AA61-2 PDR

AFFIRMATION

cc: Dircks
Roe
G. Cunningham, OGC
FMI
TK
3/16

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER AHEARNE

WO
Parron

SUBJECT: SECY-83-16B - REVISED REGULATIONS TO IMPLEMENT LEGISLATION ON (1) TEMPORARY OPERATING LICENSING AUTHORITY AND (2) NO SIGNIFICANT HAZARDS CONSIDERATION (THE "SHOLLY AMENDMENT") - SECY-83-16 AND 83-16A

APPROVED X DISAPPROVED_____ ABSTAIN_____

NOT PARTICIPATING_____ REQUEST DISCUSSION_____

COMMENTS: (OGC markup with modification to Encl. 2 page 19. Also NP markup of pp. 1 and 20 and TR markup of p. 26, Encl. 3 which were not picked up by OGC.)

as modified
(see attached)

I accept, given the understanding, as staff has expressed in several Commission meetings, that the TMI venting would not have met these significant hazards criteria

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J. Ahearne
SIGNATURE

3/17/83
DATE

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

NRC-SECY FORM DEC. 80

Enclosure 4 (OGC mark up)

(i) Use local media to inform the public in the area surrounding a licensee's facility of the licensee's amendment request and of its proposed determination as described in paragraph (a)(2) of this section;

(ii) Provide for a reasonable opportunity for the public to comment, using its best efforts to make available to the public whatever means of communication it can for the public to respond quickly;

(iii) Use its normal public notice and comment procedures in paragraph (a)(2) of this section ~~or consult during the license amendment~~ where it determines that the licensee has failed to use its best efforts to make a timely application for the amendment in order to create the exigency and to take advantage of this procedure.

~~(iv)~~ Require an explanation from the licensee about the reason for the exigency and why the licensee cannot avoid it and

~~(v) Grant the amendment request only if it finds that the licensee's action pursuant to its request:~~

~~(A) is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest;~~

~~and~~

~~(B) involves no significant hazards considerations; and~~

(iii) Publish a notice of issuance under § 2.106, providing an opportunity for a hearing and for public comment after issuance, if it determines that the amendment involves no significant hazards consideration;

(b) State consultation.

(1) At the time a licensee requests an amendment, it must notify the State in which its facility is located of its request by providing to that

clearly contemplate that the procedural framework is both useful and needed to govern the Commission's actions in exercising the new authority and to preserve for the public its right to participate in licensing decisions.

fm Marty Malsch

Proposed Subpart C to 10 C.F.R. Part 2 - "Procedures Under Section 192 for the Issuance of Temporary Operating Licenses."

Subpart C would simply add procedural requirements to 10 C.F.R. Part 2 needed to implement the temporary operating licensing authority in section 192 of the Act as provided for in a new § 50.57(d) of 10 C.F.R. Part 50. Unlike the hearing process on the final operating license, the temporary operating licensing process would be subject neither to the hearing requirements of section 189a. of the Act, ~~nor~~ to the requirements of subparts A ~~&~~ not all the requirements of subpart G of the Rules of Practice in 10 C.F.R. Part 2. However, certain sections of subpart G would be applied to resolve needless controversy about such items as the filing of papers, service on parties, and so on. These are 10 C.F.R. § 2.701, 2.702 and 2.708 - 2.712, relating to service and filing of documents, maintaining a docket, and time computations and extensions; § 2.713, relating to appearance and practice before the Commission; § 2.758, generally prohibiting challenges to the Commission's rules; and § 2.772, generally granting the Commission's Secretary the authority to rule on procedural matters. It should be noted that 10 C.F.R. § 2.719 and 2.780, relating to separation of functions and ex parte communications, would not apply. ~~[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 positions.]~~

JFA: OK

JFA: OK

proposed modification to NUP vote

Evd 2

~~In the temporary operating license~~ However, the Commission is sensitive to the concern that informal contacts should not be extensive and that they should not result in significant data or argument that is both relied on by the Commission in its temporary operating licensing decision and unavailable to the parties for comment before the decision.[2] ~~It will separate ex parte contacts in the~~ ~~in the area of temporary operating licensing from those with respect to~~ ~~operating licensing proceedings and attempt to ensure that such contacts do~~ ~~not contaminate operating licensing proceedings.~~ The Commission's decision not to apply separation of functions and ex parte rules to temporary operating licensing is based on the belief that operating licensing and temporary operating licensing proceedings on a given plant are separate proceedings for the purpose of application of the formal hearing requirements of the Administration Procedure Act (APA). The amendment to section 192 of the Atomic Energy Act (Act) states that section 189a. of the Act does not apply to a temporary operating licensing proceeding; thus, if section 189a. does not apply, then the APA's formal hearing requirements do not apply either. Consequently, the Commission's consideration of ~~private~~ informal communications with the parties in a temporary operating licensing proceeding would not prevent the Commission from eventually considering, as necessary, issues arising from the operating licensing proceeding. ~~In this~~ ~~context~~ It bears mention that the Conference Committee noted that, under section 192, the Commission cannot issue a temporary operating license before "all significant safety issues specific to the facility in question have been resolved to the Commission's satisfaction." See Conf. Rep. No. 97-884, 97th Cong., 2d Sess. 35 (1982).

