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(55 FR 29043) 127

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JOSEPH GALLO  
(202) 835-8082

November 1, 1990

Secretary of the Commission  
Attn: Docketing and Service Branch  
United States Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Re: Proposed Rule - Nuclear Power Plant License  
Renewal -- 55 Fed. Reg. 29043 (July 17, 1990)

Gentlemen:

The proposed rule would establish the substantive and procedural requirements for the renewal of operating licenses for light water nuclear power reactors. The objective of the proposal is to frame a stable and predictable process that assures the protection of public health and safety. This initiative, which I support, would create a viable energy source for the beginning of the next century.

Substantial comments have been submitted to the U.S. Nuclear Regulatory Commission by the nuclear industry and it is my purpose to address two limited matters. One concerns the nature of the hearing and the arcane question of the type of license required by the Atomic Energy Act to effect the renewal of a facility operating license. The other comment concerns the need for an NRC-endorsed hearing schedule for license renewal hearings. My qualification to discuss these issues is based on 18 years of experience as an attorney in the field of atomic energy, both with the U.S. Atomic Energy Commission and the NRC and as a private practitioner. My experience encompasses both, the proper interpretation of the Atomic Energy Act and the Administrative Procedure Act, and the representation of government regulatory and utility clients in NRC adjudicatory hearings.

It is my view that full-term operating licenses for nuclear power reactors can only be renewed by the issuance of a new license, or as labeled in the proposed rule, a "renewed" license. I am also convinced that the NRC should publish, as a part of the license renewal rulemaking, a hearing schedule that establishes important hearing milestones. The bases for these views are explained below.

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### Nature of the License

The NRC considers, in the statement of considerations accompanying the proposed rule, two means to effect the renewal of full-term operating licenses for nuclear power reactors. One means would involve amending the license to extend the license term beyond 40 years. The other would involve the issuance of a new license, called a renewed license. The NRC rejects license renewal by amendment beyond a 40-year term because section 103 of the Atomic Energy Act limits the terms of operating licenses to 40 years. The NRC observes that although the legislative history of section 103 does not show any safety basis for the Congressional decision to limit the duration of operating licenses to 40 years, the NRC, nevertheless, is not free to ignore the statutory mandate. The NRC also concludes that the terms of nuclear power reactor licenses issued under section 104b, which contains no temporal constraint, should also be limited to 40 years.

I concur with these conclusions. The language of the statute is plain -- an operating license "shall be issued for a specified period . . . but not exceeding forty years." An amendment to a full-term operating license that gives full effect to the proposed 20-year license renewal term would result, contrary to section 103, in a 60-year license. The United States Supreme Court has ruled that "[if a] statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986), quoting Chevron U.S.A. Inc. v. National [sic] Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The rejection of the renewal-by-amendment mechanism, thus, is consistent with this rule of construction. In addition, it seems eminently sensible for the NRC to continue the 40-year duration limit specified in 10 C.F.R. § 50.51 for section 104b licensees. Public policy favors such even-handedness in the issuance of both section 103 and 104b operating licenses. A legal memorandum that analyses these matters is attached as Enclosure A.

The NRC also concludes, in the statement of considerations supporting the proposed license renewal rule, that the legal form of a renewed operating license does not have any substantive effect on the technical aspects of license renewal. I agree. The scope of any regulatory matter submitted to the NRC for licensing action, including license renewal, is defined and governed by its substantive content, not by legal nomenclature. Assuming the NRC promulgates a regulation that identifies and defines the complete body of requirements for license renewal, the technical issues involved will be the same, irrespective of whether NRC processes the renewal application in the form of an amendment or a renewed license.

## Hearing Schedule

Several recommendations have been made in the past urging the NRC to adopt a license renewal hearing schedule, which would, as a policy pronouncement of the Commissioners, provide schedular guidance for the conduct of license renewal hearings by the Atomic Safety and Licensing Board Panel. The NRC, to this point, has declined to adopt a hearing schedule as a part of the license renewal rulemaking. The NRC believes such action is unnecessary because (i) under the timely renewal doctrine, licensees can continue plant operations pending final agency action on their renewed license applications, (ii) the Commissioners, Atomic Safety and Licensing Board Panel and presiding hearing officers have sufficient authority to adopt hearing schedules, as necessary, in individual license renewal proceedings and (iii) the scope of issues to be heard by ASLBs is expected to be narrow given the proposed focus on age-related degradation issues and the proposed plenary consideration of environmental issues under the Part 51 rulemaking. 55 Fed. Reg. 29043, 29052-053 (July 17, 1990). None of these reasons is compelling. Thus, I urge the NRC to reconsider its position and incorporate, as guidance, a hearing schedule as a part of the final Part 54 rule.

The NRC's reliance on the timely renewal doctrine implies that it is not concerned about minimizing hearing delays because nuclear power plants will continue to operate, under timely renewal, should such delays cause operating licenses to expire before decisions can be rendered on pending license renewal applications. The timely renewal doctrine is not the panacea for the real problem that can arise as a result of protracted license renewal hearings. Licensees need to plan for future generating capacity and replacement power ten to fifteen years in advance of the actual need for the capacity. This planning, called "system planning," will, of course, occur 10 to 15 years prior to the expiration of operating licenses. Thus, the application of the timely renewal doctrine will not remedy the adverse impacts of hearing delays on system planning actions that must be undertaken long before license expiration.

