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Before the Nuclear Regulatory Commission

Specific Exemptions)	Notice of Proposed	DOCKETED USNRC
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10 C.F.R. Part 50)	50 Fed. Reg. 16506	
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Union of Concerned Scientist' Comments
on Proposed Rule Re: Specific Exemptions

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Introduction

The Commission has published a proposed regulation that changes the standard for granting exemptions from its regulations. Proposed 10 C.F.R. § 50.12, 50 Fed. Reg. 16586, April 26, 1985.

The proposal greatly expands the grounds for issuing regulatory exemptions to operating license applicants and licensees of operating plants. Although the courts have approved such waivers in the case of construction permit applications, noncompliance by an operating reactor presents a more difficult issue. Compliance with the regulations is essential to a demonstration that a reactor can operate safely. Courts that have approved the issuance of exemptions to construction permit applicants have thus warned that those applicants must eventually reckon with the Commission's strict safety rules.

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The Commission here attempts to soften that reconing. That attempt is illegal. First, the Commission has no authority to grant exemptions from its regulations. Even if the Commission could be found to possess the authority to grant exemptions from its safety regulations, however, the proposal violates other aspects of the Atomic Energy Act. Second, the proposal broadens the grounds for obtaining exemptions to the extent that exceptions to the regulations could become the rule. This is inconsistent with the principle that compliance with the Commission's regulations must be the cornerstone of its licensing program. Third, the proposal would illegally permit the Commission to consider exemption requests based on financial considerations. In making licensing decisions, the Commission must concern itself exclusively with issues related to public health and safety and the common defense and security. Finally, the proposed rule would illegally lower the standard for safe operation by requiring less assurance of safety for exempted plants than would be afforded by compliance with the regulations.

I. The Commission Has No Authority to Issue Exemptions From Compliance with Its Regulations.

The Commission claims to share the "well established" authority of administrative agencies to provide for exemptions from its regulations. 50 Fed. Reg. at 16587. The Supreme Court has made it clear, however, that this authority must be granted

by Congress, either through the specific language of the enabling statute or its legislative history. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 138, 97 S.Ct. 965 (1977). In that case, the Court found that EPA was not authorized by the Clean Water Act to establish provisions for variances from new source performance standards. The Court based its conclusion on the lack of a variance provision in the statute, the use of the word "standards" in the statute, and the statute's statement that it is unlawful to operate a new source in violation of the standards. The court also found that the lack of a variance provision was consistent with Congress' intent to insure national uniformity and maximum control of new sources.

Similarly, the Atomic Energy Act contains no provision allowing the Commission to grant exemptions from compliance with its regulations. To the contrary, the Commission may issue a license only to those applicants

who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish.

42 U.S.C. § 2133(b) (2). No variance from this requirement can be found in 42 U.S.C. § 2201(h), which governs consideration of license applications. The statute simply does not contemplate exceptions to compliance with the regulations. Absent a showing of Congressional authority in the legislative history of the Atomic Energy Act or the Energy Act, the Commission lacks the grounds to establish rules for exemptions from its regulations.

II. Even if the Commission Could Legally Issue Exemptions, the Proposed Rule Is Nevertheless Illegal.

Assuming, arguendo, that the Commission has some authority to grant exemptions, that authority is narrowly limited. Compliance must be the rule, and waivers must be used only as a "safety valve" in unusual circumstances. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). This proposal is so broad as to allow exceptions to swallow the rule that ordinarily requires compliance with the Commission's regulations. Moreover, the proposal exceeds the limitations of the Atomic Energy Act. It violates the principles that compliance with each of the Commission's regulations is a prerequisite to safe nuclear power plant operation, and that this compliance must be found before a plant is licensed. Finally, the proposal illegally permits the Commission to place financial considerations above safety. The rule includes only two potentially legitimate grounds for exemption from the regulations: first, where application of the regulation would be in conflict with some other regulation; and second, where the purpose of the regulation would not be served by compliance.

A. The proposal would allow exemptions to swallow the Commission's safety rules.

The Commission's safety standards represent "the Commission's definition of what is required to protect the public health and safety." Vermont Yankee Nuclear Power Corp., (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 528 (1973). Satisfaction of the Commission's regulations forms the basis for a finding that a nuclear power plant can operate

with a "reasonable assurance of safety." Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 A.E.C. 1003, 1010 (1973). In fact, compliance with the regulations is considered to be the "sine qua non of adequate protection to public health and safety." Id. at 1009.

In apparent recognition of this principle, the Commission states in the preamble to the proposed rule that

it expects the intent of its regulations to be met and normally this requires conforming to the regulations as stated.

