No party may file more than fifty (50) interrogatories on another party during the course of the proceeding, unless leave to do so is granted by the presiding officer. For purposes of this section each subpart of a question (whether or not designated as such) is considered as an interrogatory, except that requests for supporting reasoning relied upon or the name of a witness who will testify on a matter covered by an interrogatory response will not count as separate interrogatories. The Board will grant leave to file additional interrogatories if it determines that: (1) response to the extra interrogatories is essential for a party to prepare adequately its case, taking into account the number of contentions in the proceeding, the complexity of issues, and timing of issuance and number of staff/applicant documents; (2) the information sought is not otherwise reasonably available; and (3) the party was not improvident in its use of its first 50 interrogatories.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this ____ day of _____, 1981.

Commissioner Bradford's proposed revisions to SECY-81-307 (Attachment), distributed at 3/19/81 Commission meeting on Discussion of Revised Licensing Procedures:

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Immediate Effectiveness Rule

Commission Review Procedures for
Power Reactor Operating Licenses

AGENCY: Nuclear Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Nuclear Regulatory Commission hereby amends its review procedures for ~~favorable~~ Licensing Board decisions granting nuclear power reactor operating license applications by requiring direct Commission review of those decisions to determine whether their effectiveness should be delayed pending normal agency appellate review. The amendment eliminates the Atomic Safety and Licensing Appeal Board review directed by Appendix B to Part 2 of the Commission's rules of practice. ~~This amendment is in response to the progress which the NRC has made in incorporating into its safety requirements lessons learned from review of the accident at Three Mile Island, and the delays which have arisen in the licensing review process as a result of the diversion of NRC staff resources to the TMI review.~~ The amendment is intended to reduce the length of time between a Licensing Board decision permitting fuel loading and low-power testing or full-power operation and the Commission's decision on whether to permit the Licensing Board's decision to become effective.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Martin G. Malsch, Esq., Deputy General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555 (202-634-1465).

SUPPLEMENTARY INFORMATION: Appendix B to Part 2 was adopted some one-and-one-half years ago as an interim response to the Three Mile Island (TMI) accident in order to increase Commission supervision of adjudicatory licensing decisions involving power reactors. Under Appendix B, an initial decision by an Atomic Safety and Licensing Board favoring grant of a nuclear power reactor construction permit or operating license did not become effective until both the Atomic Safety and Licensing Appeal Board and the Commission had reviewed that decision and decided whether it should become effective. The review process contained in Appendix B nominally postponed the issuance of licenses for close to three months beyond a favorable Licensing Board decision.

Following the Three Mile Island accident, the Commission reassigned most of the staff who had been reviewing applications seeking authorization to construct or operate nuclear power reactors to other tasks, such as investigating the causes of the accident and developing new regulations based on the lessons learned. As a direct resu . of these reassignments construction of a number of plants will be finished prior to any effective decision by the Commission on the issuance of an operating

license. On April 3, 1981, the Commission published in the FEDERAL REGISTER proposed alternative modifications of Appendix B designed to expedite the review process. 46 Fed. Reg. 20215. Two alternatives were set out for public comment: Option A, which retained a period of deferred effectiveness pending expedited Commission review of favorable Licensing Board decisions; and Option B, which would grant immediate effectiveness to favorable Licensing Board decisions while retaining the Appeal Board and Commission review process of Appendix B. The alternatives were designed to reduce or eliminate the delay between completion of construction and issuance of an operating license following a favorable Licensing Board decision.

Approximately 90 comments on the proposed rule were received from interested individuals and organizations, divided along two distinct lines which may be characterized as intervenor- and nuclear industry-oriented positions. Intervenors, over two-thirds of the commenters, favored retention of Appendix B, generally citing concerns that elimination of Appendix B reviews would provide less assurance that TMI-related policy concerns would be included in decisions. Nuclear industry commenters, meanwhile, favored Option B of the proposed alternative modifications, generally citing the thoroughness of the review process before Appendix B takes hold. These commenters often stated a strong preference for full reinstatement of the immediate effectiveness

rule. Several industry commenters also urged reinstatement of the immediate effectiveness rule for construction permits, a matter that is the subject of another, separate rulemaking.1/

SECY 81-___, a brief analysis of the public comments, was prepared for the Commissioners by the Office of the General Counsel and, along with a copy of all comments received, is available for public inspection at the NRC Public Document Room, located at 1717 H Street, NW., Washington, D.C.

