



PROPOSED RULE **PR 2**

(55 FR 27645)

P.O. Box 14000, Juno Beach, FL 33408-0420

8

DOCKETED  
USNRC

'90 SEP -7 P3:16

SEPTEMBER 04 1990

L-90-319

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

Attention: Docketing and Service Branch

Ref: Nuclear Regulatory Commission; Proposed Rule - 10 CFR Part 2  
Revisions to Procedures to Issue Orders: Challenges to Orders  
that are made Immediately Effective; 55FR 27645 (July 5,  
1990); Request for Comments

Dear Mr. Chilk:

On July 5, 1990, the Nuclear Regulatory Commission (NRC) published for public comment a proposal to revise its regulations governing orders to provide for the expeditious consideration of challenges to orders that are made immediately effective. These comments are submitted on behalf of the Florida Power & Light Company (FPL).

FPL is an investor-owned utility serving over three (3) million customers in the State of Florida. FPL is a licensed operator of two nuclear power plant units in Dade County, Florida and two units in St. Lucie County, Florida.

FPL favors the concept of expeditious procedural treatment of a challenge to an order the NRC determines should be made effective immediately. FPL is pleased that the NRC has taken into account considerations of fairness and the rights of the parties in this proposed revision of 10 CFR § 2.202. There may be occasions when a person aggrieved by an immediately effective order can make a proper showing that the order should not take effect immediately.

On such occasions, the challenger's motion to set aside immediate effectiveness should be heard and decided as expeditiously as possible. FPL appreciates the NRC's recognition of the likelihood of these occurrences and the NRC's effort to decide them fairly and promptly.

However, in keeping with the spirit of the proposed rule and the considerations of fairness which inform the proposed rule, FPL suggests that the NRC consider these further revisions to Section 2.202(c)(2):

9010160221 900904  
PDR PR  
2 55FR27645 PDR

1. The "adequate evidence" standard should be replaced with a "preponderance of the evidence" standard.
2. The NRC should impose a time limit for the rendering of a decision by the presiding officer after the staff responds to a motion to set aside.
3. The NRC should impose a time limit to assure the Commission's prompt review of a presiding officer's order granting a motion to set aside.

FPL believes these further revisions will improve the proposed rule for the following reasons:

#### **Evidence Standard**

The proposed rule states that "[t]he presiding officer shall uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness." Proposed Section 2.202(c)(2), 55 FR 27648. In the statement of background information, the NRC states that

adequate evidence is deemed to exist when facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges ... are true ... and/or that the action specified ... is necessary to protect the public health, safety or interest.

55 FR 27646.

The NRC further states that the "adequate evidence" standard does not require "a balancing of evidence between that provided by the NRC staff and that provided by the person seeking to set aside immediate effectiveness" and that "[i]t is not a preponderance of the evidence test." 55 FR 27646.

FPL believes that the stringency of an immediately effective order compels a more stringent evidence test to affirm such orders. The staff should bear the burden of persuading the presiding officer that an order should be immediately effective, despite a challenge to the order, by a preponderance of the evidence. FPL believes that the rule should provide for a balancing of the evidence.

As drafted, the proposed rule requires the presiding officer to decide whether the staff's evidence is "adequate" or "sufficient," and if it so finds, "the presiding officer is required to uphold the immediate effectiveness of the order." 55 FR 27646 (emphasis added). Indeed, the NRC states that the presiding officer "must



view the evidence presented in a light most favorable to the staff and resolve all inferences in the staff's favor." 55 FR 27646.

Thus, even though a challenger has an opportunity to present evidence in support of its motion to set aside, it appears that the probable result in most of these proceedings will be a decision against the challenger. The "adequate" or "sufficient" evidence standard seems to us to make the motion to set aside a futile gesture. Absent some requirement of deliberation or weighing of the evidence presented by both the staff and the challenger, the presiding officer appears to be encouraged to "rubber stamp" the staff's actions. We recommend a rewording of the "adequate evidence" sentence in proposed Section 2.202(c)(2):

The presiding officer shall uphold the immediate effectiveness of the order if a preponderance of the evidence supports immediate effectiveness.

#### **Time Limit for Presiding Officer's Decision**

FPL recommends that the NRC impose a time limit for the rendering of a decision by the presiding officer after the staff responds to a motion to set aside. The proposed rule requires the staff to respond to a challenger's motion to set aside immediate effectiveness "within five (5) days of the filing of the motion." Thereafter, the proposed rule provides only that the motion shall be decided "expeditiously." Although the proposed rule confers on the presiding officer the discretion to compress time schedules "to assure expeditious consideration and disposition of the motion," FPL believes that a time limit should also be fixed in the proposed rule for the rendering of the presiding officer's decision. We suggest a limit of five (5) days after the filing of the staff's response to the motion to set aside.

As it appears that there may be no opportunity for an oral argument or presentation on the motion, and because the proposed rule clearly provides that there shall be no stay of immediate effectiveness "during the pendency of the motion or at any other time," FPL believes that expedited treatment can be better assured by imposing a time limit for the rendering of the presiding officer's decision. A time limit may also work to lessen the hardship or burden of a challenger's compliance with the order, if the challenger claims a hardship or burden in the circumstances of a particular case.

Mr. Samuel J. Chilk  
Page 4

**Time Limit for Commission Review of  
an Order Granting the Motion to Set Aside**

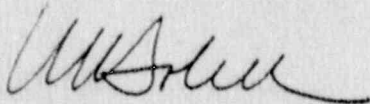
Similarly, FPL believes that the proposed rule should be revised to impose a time limit on the Commission's review of a presiding officer's order granting a challenger's motion to set aside. As drafted, the proposed rule provides that such an order "will be referred promptly to the Commission itself" but the order to set aside "will not be effective pending further order of the Commission." Proposed Section 2.202(c)(2), 55 FR 27648 (emphasis added). Nothing in the proposed rule indicates how promptly the Commission will act on the order granting the motion to set aside immediate effectiveness.

In its statement of background information, the NRC notes its expectation that the motion to set aside should be decided "within fifteen (15) days of the date the hearing request and accompanying motion are referred to the presiding officer." FPL proposes to formalize that expectation by fixing a time limit of five (5) days for the Commission's review of orders favoring challengers. FPL recommends a revision of the proposed rule to provide for Commission review of the presiding officer's order within five (5) days of the filing of such order.

FPL appreciates having this opportunity to comment on the proposed rule and to offer our suggestions for further revisions to Section 2.202. We believe that our suggested revisions will improve the rule and will assure fairness, prompt action and due consideration of the rights and interests of private parties, the NRC and its staff, and the public.

We would welcome the opportunity to discuss our comments and concerns with the NRC staff.

Yours very truly,



William H. Bohlke  
Vice President  
Nuclear Engineering and Licensing