AA61-2 PDR

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 2, 83

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D.C. 20515

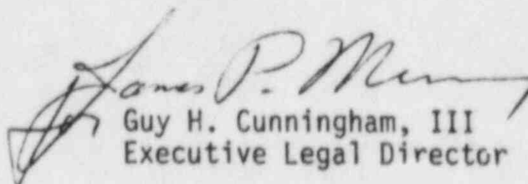
Dear Mr. Chairman:

The Commission is preparing to adopt amendments to its "Rules of Practice for Domestic Licensing Proceedings" in 10 C.F.R. Part 2 and to its regulations in 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," to reflect Public Law 97-415, enacted on January 4, 1983, authorizing the Commission to issue temporary operating licenses.

The legislation also directs the Commission to promulgate, within 90 days of enactment, regulations which establish (a) standards for determining whether an amendment to an operating license involves no significant hazards consideration, (b) criteria for providing or, in emergency situations, for dispensing with prior notice and opportunity for public comment on such a determination, and (c) procedures for consultation on such a determination with the State in which the facility involved is located.

To implement this legislation, the Commission has prepared the enclosed regulations for publication in the Federal Register. The statements of consideration describe and explain the regulations in detail. A public announcement is also enclosed.

Sincerely,



Guy H. Cunningham, III
Executive Legal Director

Enclosures:
As stated

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OFFICE OF THE COMMISSIONER

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

April 1, 1983

MEMORANDUM FOR SAMUEL J. CHILK, SECY

FROM: William J. Manning, OCM

SUBJECT: SEPARATE VIEWS

Attached are Commissioner Gilinsky's separate views regarding the interim rule on No Significant Hazards Considerations and the proposed rule on Temporary Operating Licenses. Please ensure that these views are published in the Federal Register together with these rules.

cc: W. Reamer
V. Harding
J. Laverty
P. Davis
OGC
EDO

4/1/83

COMMISSIONER GILINSKY'S SEPARATE VIEWS ON THE INTERIM FINAL RULE REGARDING STANDARDS FOR DETERMINING WHETHER LICENSE AMENDMENTS INVOLVE NO SIGNIFICANT HAZARDS CONSIDERATIONS (AMENDMENTS TO 10 CFR PART 50)

Standing by themselves, the standards which are set forth in the rule are so general that they offer no real guidance to the NRC staff. In a prior version of the rule, the Commission included, in the rule itself, some very useful examples of which amendments do and do not involve a significant hazards consideration. In the final version, these examples have been downgraded to the preamble of the rule where they will be of little or no legal consequence and where, as a practical matter, they will be inaccessible to anyone but the NRC historian. This diminishes the value of the rule so much that I can no longer approve it.

The earlier version of the rule placed amendments authorizing substantial spent fuel pool expansions in the significant hazards consideration category. The Commission should have retained this categorization which is consistent with the terms of the rule. Moreover, the Commission should not have ignored the strong public and Congressional views which have been expressed on this point, most recently by Senators Simpson, Hart, and Mitchell.

4/1/83

COMMISSIONER GILINSKY'S SEPARATE VIEWS REGARDING THE PROPOSED RULE ON TEMPORARY OPERATING LICENSES (AMENDMENTS TO 10 CFR PARTS 2 AND 50)

I have voted against the Temporary Operating License rule because of the Commission's decision to exempt Temporary Operating License proceedings from the *ex parte* and separation of functions rules. "This would mean that the Commission's staff, applicants and intervenors would be free to contact individual Commissioners as well as the Commission's Office of General Counsel and Office of Policy Evaluation to argue their respective position on the temporary operating license." (A sentence of explanation which appeared in the penultimate draft and which the Commission was too modest to leave in the final version.)

This decision is but another example of the Commission's deep-seated hostility toward informing the public and involving it in NRC's proceedings. The decision is incompatible with the basic notions of fairness which underlie the *ex parte* rules since the temporary operating license issues will inevitably be quite similar to the issues in the operating license hearing which will be going on at the same time. As has so often happened, the course chosen by the Commission is likely to be self-defeating: it is bound to result in endless litigation.