The Commission has reassessed its Appendix B process in light of the need for expedited decisions in a number of pending OL cases. It has concluded that the full Appendix B reviews of operating license decisions are not ~~longer~~ necessary. Therefore, some changes to Appendix B are warranted in order to avoid unwarranted and expensive delays.

~~believes that substantive licensing requirements are sufficiently settled in light of the numerous studies of TMI and regulatory actions taken in response thereto that the~~

~~Upon due consideration,~~ the Commission has decided to adopt the proposed Option A. This decision is based upon a balancing of two competing factors: (1) the benefit of ~~increased~~ direct Commission assurance that nuclear power reactor operating licenses are issued only when consistent with Commission policy; and (2) the costs associated with postponing operation of completed plants.

~~The Commission firmly believes that~~ this amendment does not compromise ~~its~~ the Commission's commitment to the protection of public health and safety or to a fair hearing process. Thorough technical safety reviews of license applications by the NRC staff and the Advisory

1/ See 45 Fed. Reg. 34279 (May 22, 1980).

Committee on Reactor Safeguards, the availability of public hearings on license applications, and the Commission's inherent supervisory authority form the basis of the network of procedural safeguards intended to implement this commitment to a fair decision process and public health and safety. These are all unaffected by the instant rule change. When warranted, stays of effectiveness remain available pursuant to the standard procedure and criteria of 10 CFR 2.788. The Commission review provided for in this amendment will focus narrowly on significant policy issues. ~~which have been brought to the Commission's attention by its personal staff offices.~~ The Commission does not intend to review the entire record developed during the licensing proceeding.

Because these amendments relate solely to procedural matters and serve to relieve procedural restrictions on licensees, the Commission has determined to make them effective upon publication in the FEDERAL REGISTER.

Finally, the format of the rule has been revised to conform to FEDERAL REGISTER guidance on proper format, removing Appendix B and incorporating the Appendix B procedures, as amended, into 10 CFR § 2.764.

REGULATORY FLEXIBILITY ACT: In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

This rule affects the Commission's Rules of Practice and procedures by permitting expedition of the licensing process.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of the United States Code, notice is hereby given of the adoption of the following amendments to 10 CFR Part 2.

1. 10 CFR Part 2 is amended by removing Appendix B.

2. 10 CFR § 2.764 is amended by revising paragraphs (a) and (b) to read as follows and by adding new paragraphs (e) and (f).

2.764 Immediate Effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

(a) Except as provided in paragraphs (c) through (f) of this section, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to the review thereof and further decision by the Commission upon exceptions filed by any party pursuant to § 2.762 or upon its own motion.

(b) Except as provided in paragraphs (c) through (f) of this section, the Director of Nuclear Reactor Regulation or

Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of exceptions, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

* * * * *

(e) Construction Permits

(1) Atomic Safety and Licensing Boards

Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The Boards' decisions concerning construction permits shall not become effective until the Appeal Board and Commission actions outlined below in paragraphs (2) and (3) have taken place.

In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard

it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. As provided in paragraph (3) below, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment, present issues on which prompt Commi ion policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

(2) Atomic Safety and Licensing Appeal Boards

Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Appeal Board shall decide any stay motions that are timely filed. 1/ For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Appeal Board and Commission action described herein. If no stay papers are filed, the Appeal Board shall, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and decide whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard.

1/ Such motions shall be filed as provided by 10 CFR 2.788. No request need be filed with the Licensing Board prior to filing with the Appeal Board. Cf. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10 (1976).

The sixty-day period has been selected in recognition of two facts: first, allowing time for service by mail, close to thirty days may elapse before the Appeal Board has all the stay papers before it; second, the Appeal Board may find it necessary to hold oral argument.