that would be allowed thereby

JFA: OK

JFA: OK proposed modifications to NJP vote

reflects a preference not to apply rules intended for formal, trial type proceedings and

JFA: OK

JFA: OK

Thus if informal contacts do take place which provide significant data or argument which may affect the Commission's decision, then that data or

Encl 2 (BGE markup)

reasons justifying the findings required by that section and § 50.57(d). The order must be sent upon issuance to the Committees described before.

· The temporary operating license would contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for its extension.

· The Commission would suspend the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license (and on which a hearing under section 189a. is being conducted) with due diligence. The Commission could, of course, suspend the license for other reasons, such as in the interest of public health and safety.

· Section 192 provides that the Commission's authority to issue new temporary operating licenses shall expire on December 31, 1983. [~~This provides the normal procedure under the Administrative Procedure Act with respect to the filing of "timely applications".~~] Since the Commission cannot issue new temporary operating licenses after December 31, 1983, it expects any licensee that wishes to apply for such a licensee to do so before November 23, 1983, to allow it to act before its authority expires. (See § 2.301.) Licensees should also note that their licenses will not expire on that date. Section 192 simply states that the Commission's authority to issue a new temporary operating license will expire. It is also clear that the Commission retains its authority to suspend the temporary operating license, if it finds that the applicant is not prosecuting its application for the final operating license with due diligence. (See § 2.306.) Finally, where the Commission has

JFA: OK

Ex d 2 JPH Medical Center

issued.

the final operating license. The applicant may file any such petition at any time after the documents called for by section 192 of the Act and § 50.57(d) of this chapter ~~are filed in the Public Document Room~~ become available.

(b) The initial petition for a temporary operating license for each such facility shall, in accordance with section 192 of the Act and § 50.57(d) of this chapter, be limited initially to a specified time and to a power level not to exceed 5 percent of the facility's rated full thermal power for that specified time. After the Commission issues a temporary operating license for any such facility, the licensee may file subsequent petitions with the Commission, using the procedure described in paragraph (a), requesting the Commission to amend the temporary operating license to allow facility operation at incremental stages beyond the initial 5 percent level for specified times, up to and including operation at full power, pending completion of the proceeding on the final operating license.

(c) The Commission has full discretion to determine the initial power level up to 5 percent and the incremental increases in power levels it will authorize and the period for which the authorization is granted. It will not grant a temporary operating license or an amendment to that license for a period lasting beyond the date the final operating license is granted, and the temporary operating license and any amendments to that license will expire when the final operating license is issued.

§ 2.302 Contents of affidavits.

The applicant's petition for a temporary operating license or an amendment to that license shall be accompanied by an affidavit or affidavits setting forth the specific facts upon which the petitioner relies to justify

Encl 3 (OGC markup)

for a nuclear power plant can become effective, if there has been a request for hearing (or an expression of interest in the subject matter of the proposed amendment which is sufficient to constitute a request for a hearing). A prior hearing, said the Court, is required even when NRC has made a finding that a proposed amendment involves no significant hazards consideration and has determined to dispense with prior notice in the FEDERAL REGISTER. At the request of the Commission and the Department of Justice, the Supreme Court agreed to review the Court of Appeals' interpretation of section 189a. of the Act. The Supreme Court has ~~not yet acted~~ remanded the case to the Court of Appeals with instructions to ~~reconsider it in light of the legislation.~~ vacate it if it is moot and, if it is not, to reconsider its decision in light of the new legislation. JFA:

The Court of Appeals' decision did not involve and has no effect upon the Commission's authority to order immediately effective amendments, without prior notice or hearing, when the public health, safety, or interest so requires. See, Administrative Procedure Act, § 9(b), 5 U.S.C. § 558(c), section 161 of the Atomic Energy Act, and 10 C.F.R. §§ 2.202(f) and 2.204. Similarly, the Court did not alter existing law with regard to the Commission's pleading requirements, which are designed to enable the Commission to determine whether a person requesting a hearing is, in fact, an "interested person" within the meaning of section 189a. -- that is, whether the person has demonstrated standing and identified one or more issues to be litigated. See, BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974), where the Court stated that, "Under its procedural regulations it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing."