50 Fed. Reg. at 16507. The language of the proposal, however, gives the Commission wide discretion to allow noncompliance with its safety rules. The proposal sets forth a proliferation of excuses for noncompliance with the regulations that the Commission may accept as long as it finds that the exemptions

are authorized by law, will not present an undue risk to the public health and safety, are consistent with the common defense and security, [and] are in the public interest.¹

The list of seven special circumstances warranting the issuance of an exemption includes conditions that are so vaguely described or so unremarkable as to invite widespread abuse of the provision. The proposal would thus institutionalize the kind of "unbridled discretion" in granting regulatory exemptions that was forbidden in WAIT Radio v. F.C.C., 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹ As discussed in Part III below, this part of the test for judging exemption requests also violates the Atomic Energy Act by lowering the safety standard and allowing consideration of costs of compliance.

For instance, the proposal would permit the Commission to grant an exemption where it finds that

Alternative or compensatory means exist to achieve the underlying purpose of the regulation.

Proposed § 50.12(b)(iii). This provision would allow routine challenges to the regulations in contravention of the Commission's longstanding refusal to permit attacks on its rules. See 10 C.F.R. § 2.758(a), Vermont Yankee Nuclear Power Corp., (Vermont Yankee Nuclear Power Station), supra, 6 A.E.C. at 529. Each exemption proceeding could be a forum for relitigation of the purpose of a rule and the acceptable means of achieving that purpose. Not only would such an approach waste the resources of the agency, but it would eliminate all consistency and reliability from the Commission's regulatory process.

B. The special circumstances violate safety principles.

Under the proposal, the Commission could also grant exemptions where

The exemption would result in an overall benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption.

Proposed § 50.12(b)(iv). The Commission gives no examples of these circumstances, but simply states that

This provision would focus on those circumstances where, on balance, the exemption would actually result in a net increase in overall safety or quality of plant operations.

50 Fed. Reg. at 16509.

The proposal thus appears to allow a licensee or applicant to compensate for the decrease in safety caused by a regulatory

exemption by increasing safety in some other part of a plant's design or operation. The exemption could be approved if the overall balance sheet for the whole plant showed a "net" increase in safety. The proposal ignores the principle of defense in depth. Each of the Commission's safety regulations has a purpose in providing a reasonable assurance of safe operation of a nuclear plant. The Commission cannot license a plant based on some "overall" finding of reasonable assurance, but must resolve the safety issues raised by noncompliance with each individual standard. See Vermont Yankee, supra, 6 A.E.C. at 529.²

C. The proposal illegally permits consideration of financial issues in licensing decisions.

The courts have made it clear that the Commission may not consider the cost of meeting its safety requirements in making decisions whether to allow the operation of nuclear power plants. See Power Reactor Development Corporation v. International Union of Electrical etc. Workers, 367 U.S. 413, 414-16 (1961); Porter County Chapter of Izaak Walton League v. NRC, 606 F.2d 1363, 1369-70 (D.C. Cir. 1979) (The utility, and not the public, bears the risk that an operating license will be denied because safety problems prove "intractable.")).

² By the same token, Commissioner Asselstine's proposal to grant exemptions where "compliance with the regulation would decrease overall facility safety" would allow applicants to sidestep the question of the effect of the exemption on the particular aspect of reactor safety being excuse

The same restrictions apply to decisions regarding regulatory exemptions. Otherwise, the Commission could license a plant based on safety considerations alone, and then proceed to use financial considerations to excuse compliance after the plant was licensed. The Commission may not rely on economic issues in order to change an operating license to permit operation at less than the same assurance of safety as provided by compliance with the regulations.

The proposed regulation violates this principle in several respects:

1. "Public interest" considered

In order to issue an exemption, the Commission must find, inter alia, that the exemption is in the "public interest." Proposed § 50.12(a)(1). According to the Commission, the term covers the "special circumstances" listed in § (a)(2), plus the "equities of the situation," including "any financial or economic hardships" incurred by the applicant. 50 Fed. Reg. at 16508. As discussed above, these considerations are no more legal in an exemption proceeding than they are in a proceeding for issuance of an operating license. The provision for consideration of the "public interest" should be struck from the rule.

2. Disparate treatment of applicants considered

Proposed § 50.12(a)(2)(v) would allow the Commission to issue an exemption where

Application of the regulation would result in treatment of the particular applicant or licensee in a manner substantially different than other similarly situated applicants or licensees.

The Commission states that this provision is intended to provide "equitable treatment" to applicants or licensees who are treated differently from other similarly situated parties because of "unusual circumstances." In other words, the exemption is designed to compensate for financial hardship caused by the disparate effects of regulation. The alleged unfairness lies not in the application of the regulation, but in the "results" of the application.

Once again, the Commission errs in allowing considerations of cost to influence its safety determinations. While the Commission may have some discretion to issue temporary exemptions to construction permit applicants on these grounds, those regulations must be met at the time of licensing for operation. Power Reactor Development Corp., supra, 367 U.S. 396. For instance, in the case cited by the Commission, Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-75-9, 2 NRC 180 (1975), the Commission granted an exemption to a construction permit applicant where a deadline for regulatory compliance had been unevenly administered. The Commission refused to grant the exemption on that basis alone, however, and found in addition that

there is sufficient present assurance of favorable resolution of the outstanding ECCS issues to authorize construction permits, at the applicant's express risk of demonstrating such resolution or having to live with undesired operating limitations.