Licensees can assure a stable and adequate supply of electrical generating capacity for their customers only through careful and timely planning. If the nation's 110 nuclear power plants are to remain a viable option for future electric energy needs, license renewal decisions must be made by the NRC in sufficient time to avoid foreclosure of other energy options that would be indispensable in circumstances where the NRC found that its requirements for renewed licenses could not be met. The NRC recognizes that nuclear utilities are faced with this problem (55 Fed. Reg. at 29,052), but inexplicably, it is not persuaded to manage undue hearing delays by establishing schedule guidelines.

The need for predictability in license renewal hearings also diminishes the validity of the Commission's second reason for not adopting a license renewal hearing schedule, *i.e.*, the Commissioners and ASLBs have plenary authority to impose ad hoc hearing schedules. Leaving the imposition of hearing schedules open to the vagaries of case-by-case determinations has not proven effective in the past. This judgment is based on the hard experience gained during 18 years of representation of government and private sector clients in over 40 AEC/NRC adjudicatory hearings involving the issuance of materials licenses, construction permits, and operating licenses, as well as amendments thereto, for nuclear power reactors.

ASLBs must take into account the views of the parties before establishing hearing schedules. The results are schedules determined by consensus and compromise, not schedules that impose rigorous, but even-handed deadlines that no hearing participant favors. Such a schedule can only be imposed through the rulemaking process. Finally, experience teaches that it is unrealistic to expect that the Commissioners will routinely set schedules on an ad hoc basis. They have done so over the past 20 years in only a handful of cases.

The NRC has endorsed a hearing schedule as guidance for its adjudicatory tribunals when it believes that hearing delays must not be allowed to thwart timely license decisionmaking. This was done in 1989, when the NRC incorporated a model hearing schedule into its final rule establishing licensing procedures for the High Level Waste Repository. 54 Fed. Reg. 14925, 14939-940 (April 14, 1989). The NRC did not rely on the inherent authority of the Commissioners and its adjudicatory tribunals there. Instead, the NRC recognized a need to avoid undue hearing delays to assure timely licensing action. Utilities' system planning needs similarly require NRC-endorsed schedules.

Finally, the notion that issues to be heard at license renewal hearings will be limited in scope under the NRC's present proposal is illusory. The broad reach of the proposed integrated plant assessments and the requirement to compile current licensing bases will serve as fertile grounds for expanding issues. Compiled CLBs, for example, will be subject to document production under 10 C.F.R. §§ 2.740 and 2.741, which in turn, will expand both the opportunity to present issues as well as the range of issues that will be presented to ASLBs for litigation. ASLBs will find it exceedingly difficult to exclude non-age-related degradation issues when they are based on information required by NRC's license renewal regulations. Thus, the NRC's initiative to limit hearing issues to age-related degradation matters will be frustrated, assuming these elements are included in the final license renewal rule.

For all these reasons, I urge the NRC to recognize the need for a hearing schedule as an essential element of license

renewal. I recommend that a schedule similar to the one adopted by the NRC for the High Level Waste Repository, Enclosure B, be incorporated into the statement of considerations for the final license renewal rule.

I appreciate the opportunity to provide these views.

Sincerely,

*Joseph Gallo*  
Joseph Gallo

JG/kit

Enclosures

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## MEMORANDUM OF LAW

TO: Joseph Gallo  
FROM: Kathryn M. Kalowsky *KMK*  
DATE: September 15, 1988  
RE: The Renewal of Nuclear Power Reactor Operating Licenses

### I. QUESTION PRESENTED

What statutory or regulatory mechanisms are available for renewing the operating licenses of nuclear power reactors which otherwise would expire at the end of forty years?

### II. INTRODUCTION

Operating licenses for nuclear power reactors have been issued pursuant to the authority of either section 103 or section 104 of the Atomic Energy Act of 1954, as amended. As explained below, the statutory origin of operating licenses affects the available means for renewing such licenses. For that reason, one can only address the regulatory mechanisms for operating license renewal in the context of the two classes of licenses, viz., section 103 and section 104 licenses. Before analyzing the regulatory mechanisms for license renewal, it is useful to examine the historical development of sections 103 and 104 insofar as those sections have been used as authority

to grant construction permits and operating licenses for nuclear power reactors.

### III. HISTORICAL BACKGROUND

#### A. Statutory Authority for Issuing Licenses for Nuclear Power Reactors

##### 1. The Atomic Energy Act of 1946

The original atomic energy statute was the Atomic Energy Act of 1946. 42 U.S.C. § 1801 et seq. ("1946 Act") (superseded). Its primary objective was the development and utilization of atomic energy for military purposes. S. Rep. No. 1211, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. & Admin. News 1327. National security concerns compelled the Congress to accord military uses of the atom top priority since, in the wake of World War II, the United States was the sole possessor of atomic weapons and it was deemed vital to preserve the then-existing status quo to promote peace and protect the national welfare. S. Rep. No. 1699, 83d Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. & Admin. News 3456, 3457.

In order to achieve the paramount objective of assuring the national defense and security, the 1946 Act provided for an absolute government monopoly of the production and ownership of fissionable materials.<sup>1/</sup> Atomic Energy Act

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<sup>1/</sup> Fissionable materials are defined as "plutonium, uranium enriched in the isotope 235, any other material which the

(Footnote continued on next page)

of 1946, Pub. L. No. 79-585, §§ 4, 5, reprinted in 1946 U.S. Code Cong. & Admin. News 722, 725-30. See also S. Rep. No. 1211, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. & Admin. News 1327, 1330-331. The Congress was convinced that such a monopoly was necessary not only to prevent the global proliferation of atomic weapons but, also, to curtail the private manufacture of fissionable material and thereby minimize the hazards to public health and safety attendant to the production and ownership of such material. S. Rep. No. 1211, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. & Admin. News 1327, 1330. The 1946 Act further sought to achieve its primary security objective by prohibiting the communication, transmission, or disclosure of "restricted data"<sup>4/</sup> to any person with the intent to injure the United States or secure an advantage for any foreign nation. Atomic Energy Act of 1946, Pub. L. No. 79-585, § 10, reprinted in 1946 U.S. Code Cong. & Admin. News 722, 732-34.

