PDR

July 24, 1984

SECY-84-290A

POLICY ISSUE
(Commission Meeting)

For: The Commission

From: Herzel H. E. Plaine, General Counsel

Subject: EXEMPTIONS

Discussion: The Staff's recent paper on "Need And Standards For Exemptions," SECY-84-290, raises serious issues regarding granting of exemptions under 10 C.F.R. 50.12 that require Commission attention and guidance. These issues relate to the Commission's recent Shoreham exemption decision, to section 185 of the Atomic Energy Act ("Act"), which requires the NRC to find that a plant "has been constructed and will operate ... in conformity with the provisions of this [Atomic Energy] Act and of

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This paper is scheduled for discussion at an open meeting on Wednesday, July 25, 1984.

the rules and regulations of the Commission" before issuing an operating license, and to the role of NRC's safety regulations, and exemptions from those regulations, in assuring adequate protection of the public health and safety.

The ideal solution to the legal and policy issues raised in the Staff's paper would be to change the regulations to distinguish more carefully among safety requirements needed for fuel loading and other operational phases, and to remove outmoded requirements and unnecessary detail. But the time has long since passed for such a regulatory reform exercise to be helpful in the review of most pending applications. Thus we will focus on what can be done to solve Staff's dilemma without extensive changes to the regulations. Fortunately, we believe that the situation is not as bleak as Staff makes it out to be. Below we

discuss the issues raised by Staff and offer what we hope are some helpful recommendations.

I. Basic Regulatory Philosophy

We begin with a discussion of the role of NRC safety regulations in licensing. As noted above, the Act requires a finding of compliance with the NRC regulations before issuing an operating license. A superficial analysis would reveal no problem here. NRC's regulations themselves provide for exemptions, and so long as a possible noncompliance is "cured" by an exemption, the compliance finding required by the Act can be made. However, the Act's requirement for a compliance finding gives rise to a more fundamental issue. The Act authorizes NRC to issue safety regulations but makes no reference to exemptions from them. Does the Act contemplate that all plants must be made

to comply with a set of basic safety regulations with no leeway for any exemptions? Is the practice of granting exemptions contrary to the Act?

We believe that any good regulatory program, including the one administered by NRC under the Act, must provide some leeway for waivers or exemptions from agency regulations. Regulations are based upon the application of broad policy principles to generalized facts regarding the problem being addressed. Every existing circumstance cannot always be accommodated, and every future circumstance cannot be predicted.

Thus, in the classic case of National Broadcasting v. U.S., 319 U.S. 190 (1943), the U.S. Supreme Court upheld FCC rules prohibiting certain methods of chain broadcasting even though the FCC did not and

could not examine the circumstances of each and every chain broadcasting license application in the rulemaking. And a rule forbidding commercial air carriers from using pilots over 60 years old was upheld in Air Lines Pilots Ass'n v. Quesada, 276 F.2d 893 (D.C. Cir. 1960), even though the health and qualifications of each and every pilot over 60 years old was not examined in the rulemaking.

But agencies' authority to issue regulations, based on policy and generalized facts, carries with it a corollary duty to recognize the limitations of such rulemaking. Thus the Court in the cited National Broadcasting case noted that the FCC had provided for exemptions from its chain broadcasting rule, and cautioned that "If time and changing circumstances reveal that the 'public interest' is not served by application of the regulations, it must be

assumed that the Commission will act in accordance with its statutory obligations." 319 U.S. at 225. The same flexibility in applying rules was again recognized in the leading Supreme Court case of U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956). The principle was more recently stated by Justice Rehnquist in U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972):

> It is well established that an agency's authority to proceed in a complex area ... by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances.

Thus we believe that the practice of granting exemptions from regulations is in accord with both the Act and sound principles of administrative law. The more difficult question is what limitations must apply to the granting of such exemptions. Judicial decisions not only reject the extreme

approach of refusing any exemptions,[1] but also reject the extreme approach of granting them indiscriminately. As one judge has put it,

> law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a special case.

Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (concurring opinion). Accordingly, a simple showing of inability to comply cannot be grounds for an exemption, since this would result in the prohibited situation of a rule for general application that need not ever be applied or, in short, a meaningless rule.

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[1]Some agencies administer statutes that have been construed to preclude exemptions. E.g., E. I. duPont de Nemours & Co. v. Train 430 U.S. 112, 138 (1977). The Atomic Energy Act neither expressly allows nor expressly disallows exemptions from regulations. Under these circumstances, the general principle of administrative law allowing exemptions should apply.