2 N.R.C. at 186 (emphasis added). Thus, proposed § 50.12(a)(v) is not a valid "circumstance" for granting an exemption to the Commission's regulations.

3. Temporary exemptions

Under proposed § 50.12(b)vi), the Commission could grant exemptions which would provide only "temporary relief" from its regulations. According to the Commission, this provision will cover "schedular exemptions where the relief sought is limited to a specific amount of time or until a specific event occurs." 50 Fed. Reg. at 16509. The Commission states that it will consider the applicant's "good faith" in attempting to comply with the schedule. Id.

Generally, the basis for requesting such a schedular exemption is financial. Compliance with a regulation may mean delay of startup or an unscheduled shutdown. Such financial hardships associated with compliance may not be considered by the Commission in making licensing decisions. A license applicant must meet the regulations before it can receive an operating license. 10 C.F.R. § 50.57.³

III. The Proposed Rule Illegally Lowers the Standard for Safe Operation of Nuclear Power Plants for Which the Commission Has Granted Exemptions.

The current language of 10 C.F.R. § 50.12 allows the Commission to grant only those regulatory exemption which it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

The proposed rule offers a different standard for the safety

³ Commissioner Asslestine proposes to permit exemptions where compliance issues are raised late in the licensing process. Proposed § 50.12(a)(2)(iv). Although there is some unfairness inherent in the NRC's untimely raising of compliance issues, UCS nevertheless believes that it is an economic consideration that cannot be part of an NRC licensing determination.

finding, requiring the Commission to find, inter alia, that the exemption will not "present an undue risk to the public health and safety." The Commission explains that it considers this language to be equivalent to the previous language requiring it to find that an exemption does not endanger the public health and safety. However, it is clear from the preamble that the Commission intends the new standard to be lower than the standard articulated in its recent interpretation of § 50.12, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984).

In the Shoreham decision, the Commission interpreted that standard to require the license applicant to demonstrate that operation under an exemption to GDC 17 would be "as safe as" operation in compliance with the standard would have been. Id. at 1156. In the proposed rule, the Commission states that it only intended that decision to apply to the "particular circumstances" of that case. 50 Fed. Reg. 16508, Col. 1.

The Commission does not define what it means by no "undue risk." It is evident from the preamble, however, that the Commission does not intend the term to have the strength of the "as safe as" standard used in the Shoreham case. The transcript of a 1984 Commission meeting on regulatory exemptions further shows that the Commission is searching for an alternative, lower standard that would not cause licensing delays. Transcript of Commission Discussion of Commissions Practice in Granting Exemptions, July 25, 1984. However, there is no acceptable lower safety standard for the granting of regulatory exemptions.

The regulations establish the minimal requirements for safe operation of a nuclear plant. They do not eliminate all risks from nuclear power plant operation, but are intended to provide a reasonable assurance of safety. In fact, this "reasonable assurance" standard is the "benchmark" utilized in establish the regulations. Nader v. Nuclear Regulatory Commission, 513 F.2d 1045, 1052 (D.C. Cir. 1975). The regulations "set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the [Atomic Energy] Act." Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 404 (1961). See also Vermont Yankee, ALAB-138, supra, 6 A.E.C. at 528 (" . . . Once a regulation is adopted, the standards it embodies represents the Commission's definition of what is required to protect the public health and safety.")

The Commission's detailed and comprehensive regulatory program establishes the fundamental requisites for providing reasonable assurance of safe operation of nuclear power plants. While the Commission may be required to go further, as it must in addressing Unresolved Safety Issues, it may not retreat from the levels of protection established in its own regulations. It may not degrade the safety of a nuclear power plant by issuing a license based on regulatory compliance and later allowing that reactor to operate in noncompliance based on some lower standard. Not only would such an action violate the license and the Atomic Energy Act, but it would be grossly unfair to other licensees that continued to comply with the regulations at

substantial cost. If the Commission cannot find that an application for a regulatory exemption demonstrates that the applicant will provide an equivalent assurance of safe operation, the request for the exemption must be denied.

Conclusion and Recommendations

The Atomic Energy Act does not specifically authorize the issuance of regulatory exemptions. Thus, the Commission has no authority to grant exemptions. If the Commission possessed some authority to waive its regulatory requirements, that authority would be extremely limited, especially with relation to operating license applications or operating plants. The Commission must restrict the grounds for granting exemptions to those situations raising a genuine and serious safety issue. It has not demonstrated those circumstances here. Considerations of cost to the applicant may not play a part in any such decision. In any event, no exemption may be granted unless the Commission finds that operation of the plant under the exemption will be conducted with a degree of safety that is equivalent to that provided by compliance with the regulation.

UCS recommends that the Commission withdraw the proposed rule.

Respectfully submitted,



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