Subsidiary to the primary national security objective of the 1946 Act was another goal: fostering research and

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Commission determines to be capable of releasing substantial quantities of energy through nuclear chain reaction of the material, or any material artificially enriched by any of the foregoing; . . . ." Atomic Energy Act of 1946, Pub. L. No. 79-585, § 5(a)(1), reprinted in 1946 U.S. Code Cong. & Admin. News 722, 727.

2/ "Restricted data" was defined in the statute to include all data "concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power. . . ." Atomic Energy Act of 1946, Pub. L. No. 79-585, § 10(b)(1), reprinted in 1946 U.S. Code Cong. & Admin. News 722, 732.



development activities in the field of atomic energy.<sup>4/</sup> Atomic Energy Act of 1946, Pub. L. No. 79-585, § 3, reprinted in 1946 U.S. Code Cong. & Admin. News 722, 725. In order to facilitate the achievement of this subordinate objective, the U.S. Atomic Energy Commission ("AEC") was created by the 1946 Act as the principal body responsible for implementing production, research, and development programs and for stimulating private research and development activities. S. Rep. No. 1211, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. & Admin. News 1327, 1328. The AEC was also authorized to license devices which utilized atomic energy.<sup>4/</sup> Atomic Energy Act of 1946, Pub. L. No. 79-585, § 7, reprinted in 1946 U.S. Code Cong. & Admin. News 722, 730. Such licenses were mandatory for the manufacture, production, or export of any equipment or device utilizing fissionable material or atomic energy. Id. Nevertheless, the government's monopoly of production and ownership of fissionable materials, combined with stringent controls over the dissemination of technical data, served to impede both effective research and

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3/ The Congressional goal was to direct the development of atomic energy in such a way as to "improve the public welfare, increase the standard of living, strengthen free competition in private enterprise, and promote world peace." S. Rep. No. 1211, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. & Admin. News 1327-328.

4/ It is important to note that the 1946 Act did not require a license for conducting research and development activities. Licenses were only necessary to manufacture, produce, or export devices which utilized fissionable material or atomic energy. Atomic Energy Act of 1946, Pub. L. No. 79-585, § 7(a), reprinted in 1946 U.S. Code Cong. & Admin. News 722, 730.

development activities and the development of atomic energy for peacetime purposes. See id. at 726-27. These handicaps were, as explained above, a necessary incident of the national security policies that existed in 1946.

## 2. The Atomic Energy Act of 1954

The United State's role as the world's nuclear weapons monopolist came to an abrupt end when, less than three years after enactment of the 1946 Act, the Soviet Union detonated its first atomic bomb. S. Rep. No. 1699, 93d Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. & Admin. News 3456, 3457. Technological strides were also rapid in terms of the development of domestic nuclear technology for non-military application. Research and development efforts progressed beyond the point originally envisioned in 1946 to where, by the early 1950s, it was evident that power produced by atomic reactors would soon be priced at a level competitive with that of electricity derived from conventional fuels. Id. at 3458. Moreover, private participation in nuclear development did not bring with it the attendant hazards to public health and safety anticipated in 1946. Id.

Thus, eight years after the enactment of the 1946 Act, the Congress deemed it necessary to bring that Act into accord with the technological advances and growth of the fledgling non-military nuclear industry so as to make its legislative controls "better conform with the scientific, technical, economic, and political facts of atomic energy. . . ." Id. at 3457. Most importantly, it reached the conclusion that the

stringent government control over the development of atomic energy for civilian use, as codified in the 1946 Act, could not function as an effective substitute for the efficiencies and incentives inherent in the competitive enterprise system. Id. at 3459.<sup>4</sup> The Congress, therefore, amended the 1946 Act and established a regime for the licensing of commercial nuclear reactors.<sup>5</sup> Atomic Energy Act of 1954, Pub. L. No. 83-703, §§ 101, 103 (1954), reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1097, 1098. See also S. Rep. No. 1699, 83d Cong., 2d Sess. 5, reprinted in 1954 U.S. Code Cong. & Admin. News 3456, 3460-461, and in 1 AEC, Legislative History of the Atomic Energy Act of 1954 at 749, 753 (1955).

Because Congress concluded that the technology of nuclear power reactors had not yet matured, it mandated that applicants for licenses to construct and operate nuclear power reactors would file their license applications first under

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<sup>5</sup>/ President Dwight D. Eisenhower spurred Congress on in its amendment of the 1946 Act when, on February 17, 1954, he delivered a message to Congress encouraging it to "broaden participation in the development of peacetime uses of atomic energy in the United States." 1946 U.S. Code Cong. & Admin. News 3456, 3460.

