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WRITER'S DIRECT DIAL
(202)

May 28, 1985

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

Attn: Docketing and Service Branch

Subject: Comments on Proposed Rule
Regarding Specific Exemptions:
50 Fed. Reg. 16506 (April 26, 1985)

Dear Mr. Chilk:

On April 26, 1985, the Nuclear Regulatory Commision ("NRC") published in the Federal Register a proposed rule which would amend 10 C.F.R. § 50.12. The proposed rule revises the existing regulation in an attempt to refine the standards to be applied by the NRC Staff when it considers requests for specific exemptions from the requirements of 10 C.F.R. Part 50. See 50 Fed. Reg. 16506 (April 26, 1985). In addition, in the Federal Register notice, the NRC published for comment a proposed version of § 50.12 drafted by Commissioner Asselstine. See 50 Fed. Reg. 16506, at 16509-10. On behalf of Arkansas Power & Light Co., Consolidated Edison Co., Duke Power Co., Florida Power Corp., Mississippi Power & Light Co., Nebraska Public Power District, Northeast Utilities, New York Power Authority, and Washington Public Power Supply System, we respectfully submit the following comments. However, in order to put the comments in proper perspective, we begin with a brief review of the events leading to the current proposed rule.

1. Background

The existing exemption regulation, 10 C.F.R. § 50.12(a), allows the NRC to grant an exemption from the specific requirements of Part 50 if:

> . . . such exemptions from the requirements of the regulation . . . are authorized by law and will not endanger life or property or the common defense and are otherwise in the public interest.

From this test, the NRC Staff has placed specific emphasis on the requirements that an exemption not endanger life or property and that the exemption be in the public interest. Thus, the Staff has granted exemptions if (1) operation, under the conditions proposed in the exemption request, would not pose any undue risk to public health and safety, and (2) special circumstances exist to justify the need for an exemption. See SECY-84-290, Need and Standards for Exemptions (July 17, 1984); see also 50 Fed. Reg. at 16507-508.

On May 16, 1984, the Commission issued an order in the Shoreham proceeding which created confusion within the NRC and the industry with respect to the NRC's 10 C.F.R. § 50.12 exemption process. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984). To justify an exemption from GDC 17 for low power operation, the Commission stated that the applicant in that case must show (1) the "exigent circumstances" that favor the granting of the exemption under § 50.12(a), and (2) the basis for concluding that, at low power, operation would be "as safe" under the conditions proposed as it would be with full compliance with the GDC. CLI-84-8, 19 NRC at 1155-56.

Compared with existing NRC Staff practice, the Shoreham decision raised the threshold for exemptions by stating two standards not included in the existing § 50.12(a). Following the Shoreham decision the NRC Staff also increased the number of situations in which exemptions are required by expanding the process to include certain temporary non-compliances at operation less than full power. As a result of the consequent NRC Staff and industry comment, the Commission undertook to reevaluate its exemption regulation. The current proposed rule ensued.1/

2. The Proposed Exemption Standards

The current proposed exemption rule is an attempt by the NRC to conform the standards of § 50.12 to traditional Staff

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1/ However, pending completion of the reevaluation, the Commission directed the Staff to return to its traditional exemption practice under existing § 50.12(a) in all cases except Shoreham. See Staff Requirements Memorandum, Chilk to Dircks and Plaine (July 27, 1984).

practice. It therefore theoretically rejects the unduly high standards adopted in CLI-84-8 for Shoreham. 50 Fed. Reg. 16508 at col. 2. We applaud the Commission's objective of reaffirming past exemption practice and of developing a regulation to ensure comprehensive and consistent exemption standards. However, we have several specific comments on the proposed standards. Under the proposed rule, an exemption can be granted if (1) the exemption "will not present an undue risk to the public health and safety" and (2) the exemption is "in the public interest."2/

a. No Undue Risk

The first prong of the exemption test is the "no undue risk" standard. We support this aspect of the proposed rule. The "no undue risk" standard is an appropriate exemption standard and has been successfully applied by the Staff in the past. Because the Staff has acquired substantial expertise in applying the standard, there should be no problems of interpretation. Moreover, this test can be easily applied in evaluating both interim schedular exemption requests and life-of-plant exemption requests.