[OGC mark up) enclosure 3

significant hazards consideration." The Commission believes that the standards coupled with the examples help draw as clear a distinction as practicable. ~~Therefore,~~ It has decided not to include the examples in the text of the rule in addition to the original standards, but, rather, to keep them as guidelines under the standards for the use of the Office of Nuclear Reactor Regulation. License amendment requests falling within the examples ~~in new §-50.92(b)(1)~~ likely to involve significant hazards or ~~(b)(2)~~ those likely to involve no significant hazards will normally be determined by operation of ~~these two~~ paragraphs, the examples, unless ~~there are sound scientific and engineering reasons to the contrary,~~ the specific circumstances of a license amendment request, when measured against the standards, lead to a contrary conclusion. Those amendments that do not fit into the ~~§-50.92(b)(1) or (b)(2)~~ examples will be determined by application of the standards in the ~~§-50.92(c),~~ rule, which will prevail at all times.

The Commission wishes licensees to note that when they consider license amendments falling ~~within the examples of amendments likely to involve significant hazards considerations or not falling within any of~~ outside the examples ~~but only within the standards~~, the Commission may need additional time for its ~~for action on amendments of this type~~ no significant hazards consideration determinations; thus, they should factor this information into their schedules for developing and implementing such changes to facility design and operation.

The interim final rule thus goes a long way toward meeting the intent of the legislation. In this regard, the Conference Report stated:

Encl) (OGC markup)

The conferees also expect the Commission, in promulgating the regulations required by the new subsection (2)(C)(i) of section 189a. of the Atomic Energy Act, to establish standards that to the extent practicable draw a clear distinction between license amendments that involve a significant hazards consideration and those amendments that involve no such consideration. These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations. These standards should be capable of being applied with ease and certainty, and should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. Conf. Rep. No. 97-884, 97th Cong., 2d Sess. 37 (1982). JFA: OK

~~[This statement should be read in light of the previous discussion.]~~

It should be noted that the Commission has attempted to draft standards that are as useful and as clear as possible, and it has tried to formulate examples that will help in the application of the standards. These final standards are the product of a long deliberative process. As will be recalled, standards were submitted by a petition for rulemaking in 1976 for the Commission's consideration. The standards and examples ~~in this interim final rule~~ are as clear and certain as the Commission can make them -- and, to repeat the Conference Report, "should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration." The Commission welcomes suggestions from the public to make them clearer and more precise, recognizing, in the Senate Committee's words, "that reasonable persons may differ on whether a license amendment involves a significant hazards consideration."

Returning to the Senate Committee Report noted above with respect to the issue of a reracking of a spent fuel pool, the Commission ~~has already been treating a reracking of a spent fuel pool as if it were likely~~

(NP markup (see also DOC mark up)

~~to involve a significant hazards consideration, accordingly, a new example (viii) has been added to the list of examples in § 50.92(b)(1) to make clear that a reracking of a spent fuel storage pool should be treated in the same way as an example considered likely to involving a significant hazards consideration. Note that, under § 134 of the Nuclear Waste Policy Act of 1982, if a hearing is held in connection with this type of example, it would take the form of a "hybrid" hearing.~~ has been providing, as a matter of public interest, prior notice and an opportunity for a prior hearing on amendment requests involving this issue. As explained in the separate FEDERAL REGISTER notice, it will continue to offer prior notice for public comment of these and other amendment requests. It is not prepared to say, though, that a reracking of a spent fuel storage pool ~~should or should not be treated in the same way as an example considered~~ likely or not likely to involve a significant hazards consideration. Each such amendment request should be treated with respect to its own intrinsic circumstances, using the standards in § 50.92 of the rule to make a judgment about significant hazards considerations. Consequently, the Commission has decided not to include reracking of a spent fuel storage pool in the list of examples or in the rule. If it does determine that a particular reracking involves significant hazards considerations, it will provide an opportunity for a prior hearing, as explained in the separate FEDERAL REGISTER notice. Additionally, it should be noted that under section 134 of the Nuclear Waste Policy Act of 1982, an interested party may request a "hybrid" hearing rather than a formal adjudicatory hearing in connection with reracking, and may participate in such a hearing, if one is held. The Commission will publish in the near future a FEDERAL

(OGC mark up) enclosure 3
(see also NP marking)