In deciding these stay questions, the Appeal Board shall employ the procedures set out in 10 CFR 2.788. However, in addition to the factors set out in 10 CFR 2.788(e), the Board will give particular attention to whether issuance of the permit prior to full administrative review may: (i) create novel safety or environmental issues in light of the Three Mile Island accident; or (ii) 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. If the Appeal Board is unable to issue a decision within the sixty-day period, it should explain the cause of the delay to the Commission. The Commission shall thereupon either allow the Appeal Board the additional time necessary to complete its task or take other appropriate action, including taking the matter over itself. The running of the sixty-day period shall not operate to make the Licensing Board decision effective. Unless otherwise ordered by the Commission, the Appeal Board will conduct its normal appellate review of the Licensing Board decision after it has issued its decision on any stay request.

(3) Commission

Reserving to itself the right to step in at any earlier stage of the proceeding, the Commission will, upon receipt of the Appeal Board decision on whether the effectiveness of a Licensing Board construction permit decision should be further delayed, review the matter on its own motion, applying the same criteria. The parties shall have no right to file pleadings with the Commission with regard to the Appeal Board's stay decision unless requested to do so.

The Commission will seek to issue a decision in each construction permit case within 20 days of receipt of the Appeal Board's stay decision. If the Commission does not act finally within that time, it will state the reason for its further consideration and indicate that time it anticipates will be required to reach its decision. In such an event, if the Appeal Board has not stayed the Licensing Board's decision, the initial decision will be considered stayed pending the Commission's decision.

In announcing the result of its review of any Appeal Board stay decision, the Commission may allow the proceeding to

run its ordinary course or give whatever instructions as to the future handling of the proceeding it deems appropriate (for example, it may direct the Appeal Board to review the merits of particular issues in expedited fashion; furnish policy guidance with respect to particular issues; or decide to review the merits of particular issues itself, bypassing the Appeal Board). Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

(f) Operating Licenses

(1) Atomic Safety and Licensing Boards

Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The Board's decisions concerning fuel loading and low-power testing operating licenses or full-power operating licenses shall not become effective until the Commission actions outlined below in paragraph (2) have taken place.

In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. As provided in paragraph (2) below, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment, present issues

on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

(2) Commission

Reserving the right to step in at an earlier time, the Commission will, upon receipt of the Licensing Board decision authorizing issuance of an operating license, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission if it determines that operation would prejudice correct resolution of serious safety issues.

The parties shall have no right to file pleadings with the Commission with regard to this Commission review unless requested to do so by the Commission, except that no extensive stay shall be issued without giving the affected parties an opportunity to be heard.

on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

(2) Commission

Reserving the ~~right~~ power to step in at an earlier time, the Commission will, upon receipt of the Licensing Board decision authorizing issuance of an operating license, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission if it determines that it ~~has~~ is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

Consistent with the target schedules set forth below, the ~~The parties shall have no right to file pleadings with the Commission with regard to this Commission review~~ parties may file brief comments with the Commission point out matters which, in their view, preclude immediate effectiveness ~~unless requested to do so by the Commission, except~~ To be considered, such comments must be received within 5 days of the Board decision. ~~that~~ No extensive stay shall be issued without giving the affected parties an opportunity to be heard.

The Commission intends to issue a decision regarding each fuel loading and low-power testing license within 10 days of receipt of the Licensing Board's decision and regarding each full-power operating license within 30 days of receipt of the Licensing Board's decision.

In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give ~~whatever~~ instructions as to the future handling of the proceeding ~~it deems appropriate~~ (for example, it may direct the Appeal Board to review the merits of particular issues in expedited fashion; furnish policy guidance with respect to particular issues; or decide to review the merits of particular issues itself, bypassing the Appeal Board). Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

In operating license cases, the Commission's review under this section is without prejudice to Appeal Board or other Commission decisions, including decisions on stay requests filed under 10 CFR 2.788.

(Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841))

Dated at Washington, D.C., this ___ day of May, 1981.

For the Nuclear Regulatory Commission,

Samuel J. Chilk,
Secretary of the Commission