In its discussion of the proposed rule the Commission correctly recognizes a key factor related to the "no undue risk" test. Specifically, the standard allows for an evaluation of overall plant conditions that will exist during the time the exemption will be in effect. 50 Fed. Reg. 16508 at col. 2. Thus, the NRC Staff should, under this standard, consider the purpose of the regulation involved, the extent to which alternative or compensatory measures proposed by the applicant will achieve the regulatory purpose, the operating conditions (e.g., power level), and the length of time the proposed exemption will be in effect. Such an approach provides the Staff with the necessary regulatory flexibility to effectively deal with the technical merits of each exemption request. Therefore, at a minimum, this additional Commission guidance on the "no undue risk" test should be reiterated in the Statement of Consideration for any final rule.

The Commission's Statement of Consideration should also reflect the fact that the "no undue risk" standard correctly repudiates the "as safe as" standard adopted in

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2/ The proposed regulation also carries forward from the current regulation the requirements that an exemption be "authorized by law" and not endanger the "common defense and security." These standards are appropriate and we have no further comments on them.

Shoreham. For many interim schedular exemptions, the "as safe as" test proposed in Shoreham would be extremely difficult, if not impossible, to meet - even with no countervailing safety reason. Moreover, the "as safe as" test created potential problems of interpretation. Comparing, on a quantifiable basis, the risks involved under the conditions proposed in an exemption request with those which would exist under full compliance would in many cases constitute an exercise in futility.

b. The Public Interest

The requirement that an exemption be in the public interest exists in the current § 50.12(a) and would be continued under the proposed rule. The Commission states in its Federal Register notice that "the public interest determination will consist of a consideration of the special circumstances that justify the exemption," and that the "determination would be confined to the equities of the situation." 50 Fed. Reg. 16508 at col. 2. In fact, this is an approach consistent with current NRC Staff practice and is an appropriate approach. It provides the Staff the necessary flexibility to assess the full range of possible exemption requests with which it may be faced.

As stated in the Federal Register notice and alluded to in the Shoreham decision, this public interest assessment must involve a balancing of all the equities of each situation. These include:

> the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good-faith effort to comply with the regulation from which an exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 at fn. 2 (1984). This balance is a key to the effectiveness of the exemption standard.

However, it appears to us that the balancing test and the types of considerations involved in the public interest standard may be easily lost by use of the overly general "public interest" language in the regulation. In fact, in the Shoreham decision, the Commission interpreted the existing "public interest" test to additionally require a showing of "exigent circumstances". "Exigent

circumstances," as understood for example in the context of the Sholly regulations, are not always present in cases where an exemption is appropriate, and therefore should be only one factor to be considered in the "public interest" balance. The NRC should refine the language of the proposed regulation to explicitly define the type of assessment which is involved in evaluating an exemption request. A general standard (either "public interest" or "special circumstances" - but not "exigent circumstances"), coupled with an equitable balancing test and a list of factors to be considered, would accomplish this objective. See, e.g., 10 C.F.R. § 2.714(a)(1). Proposed § 50.12(a)(2), discussed below, only partially alleviates the problem.

c. Proposed § 50.12(a)(2)

As a new wrinkle to the exemption regulation the Commission is proposing a new subsection, 10 C.F.R. § 50.12(a)(2). This section purports to itemize the "situations in which it would be reasonable to grant an exemption." 50 Fed. Reg. 16508 at col. 3. Therefore, in addition to meeting the two general standards discussed above, an exemption request must fall within one of seven pre-approved categories for exemptions. The Commission notes that each of the seven categories of § 50.12(a)(2) "constitute[s] a specific application of either the safety criterion or the public interest (special circumstances) criterion stated in the general standards of proposed § 50.12(a)(1)." Id.