<sup>6</sup>/ The Atomic Energy Act of 1954 also provided for the licensing of facilities for use in medical therapy as well as research and development not leading to a demonstration of the "practical value" of such facilities for industrial and commercial purposes. Atomic Energy Act of 1954, Pub. L. No. 83-703, §§ 104(a), (c), reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1098-099. These intricacies of the overall licensing regime are beyond the scope of this memorandum.

section 104(b) of the Act.<sup>7/</sup> Upon their licensing under that section, the facilities would, in the view of Congress, gain sufficient operating experience to demonstrate their economic and technical feasibility, or, in the terms of section 102 of the 1954 Act, their "practical value."<sup>8/</sup> Atomic Energy Act of 1954, Pub. L. No. 83-703, § 102, reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1097. Once the AEC determined that a section 104 license was sufficiently developed to be of "practical value" for industrial or commercial purposes, the 1954 Act provided that the facility's section 104 license would be converted to a section 103 license. Thereafter, licenses

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7/ Section 104(b) of the 1954 Act, in part, authorized the AEC to

issue licenses to persons applying therefor for utilization and production facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Atomic Energy Act of 1954, Pub. L. No. 83-703, § 104(b), reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1098-99.

8/ Section 102 stated that

[w]henver the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

Atomic Energy Act of 1954, Pub. L. No. 83-703, § 102, reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1097.

for the same type of facility would be issued pursuant to section 103, the authority for issuing commercial licenses.<sup>9/</sup>

3. Breakdown of the 1954 Act's Licensing Regime For Nuclear Power Reactors

The AEC issued section 104 licenses for approximately seven commercial facilities by 1965.<sup>10/</sup> At that time, the AEC also considered whether it could make a determination of "practical value" for light water reactors. After considering the issue through a rulemaking proceeding, AEC, on December 29, 1965, declined to make an affirmative finding of "practical value." See H.R. Rep. No. 1470, 91st Cong., 2d Sess. 2-9, reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 4989. See also 29 Fed. Reg. 9458 (1964). Instead, it concluded that light water nuclear power reactor operating experience, up to that point in time, was limited to small-scale facilities that were not economically competitive.

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<sup>9/</sup> Section 103(a) provides in pertinent part that

[s]ubsequent to a finding by the Commission as required in section 102, the Commission may issue licenses to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, import, or export . . . [nuclear power reactors].

Atomic Energy Act of 1954, Pub. L. No. 83-703, § 103(a), reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1098, 42 U.S.C. § 2133(a).

<sup>10/</sup> Construction permits for the following light water nuclear power reactors were issued by 1965: Yankee-Rowe, Big Rock Point, San Onofre-1, Haddam Neck, Lacrosse, Oyster Creek-1, and Nine Mile Point-1. See NUS Corp., Commercial Nuclear Power Plants, Ed. No. 18 (M. Behrens ed. 1987).

H.R. Rep. No. 1470, 91st Cong., 2d Sess. 2-9, reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 4989. On October 18, 1966, following another rulemaking petition, the Commission again determined that a section 102 finding of "practical value" could not be made for light water reactors, and that such a finding would have to await a reliable estimate of the applicable economics based upon a satisfactory demonstration of nuclear technology and plant performance. Id. Thus, as of 1970, no commercial operating license for a nuclear power reactor had been issued under section 103.

The Commission's inability to issue a "practical value" finding under section 102 was perceived by some public power interests as undue protectionism of private power interests. This view arose, in part, from the fact that only section 103 licenses were subject to prelicensing antitrust review under section 105(c) of the 1954 Act. Atomic Energy Act of 1954, Pub. L. No. 83-703, § 105(c), reprinted in 1954 U.S. Code Cong. & Admin. News 1076, 1100. These public power interests were awaiting a finding of "practical value" so that they could invoke the AEC's antitrust authority to obtain direct access, through ownership or otherwise, of the nuclear facilities under construction. See e.g., Cities of Statesville v. Atomic Energy Commission, 441 F.2d 962, 965-69 (D.C. Cir. 1969); Municipal Elec. Ass'n of Mass. v. Securities and Exchange Comm'n, 413 F.2d 1052, 1055 (D.C. Cir. 1969); and In the Matter of Duke Power Co., (Oconee Nuclear Station, Units 1, 2, and 3), Dkt. Nos. 50-269, 50-270, 50-287, 4 AEC 19, 24, 29 (1967).

In Statesville, 441 F.2d at 970, the plaintiff-municipalities sought to have the U.S. Court of Appeals make an independent finding of "practical value." Their purpose was to cause the AEC to initiate, under sections 103 and 105(c), an antitrust inquiry prior to issuing construction permits for the Vermont Yankee reactor. A majority of the Court ruled that it would be an unauthorized usurpation of the AEC's function to make an independent judicial finding of "practical value." Id. Nevertheless, it did hold that although construction permits were properly issued for Vermont Yankee under section 104, the AEC must issue subsequent operating licenses under section 103 if it concluded that the facilities were of "practical value" for commercial use. Id. at 974-75. This was an unambiguous message from the Court's majority that it expected the matter of "practical value" to be revisited by the AEC by the time Vermont Yankee was eligible for its operating license. Moreover, a vocal minority of the Court was clearly expecting an affirmative AEC finding of "practical value" under section 102 and an end to what was perceived to be AEC procrastination. Id. at 994 (Bazelon, concurring in part and dissenting in part); id. at 984 (Leventhal, Wright, Robinson, concurring). The AEC subsequently published a notice in the Federal Register, dated June 26, 1970, that it would again consider the "practical value" issue and that it was seeking public comment thereon. 35 Fed. Reg. 10,460 (1970). See also H.R. Rep. No. 1470, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 4989.

4. The 1970 Amendments to the Atomic Energy Act of 1954

The Congress entered the "practical value" debate in 1969, when it began considering legislation to eliminate the concept from the 1954 Act. Revisions to the Act were also being considered to expand the AEC's authority to address certain water quality issues and to strengthen the agency's existing antitrust authority. The Joint Committee on Atomic Energy held hearings in November 1969 and April 1970 on bills proposed by Congressmen Holifield and Price, Senators Aiken and Anderson, and the AEC. The Aiken bill presented the viewpoint of the public power interests. A compromise bill was finally enacted on December 19, 1970. Atomic Energy-Utilization For Industrial or Commercial Purposes, Pub. L. No. 91-560, re-printed in 1970 U.S. Code Cong. & Admin. News 1714.

