May 6, 2003

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0077

TITLE: PROPOSED RULE TO UPDATE 10 CFR PART 52, "EARLY SITE PERMITS, STANDARD DESIGN CERTIFICATIONS, AND COMBINED LICENSES FOR NUCLEAR POWER PLANTS"

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 6, 2003.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner Dicus
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-02-0077

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	5/23/02
COMR. DICUS	X				X	7/14/02
COMR. McGAFFIGAN	X				X	4/22/03
COMR. MERRIFIELD	X				X	12/12/02

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 6, 2003.

Commissioner Comments on SECY-02-0077

Chairman Diaz

I approve the request to publish the proposed revision in the Federal Register. Many good changes to part 52 are contained in this proposed rulemaking; however, I do not necessarily agree with all the changes that are proposed.

I would have preferred to see the Industry Petitions addressed in this proposed rulemaking; however, since I believe that we need to get on with this rulemaking, I am approving the proposed rule for publication. Nonetheless, I believe that the Industry Petitions for rulemaking should be consolidated into this rulemaking effort, if they are approved, even if re-publication is necessary. I believe that this will not unduly delay a final rulemaking.

I disagree with using a "minimal increase" threshold rather than a "substantial increase" threshold for changes in severe accident-related information. The rule should retain the "substantial increase" threshold for severe accident-related information. In addition, the duration of a Final Design Approval should be changed from five to 15 years to correspond to the duration of design certification. These two changes should be made prior to publishing the proposed revision in the Federal Register.

I do not believe that it is appropriate to begin the 40 year license term at the date of issuance of the combined operating license. A high priority should be placed on resolving this item before the final rule is issued.

I look forward to the public comments on these and other issues associated with this proposed rule change, as well as the staff resolution of the comments.

Commissioner Dicus

I approve the staff's request to publish in the Federal Register the proposed revision to the requirements in 10 CFR Part 52 and other related sections of the regulation in Title 10 subject to the following.

1. Since the staff's recommendations on two petitions for rulemaking should be submitted to the Commission by September 2002, I believe it is prudent, based on resources and efficiency, that the two petitions be assessed and incorporated into this rulemaking.

2. I do not support the staff's proposed changes to the current §§ 52.83 and 52.97 with regards to beginning date for the term of a combined license. As I stated in my vote on COMSECY-98-004 on combined license review process, I believe that the Commission should continue to support the current duration of the combined license as described in the current 10 CFR 52.83. That is, the 40-year license begins when the Commission finds that the prescribed acceptance criteria are met pursuant to 10 CFR 52.99. Not too many years ago, the NRC and licensees expended considerable effort in amending operating licenses to "recapture" the years spent constructing some power plants to assure they had a full 40 years of operation. The validity of our combined license rule has been upheld. We should, therefore, not change the current rule language without

good reason. Additionally, both the House and Senate Energy Bills have proposed words which would clarify the combined license period (as it was originally intended). According to OCA, it is very likely that the proposed clarification words will be enacted with the Energy Bill. At this time, no licensee is impacted by these regulations and no one will be impacted in the near future. Therefore, I recommend that the current §§ 52.83 and 52.97 remain unchanged until such a time that the statute is clarified or a licensee is impacted by the regulation.

3. With respect to the proposed wording of 52.211(d)(1), the last sentence should not include "construction permit, duplicate design license, or" since that section of the proposed rule is within the subpart on combined licenses. Therefore, proposed §52.211(d)(1) should only refer to combined licenses. Additionally, the last sentence of §§ 52.39(b) and 52.39(c) should include "duplicate design license" based on the same reasoning.

I would like to commend the staff on the high quality product exhibited in SECY-02-0077. I recognize the amount of time and effort that was expended on this rulemaking by the staff and our stakeholders. I believe that this effort has yielded a regulation and regulatory framework that is suitable for effective and efficient for the reviews of the expected early site permits and other associated reviews, if and when the staff receives new reactor license applications.

Commissioner McGaffigan

I approve the staff's recommendation to publish the notice of proposed rulemaking, but I agree with the comments of my colleagues on the Commission that certain changes should be made prior to publishing the documents in the Federal Register.