~~to involve a significant hazards consideration, accordingly, a new example (viii) has been added to the list of examples in § 50.92(b)(2) to make clear that a reracking of a spent fuel storage pool should be treated in the same way as an example considered likely to involving a significant hazards consideration. Note that, under § 134 of the Nuclear Waste Policy Act of 1982, if a hearing is held in connection with this type of example, it would take the form of a "hybrid" hearing.~~ has been providing [redacted] prior notice and an opportunity for a prior hearing on amendment requests involving this issue. As explained in the separate FEDERAL REGISTER notice, it will continue to offer prior notice for public comment of these and other amendment requests. It is not prepared to say, though, that a reracking of a spent fuel storage pool should or should not be treated in the same way as an example considered likely or not likely to involve a significant hazards consideration. Each such amendment request should be treated with respect to its own intrinsic circumstances, using the standards in § 50.92 of the rule to make a judgment about significant hazards considerations. Consequently, the Commission has decided not to include reracking of a spent fuel storage pool in the list of examples or in the rule. If it ~~does~~ cannot determine that a particular reracking involves significant hazards considerations, it will provide an opportunity for a prior hearing, as explained in the separate FEDERAL REGISTER notice. Additionally, it should be noted that under section 134 of the Nuclear Waste Policy Act of 1982, an interested party may request a "hybrid" hearing ~~rather than a formal adjudicatory hearing~~ in connection with reracking and may participate in such a hearing, if one is held. The Commission will publish in the near future a FEDERAL

JFA: OK because of the perceived public interest in actions of this sort. The Commission has done this before making any determination on significant hazards consideration.

JFA: OK no

JFA: OK no

JFA: OK

or § 50.22 or for a testing facility will likely be found to involve significant hazards considerations, if operation of the facility in accordance with the proposed amendment involves one or more of the following:

(i) A significant relaxation of the criteria used to establish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety (such as allowing a plant to operate at full power during which one or more safety systems are not operable).

(iv) Renewal of an operating license.

(v) For a nuclear power plant, an increase in authorized maximum core power level.

(vi) A change to technical specifications or other NRC approval involving a significant unreviewed safety question.

JFA: OK

(vii) A change in plant operation designed to improve safety but which, due to other factors, in fact allows plant operation with safety margins ~~of some~~ significantly reduced from those believed to have been present when the license was issued.

~~(viii) Reracking of a spent fuel storage pool.~~

(viii) Permitting a significant increase in the amount of effluents or radiation emitted by a nuclear power plant.

enclosure 3 (NP markup)

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Standards for Determining Whether License Amendments Involve No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Interim final rule.

SUMMARY: Pursuant to Public Law 97-415, NRC is amending its regulations to specify standards for determining whether requested amendments to operating licenses for certain nuclear power reactors and testing facilities involve no significant hazards considerations. These standards will help NRC in its evaluations of these requests. Research reactors are not covered.

EFFECTIVE DATE: _____.* The Commission specifically requests comments on this interim final rule by _____.* Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

JFA: ok

*/ 30 days following publication in the FEDERAL REGISTER. This footnote will be deleted after the Commission has acted.

However, the Commission is reviewing the extent to which and the way standards should be applied to research reactors

Fed 4

(OGC markup)

consideration is involved, it would handle this request in the same way it does now, by issuing an individual notice of proposed action and providing an opportunity for a hearing under § 2.105. The only change in its present procedure would be that it could notify the public of the final disposition of the amendment by noting its issuance or denial in the monthly FEDERAL REGISTER notice instead of in an individual notice.

Another possibility might be that the Commission receives an amendment request and finds an emergency situation, where failure to act in a timely way would result in derating or shutdown of a nuclear power plant. In this case, also discussed later in connection with State consultation, it may proceed to issue the license amendment, if it determines, among other things, that no significant hazards consideration is involved. In this circumstance, the Commission might not necessarily be able to provide for prior notice for opportunity for a hearing or for prior notice for public comment and might therefore use its present procedure, publishing an individual notice of issuance under § 2.106 (which provides an opportunity for a hearing after the amendment is issued.) Additionally, the Commission's monthly FEDERAL REGISTER notice system would note the Commission's action on the amendment request and, thereby, provide an opportunity for public comment. In connection with emergency requests, the Commission expects its licensees to apply for license amendments in a timely fashion. It will ~~consider denying a license amendment~~ decline to dispense with notice and comment on the no significant hazards consideration determination if ~~where~~ it determines that the applicant has failed to make a timely application for the amendment in order to create the emergency and to take advantage of the

JFA: OK

enclosure 4 (OGC mark-up)

The Commission will use these procedures sparingly and wants to make sure that its licensees will not take advantage of these procedures. Therefore, it will use criteria, somewhat similar to the ones it will use with respect to emergency situations, to decide whether it will shorten the comment period and change the type of notice normally provided. Consequently, in connection with requests indicating an exigency, the Commission expects its licensees to apply for license amendments in a timely fashion. It will not change its normal notice and public comment practices where it determines that the licensee has failed to use its best efforts to make a timely application for the amendment in order to create the exigency and to take advantage of the exigency provision. Whenever a licensee wants to use this provision, it will have to explain to the Commission the reason for the exigency and why the licensee cannot avoid it; the Commission will assess the licensee's reasons for failure to file an application sufficiently in advance of its proposed action or for its inability to take the action at some later time. [Moreover, the Commission will grant an amendment request in an exigency and change its normal notice and public comment procedures, only if it finds that the licensee's action pursuant to its request (1) is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest -- this is the standard used for specific exemptions under § 50.12(a) -- and (2) involves no significant hazards considerations.]