The 1970 amendments eliminated the "practical value" finding as a prerequisite to the issuance of a section 103 commercial license. Id., § 3 at 1715. See also H.R. Rep. No. 1470, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 5006. Furthermore, the Congress grandfathered<sup>11/</sup> facilities with existing section 104(b)

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<sup>11/</sup> The grandfather clause operated such that all reactor owners who had been issued operating licenses under section 104 prior to December 19, 1970, would continue to hold those licenses under section 104. Furthermore, all reactor owners who possessed construction permits and who were in the process of constructing nuclear power reactors would be issued operating licenses under section 104 and continue to

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construction permits or operating licenses and thereby precluded any antitrust review of those licenses.<sup>12/</sup> Atomic Energy-Utilization for Industrial or Commercial Purposes, Pub. L. No. 91-560, § 3(b), reprinted in 1970 U.S. Code Cong. & Admin. News 1714, 1715. See also H.R. Rep. No. 1470, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 5006. Therefore, of approximately 109 operating licenses issued by the AEC and NRC to date, about sixty-four reactors are operating with section 104 licenses and the remainder are section 103 licenses.

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hold such licenses under section 104. The only exception to the grandfather provision pertains to facilities which were to be "modified to such a degree as to constitute a new or substantially different facility." H.R. Rept. No. 1470, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 5007.

<sup>12/</sup> Congressional sentiment regarding the possible antitrust review of converted licenses was quite negative. The Joint Committee clearly explicated its view that license conversion would impose "unnecessary hardship" on section 104(b) licenses relative to potential antitrust review, and would serve no "useful purpose." H.R. Rept. No. 1470, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4981, 5007. For example, in the course of questioning Mr. Joseph Hennessey, AEC General Counsel, about the propriety and implications of such license conversion, Representative Craig Hosmer remarked that "companies may have as much as \$200 million or more invested in a facility that is ready for an operating license and this whole can of worms on antitrust is then opened up." Prelicensing Antitrust Review of Nuclear Powerplants: Hearings Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. 92 (1969).

#### IV. DISCUSSION

##### A. Renewal of Section 103 Operating Licenses For Nuclear Power Reactors

The authority to renew section 103 operating licenses by issuing a new license is coextensive with the Nuclear Regulatory Commission's ("NRC") authority to grant initial licenses for nuclear power reactors under section 103 of the Atomic Energy Act, 42 U.S.C. § 2133. Hence, the renewal of a section 103 commercial operating license can be effected by the grant of a new license.

Although section 187 of the Atomic Energy Act, 42 U.S.C. § 2237, provides the NRC with general authority to amend reactor licenses,<sup>13/</sup> the amendment mechanism cannot be utilized by the NRC to renew a section 103 commercial operating license. The bar to renewal by amendment results from the forty year durational limit on the term of a commercial license imposed by section 103(c) which states that:

[e]ach such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

42 U.S.C. § 2133(c) (emphasis added).<sup>14/</sup>

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<sup>13/</sup> The NRC has promulgated regulations for the amendment of licenses pursuant to the statutory authority bestowed upon it by section 187 of the Atomic Energy Act. See 10 C.F.R. §§ 50.90-.92, 50.100 (1988).

<sup>14/</sup> As originally proposed in 1954, section 103(c) established a license term which was not to exceed twenty-five years in  
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A maximum duration operating license either expires forty years from its date of issuance, or, on whatever date that addition yields. In either case, an amendment to extend the expiration date would create a license invalid on its face because it would create a term of more than forty years from issuance. Moreover, the NRC cannot properly manipulate the process by amending the commercial license's original date of issuance to a later date. If the NRC, by license amendment, could change either the original date of issuance or its expiration date, the statutory forty-year limit in section 103 would become meaningless.

In 1986, Chief Justice Burger, on behalf of a majority of the United States Supreme Court, stated that "[if a] statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368, 106 S. Ct. 681, 686 (1986), quoting Chevron

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duration. Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., A Proposed Act to Amend the Atomic Energy Act of 1946 20-21 (Comm. Print 1954), reprinted in 1 AEC, Legislative History of the Atomic Energy Act of 1954 at 53, 80-81 (1955). The maximum license term was changed from twenty-five to forty years by the Joint Committee after it heard testimony on the likely useful life and amortization schedules of a commercial nuclear power plant. See, S. 3323 and H.R. 8862, to Amend the Atomic Energy Act of 1946: Hearings Before the Joint Comm. on Atomic Energy, 83d Cong., 2d Sess. 227, 229-31 (1954), reprinted in 2 AEC, Legislative History of the Atomic Energy Act of 1954 at 1629, 1861, 1863, 1964-965, 227 (1955).