The proposed section provides some guidance for applying the two general exemption standards. It does this by providing examples of situations in which one of the tests has been applied and it has been determined that either no undue risk is involved or special circumstances exist. However, this gives the regulation a slightly illogical structure. The two general standards are in effect defined and limited by specific previous applications of the standards. It would be a better approach to provide further guidance as to the meaning of each of the general standards by definition rather than limiting examples. Specifically, as discussed above, under the public interest standard the regulation should state that the standard is an equitable balancing test for special circumstances. Under that general standard, examples of the equitable factors to be balanced could be listed. This list of factors would in many respects parallel the situations listed in proposed § 50.12(a)(2). However, by utilizing this approach, the regulation would retain flexibility and would not be limited by past applications.

The problem inherent in using examples to provide guidance as to the meaning of the general rules is that examples may not be inclusive of all factual situations which may eventually arise. The Commission correctly provides item (a)(2)(vii) as a "catch-all" provision for unanticipated circumstances. If the structure of the proposed regulation is retained in a final rule, this item must also be retained.

One specific situation which currently is not, but should be, included in § 50.12(a)(2), is a situation in which a plant-specific exemption is justified based upon a quantitative assessment of overall power plant design and the potential risks to public health and safety. For example, an assessment of plant design may demonstrate that, in a certain situation, regulatory compliance is unnecessary in order to satisfactorily protect public health and safety from undue risk. This conclusion could be based upon a showing that there would be "no undue risk" because the risk of reactor core damage as a result of a particular non-compliance will not exceed the plant performance design objectives established in safety goals. See 48 Fed. Reg. 10772, 10775 at col. 1-2 (1983). This is a "special circumstance" in which an exemption is appropriate.

Finally, the situations listed in proposed § 50.12(a)(2) should not be interpreted to contradict the requirements of the Commission's backfit rule. See 10 C.F.R. § 50.109. Exemptions may be necessary and appropriate on a plant-specific basis where proposed generic backfits do not provide the "substantial, additional" protection required by § 50.109. For example, a new generic regulation may be justified under the backfit rule on a generic basis. However, an individual utility should be entitled to an exemption where it can demonstrate on a plant-specific basis that the backfit standard is not met. This also should be a "special circumstance" included within the scope of § 50.12.

3. Scope of the Exemption Rule

Under the proposed rule, the Commission plans to expand the scope of the exemption process to explicitly encompass new situations which in the past would have been handled by the NRC Staff with license conditions. The expansion, in our view, is unnecessary.

For near term operating plants there are typically situations in which full regulatory compliance will not be achieved for fuel load, or various levels of low power operation. However, in these situations full compliance is not necessary for the operating conditions and the risks involved at the relevant power level. Routinely, under

prior practice, the NRC Staff issued license conditions (as part of the safety evaluation report) that allowed the applicant to operate at less than full power. The license condition scheduled full regulatory compliance at some later time consistent with the technical realities of short term operation and the public health and safety. Although not reviewed under the § 50.12 process, the Staff applied a standard equivalent to the "no undue risk" test used for exemptions.

According to the text accompanying the proposed rule, the Commission now proposes to specifically require exemptions under § 50.12 in these situations. See 50 Fed. Reg. at 16507-508. There is no particular language in the proposed rule, however, which would specifically mandate this change in practice. Moreover, as a practical matter we do not believe the change is either necessary or desirable. Where compliance with a regulation for low power operation makes no technical sense, or presents no undue risk, an exemption request should not be necessary. A certain amount of flexibility should be assumed in the regulations, i.e., compliance should not be required for a level of operation for which the regulation has no effect or serves no purpose. The traditional license condition approach avoids unnecessary exemption paper work and prevents potential licensing delays which could result from non-compliances which are a relatively normal part of the evolution of the plant. Moreover, because the Staff has used the "no undue risk" standard in establishing acceptable license conditions, the license conditions provide the same level of public protection as would exemptions.

