

SHAW, PITTMAN, POTTS & TROWBRIDGE

1800 M STREET, N. W.

WASHINGTON, D. C. 20036

RAMSAY D. POTTS
STUART L. PITTMAN
GEORGE F. TROWBRIDGE
STEPHEN D. POTTS
GERALD CHARNOFF
PHILLIP D. BUSTWICK
R. TIMOTHY HANLON
GEORGE M. ROGERS, JR.
FRED A. LITTLE
JOHN B. RHINELANDER
BRUCE W. CHURCHILL
LESLIE A. NICHOLSON, JR.
MARTIN O. KRALL
RICHARD J. KENDALL
JAY E. SILBERG
BARBARA M. ROSSOTTI
GEORGE V. ALLEN, JR.
WM. BRADFORD REYNOLDS
FRED CRASNER
NATHAN EL P. BREED, JR.
MARCO L. TONBLICK
ERNEST L. LAKE, JR.
CARLETON S. JONES
THOMAS A. BAXTER
JAMES M. BURGER
SHELDON J. WEISEL
JOHN A. McCULLOUGH
J. PATRICK HICKEY
GEORGE P. MICHAELY, JR.
JAMES THOMAS LENHART
STEVEN L. MELTZER
DEAN D. AULICK
JOHN ENGEL
STEPHEN B. HUTTNER
WINTHROP N. BROWN
JAMES B. HAMLIN
ROBERT E. ZAHLER
RICHARD E. GALEN
ROBERT S. ROBBINS
STEVEN M. LUCAS

MATIAS F. TRAVIESO-DIAZ
VICTORIA J. PERKINS
JOHN H. O'NEILL, JR.
JAY A. EPSTEIN
RAND L. ALLEN
TIMOTHY B. McBRIDE
ELISABETH M. PENOLETON
LUCY G. ELIASOF
PAUL A. KAPLAN
HARRY H. GLASSPIEGEL
RANDAL B. KELL
THOMAS H. MCCORMICK
SUSAN O. FALKSON
WILLIAM P. BARR
SUSAN M. FREUND
MARK SCHULTZ
JOHN L. CARR, JR.
PHILIP J. HARVEY
ROBERT M. GORDON
JEANNE A. CALDERON
BARBARA J. MORGAN
BONNIE S. GOTTLIEB
ALFRED M. POSTELL
HOWARD H. SHAFFERMAN
DEBORAH L. BERNSTEIN
SCOTT A. ANENBERG
SETH H. HOGGASIAN
SHEILA E. McCAFFERTY
DELISSA A. RIDGWAY
KENNETH J. HAUTMAN
DAVID LAWRENCE MILLER
ANNE M. KRAUSKOPF
FREDERICK L. KLEIN
GORDON R. KANOFFSKY
SALLY C. ANDREWS
JEFFREY S. GIANCOLA
HANNAH E. M. LIEBERMAN
SANDRA E. FOLSON
MARCIA R. NIRENSTEIN
JUDITH A. SANDLER

DOCKET NUMBER

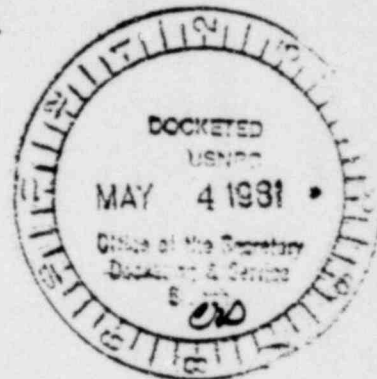
PROPOSED RULE PR-2

(46 FR 20215)



May 4, 1981

(202) 822-1000
TELECOPIER
(202) 822-1099 & 822-1199
TELEX
89-2693 SHAWLAW WSH
CABLE "SHAWLAW"
EDWARD S. GROSLAND
COUNSEL
WRITER'S DIRECT DIAL NUMBER
(202) 822-1051



Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Notice of proposed rulemaking regarding the
immediate effectiveness rule

Dear Mr. Chilk:

This letter is in response to the March 31, 1981, notice of proposed rulemaking published in the April 3, 1981, Federal Register (46 Fed. Reg. 20215). The comments are submitted on behalf of Alabama Power Company, Baltimore Gas & Electric Company, Carolina Power & Light Company, The Cleveland Electric Illuminating Company, Duquesne Light Company, Georgia Power Company, Jersey Center Power & Light Company, Kansas City Power & Light Company, Kansas Gas and Electric Company, Louisiana Power & Light Company, Metropolitan Edison Company, Pennsylvania Power & Light Company, Union Electric Company, and Wisconsin Electric Power Company, all of whom hold operating licenses or construction permits for nuclear plants.

Sections 2.764(a) and (b) of the Commission's Rules of Practice provide that an initial decision for the issuance or amendment of a construction permit, a construction authorization, or an operating license shall become effective immediately, and that the authorized license shall be issued within

8105210369

L-4-1 24.2

SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. Samuel J. Chilk

Page Two

May 4, 1981

ten days of the initial decision. This so-called "immediate effectiveness rule" was suspended by the Commission on November 9, 1979 (44 Fed. Reg. 65049) with the issuance of Appendix B to Part 2. That Appendix automatically stays the effectiveness of an initial decision until both the appeal board and the Commission have reviewed the record and decision below to decide whether a stay is warranted, irrespective of whether any party has requested a stay. The Commission is now proposing, in the alternative, two options for modifying Appendix B with respect to operating license hearings. Option A would eliminate the mandatory stay review by the appeal board, but would still automatically delay the effective date of the initial decision while the Commission performs a mandatory stay review. It has the potential--but not the certainty--of lessening the review period which must now occur under Appendix B before the initial decision becomes effective and the license issues. Option B would retain the mandatory stay reviews by both the appeal board and the Commission, but would not hold up issuance of an operating license while those reviews are taking place. The current construction permit review procedures in Appendix B would remain essentially unchanged.

We emphatically endorse that part of the Commission's proposed Option B which would fully reinstate the immediate effectiveness rule for operating licenses, and we urge that it be implemented immediately. Our views are based on two fundamental premises: (1) an automatic stay of the immediate effectiveness of an initial decision is not necessary--or even helpful--in providing the requisite assurance of public health and safety, and (2) a mandatory, unsolicited stay review is inconsistent with and inappropriate for an agency's appellate process and for the type of review we believe the Commission may be trying to accomplish.

As more attention is focused on the adjudicatory aspects of NRC licensing, there is an increasing tendency to lose sight of the fact that the NRC staff's technical review process is the fundamental basis upon which we rely for assurance of the public health and safety. The staff's comprehensive and complex review process includes the issuance of regulations and regulatory guides, generic safety reviews, and a lengthy and detailed technical review of each application by experts in the various disciplines involved. The application is also subjected to a technical safety review by the Advisory Committee on Reactor Safeguards. In the case of an operating license, a hearing is not even required unless an appropriate request is made by an interested person. Even

Mr. Samuel J. Chilk
Page Three
May 4, 1981

after the issuance of a favorable decision by a licensing board, no license can issue unless the Director of Nuclear Reactor Regulation finds that the Commission's rules and policies have been satisfied and there is reasonable assurance that public health and safety are adequately protected. These technical safety reviews--rather than the NRC's hearing and appellate processes--constitute the fundamental agency expertise upon which the health and safety findings are based.

Interested persons have the right to test and challenge the staff's findings in a public hearing. This provides further assurance on matters which have been raised by those intervening in the hearing process.