U.S.A. Inc. v. National [sic] Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See also International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 558 (1978); and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). The Congressional intent of section 103 is clear and unambiguous; the term of operating licenses "shall not exceed 40 years." The NRC is, therefore, without legal authority to renew a section 103 license by way of amendment.<sup>15/</sup>

Section 103(c) was modeled after the license term and renewal provisions of the Communications Act of 1934, § 307(d), see G. & W. Mazuzan, Controlling the Atom: The Beginning of Nuclear Regulation, 1946-1962 21 (1984), which stated that

[n]o license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years. . . . Upon the expiration of any license, upon application

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<sup>15/</sup> Although the NRC has amended licenses so as to extend the duration of license terms, none of those licensing actions extended the license term beyond the original forty year period. See, e.g., Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1311 (D.C. Cir. 1984), cert denied, 107 S. Ct. 330 (1986) (extension of a low power operating license); In the matter of Philadelphia Elec. Co., (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273 (1986) (extension of license term to capture the full forty years authorized by law); In the Matter of Florida Power and Light Co., (Turkey Point Plant, Unit 3) DD-80-28, 12 NRC 386 (1980) (amendment of operating license to permit continued operation pending inspection of steam generators); In the Matter of Consolidated Edison Co. of N.Y., Inc., (Indian Point Units 1 and 2), DL-80-5, 11 NRC 351 (1980) (extension of interim operating period); and In the Matter of Consolidated Edison Co. of N.Y., Inc., (Indian Point Station, Unit No. 2), LBP-77-39, 5 NRC 1452 (1977) (extension of interim operating period).

therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, . . . .

Communications Act Amendments, 1952, Pub. L. No. 82-554, § 6 (1952), reprinted in 1952 U.S. Code Cong. & Admin. News 673, 676.<sup>16/</sup> Hence, FCC implementation of the Communications Act for renewal purposes provides a meaningful analog to support the meaning of section 103(c). In this regard, the FCC renews broadcasting station licenses by issuing new licenses. See, e.g., Committee for Open Media v. Federal Communications Comm'n, 543 F.2d 861, 866-67 (D.C. Cir. 1976); In Re Request of Raystay Co., FCC 77-281, 64 F.C.C. 2d 711 (1977); In Re Application of Newhouse Broadcasting Corp., FCC 76-984, 62 F.C.C. 2d 280 (1976); and In Re Application of Gerald M. Fried et al., FCC 76-528, 59 F.C.C. 2d 885 (1976).

Given the express forty year limitation in section 103(c) of the Atomic Energy Act, according that provision its plain meaning, and recognizing the NRC's lack of authority to act contrary to the express provisions of the Atomic Energy Act as well as the Congressional intent embodied therein, one must conclude that NRC's license amendment procedures are not a viable means by which to effect commercial operating license renewal. This conclusion finds further support in the

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<sup>16/</sup> Although section 307(d) of the Communications Act has since been amended, that amendment has not affected the pertinent portions of the Act under consideration herein. See 47 U.S.C. § 307(c) (1988).

regulatory application of the Communications Act of 1934; an Act whose provisions are similar to those of the Atomic Energy Act.

B. Renewal of Section 104 Operating Licenses For Nuclear Power Reactors

Unlike section 103, section 104 neither imposes a durational limit on the term of a reactor license issued under its auspices nor does it provide for their renewal. 42 U.S.C. § 2134. Such provisions were not necessary under the 1954 licensing regime because thereunder the Congress intended that all reactors licensed under section 104 would, upon achieving "practical value," be converted to section 103 licenses. See 107 Cong. Rec. 13,646, 13,656 (1954); and Hearings Before the Joint Committee on Atomic Energy 600, 637-39, 921-23, reprinted in 2 AEC, Legislative History of the Atomic Energy Act of 1954 (1955). Once licensed under section 103, the forty year durational limit would then come into effect and limit the term of the converted license.

When the Congress amended the Atomic Energy Act in 1970 and grandfathered existing section 104 licenses so as to preclude their future conversion to section 103, it failed to specify a limit on their duration similar to that found in section 103(c). Perhaps the inaction of Congress was prompted by the fact that, in 1956, the AEC had imposed a forty-year limit on the terms of both section 103 and 104 licenses. 10 C.F.R. § 50.51. The regulation also provided for the renewal

of both types of licenses upon the expiration of their terms.  
Id.<sup>17/</sup>

Given the continuing effect of section 50.51, one may ask whether the NRC can enforce a regulation that arguably exceeds the requirements of the Atomic Energy Act; namely, the imposition of a forty year limit on section 104 licenses. The placement of sections 103 and 104 reactor license terms on equal footing appears to be a reasonable exercise of the AEC/NRC's rulemaking authority. Decisions relative to the safe operation of a nuclear reactor cannot be made in a temporal vacuum. Indeed, in order to protect the public health and safety, a structured and rational regulatory process must be established. This objective was served when the agency defined, in section 50.51, the temporal parameters within which public health and safety considerations would be examined in the course of power plant licensing.

The NRC may not depart from a requirement of its regulations unless it either exempts an applicant or class of applicants from its application under section 50.12,<sup>18/</sup> or

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<sup>17/</sup> 10 C.F.R. § 50.51 (1988) reads as follows:

Each license [both section 102 and 103 licenses] will be issued for a fixed period of time to be specified in the license but in no case to exceed 40 years from the date of issuance. . . . Licenses may be renewed by the Commission upon the expiration of the period.

<sup>18/</sup> 10 C.F.R. § 50.12 authorizes the NRC to grant exemptions from the requirements of its regulations if the exemptions are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the  
(Footnote continued on next page)

undertakes a rulemaking, 10 C.F.R. §§ 2.800-.809 (1988), to amend section 50.51 and thereby make its forty year limit applicable only to section 103 licenses. Upon the accomplishment of either option, the agency could then renew section 104 licenses by amendment. In the absence of such action, license renewal of a section 104 operating license must be effected by the issuance of a new license.