Specifically:

1) The current "substantial increase" threshold should be retained (and not changed to "more than a minimal increase" as proposed in SECY-02-0077) for changes in severe accident-related information.

2) The existing requirement for the NRC to publish successful ITAAC completion (section 52.99) should be retained, rather than the change proposed by the staff (proposed section 52.229) that the NRC publish instead notices only of the licensee's notification that the licensee believed that ITAACs had been successfully completed. I completely concur in former Chairman Meserve's comments on this matter.

3) The staff should continue its efforts to bring about the statutory changes necessary to allow licensees to operate facilities that gain an operating license under Part 52 for at least 40 years from the time acceptance criteria are met. However, I believe that we have no choice under the existing statute but to propose the changes the staff is including (proposed sections 52.215 and 52.227(e)). I hope that Congress will have adopted our proposed correction by the time this rule is finalized.

I also agree with the edits proposed by former Chairman Meserve, and attach them to my vote.

Commissioner Merrifield

I appreciate the staff's considerable efforts on the proposed revision to 10 C.F.R. Part 52 and other related sections in 10 C.F.R. and I approve the staff's request to publish in the *Federal Register* the proposed rulemaking. However, the staff should make the following changes prior to publishing the documents in the *Federal Register*:

1. I agree with Commissioners Dicus and Diaz that the term of a combined license needs further consideration. I do not approve the staff's recommendations for changing Sections 52.83 and 52.97 in the proposed rule. The Commission has repeatedly sought legislation to clarify the initiating event for beginning a Part 52 COL term. Although, this clarification has not been made, this session of Congress had included a clarification in both the House and Senate Energy Bills. Certainly, NRC regulations should not be changed before the Commission knows definitively that Congress will not provide this clarification prior to the issuance of the first Part 52 COL.

   Even without clarification from Congress the regulations should not be changed. If the regulations are changed, as the staff suggests, the operating term for a COL will be reduced by the number of years spent in construction, while at the same time our regulations will continue to exclude the period of construction for Part 50 operating license terms. This regulatory scheme makes no sense in the context of Section 103(c), which clearly states that a license term depends "on the type of activity to be licensed." Section 103(c) can not be reasonably interpreted to require such different terms for the same activity - reactor operation. When the Commission promulgated Part 52 it concluded, albeit implicitly, that the "activity" of operation for a COL holder may extend for 40 years. It crafted the regulations to provide that the operating term extends 40 years after the Commission makes its' finding that the acceptance criteria are met, which takes place after the construction period. It is well understood that the purpose of Congress enacting AEA §185b was to clarify the Commission's authority to promulgate Part 52, which was the subject of significant controversy. There can be no question that Congress was well aware of the provisions of Part 52, including the 40-year term of operation. Thus, Congress had the opportunity to limit the Commission's authority to allow for a 40-year operating term, but it did not.

   Now, after all of the controversy over Part 52 in the first place, including years of litigation, Congressional endorsement of it, and 10 intervening years following its endorsement, the staff on its own raises the issue of reducing the operating term. After all of this public interaction, I am unwilling to change the Commission's long standing interpretation of Section 103(c), without a judicial or Congressional mandate to do so.

2. I agree with Commissioner Diaz's comment that a "minimal increase" threshold rather than a "substantial increase" threshold in severe accident-related information should be retained in paragraph (B)(5)(c) of Section VIII of the design certification rule (Appendices A, B and C). The staff should maintain the "substantial increase" threshold for severe-accident-related information rather than apply the "more than minimal increase" threshold of 10 C.F.R. 50.59. The application of the "more than minimal increase" threshold of Section 50.59 which applies to design basis accidents, not severe accidents, would impose additional burden on licensees and the staff because it would require prior NRC review and approval. This increased burden is not necessary to maintain adequate protection of public health and safety. The increase in risk would be insignificant for these

very low probability events.

3. I agree with Commissioners Dicus and Diaz regarding the industry petitions for rulemaking. These petitions should be consolidated into this rulemaking effort, if approved, and published in the Federal Register as one final proposed rulemaking.