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AB-6-2
PDR

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

September 11, 1985

MEMORANDUM FOR: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech

FROM: John E. Zerbe, Director
Office of Policy Evaluation

SUBJECT: OPE COMMENTS ON FINAL RULE, "LIMITATION ON THE USE OF HIGHLY ENRICHED URANIUM (HEU) IN RESEARCH AND TEST REACTORS" -- SECY-85-284

We have reviewed SECY-85-284 and have the following comments on the proposed final rule to convert non-power reactors to low-enriched uranium.

Flexibility and Funding

In response to public comments on the proposed rule, the staff has made a number of changes to the wording of the rule that appear to be aimed at greater flexibility in deciding whether the economic circumstances justify delaying conversion for particular facilities. For example:

-- On page 25 of the draft Federal Register notice (see also comparative text in Enclosure B), the staff has redefined "unique purpose" to mean "a project, program, or commercial activity which cannot reasonably or economically be accomplished without the use of HEU fuel, and may include: ..." The addition of the adverb "economically" appears to change the conditions under which the Commission would allow the use of HEU fuel, in that it would be more lenient in licensing a new activity using HEU fuel and in granting exemptions from conversion for existing facilities.

-- On page 28 of the draft Federal Register notice (see also comparative text in Enclosure B), the staff has modified the fuel use criterion for "unique purpose" reactors. In the previous version this category of non-power reactors was directed to use "HEU fuel of enrichment as close to 20% as is available and acceptable to the Commission." In the current version the rule reads: "may use other fuel acceptable to the Commission with either reduced enrichment or extended life characteristics which permit construction of the new facility or continued operation of the existing facility." Apparently, this change was made to permit the use of "high density" HEU and thereby

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minimize the transport of HEU fuel between the reactor site and the fuel fabrication facility.

In our view, such wording indicating greater flexibility does not seem to be necessary, but if it is adopted, the Commission should go out of its way to reinforce the message to licensees that the Commission is serious about the conversion effort.

The underlying concern is whether the licensee will be made to bear any part of the costs of conversion. We think that issue should be addressed more squarely. In this regard, Section 50.64 (c) (2)(i) requires that the Department of Energy or other appropriate Federal Agency certify that funds are available for the conversion. It seems to us that, while the precise determination as to which costs the Federal Government would reimburse should be a matter of negotiation between the licensee and the administrators of the conversion fund, we believe the Commission should make clear that a requirement that any facility be converted would be based on the expectation that there will be federal funding for all reasonable costs of conversion. (These costs would include the seven categories identified on page 7 of Enclosure A to SECY-85-284. Note, that costs for licensing amendments appear to be included (the sixth category), but that the staff explicitly would exclude the costs of litigations on required license amendments.)

While most of the non-power reactors are owned and operated by universities, there are several facilities operated by "for profit" institutions such as General Electric and General Atomic. The issue of whether federal funds should cover the conversion of these few facilities is not sufficient, in our view, to dilute a Commission position on full funding or to delay moving forward with the rule.

Alternatives for Overcoming Legal Difficulties with Proposed Rule

During the discussion of this rule, the Commission urged the staff to recommend an approach to licensing conversions which would deal with the issue raised by many commenters regarding the possibility of protracted hearings associated with any license amendments required to accomplish the conversion process. Licensees are concerned that lengthy hearings might be too costly to endure, and would therefore close down their facilities.

The General Counsel has reviewed the staff's proposed approach (SECY-85-284A) and finds that there are significant legal problems with the approach used to eliminate or minimize the need for hearings on non-power reactor fuel conversions. They propose instead that in the event a contested hearing places a substantial and unreimbursable costs on a particular licensee, the NRC entertain a request from the licensee to be exempt from the requirement to convert. They acknowledge that this approach is not without its own legal problems.

Intervenors have said that they do not intend to intervene in these proceedings since conversion is one of their objectives. The Commission wishes to proceed expeditiously with conversion. In view of this, and

given Federal funds availability and both fuel fabrication technology and capacity, we believe that the Commission could put the conversion effort on two tracks. The first track would be to issue the rule without the legally questionable language which would eliminate the need for hearings. Thus, as schedules are established and licensees come in for their amendments, some licensees may be exposed to the possibility of a lengthy hearing. The second track would be to direct the staff to develop generic envelopes of safety which would probably be the subject of a further rulemaking activity.

A two-track approach has the merit of permitting the promulgation of the final rule now. It also has the merit that only a few licensees would be exposed to the possibility of a lengthy hearing (which the "nonproliferation"-oriented intervenors say they would not pursue) during the period of time it takes the staff to develop the necessary generic envelopes and conduct a further rulemaking, if required. We understand this approach has been considered by OGC and they believe it has merit. The Commission may wish to ask the staff what obstacles there are to adopting a two-track approach.

Conclusion

We believe the new more flexible wording of the rule would be acceptable provided that the Commission:

1. reemphasizes its determination to convert all facilities as expeditiously as possible, and

2. clearly indicates that a requirement that any facility be converted will be based on the expectation that there will be full federal funding for all reasonable costs of conversion.

In addition, we suggest that the staff be asked to address the obstacles to adopting the alternative approach identified above to straighten out the legal difficulties with the proposed rule.

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