Once this point has been reached and the licensing board has issued a favorable decision, the license should issue. The application has passed muster under the agency's expert review, and has been subjected to a public hearing. To attempt to stay the issuance of the license at this stage is a serious matter, one which should place a substantial burden on the proponent of the stay to show why such a stay is necessary in the public interest. The only reason for not issuing the license immediately would be the existence of a valid concern that public health and safety would actually be jeopardized during the several months between issuance of the license and completion of the NRC's prescribed appellate review process (sections 2.760 through 2.787), notwithstanding the favorable determinations of the ACRS, the Director of Nuclear Reactor Regulation, and the licensing board. The Commission's regulations in section 2.788 provide an effective mechanism for any party to request a stay if he believes there is a valid safety reason for not allowing the plant to operate during this period. If such a valid safety concern should exist, the appeal board or the Commission can take timely and appropriate action on short notice. */

*/ It is even more difficult to make a logical case in support of an automatic stay prior to issuance of a construction permit. Public health and safety are not likely to suffer to any extent if an applicant were allowed to commence construction upon issuance of the licensing board's initial decision. The Commission's notice states that it is here concerned only with operating license review, and that the application of Appendix B to construction permit decisions will be considered separately. However, because adoption
(Footnote continued on next page)

Mr. Samuel J. Chilk
Page Four
May 4, 1981

It is of interest to note that in none of the public notices dealing with the existing Appendix B to Part 2**/ and the currently proposed amendments of Appendix B is there a discussion of why the public interest requires that issuance of licenses be automatically stayed. The discussions instead deal with the conduct of a mandatory stay review by the Commission or the appeal board, or both: nowhere does there appear an explanation of why or how public health and safety would be jeopardized if the effectiveness of the initial decision is not stayed during the conduct of that review.

As noted above, the current Appendix B does more than automatically stay the immediate effectiveness of an initial decision. It also provides for a mandatory stay review by both the Commission and the appeal board, irrespective of whether any party has requested a stay or provided justification for a stay. This is in addition to the normal appellate review which is conducted by the appeal board and the Commission pursuant to sections 2.760 through 2.787. Since there is no need for an immediate stay in the absence of a request for a stay justified by application of the stay criteria in section 2.788(e), there is a valid concern as to whether the mandatory stay review is either necessary or desirable. We see no logical justification for the superfluous stay review which does little more than add to the administrative burden of the appeal board and the Commission and, under the existing Appendix B and the proposed Option A, adds unnecessarily to the duration of the NRC licensing process.

Appendix B was issued in implementation of the Commission's post-TMI policy that new construction permits, limited work authorizations, and operating licenses for power reactors would be issued only after action of the Commission itself. 44 Fed. Reg. 58559 (October 10, 1979). The stated

*/ (Footnote continued from Page Three)
of either of the proposed options includes application of the amended Appendix B procedures to construction permit decisions, we wish to make it clear that we also oppose the automatic stay and the mandatory stay review in the construction permit context.

**/ 44 Fed. Reg. 58559 (October 10, 1979); 44 Fed. Reg. 63049 (November 9, 1979).

SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. Samuel J. Chilk
Page Five
May 4, 1981

reasons for issuing Appendix B were that regulations and policies related to the Three Mile Island accident were still under development, and that new regulations or policies might affect the licensing board's initial decision. As the Commission has noted in its notice of the proposed rule change, this justification no longer exists. However, given the context in which Appendix B was developed, we are left with a confusing hybrid of three different kinds of appellate review--review of issues litigated by the parties below; overall review of the entire record to affirm that a license should issue; and review to determine if a stay is necessary.

Confusion arises because the stated purpose of the stay review seems to be to examine the broad question of whether the license should issue in light of possibly changed TMI requirements and policies (Appendix B, para. 1), while at the same time the review is specifically limited to matters which have been placed in issue and adjudicated (Appendix B, para. 4).

Further confusion arises in the examination of the varying criteria to be used in the stay reviews. For all reviews under the existing Appendix B, and for construction permit reviews under the proposed Option A, the appeal board is directed to apply the stay criteria in section 2.788(e). But the appeal board is also directed to determine whether issuance "prior to full administrative review" may (1) create novel safety or environmental issues in light of the Three Mile Island accident, or (2) prejudice review of significant safety or environmental issues. These latter criteria have no bearing on the factual issues which are to be considered in section 2.788(e) for the narrow question of whether the license issuance should be stayed. But even this is not consistently carried through. The criteria to be used by the appeal board and the Commission for the various existing and proposed stay reviews for construction permits and operating licenses differ markedly. In some cases--e.g., operating license review by the appeal board under Option B, and all Commission reviews under the existing Appendix B and Option B--the reviewing body is held to no criteria at all.