OFFICE: OK

Another different circumstance may also present itself to the Commission. For instance, it could receive an amendment request with respect to which it

Encl 4 (OGC markup)

amendment, unless it determines that a significant hazards consideration is involved.

(5) Where the Commission finds that an emergency situation exists, in that failure to act in a timely way would result in derating or shutdown of a nuclear power plant, it may issue a license amendment involving no significant hazards consideration without prior notice and opportunity for a hearing or for public comment. In such a circumstance, the Commission will not publish a notice of proposed determination on no significant hazards consideration, but will publish a notice of issuance under § 2.106, providing for opportunity for a hearing and for public comment after issuance. The Commission expects its licensees to apply for license amendments in a timely fashion. It will ~~consider denying a license amendment when~~ decline to dispense with notice and comment on the no significant hazards consideration determination if it determines that the licensee has failed to make a timely application for the amendment in order to create the emergency and to take advantage of the emergency provision. Whenever a threatened closure or derating is involved, a licensee requesting an amendment must explain why this emergency situation occurred and why it could not avoid this situation, and the Commission will assess the licensee's reasons for failure to file an application sufficiently in advance of that event.

JFA: OK

(6) Where the Commission finds that exigent circumstances exist, in that a licensee and the Commission must act quickly and that time does not permit the Commission to publish a FEDERAL REGISTER notice allowing 30 days for prior public comment, it will:

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May 2, 1983

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

Attn: Docketing and Service Branch

Re: Interim Final Rules on "Standards for Determining Whether License Amendments Involve No Significant Hazards Considerations" and "Notice and State Consultation" (48 Fed. Reg. 14,864-80)

Dear Mr. Chilk:

On April 6, 1983, the Commission published "interim final rules" on the foregoing subjects and requested comments thereon by May 6, 1983. In response to such request, these comments are being submitted on behalf of Iowa Electric Light and Power Company and Florida Power & Light Company.

For the reasons set forth in more detail below, we suggest that the regulations and the Commission's intent be clarified as to the situations that could constitute an "emergency" or an "exigency," as to the transitional provisions applicable to requests for amendments received prior to May 6, 1983, and as to the use of post-notices under Section 2.106 in lieu of pre-notices under Section 2.105 in specified circumstances.

"Emergency Situations"

Under new 10 C.F.R. § 50.91(a)(5), the Commission may issue a license amendment involving no significant hazards consideration without prior notice and opportunity for hearing "[w]here the Commission finds that an emergency situa-

tion exists, in that failure to act in a timely way would result in derating or shutdown of a nuclear power plant . . . ."

Neither "shutdown" nor "derating" is defined in the regulation.*/ Although neither term is precise, in our view the logical intent must be for the regulation to include any interruption or reduction in the normally expected supply of electricity from a plant which has been in operation, under circumstances where such interruption or reduction would cause unnecessary economic injury or impact on a generating system. Thus, an "emergency" either could result from an interruption of operation or decrease in operating capacity or could exist because a plant, which has been shutdown or operated in a derated mode, is not permitted to return to operation or to increase its power output.

However, a narrower -- and we believe mistaken -- reading of the terms "shutdown" and "derating" might attempt to limit the regulation only to circumstances where a plant is actually in operation and suspension of operation or reduction of power generation would result unless the license amendment is timely issued. So interpreted, the provision would not apply to an amendment needed prior to return to power by a plant which has not been in operation (e.g., because of refueling, maintenance, interruption of transmission capacity, etc.). Nor would it apply to an amendment required prior to an increase in power output by a plant which, for any one of a number of similar reasons, is operating at a lower level of generation.

Because of this ambiguity, we strongly suggest that Section 50.91(a)(5) be amended to make it clear that an emergency situation can exist whenever it is necessary that a plant not in operation return to operation or for a derated plant to operate at a higher level of generation.

We believe that there is no impediment to this proposal in either Public Law 97-415 itself or its legislative history.

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*/ The discussions of emergencies in the Statement of Considerations (48 Fed. Reg. 14,876, 14,877) does not assist in this interpretative effort.

On the contrary, our proposal corresponds with our view of the legislative intent.

It is clear that Section 12(a) of that legislation does not stand in the way of the proposal. The only relevant language is contained in the new Section 189a(2)(C) which directs the Commission to

> promulgate regulations establishing . . . (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved;

The provision does not define "emergency" or "emergency situations" but it does direct the Commission to "take into account the exigency of the need for the amendment involved." So far as economic need and system reliability are concerned, when power is needed the "exigency of the need" is essentially no different whether power is obtainable from a plant which can remain in operation or be operated at a high power level or from a plant which can be returned to operation.