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common defense and security. The NRC will not consider granting an exemption unless "special circumstances" are present, such as when application of the regulation conflicts with other rules or requirements, or when application would not serve the underlying purposes of the rule. It is unlikely that a section 104 licensee would be granted an exemption from the effect of section 50.51 because the Commission cannot protect the public health and safety without imposing temporal limitations on license terms.



section 114(d) of the NWSA. Consistent with this objective, § 2.1018(c) includes criteria to prevent abuse of the discovery process from frustrating this objective. In ruling on motions to protect a party from a particular discovery request, the Board may consider any "undue delay" that would result from the discovery request, as well as the failure to respond to a discovery request. Under this criterion, the Board will review any motion for a protective order from a particular discovery request, including a request for a written deposition, to determine whether the request creates the potential for unreasonably interfering with meeting the three year schedule. When a party or an interested governmental participant reasonably believes that the Board has not ruled in accordance with this rule and its underlying policy, it may seek review pursuant to directed certification under § 2.718(i) of this part. The Commission itself may entertain such requests and will apply the criteria for granting directed certification liberally. The Hearing Licensing Board or Discovery Master may also consider undue delay as a basis for granting a petition for the use of written interrogatories or depositions on written questions under § 2.1018(a)(2).

In addition, §§ 2.1021 and 2.1022, on the first and second pre-hearing conferences respectively, provide for the establishment of discovery schedules by the Board. In establishing these discovery schedules, the Board must consider the objective of meeting the three-year schedule specified in the NWSA, as well as the early availability of information made possible by the Licensing Support System. Furthermore, the Board should exercise all due diligence to ensure that discovery is completed within two years of the notice of hearing. However, this could not prevent the Board from establishing a schedule that provided for less than a continuous two-year period of discovery, or determining whether any discovery is necessary after the second pre-hearing conference.

Section 2.1018(f) anticipates the application of the traditional sanctions by the Licensing Board for failure to respond to a discovery request, including the issuance of an order for a response or answer to a discovery request.

#### Section 2.1019 Depositions

Section 2.1019 provides for discovery through the taking of depositions. Section 2.1019 basically follows the content of the general deposition rule in 10 CFR 2.740a. However, § 2.1019(i) provides for the derivative discovery of

documents during the deposition. This provision establishes requirements for the disclosure, and entry into the LSS, of material in a deponent's possession that would not be required to be initially entered into the LSS under § 2.1003. This includes personal records, travel vouchers, speeches, preliminary drafts, and marginalia. "Preliminary drafts" means any nonfinal document that is not a circulated draft, i.e., on which no formal, unresolved objection or nonconurrence has been made. "Marginalia" means handwritten, printed, or other types of notations added to a document, excluding underlining and highlighting.

#### Section 2.1020 Entry Upon Land for Inspection

Section 2.1020 establishes the procedures for parties to gain access to the land or property in the possession or control of another party or its contractor for the purpose of inspection and access to raw data. However, this provision should not be construed as expanding any of the rights contained in section 116 or section 118 of the NWSA, or any other applicable statutory or regulatory restrictions, related to site investigation.

#### Section 2.1021 First Prehearing Conference

Section 2.1021 establishes a first pre-hearing conference in the HLW proceeding. The first pre-hearing conference will identify the key issues in the proceeding, and consider petitions for intervention.

#### Section 2.1022 Second Prehearing Conference

Section 2.1022 establishes a second pre-hearing conference in the HLW licensing proceeding. The second pre-hearing conference is to be held not later than seventy days after the NRC staff Safety Evaluation Report is issued. The second pre-hearing conference will consider new or amended contentions, stipulations and admissions of fact, identification of witnesses, and the setting of a hearing schedule.

#### Section 2.1023 Immediate Effectiveness

Section 2.1023 provides for an immediate effectiveness review of the Licensing Board's initial decision on the issuance of a construction authorization. The Commission's existing regulations in 10 CFR 2.764 do not provide for an immediate effectiveness review. Rather 10 CFR 2.764 requires a Commission decision on the substantive merits of the Licensing Board decision before a construction authorization decision can be final. Section 2.1023 would authorize

the Director of the NRC Office of Nuclear Material Safety and Safeguards to allow DOE to proceed with construction, assuming a favorable Licensing Board decision, if the Commission did not suspend the Licensing Board decision after its supervisory immediate effectiveness review, or the Appeal Board did not stay the effectiveness of the initial decision under 10 CFR 2.786. The Appeal Board and the Commission would then undertake a review of the substantive merits of the initial Licensing Board decision. Issuance of the construction authorization under these circumstances would be the event that tolls the time period for determining whether the NWSA three year time frame for the decision on the construction authorization had been satisfied.

#### Schedule

In order to assist the Hearing Licensing Board in establishing a schedule for the HLW proceeding that will facilitate meeting the timeframe specified in the NWSA for a Commission decision on construction authorization, the Commission has prepared the following model timeline. This timeline is intended for general guidance only, and is not intended to suggest any predisposition by the Commission on the merits of DOE's future license application.

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5)	FR Notice of Hearing.
30	2.1014(a)(1)  2.715(c)	Pet. to intervene/request for hearing, w. contentions.  Pet. for status as interested govt. participant (IGP).
50	2.1014(b)	Answers to intervention & IGP petitions.
70	2.1021	1st Prehearing Conference.
100		1st Prehearing Conference Order identifies participants in proceeding, admits contentions, and sets discovery and other schedules.
	2.1018(b)(1), 2.1019 2.1015(b)	Deposition discovery begins.
110		Appeals from 1st Prehearing Conference Order, w/ briefs.
120	2.1015(b)	Briefs in opposition to appeals.
150		AB order ruling on appeals from 1st Prehearing Conference Order.
548		NRC staff issues SER.
588	2.1014(a)(4)	Petitions to amend contentions based on SER.
608	2.1014(b)	Answers to petitions to amend SER-related contentions.
618	2.1022	2nd Prehearing Conference.

