UNITED STATES

NUCLEAR REGULATORY COMMISSION

(6)

Proposed Rule: 10 CFR Part 2 Commission Review Procedures for Power Reactors Construction Permits; Immediate Effectiveness Rule 47 Fed. Reg. 47260 (Oct. 25, 1982)

COMMENTS BY THE UNION OF CONCERNED SCIENTISTS

On October 25, 1982, the Nuclear Regulatory Commission (NRC) proposed to amend its rules of practice to require the Commission to independently determine whether a Licensing Board decision issuing a construction permit should be immediately effective prior to Appeal Board review. 47 Fed. Reg. 47260 (October 25, 1982). The Commission stated that it was necessary to change the existing procedure, which requires Appeal Board and Commission review prior to permit issuance, to "avoid unnecessary delay in the issuance of construction permits." Id. at 47260.

This rule is not only unwise, but unworkable and unnecessary. As we describe below, the rule is not supported by the NRC analysis of the question of immediate effectiveness. Moreover, experience under a similar rule for operating licenses has proved that the proposed procedure is confusing and prejudicial to the parties, ill-suited to Commission review, and does not save time for licensees or anyone else. Finally, given the lack of applications for construction permits and the Commission's intent to propose wholesale revisions in the regulatory system "later this year," there is no need to rush through this rule change prior to that comprehensive review.

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I. The Proposed Rule is Unwise As Construction Permit Initial Decisions Should Not Be Immediately Effective Prior to Full Appellate Review by the Commission.

Despite the fact that the issue of immediate effectiveness has been discussed in previous rulemakings, it is useful at the outset to review the rationale behind the original rule and the Commission's experience under that rule.

Originally, NRC rules provided that decisions by Licensing Boards were immediately effective, prior to Appeal Board Review and therefore prior to final agency action. 10 CFR §2.764(a)(1981 ed.). Under this rule, construction or operation could be deferred until the appeals were concluded only through application for a stay, under general "irreparable injury" injunctive standards.

The injustice of this rule was seen most clearly in the Seabrook proceeding. In that case, the Appeal Board denied intervenors' requests for a stay of construction. By the time the Appeal Board was able to review the factual record, upon which basis it reversed the Licensing Board's decision on site-related issues, the plant was already substantially into construction and the site had been cleared and bulldozed. As the crowning injustice, the Commission later ruled that, in weighing Seabrook against alternatives, the money spent during construction pursuant to a legally incorrect and later reversed Licensing Board decision would be counted as an advantage of Seabrook and a detriment to all other alterntatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 7 NRC 1 (1978).

This ruling, which is presumably still good NRC precedent, gives the lie to the assertion that pre-appeal construction is at the "peril" of the applicant. The peril, of course, is to the public interest, and to the ability of the Appeal Board and the Commission to render an unbiased decision on the basis of the evidence on the record, all of which becomes hostage to the speed of construction. In fact, the absurdity of the result in Seabrook was apparent to the Commission, which ordered a detailed study of the propriety of the immediate effectiveness rule.

After the Seabrook ruling, the accident at Three Mile Island compelled the NRC to take immediate action to suspend the existing procedure. Subsequent to that accident the Commission ruled that no permittee could begin either construction or operation prior to complete Appeal Board and Commission review of the relevant decision. 44 Fed. Reg. 65049 (November 9, 1979); 10 CFR Part 2, Appendix B. That rule was later modified by the Commission for operating licenses when it decided to review not the substance of the issues in an operating license but only the question of the immediate effectiveness of Licensing Board decisions itself in an expedited proceeding concurrent with Appeal Board review. 10 CFR §2.764(f), published at 46 Fed. Reg. 47764 (September 30, 1981).

It is this procedure which the NRC desires to extend to construction permits in this proposed rule. However, the detailed study ordered by the Commission in the Seabrook decision provides no support for this proposal. After months of study, the

"Milhollin Report" (so named for its Chairman, Professor Gary Milhollin of the University of Wisconsin Law School) concluded that the original basis for the "immediate effectiveness" rule had been eliminated: */

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> The immediate effectiveness rule was part of an effort to increase the ability of nuclear power to compete with other forms of electric generation. Efforts such as this are no longer an objective of the Commission. Thus, the original basis for the rule has vanished. Milhollin Report, at 1-5.

Moreover, the Milhollin Report concluded that "the Commission is unique among federal agencies in allowing Initial Decisions to be immediately effective." Id. This is particularly notable since Appeal Board review of Licensing Board decisions is mandatory in all cases. It noted that permits for other large, potentially dangerous facilities, such as liquified natural gas terminals, are issued only after the entire agency review is complete. Id., at 3-61. The Milhollin Report also concluded that the stay procedure did not provide a fair opportunity for parties who had not prevailed before the Licensing Board to prevent environmental damage prior to appellate review. Id. at 1-4.