We are aware that the language of Section 50.91a(5) is derived from similar language in the Conference Report:

> In the context of subsection (2)(C)(ii), the conferees understand; (sic) the term "emergency situations" to encompass only those rare cases in which immediate action is necessary to prevent the shutdown or derating of an operating commercial reactor. (The Commission already has the authority to respond to emergencies involving imminent threats to the public health or safety by issuing immediately effective orders pursuant to the Atomic Energy Act or the Administrative Procedure Act. And the licensee itself has authority to take whatever action is necessary to

respond to emergencies involving imminent threat to the public health and safety.)*/

However, the language of the first sentence quoted above has no more precision than does the regulation. On the other hand, the immediately following language contained in the parentheses makes it clear that the term "emergency situations" does not involve "imminent threats to the public health or safety" in the sense that those terms are used in the Atomic Energy Act. Rather the "emergency situations" must relate to other kinds of events and situations, including dislocation because of power outages or inability to return a plant to operation and of economic losses resulting from the unavailability of an economic means of generating power.

For the foregoing reasons, we recommend that Section 50.91(a)(5) be amended by inserting after the words "derating or shutdown of a nuclear power plant" the following words: ("including any prevention of either resumption of operation or increase in power output)".

"Exigent Circumstances"

At 48 Fed. Reg. 14,877 the Commission explains an "exigency" as a situation "where a licensee and the Commission must act quickly and where time does not permit the Commission to publish a Federal Register notice soliciting public comment or to provide 30 days ordinarily allowed for public comment." We agree with the breadth of that definition by the Commission. However, the two examples then given by the Commission appear to us unnecessarily narrow since both involve obvious improvements in safety and both involve potentially lost opportunities to implement such improvements during a plant outage. Although no amendment to the regulations is required, we suggest that the Commission make clear that these examples were not meant to be limiting in any respect, and that a determination of "exigency" can be considered whenever a proposed amendment involves no significant hazards consideration and the licensee can demonstrate that avoiding delay in issuance will provide a significant benefit (safety, environmental, reliability, economic, etc.).

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*/ H.R. Rep. No. 884, 97th Cong., 2nd Sess. 18 (1982).

Amendment Requests Received Before May 6, 1983

In its statement of considerations (48 Fed. Reg. 14,877), the Commission specified that with respect to amendment requests received before May 6, 1983, the Commission intends to keep its present procedures and not provide prior notice of amendments that involve no significant hazards considerations. In our view, not only is this approach valid and appropriate under the statute, but it is essential in order to avoid both the potential logjam in NRC licensing activities that could result from the publication of an omnibus listing of pending amendment requests and the unnecessary delays that could result in the processing of any particular pending request. To assure that the foregoing Commission intent is carried out, however, we believe that the newly adopted Section 2.105(a)(4)(i) should be clarified. As promulgated, the section does not explicitly distinguish between requests received before May 6 and those received thereafter. In order to avoid reliance solely on the Commission's statement of its intent we suggest that the regulation be amended as follows:

In Section 2.105(a)(4)(i), delete the words "though it will provide notice of opportunity for a hearing pursuant to this section," and substitute the following: "though it will publish a notice of proposed action pursuant to this section (except in the case of an application for amendment received prior to May 6, 1983, where it will instead publish a notice of issuance pursuant to § 2.106),".

Several of the other contemporaneously adopted regulations also do not deal explicitly with amendment requests filed before May 6, 1983. Although corresponding clarifications could be considered, we do not believe that they are necessary. In order to avoid any misunderstanding as to the Commission's intent, however, we urge that the Commission explain clearly the overall effect of the new regulations on amendment requests still pending on May 6. For the convenience of the Commission, we enclose a proposed explanation which could be published in the statement of considerations dealing with the revision of the interim rule.

Issuance of Post-Notices Under Section 2.106

It is the obvious intent of the new Section 2.105(a)(4)(ii) that, under the circumstances there specified (a determination of an emergency or exigent situation and an amendment involving no significant hazards consideration), a notice of proposed action would not be published under Section 2.105 and, instead, a notice of issuance would be published under Section 2.106. However, to avoid the possible misunderstanding that the Section 2.106 notice is in addition to, and not a substitute for, a Section 2.105 notice, we suggest that the regulation be amended as follows:

In Section 2.105(a)(4)(ii), delete the words "it will provide notice of opportunity for a hearing pursuant to § 2.106" and substitute the following: "instead of publishing a notice of proposed action pursuant to this section it will publish a notice of issuance pursuant to § 2.106".

Although this amendment might be viewed as an overabundance of caution, we believe it to be desirable to avoid possible future controversy.