Sometimes the courts speak of the need for a showing of "hardship", Basic Media, Ltd. v. FCC, 559 F.2d 830 (D.C. Cir. 1977), or "special circumstances," U.S. v. Allegheny-Ludlum Steel Corp., supra, before an exemption can be granted. NRC's own regulations on the granting of so-called waivers or exceptions from regulations in formal hearings also speak of "special circumstances." We think that both of these formulations of the standard fit within the more general principle stated in WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). The WAIT principle is that an exemption may be granted upon a showing by the exemption applicant that his circumstances are substantially different from those considered at the rulemaking process. See also, Turner Bros. Trucking Co., Inc. v. ICC, 684 F.2d 701 (10th Cir. 1982); Industrial Broadcasting v. FCC, 437 F.2d 680 (D.C. Cir. 1970). This principle fits in

very nearly with the concept of rulemaking that we discussed above. An exemption application which presents circumstances that differ substantially from the general factual and policy bases for the rule at issue would raise issues not considered and resolved in the rulemaking. Such an exemption application would not, therefore, seek to undercut the rule itself.

The courts have also stated that when an agency decides to make an exemption, it subjects itself to careful scrutiny by a reviewing court, and the agency will be required to state its reasons clearly on the record. Moreover, case law suggests that where an agency grants an exemption from a rule from which it has never before deviated, judicial scrutiny will be especially close and the agencies' reasons must be especially strong. Basic Media, Ltd. v. FCC, supra.

In sum, NRC can grant exemptions from its regulations. The basic principle is that an exemption may be granted lawfully if a showing is made that there are circumstances which are substantially different from those considered in the rulemaking process.

II. The Shoreham Decision

With these administrative law principles in mind, the NRC's Shoreham decision, CLI-84-8 (May 16, 1984), can be examined. Shoreham fairly stands for the proposition that certain, and perhaps all, exemptions from the regulations may be granted under 10 C.F.R. 50.12 only upon a finding of "exceptional circumstances." Under Shoreham such a finding of exceptional circumstances requires a reasoned exercise of discretion that takes into account the equities of each situation, including the stage of the facility's life, any financial or economic

hardship, any internal inconsistencies in the regulations, good-faith efforts to comply, the safety significance of the issues involved, and the public interest in adherence to the regulations. Shoreham also fairly stands for the proposition that, at least for some exemptions, the plant must be as safe with the exemption as without it.

A. Exceptional Circumstances

10 C.F.R. 50.12 does not, by its terms, require any finding of "exceptional circumstances." It requires a finding that the exemption requested would be "authorized by law;" would "not endanger life or property or the common defense and security," and would be "otherwise in the public interest." However, a finding of "exceptional circumstances" is defensible as a Commission refinement of either the

"public interest" or "authorized by law" regulatory exemption standard.

The critical question is whether the finding of "exceptional circumstances" can be limited to certain types of exemptions, or abandoned in favor of some different standard. The answer to this question is yes, for the following reasons.

As explained above, judicial decisions support a general administrative law principle that exemptions are appropriate if a showing is made of circumstances which are substantially different from those considered in the rulemaking process. The use of this principle in any given case will require some knowledge of the policy and generalized facts underlying the rule in question.

If, for example, the generalized factual premise for a required containment leakage

test in 10 C.F.R. Part 50, Appendix J, is that the test would be relatively inexpensive and easy to perform, and changes in a particular plant design since the requirement was issued make the tests expensive and difficult, then the circumstance would be substantially different and an exemption would be appropriate.

Similarly, hardship resulting from the late identification of a problem with an applicant's good-faith effort to comply with a regulation could be ground for an exemption. Here the basis of the regulation for which the exemption is sought would need to have included the presumption that problems with compliance would be identified in a timely manner.

This suggests that the "exceptional circumstances" test, if understood to mean circumstances that are highly unusual, or

understood to impose a very high threshold, is a more severe test than the law would require in every case. On the other hand, if "exceptional circumstances" is taken to refer to circumstances that are different from or, speaking loosely, an exception from, the circumstances considered in the rulemaking, then the "exceptional circumstance" test is the rough equivalent of what the law would require. But there is no "magic" in the "exceptional circumstances" formulation. The Commission may choose to retain it, limit it to certain types of exemptions, or abolish it and provide some substitute test that falls within the WAIT principle.