Day	Regulation (10 CFR)	Action
648		2nd Prehearing Conference Order rules on amended conditions, sets any further discovery schedule, and sets schedule for prefiled testimony and hearing.
658	2.1015(b)	Appeals from 2nd Prehearing Conference Order, w/ briefs.
668	2.1015(b)	Briefs in opposition to appeals.
698		AB order ruling on appeals from 2nd Prehearing Conference Order.
700	2.749 (set by LB)	Final motions for summary disposition.
720	2.749	Replies to final motions for summary disposition.
730	Supp. info.	Discovery complete.
740		LB order on final motions for summary disposition.
750	2.1015(b)	Appeals from final summary disposition order, w/ briefs.
760	2.1015(b)	Evidentiary hearing begins. Briefs in opposition to appeals from final summary disposition orders.
790		AB order on appeals from final summary disposition orders.
850		Evidentiary hearing ends.
880	2.754(a)(1)	Applicant's proposed findings.
890	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings.
900	2.754(a)(2)	NRC staff's proposed findings.
905	2.754(a)(3)	Applicant's reply to proposed findings.
995	2.760	Initial decision.
1005	2.760(a), 2.762(a), 2.1015(c)	Stay motions to AB Notices of Appeal.
1015	2.760(d)	Replies to stay motions.
1035	2.762(b)	AB ruling on stay motion.
1045	2.762(b), 2.786(a)	Appellant's briefs. Stay motions to Commission.
1055	2.786(d)	Replies to stay motions.
1065	2.762(c)	Appellee's brief.
1075	2.762(c)	NRC staff brief.
1095	2.1023, Supp. info	Completion of NMSS and Commission supervisory review. Commission ruling on any stay motions; issuance of construction authorization; NWSA 3-year period tolled.
1105	2.763	Oral argument on appeals.
1185		Appel Board decision.
1180	2.1015(e), 2.786(b)(1)	Petitions for Commission review.
1190	2.786(b)(3)	Replies to petitions.
1250		Commission decision.

### Topical Guidelines

The following topical guidelines are to be used for identifying the documentary material that should be submitted by LSS participants for entry into the LSS under section 2.1003. The topical guidelines will also be used by the Pre-License Application Licensing Board for evaluating petitions for access to the

LSS during the pre-license application phase under § 2.1008.

#### I. Categories of Documents

- Technical reports and analyses including those developed by contractors
- QA/QC records including qualification and training records
- External correspondence
- Internal memoranda
- Meeting minutes, including DOE/NRC meetings, Commission meetings
- Drafts (i.e., those submitted for decision beyond the first level of management or similar criterion)
- Congressional Q's & A's
- "Regulatory" documents related to HLW site selection and licensing, such as:
  - Draft and final environmental assessments
  - Site characterization plans
  - Site characterization study plans
  - Site characterization progress reports
  - Issue resolution reports
  - Rulemakings
  - Public and agency comments on documents
  - Response to public comments
  - Environmental Impact Statement, Comment Response Document, and related references
  - License Application (LA), LA data base, and related references
  - Topical reports, data, and data analysis
  - Recommendation Report to President
  - Notice of Disapproval, if submitted

#### II. General Topics

1. Any document pertaining to the location and potential of valuable natural resources, hydrology, geophysics, tectonics (including volcanism), geomorphology, seismic activity, atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, proximity to components of the National Park System, the National Wildlife Refuge System, the National Wildlife and Scenic River System, the National Wilderness Preservation System, or National Forest Lands, proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored, spent fuel and nuclear waste transportation, safety factors involved in moving spent fuel or nuclear waste to a repository, the cost and impact of transporting spent fuel and nuclear waste to a repository site, the advantages of regional distribution in siting of repositories, and various

geologic media in which sites for repositories may be located.

2. Any document related to repository design, siting, construction, or operation, or the transportation of spent nuclear fuel and high-level nuclear waste, not categorized as an "excluded document", generated by or in the possession of any contractor of the Department of Energy, the Nuclear Regulatory Commission, or any other party to the HLW licensing proceeding.

3. All documents related to the physical attributes of the Basin and Range Province of the continental United States.

4. Any document listing and/or considering any site or location other than Yucca Mountain as a possible location for a high level nuclear waste repository, or any alternative technology to deep geologic disposal.

5. Any document analyzing the effect of the development of a repository at Yucca Mountain on the rights of users of water in the Amargosa ground-water basin in Nevada.

6. Any document analyzing the health and safety implications to the people and environment of the transportation of spent fuel between locations where spent fuel is generated or stored and Yucca Mountain, Nevada, or any other site nominated for repository characterization on May 28, 1986, including, but not limited to:

- a. Any analysis of possible human error in the manufacture of spent fuel casks;
- b. Any analysis of the actual population density along all of any specific projected routes of travel;
- c. Any analysis of releases from any actual radioactive material transportation incidents;
- d. Any analysis of the emergency response time in any actual radioactive materials transportation incident;
- e. Any actual accident data on any specific projected routes of travel;
- f. Any calculations or projections on the probabilities of accidents on any specific projected routes of travel;
- g. Any data on the physical properties or containment capabilities of spent fuel casks which have been used or which are projected to be used at any hypothetical or actual projected repository;
- h. Any analysis of modeling of the containment capabilities of spent fuel casks under a stress scenario;

i. Any analysis or comparison of spent fuel casks projected to be used against the spent fuel cask certification standards of the Nuclear Regulatory Commission;