Very truly yours,

Lowenstein, Newman, Reis
& Axelrad

KHS:jcj
Attachment

bcc: Guy H. Cunningham

ATTACHMENT

Proposed Statement Pertaining to Amendment Requests Received Before May 6, 1983

As was indicated in the statement of considerations (48 Fed. Reg. 14,877), with respect to amendment requests received before May 6, 1983, the Commission intends to keep its present procedures and not provide prior notice of amendments that involve no significant hazards considerations. Since the new Section 2.105(a)(4)(i) adopted in the interim final rule did not implement our intent with complete clarity, we are revising the final version to make it more explicit.*/ Thus, as to any such application for amendment still pending on May 6, the NRC, if the standards of Section 50.58 are satisfied, will issue the amendment and publish a notice of issuance pursuant to Section 2.106. If a hearing is requested before such notice is published, the amendment may nevertheless still be made immediately effective and the hearing granted thereafter.

No corresponding clarification of Section 2.105(a)(4)(ii) is required since, with respect to applications received before May 6, 1983, which involve no significant hazards consideration, the present procedures of the NRC (which remain applicable thereto) do not require a determination that an emergency or exigent situation exists in order to omit a notice of opportunity for a hearing prior to NRC action.

Similarly, although Sections 50.58(b) and 50.92 do not explicitly distinguish between applications received before May 6, 1983, and those received thereafter, no clarification of these sections is required since Section 2.105(a)(4)(i), as explained above, now makes the Commission's intent clear.

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*/ We are also clarifying that the notice published under Section 2.105 is a notice of proposed action, which includes a notice of opportunity for a hearing.

T. Dorian

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OF COUNSEL

May 2, 1983

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

Attn: Docketing and Service Branch

Re: Interim Final Rules on "Standards for Determining Whether License Amendments Involve No Significant Hazards Considerations" and "Notice and State Consultation" (48 Fed. Reg. 14,864-80)

Dear Mr. Chilk:

On April 6, 1983, the Commission published "interim final rules" on the foregoing subjects and requested comments thereon by May 6, 1983. In response to such request, these comments are being submitted on behalf of Iowa Electric Light and Power Company and Florida Power & Light Company.

For the reasons set forth in more detail below, we suggest that the regulations and the Commission's intent be clarified as to the situations that could constitute an "emergency" or an "exigency," as to the transitional provisions applicable to requests for amendments received prior to May 6, 1983, and as to the use of post-notices under Section 2.106 in lieu of pre-notices under Section 2.105 in specified circumstances.

"Emergency Situations"

Under new 10 C.F.R. § 50.91(a)(5), the Commission may issue a license amendment involving no significant hazards consideration without prior notice and opportunity for hearing "[w]here the Commission finds that an emergency situa-

dupe

tion exists, in that failure to act in a timely way would result in derating or shutdown of a nuclear power plant . . . ."

Neither "shutdown" nor "derating" is defined in the regulation.*/ Although neither term is precise, in our view the logical intent must be for the regulation to include any interruption or reduction in the normally expected supply of electricity from a plant which has been in operation, under circumstances where such interruption or reduction would cause unnecessary economic injury or impact on a generating system. Thus, an "emergency" either could result from an interruption of operation or decrease in operating capacity or could exist because a plant, which has been shutdown or operated in a derated mode, is not permitted to return to operation or to increase its power output.

However, a narrower -- and we believe mistaken -- reading of the terms "shutdown" and "derating" might attempt to limit the regulation only to circumstances where a plant is actually in operation and suspension of operation or reduction of power generation would result unless the license amendment is timely issued. So interpreted, the provision would not apply to an amendment needed prior to return to power by a plant which has not been in operation (e.g., because of refueling, maintenance, interruption of transmission capacity, etc.). Nor would it apply to an amendment required prior to an increase in power output by a plant which, for any one of a number of similar reasons, is operating at a lower level of generation.

Because of this ambiguity, we strongly suggest that Section 50.91(a)(5) be amended to make it clear that an emergency situation can exist whenever it is necessary that a plant not in operation return to operation or for a derated plant to operate at a higher level of generation.

We believe that there is no impediment to this proposal in either Public Law 97-415 itself or its legislative history.

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*/ The discussions of emergencies in the Statement of Considerations (48 Fed. Reg. 14,876, 14,877) does not assist in this interpretative effort.

On the contrary, our proposal corresponds with our view of the legislative intent.

It is clear that Section 12(a) of that legislation does not stand in the way of the proposal. The only relevant language is contained in the new Section 189a(2)(C) which directs the Commission to

> promulgate regulations establishing . . . (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved;

The provision does not define "emergency" or "emergency situations" but it does direct the Commission to "take into account the exigency of the need for the amendment involved." So far as economic need and system reliability are concerned, when power is needed the "exigency of the need" is essentially no different whether power is obtainable from a plant which can remain in operation or be operated at a high power level or from a plant which can be returned to operation.