4. Commissioner Asselstine's Proposal

In the Federal Register notice Commissioner Asselstine provided his own proposed version of 10 C.F.R. § 50.12 for comment. We have three comments on his proposal.

First, Commissioner Asselstine would adopt the same "no undue risk" standard as would the rest of the Commission, but would replace the "public interest" test with a requirement that "special circumstances" exist. As discussed above, we support the "no undue risk" standard. This is the standard which has been applied by the Staff in the past. Commissioner Asselstine's "special circumstances" standard is also not unlike the Staff's existing interpretation of the "public interest" test. Compare 50 Fed. Reg. 16508 at col. 2. However, Commissioner Asselstine's proposed rule is more specific than the "public interest" test proposed by the Commission and fails to identify the "public interest/special circumstances" test for what it should be: an equitable balancing of all the

factors involved in the exemption request. Therefore, as discussed above, a standard which specifically adopts the balancing test alluded to in CLI-84-8 would be preferable. This can be done by establishing a general standard followed by a list of equitable factors to be considered in a balancing test. The list of factors is provided in the Shoreham decision. See CLI-84-8, 19 NRC at 1156, fn. 3.

Second, Commissioner Asselstine's "special circumstances" test is circumscribed by six specific situations. These situations would constitute the exclusive list of special circumstances. This list is too restrictive. It does not properly reflect all the possible balances of equities that could be involved in an exemption request. In addition, the test specifically fails to include interim schedular exemptions. At a minimum, a situation allowing exemptions that provide only temporary relief, while creating no undue risk, should be included in the list of circumstances. Experience has demonstrated that schedular or interim exemptions are sometimes required, despite good faith efforts to comply with the regulation. It would, in our view, be unrealistic to ignore these situations in the exemption process and inappropriate to attempt to deal with them through enforcement.

Finally, Commissioner Asselstine's rule inherently recognizes the slightly illogical structure of the Commission's proposed rule. His proposal is an attempt to group specific applications of the "special circumstances" standard under the standard being applied. We support this idea in theory. Such an approach is preferable in the sense that it provides guidance as to the meaning of the general standard. The general standard, once understood, can then be applied to all factual situations rather than requiring that all factual situations be pigeon-holed into one of seven categories. However, Commissioner Asselstine's proposal could be improved, as discussed above, by replacing the six specific situations in § 50.12(a)(2) with a general balancing test and a list of factors to be considered.

5. Conclusion

In sum, we support the Commission's proposed rule insofar as it codifies the existing NRC Staff standards for evaluating exemption requests. Those standards provide a comprehensive and consistent framework to be applied to both schedular and life-of-plant exemption requests. However, we believe the proposed rule could be improved in several respects to better refine the standards. First, a definition of the "public interest" standard could be articulated in order to more accurately and completely reflect the current equitable balancing test. Second, the

structure of the regulation could also be rearranged in order to further clarify the two standards. Finally, the list of situations in which exemptions would be appropriate, as currently proposed by the Commission, should be supplemented. Otherwise, the exemption regulation will be unduly limited and will deprive the NRC Staff of the discretion and flexibility it should have to successfully analyze unforeseen circumstances.

We do not support the proposed rule insofar as it would alter past Staff practice by requiring specific exemptions for various non-compliances at low levels of operation. License conditions have been utilized in the past and provide the same level of public protection. The proposed change in practice (which is not expressly mandated by the proposed rule) will merely create an unnecessary paper hurdle to be overcome, and a potential for unnecessary licensing delays.

We greatly appreciate this opportunity to provide you with our comments on the proposed regulation.

Sincerely,

J. Michael McGarry, III
Nicholas S. Reynolds
David A. Repka

cc: F. X. Cameron