The proposed amendments leave us with some uncertainty as to the Commission's purpose in maintaining an Appendix B procedure. If the purpose is to invoke an overall Commission review of the application and the hearing record, or to assure itself that post-TMI policies and regulations have been satisfied, a stay review is not the appropriate

Mr. Samuel J. Chilk
Page Six
May 4, 1981

mechanism to accomplish that purpose. The purpose of a stay review is not to determine whether the licensing board below erred, or whether all of the Commission's regulations and policies have been satisfied. That comes later, presumably during the full administrative review conducted by the appeal board and the Commission under current NRC rules. The purpose of a stay review is to determine the discrete question of whether a stay of effectiveness is necessary to avoid harm to the health and safety of the public pending completion of the agency's normal appellate review process.

OPTION A

In view of the foregoing, the automatic stay and the mandatory Commission stay review proposed in Option A are neither necessary nor consistent with a logical appellate process. Moreover, as we are warned in the Commission's discussion of this proposed option, the Commission would be allowed to exceed the specified time period for the review, thus creating the potential for further delay.

We are also concerned with the procedural aspects of the Commission's review under the proposed Option A. Normally, the proponent of a stay has the serious burden of persuading the fact finder that a stay is warranted, using the judicially and administratively accepted stay criteria which the Commission has adopted in section 2.788(e). Here, however, the Commission is free to decide a stay question with no presumptive burden to be overcome by anyone; worse, the Commission is not even holding itself to the normal stay criteria, which it is proposing to abandon in favor of its own unilateral determination of whether "operation would prejudice correct resolution of serious safety issues." Anyone proposing or ordering a stay, including the Commission, should at least be required to show that a stay is necessary and justified by application of the criteria in section 2.788(e). As noted above, the purpose of the stay should be to avoid harm to the public health and safety during the normal administrative review period.

Option A should not be implemented.

OPTION B

With no valid legal or public health and safety reason for not making the licensing board's initial decision immediately effective, and with real licensing delays now

SHAW, PITTMAN, POTTS & TROWBRIDGE
Mr. Samuel J. Chilk
Page Seven
May 4, 1981

costing public utilities and ratepayers on the order of millions of dollars per week of delay, the immediate effectiveness rule should be reinstated at once. */

We do not totally agree, however, with the manner proposed by the Commission in Option B for reinstating the immediate effectiveness rule. Option B prescribes a mandatory stay review by the appeal board and the Commission. A mandatory stay review, in the absence of a valid request by a party, is unnecessary, and is inconsistent with the concept of an orderly, logical, and competent regulatory process. It implies a lack of confidence in both the Director of Nuclear Reactor Regulation's determinations and in the hearing process. It enables both the appeal board and the Commission to exercise wide discretion in ordering a stay, with no burden on their part or the part of any party to show why a stay is necessary. Moreover, the Commission's proposal contains no criteria which the appeal board or the Commission must apply to determine whether a stay is necessary, and would seem to allow either body to decide arbitrarily whether or not to issue a stay order. At the very least, the stay criteria of section 2.788(e) should be incorporated.

A mandatory stay review--superimposed on top of the already existing administrative review procedures in the Commission's regulations--is unnecessary and administratively inefficient. Option B should be recast to either eliminate Appendix B to Part 2, or modify Appendix B to eliminate all stay reviews (at both the construction permit and operating license stages) by the appeal board or the Commission unless requested by a party pursuant to section 2.788.

Accordingly, in consideration of the enormous costs incurred as a result of unnecessary delays in the licensing process caused by unsolicited stay reviews, the immediate

*/ The immediate effectiveness rule was suspended without prior public notice. There is no reason why it could not be immediately reinstated in the same manner.

SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. Samuel J. Chilk
Page Eight
May 4, 1981

effectiveness rule in section 2.764 should be reinstated as
it existed prior to the adoption of Appendix B to Part 2.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By


Bruce W. Churchill