We are aware that the language of Section 50.91a(5) is derived from similar language in the Conference Report:

> In the context of subsection (2)(C)(ii), the conferees understand; (sic) the term "emergency situations" to encompass only those rare cases in which immediate action is necessary to prevent the shutdown or derating of an operating commercial reactor. (The Commission already has the authority to respond to emergencies involving imminent threats to the public health or safety by issuing immediately effective orders pursuant to the Atomic Energy Act or the Administrative Procedure Act. And the licensee itself has authority to take whatever action is necessary to

respond to emergencies involving imminent threat to the public health and safety.)*/

However, the language of the first sentence quoted above has no more precision than does the regulation. On the other hand, the immediately following language contained in the parentheses makes it clear that the term "emergency situations" does not involve "imminent threats to the public health or safety" in the sense that those terms are used in the Atomic Energy Act. Rather the "emergency situations" must relate to other kinds of events and situations, including dislocation because of power outages or inability to return a plant to operation and of economic losses resulting from the unavailability of an economic means of generating power.

For the foregoing reasons, we recommend that Section 50.91(a)(5) be amended by inserting after the words "derating or shutdown of a nuclear power plant" the following words: ("including any prevention of either resumption of operation or increase in power output)".

"Exigent Circumstances"

At 48 Fed. Reg. 14,877 the Commission explains an "exigency" as a situation "where a licensee and the Commission must act quickly and where time does not permit the Commission to publish a Federal Register notice soliciting public comment or to provide 30 days ordinarily allowed for public comment." We agree with the breadth of that definition by the Commission. However, the two examples then given by the Commission appear to us unnecessarily narrow since both involve obvious improvements in safety and both involve potentially lost opportunities to implement such improvements during a plant outage. Although no amendment to the regulations is required, we suggest that the Commission make clear that these examples were not meant to be limiting in any respect, and that a determination of "exigency" can be considered whenever a proposed amendment involves no significant hazards consideration and the licensee can demonstrate that avoiding delay in issuance will provide a significant benefit (safety, environmental, reliability, economic, etc.).

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*/ H.R. Rep. No. 884, 97th Cong., 2nd Sess. 38 (1982).

Amendment Requests Received Before May 6, 1983

In its statement of considerations (48 Fed. Reg. 14,877), the Commission specified that, with respect to amendment requests received before May 6, 1983, the Commission intends to keep its present procedures and not provide prior notice of amendments that involve no significant hazards considerations. In our view, not only is this approach valid and appropriate under the statute, but it is essential in order to avoid both the potential logjam in NRC licensing activities that could result from the publication of an omnibus listing of pending amendment requests and the unnecessary delays that could result in the processing of any particular pending request. To assure that the foregoing Commission intent is carried out, however, we believe that the newly adopted Section 2.105(a)(4)(i) should be clarified. As promulgated, the section does not explicitly distinguish between requests received before May 6 and those received thereafter. In order to avoid reliance solely on the Commission's statement of its intent we suggest that the regulation be amended as follows:

In Section 2.105(a)(4)(i), delete the words "though it will provide notice of opportunity for a hearing pursuant to this section," and substitute the following: "though it will publish a notice of proposed action pursuant to this section (except in the case of an application for amendment received prior to May 6, 1983, where it will instead publish a notice of issuance pursuant to § 2.106),".

Several of the other contemporaneously adopted regulations also do not deal explicitly with amendment requests filed before May 6, 1983. Although corresponding clarifications could be considered, we do not believe that they are necessary. In order to avoid any misunderstanding as to the Commission's intent, however, we urge that the Commission explain clearly the overall effect of the new regulations on amendment requests still pending on May 6. For the convenience of the Commission, we enclose a proposed explanation which could be published in the statement of considerations dealing with the revision of the interim rule.

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Very truly yours,

Maurice Axelrad

Lowenstein, Newman, Reis
& Axelrad

KHS:jcj
Attachment

bcc: William Olmsted

ATTACHMENT

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AA61-2 PDR

cc: Dircks
Roe
C. Cunningham
H. Denton
R. Minogue
FYI
JR 3/29

AFFIRMATION

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ASSELSTINE

SUBJECT: STANDARDS FOR DETERMINING WHETHER LICENSE AMENDMENTS INVOLVE NO SIGNIFICANT HAZARDS CONSIDERATIONS
10 CFR PART 50 - MARCH 29, 1983 VERSION

APPROVED ✓ DISAPPROVED _____ ABSTAIN _____

NOT PARTICIPATING _____ REQUEST DISCUSSION _____

COMMENTS:

Thomas K. Asselstine
SIGNATURE

3-30-83
DATE

8504204 39
1P

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

NRC-SECY FORM DEC. 80