B. Treating all Exceptions the Same

The Shoreham "exceptional circumstances" test has been understood as establishing a fairly high threshold standard for 10 C.F.R.

50.12 exemptions, although this is an arguable proposition given the rather broad scope of the "equities" that are listed as proper for consideration. The question here is whether a high threshold must be used for all exemptions if the Shoreham decision is to be followed.

We believe that the answer to this question is no. The "exceptional circumstances" test derives from Commission practice related to exemptions to allow pre-construction permit site clearing and excavation. This kind of exemption raises exceptionally serious environmental issues. And, given the fact that the GDC represent the basic principles of power reactor safety regulation, it would be fair to state that the exemption request in Shoreham raised exceptionally serious safety policy issues. But clearly there are many other regulations which occupy far less prominent positions in the field of nuclear

regulations. Exemptions from these latter regulations need not, in our view, be subject to an especially stringent test under Shoreham.

C. The Level of Safety

Shoreham imposed a requirement that the level of safety be the same with the exemption as without it.[2] We believe that this requirement is a legally defensible one, but is not required by law.

It should be recognized, though, that the Shoreham "same level of safety" standard has

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[2]The Staff's and ASLB's position in Shoreham that the level of safety for low power should be equivalent to that associated with full-power operation in full compliance with the regulations would, if applied generally to low-power exemption requests, have led to unfortunate consequences. It would have obliterated the distinction between the safety risks at low power as opposed to full power, and thereby defeated both the customary basis for defeating court injunctions against low power, and the basis for the rule requiring no finding regarding offsite emergency planning for low power.

some administrative advantages. For one, it focuses the safety analysis on some general safety level that can, at least in some substantial number of cases, be inferable from the regulations in question, rather than on the more amorphous "adequate protection" statutory standard. For another, it diminishes the safety significance of exemptions, and simplifies the preparation of any required NEPA environmental impact appraisal.

On the other hand, the "same level of safety" standard introduces a considerable stringency, and inflexibility, to the granting of exemptions. Thus the test has both "pros" and "cons," and the Commission may wish to consider whether, as a policy matter, it wishes to limit it to certain cases or abolish it.

D. Different Licenses

In SECY-84-290, Staff takes the position that Shoreham requires a finding of full compliance with the regulations assuming full-power operation, or the granting of an exemption, before any license, including a fuel-loading and low-power license, can be issued. We believe this is not required by Shoreham.

It is true that the Commission held in Shoreham that 10 C.F.R. 50.57(c) does not make GDC-17 inapplicable to licenses for low-power operation. We believe that this is a correct reading of the regulations.

To say that a particular regulation applies to low power licenses does not require the assumption that plant systems will be stressed or taxed as if the plant were operating at full power. Thus such things

as the lower temperatures and pressures associated with low power can be taken into account in determining whether the regulation is satisfied.

Moreover, some regulations can be considered inapplicable as a matter of simple logic, without the need to use 10 C.F.R. 50.57(c). For example, simple logic would suggest that the requirements of GDC-61 relating to spent fuel storage have no bearing on a license to load fuel but not to go critical. We see a distinction between this kind of simple logic, and the use of 10 C.F.R. 50.57(c). The former is straightforward and essentially uncontrovertible. The latter would have entailed highly judgmental and controvertible decisions about whether the level of safety associated with the application of the regulation to lower power can be deemed excessive.

However, we do not find any basis in the regulations for staff's apparent past practice of considering all of the regulations so flexible as to allow the picking and choosing of which regulations needed to be satisfied for particular phases of licensing. Perhaps the regulations should be more carefully drafted to provide some flexibility, but they do not do so now.

E. Operating Reactors

Sometimes operating reactors[3] come into noncompliance with a regulation or license condition as, for example, when the deadline for installation or qualification of some equipment cannot be met. In this

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[3] A reactor is an operating reactor for purposes of this discussion if and to the extent that it holds an operating license. A reactor with a low-power license is only an operating reactor insofar as an exemption request relates to low-power operation.

circumstance the issue arises whether the licensee may or can be granted an exemption from the requirement in order that a plant shutdown, not necessary for safety, can be avoided.

