

DOCKET NUMBER **PR-50**
PROPOSED RULE

(17)

ISHAM, LINCOLN & BEALE
COUNSELORS AT LAW

DOCKETED (50 FR 16506)

THREE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60602
TELEPHONE 312 558-7500
TELEX: 2-5288

5 JUL 1985

EDWARD S. ISHAM, 1872-1902
ROBERT T. LINCOLN, 1872-1889
WILLIAM G. BEALE, 1885-1923

WASHINGTON OFFICE
1120 CONNECTICUT AVENUE, N.W.
SUITE 840
WASHINGTON, D.C. 20036
202 833-9730

July 16, 1985

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Dear Sir:

This law firm has been requested by Commonwealth Edison Company to submit the following comments on the Nuclear Regulatory Commission's proposed amendment to 10 C.F.R. 50.12(a) which was published in 50 Fed. Reg. 16506 et. seq. (April 26, 1985).

10 C.F.R. 50.12(a) governs the grant of specific exemption from NRC regulations. The proposed amendment essentially retains that portion of the current regulation which requires that any exemption granted: present no undue risk to public health and safety; is consistent with the common defense and security; and is otherwise in the public interest. Proposed 10 C.F.R. 50.12(a)(1). The proposed amendment then augments the current regulation by listing seven criteria or conditions. Proposed 10 C.F.R. 50.12(a)(2). A request for a specific exemption must satisfy both the general standards of subsection 1 and meet one of seven criterion listed in subsection 2 before an exemption is granted.

DS10
add: J. H. Cameron, 9604 MNB

8507230347 850716
PDR PR
50 FR16506 PDR

Acknowledged

JUL 19 1985 pd

We don't agree that it is necessary to change the current policy and procedure under which specific exemptions are granted. For example, we believe that the current informal procedure for granting temporary exemptions is an efficient method which avoids the diversion of NRC staff resources from its primary concerns of safety to unnecessary administrative paper shuffling.

It has also been Commonwealth Edison Company's experience that the NRC staff has sometimes required the license applicant to seek exemptions from NRC "requirements" contained in the Standard Review Plan, regulatory guides or other guidance documents. We believe this is an inappropriate and unnecessary use of the specific exemption provisions since the failure to meet these "requirements" often is the result of a change in NRC staff interpretation and not a change in the underlying regulation.

However, we are most troubled by the fact that the list of criteria proposed is too limited in that it apparently does not include one of the reasons previously recognized by the NRC as appropriate and justified for the issuance of exemptions. Specifically, we note that this list of seven conditions or criteria does not include an exemption based on undue hardship and/or excessive costs. The Commission suggests that financial hardships will be considered to determine whether an exemption is in the "public interest"

in proposed §50.12(a)(1). 50 Fed. Reg. at 16508. However, we believe that undue hardship and/or excessive costs should also be recognized as a separate condition or criterion under proposed §50.12(a)(2).

The failure to include these factors as an alternative condition justifying exemption is puzzling in light of the comments accompanying the proposed rule which state:

These conditions were selected on the basis of exemption criteria that have been noted by the courts with approval [special circumstances, hardship, equity, more effective implementation of overall policy, circumstances substantially different from those considered in the rulemaking procedure] and on the basis of examples from past Commission exemption practice where the circumstances underlying the exemption appeared to be relevant and appropriate for exemption relief. 50 Fed. Reg. at 16508.

It has been past NRC practice to grant exemptions where literal enforcement of a regulation would cause a licensee undue hardship or excessive costs. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1377-1379 (1984); United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 7-8 (1983); Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 938, 941, n. 4 (1974). Yet undue hardship and/or excessive costs are not listed in the NRC's proposed criteria. If, as the Commission suggests, the purpose of the amendment is to fashion a framework based, in part, on past staff practice, this omission represents a radical departure from previously recognized standards.

The Commission has recognized that hardship, economic and otherwise, is often associated with shutdowns and delays which may result from failure to grant necessary exemptions. For example, in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1377 (1984), the Licensing Board characterized as "self-evident" the financial hardship resulting from an unused and non-productive nuclear facility. The Licensing Board also noted that the costs of heavy and protracted litigation should be considered in evaluating financial or economic hardships and concluded...

The unusually heavy financial and economic hardships associated with the very protracted Shoreham licensing proceedings constitute a significant equity, which we hold can reasonably be held to amount to exceptional circumstances in the context of granting a low-power exemption. Id. at 1379.

A criterion addressing resultant hardship and/or cost should be incorporated in the proposed amendment for another reason. With the inclusion of such a criterion, the NRC staff retains the necessary discretion to take into account the overall equities of each situation.

A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. These equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulations, 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 Company (Shoreham Nuclear Power Station, Unit 1), CLO-84-8, 19 NRC 1154, 1156 fn. 3 (1984).

The NRC's proposed criteria could be read as ignoring most of these factors and compel literal enforcement of a regulation whose safety significance is far outweighed by the cost of adherence. The inclusion of a criterion which permits the NRC staff to consider the hardship and costs retains agency discretion necessary for a reasonable and just administration of NRC regulations.

The above quotation includes among equitable considerations the stage of the facility's life. Similarly, we believe that any assessment of hardship incorporates consideration of the timing of when a compliance issue is raised. Commissioner Asselstine has recognized the importance of this issue by proposing a special circumstance exists whenever

(iv) a compliance issue is raised late in the licensing review that cannot be fully resolved in a timely fashion despite good faith efforts. 50 Fed. Reg. at 16510.

We have some reservations as to whether the tardiness of an issue, standing alone, can legitimately serve as the basis for an exemption. However, Commissioner Asselstine's proposal does recognize a real and substantial problem often faced by licensees. One solution to this problem is the recognition that a compliance issue raised

relatively late in the NRC review process heading to the issuance of an operating licensee, operating license amendment or a technical specification change may result in undue hardship and excessive cost. Such costs and hardships can be minimized by the timely grant of an exemption which otherwise meets the standards of public health etc. enunciated in proposed §50.12(a)(1)

We do not endorse another aspect of Commissioner Asselstine's proposed criteria (Asselstine proposed §50.12(a)-(2)(iii)) Commissioner Asselstine's proposal would apparently limit exemptions based on undue hardship or excessive costs to cases where suits hardship or costs were not contemplated at the time the regulation was adopted.^{1/} We are concerned that Commissioner Asselstine's proposal might be read to exclude consideration of hardships and/or costs, such as the cost of facility shutdown, which could be considered "foreseeable." Yet, such hardships and costs have proved to be among the most usual and compelling reasons for granting exemptions.

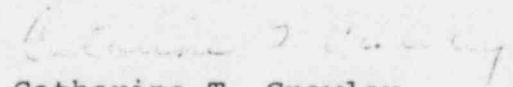
In summary any listing of criteria intended to encompass all circumstances under which exemption are

^{1/} This aspect of Commissioner Asselstine's proposal may be unnecessary, since such unanticipated hardships and costs come within the criterion proposed by both Asselstine and the Commission for "material circumstances not considered when the regulation was adopted." Proposed 10 C.F.R. 50.12(a)(2)(vii).

appropriate must incorporate the previously recognized principle that enforcement should not result in undue hardship and/or excessive costs.

We appreciate the opportunity to provide these comments.

Sincerely,


Catherine T. Crowley

CTC:lm