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CHAIRMAN PALLADINO'S ADDITIONAL VIEWS

In my opinion the Commission's decision on reracking represents its best technical judgment at this time on the generic no-significant-hazards question. That is, the Commission cannot say that reracking, as a general matter, would or would not involve a significant hazards consideration. The technical considerations of reracking proposals can vary significantly from one to another.

It was this latter fact, as well as the statements made in the Congress on reracking, that caused me to vote for the staff to study the technical basis for judgments about the hazards considerations presented by particular reracking applications.

I also believe that we may have cleared up one of the Congressional concerns about reracking by stating that it is not our intent to make a no-significant-hazards-consideration finding for reracking based on unproven technology.

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ADDITIONAL VIEWS OF COMMISSIONER ASSELSTINE

I strongly disagree with the Commission majority's decision not to apply the provisions of 10 CFR Sections 2.719 and 2.780, relating to separation of functions and *ex parte* communications, as part of the procedural requirements for implementing the temporary operating license authority in Section 192 of the Atomic Energy Act of 1954, as amended.

In all likelihood, the issues that will be raised before the Commission in the temporary operating license proceedings under the provisions of Section 192 will be similar to, or the same as, the issues being adjudicated in the hearing in the final operating license proceedings. By permitting the NRC staff and the applicant, among others, to make informal off-the-record contacts with the Commission on these issues during the temporary operating license proceedings, the Commission majority's proposed rule presents a grave risk of contaminating the formal on-the-record operating license proceeding. I do not believe that this risk of contaminating the final operating license proceeding can be avoided easily if informal, off-the-record contacts on similar issues arising in the temporary license proceedings are permitted. In order to assure procedural fairness in our operating license proceedings, I would apply our regulations relating to separation of functions and *ex parte* communications to temporary operating license proceedings, just as we now do for final operating license proceedings.

ADDITIONAL VIEWS OF COMMISSIONER ASSELSTINE

I strongly disagree with the Commission majority's decision to permit the use of the "Sholly amendment" authority contained in section 12 of Public Law 97-415, the NRC Authorization Act for fiscal years 1982 and 1983, for license amendments for the reracking of a spent fuel pool.

The Commission majority's interim final rule would change the Commission's longstanding and consistent policy of requiring that any requested hearing on a license amendment for the reracking of a spent fuel pool be completed prior to granting the license amendment. Although the Commission has considered and approved a large number of spent fuel pool reracking amendments in the past, it has never used the no significant hazards consideration provisions in section 189 a. of the Atomic Energy Act of 1954 as a basis for approving the amendment before the completion of a requested hearing.

It is clear to me from the legislative history of section 12 of Public Law 97-415 that the Congress did not intend that the authority granted by section 12 should be used to approve reracking amendments prior to the completion of any requested hearing. The Sholly amendment was first included in the NRC authorization bill for fiscal years 1982 and 1983 by the Senate Committee on Environment and Public Works. The

report of that Committee on the bill (Senate Report 97-113) makes it abundantly clear that the Committee did not intend the Sholly amendment to be used by the Commission to approve reracking amendments in advance of the completion of a requested hearing. Although the report of the Conference Committee on the bill did not repeat this admonition, there is no evidence to indicate a contrary view by the House-Senate conferees on the bill or by the two House Committees that considered the legislation.

Moreover, I believe that the use of the Sholly amendment authority to approve reracking amendments before the completion of any required hearing goes far beyond the justification offered by the Commission when it requested the Sholly amendment. In requesting the enactment of the Sholly amendment, the Commission described in some detail the situations in which it foresaw the need for this authority. The Commission emphasized the need for a large number of unforeseen and unanticipated changes to the detailed technical specifications in the operating licenses for nuclear powerplants that arise each year through such activities as refueling of the plant. The Commission argued that the need to hold a hearing on each of these changes, if one is requested, would be burdensome to the Commission and could disrupt the operation of a number of plants. In order to avoid this problem, the Commission asked the Congress to reinstate the authority that the Commission had exercised in similar situations since 1962. A reracking amendment is substantially different from the situations described by the Commission in requesting the Sholly amendment, because the need for reracking can be anticipated, because reracking involves a substantial physical

modification to the plant and because of the significance attached to reracking by State and local officials and by the public.