This type of exemption procedure can run into serious legal difficulty if the potential noncompliance relates to a condition in the license. In this circumstance, the "exemption" is a form of license amendment, and the provisions of the so-called Sholly amendment, sections 189a(2) of the Act, apply. The result is that the "exemption" cannot be granted, effective immediately, in the face of a request for a hearing from an interested person, unless the Commission finds that the "exemption" involves no significant hazards consideration.

Some legal issues are raised here if the exemption relates to a requirement that is

in the regulations, but not in the license. An exemption is probably a form of license under the Administrative Procedure Act, and it is possible that a court might impose procedural requirements, including public notice and some form of hearing or comment period, before it can be granted.

This suggests to us that the preferable course, from a purely legal standpoint, may be to decline all such exemption requests for operating reactors, and instead issue notices of violation and consider the need for enforcement action, including shutdown, as a largely discretionary enforcement matter. If the violation does not pose a safety problem requiring plant shutdown, then an explanation of the reasons for this conclusion, along with a new schedule for compliance, could accompany the notice of violation. The new compliance schedule would be characterized, legally, as an

advisory to licensee of the date beyond which shutdown or other "escalated" enforcement action will be considered.

Recommendations: Our recommendations are in two groups: (1) those that can be adopted without any change in the Shoreham decision; and (2) those that will require some deviation from Shoreham for future exemption requests.

(1) We believe that all of the following principles of Commission guidance on the general granting of 10 C.F.R. 50.12 exemptions would be consistent with Shoreham and administrative law principles:

(a) The criteria in 10 C.F.R. 50.12(a) must be satisfied;

(b) The "authorized by law" and "public interest" criteria in 10 C.F.R. 50.12(a) should be

understood to include a finding, in all cases, that there are circumstances which are substantially different from those considered when the rule in question was issued.

Such substantially different circumstances may include such things as substantial changes in technology or the costs of compliance since the rule was issued; the fact that the rule presumed full-power operation for the full license term, while the exemption involves only fuel loading or low-power operation for limited time; and undue hardship arising from late discovery of a compliance problem, despite applicant's good-faith efforts to comply.

In each case the underlying factual assumptions or premises for the rule must be examined to see if present circumstances are indeed substantially different. If, for example, the rulemaking fairly reflected the judgment that a requirement must be imposed despite substantial cost, then a mere showing of substantial cost does not warrant the granting of an exemption.

(c) A requirement that there be "exceptional circumstances," understood as an especially strong showing of need for an exemption, and the requirement that the level of safety be the same with the exemption as without it, need only apply to exemptions from regulations of special safety, security,

or environmental significance, such as 10 C.F.R. 50.10 and the GDC.

(d) Some regulations, including some GDC, may properly be considered inapplicable to fuel loading and low power testing if such a conclusion is fairly compelled by simple logic and common sense. However, a regulation cannot be considered inapplicable merely because, as applied to fuel loading or low-power testing, it is logical but arguably excessive.

(e) In considering a low-power license, under the regulations, there is no requirement that full-power operation be postulated. In determining regulation compliance, such factors as decreased

temperatures and pressures can be factored into the analysis.

(f) Exemptions should not be granted for operating reactors. Instead, violations, including violation of schedular requirements, would be treated as matters suitable for the exercise of enforcement discretion. Where the safety significance of the violation does not warrant immediate shutdown or other "escalated" enforcement action, a schedule for compliance would be established to control future enforcement actions.

(2) The following possibilities would require some deviation from Shoreham for future exemption requests:

(a) The provision in Shoreham requiring that operation be "as safe" with the exemption as operation in full compliance could be modified, even as applied to significant regulations. Minor deviations from the level of safety associated with full compliance could be allowed.

For example, "substantially as safe as" could be a suitable standard. Or, a more flexible standard could be considered for short-term exemptions designed to allow a limited period of initial operation while full compliance was being achieved. These short-term exemptions could be authorized under the "not endanger life or property" standard of 10 C.F.R. 50.12.

(b) The "exceptional circumstances" test could be changed, even as applied to significant regulations, to the WAIT standard -- does the exemption request present circumstances that are substantially different from those considere and forming the basis for the rulemaking.

We believe that those recommendations which are consistent with Shoreham can be implemented by either a SECY requirements procedure, placed in the Public Document Room, or a published Commission policy statement. Changes to Shoreham, applicable to future exemption requests, should be done by published Commission policy statement.

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THIS PAPER IS SCHEDULED FOR DISCUSSION AT AN OPEN MEETING ON WEDNESDAY, JULY 25, 1984.

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