Although the Milhollin Report was released almost two years ago, the Commission has not implemented its recommendations. It is instructive to note that the proposal under review here, Commission review of "immediate effectiveness", is not among those options proposed by that Report. The Report recognized that the issue of immediate effectiveness was of critical importance, and proposed that at the very least, permit

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*/ "Report of the Advisory Committee on Construction During Adjudication," NUREG-0646, January 1980.

issuance should be delayed until both the Appeal Board and the Commission had reviewed the question. Id. at 1-6 to 1-8 (Option A). The rule as proposed would bypass the Appeal Board denying the Commission its valuable assistance in limiting the issues on review.

The Commission seems to have simply forgotten the recommendations of the Milhollin Report and their reasoning. None of the so-called licensing "reform" initiatives which are under current discussion by NRC contain or discuss these proposals. It is important to note, however, that the only comprehensive analysis of the issue has decided that the concept of "immediate effectiveness" is fundamentally in conflict with the NRC's role as an impartial regulatory body, and that any pre-final decision permit issuance should allow the thorough review of both the Appeal Board and the Commission. The proposed rule is therefore without any rational support. We urge that the Commission retain its existing prohibition on immediate effectiveness until the public and the Commission can thoroughly review the issues involved.

II. The Proposed Rule is Unworkable and Prejudicial to Petitioners.

The preamble to the proposed rule states that it is being proposed due to "experience gained in the Commission review of operating license decisions." 47 Fed. Reg. at 47260. This statement is mystifying, as the same rule in operating

licenses cases has proven to be totally unworkable in those cases in which immediate effectiveness is a serious issue.

The prime example of this fact is the Commission's attempt to rule on the immediate effectiveness of the Licensing Board's decision in the TMI-1 Restart proceeding. The initial decision in that case was issued in December, 1981, thereby forcing the parties to prepare simultaneously for Appeal Board and Commission review. The record of that hearing shows numerous extensions of time due to the intolerable burdens of simultaneous pleading deadlines, to the end that the Appeal Board has resolved some substantive issues prior to the Commission's supposed "expedited" review of immediate effectiveness. The Commission's goal of 30 days to reach its decision has now stretched to over nine months, with no end in sight.

The irrationality of the proposed rule is due not only to the impossible timetable and pleading burden placed on the parties, but also due to the practical incapability of the Commission to conduct a thorough review of the record in a Licensing Board case. The detailed review of a Licensing Board case is given to the Appeal Board, with Commission review limited to the major policy and legal issues remaining. The TMI-1 Restart case shows that the Commission simply does not have the time or staff to make the detailed factual review necessary to render a meaningful immediate effectiveness ruling. This history demonstrates that a ruling by the Appeal Board prior to Commission review would be more expeditious, and would result in a more reasoned decision.

In addition, the "standard" set by the rule which purports to establish the threshold justifying a denial of "immediate effectiveness" is so broad as to be meaningless. Section 2.764(e)(2) of the proposed rule states that an initial decusion will be stayed if the Commission "determines that it is in the public interest to do so", based on the following factors: (1) the "gravity of the substantive issue"; (2) the "likelihood that it has been resolved incorrectly below"; (3) the "degree to which correct resolution would be prejudiced" by immediate effectiveness; and (4) "other relevant public interest factors." It is simply impossible for a party to know what it must prove to deny immediate effectiveness under this "standard."

Finally, the prior review of immediate effectiveness by the Commission, as envisioned by this rule, inherently prejudices the Appeal Board's review of the merits, prejudicing the rights of the parties. The Appeal Board and Commission are simultaneously reviewing the same record, and while the standard of review differs somewhat, the Appeal Board is obviously affected by Commission decisions of the content of that record.

III. There is No Need to Promulgate This Rule.

The proposal notes that the rule is intended to apply to construction permit applications, even though "no construction permits have been issued since the suspension of the original rule." 47 Fed. Reg. at 47260. In addition, the proposal states that the issue of immediate effectiveness will be reviewed as a part of the Commission's regulatory reform proposals due "later this year." Id.

Given these facts, there is no need for this rule. There are to our knowledge no ongoing construction permit proceedings other than the Clinch River Breeder Reactor and that will not reach the initial decision stage before the end of the year. Prior to decision on an issue of this importance, the Commission should thoroughly consider the analysis in the Milhollin Report, and allow the public to comment on those proposals which are very different and more equitable than this one.