Finally, I believe that there are strong public policy reasons for continuing the Commission's past practice of completing hearings on reracking amendment proposals before approving the amendment. These public policy reasons include the strong interest and concern on the part of State and local governments and the public regarding reracking proposals and the extent to which proceeding with reracking in advance of the hearing may prejudice the later consideration of other alternatives to the proposed reracking plan.

For these reasons, as a matter of policy, I would not permit the use of the Sholly amendment authority to approve reracking amendments prior to the completion of any requested hearing. I would therefore have added a provision to the Commission's interim final rule that would have required, as a policy matter, the completion of any requested hearing on a spent fuel pool reracking amendment before Commission approval of the amendment.

ADDITIONAL COMMENTS OF COMMISSIONER AHEARNE

There have been several complaints that the criteria for determining when an amendment involves significant hazards considerations are unclear or difficult to apply. For example, in the current notice the Commission notes that a commenter on the proposed rule stated the standards are "unclear and useless in that they imply a level of detailed review of amendment applications far beyond what the staff normally performs."[1] However, these criticisms must be considered in context.

In May 1976 a petition for rulemaking was filed which requested that criteria be specified for determining when an amendment involved no significant hazards considerations.[2] The petition was published for comment in 1976.[3] The Commission received a few comments, primarily supporting or opposing criteria which had been proposed in the petition. The discussion focused on underlying philosophical/legal issues rather than specific alternative criteria.

The rulemaking then lay dormant for several years. In late 1979 the Commission addressed the matter and agreed to issue a proposed rule for

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[1]This refers to: "Comments by the Natural Resources Defense Council and the Union of Concerned Scientists on Proposed amendments to 10 CFR Parts 2 and 50: No Significant Hazards Consideration" at 8 (May 23, 1980) (comment 3, PR-2,50 (45 FR 20491)).

[2]The petition was filed May 7, 1976 by Mr. Robert Lowenstein on behalf of Boston Edison Company, Florida Power and Light Company, and Iowa Power Company.

[3]41 Fed. Reg. 24006 (June 14, 1976).

public comment. The proposed rule was published in March 1980.[4] As the Commission explained in that notice:

> "During the past several years, the Staff has been guided in reaching its findings with respect to 'no significant hazards consideration' by staff criteria and examples of amendments likely to involve, and not likely to involve, significant hazards considerations. These criteria and examples have been promulgated within the Staff and have proven useful to the Staff. The Commission believes it would be useful to consider incorporating these criteria into the Commission's regulations for use in determining whether a proposed amendment to an operating license or to a construction permit of any production or utilization facility involves no significant hazards consideration."[5]

With respect to the criticism that the criteria are unclear, we have not received much assistance in developing clearer criteria despite having obtained two rounds of comment over the last seven years. For example, in the comment on the proposed rule mentioned above, NRDC and UCS simply argued: "The NRC should promulgate a rule holding that prior notice and opportunity for hearing should be provided for construction permit and operating licenses amendments in all cases except those involving no significant previously-unreviewed safety issue."[6] In addition, the debate has often

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[4]45 Fed. Reg. 20491 (March 28, 1980).

[5]Id. at 20492.

[6]Id. at 11. 10 CFR 50.59 deems actions to be an "unreviewed safety question":

> "(i) if the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the safety analysis report may be increased; or (ii) if a possibility for an accident or malfunction of a different type than any evaluated previously in the safety analysis report may be created; or (iii) if the margin of safety as defined in the basis for any technical specification is reduced."

NRDC/UCS did not propose an alternate definition to be used with their proposal. It is interesting to note the substantial similarity to the significant hazards consideration test.

become confused by differing assumptions and philosophies that are not usually clearly identified. For example, the NRDC/UCS implication of a detailed level of review arises largely because of an implicit assumption that the criteria are intended to require a merits type review. In fact, what the staff has always done, and what I believe we had in mind, was to make a preliminary judgment.

Basically, we have done the best we can. I would be willing to address any specific alternatives. However, after dealing with this for a number of years, I believe we must move ahead with what we have.

AA61-2 PDR

IDENTICAL LETTER SENT TO:

Alan Simpson, Chairman
United States Senate
cc: The Honorable Gary Hart

Richard L. Ottinger, Chairman
U.S. House of Representatives
cc: The Honorable Carlos Moorhead

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
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cc: Rep. Manuel Lujan

Enclosures:
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