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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 51

#### United States Standards for Grades of Fall and Winter Type Squash

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This rule amends the voluntary U.S. Standards for Grades of Fall and Winter Type Squash to include pumpkin. Currently there are no U.S. standards for pumpkin. Adding pumpkin to the standards will provide industry with official levels of quality. This rule also includes minor changes in wording, procedures and standards format.

The Agricultural Marketing Service has the responsibility, to maintain grade standards in line with current marketing practices.

**EFFECTIVE DATE:** October 13, 1983.

**FOR FURTHER INFORMATION CONTACT:** Philip C. Eastman, Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250 (202) 447-5024.

**SUPPLEMENTARY INFORMATION:** This rule has been reviewed under USDA procedures and Executive Order 12291 and has been designated as a "non-major" rule. It will not result in an annual effect of \$100 million or more. There will be no major increase in cost or prices for consumers; individual industries; Federal, State, or local government agencies, or geographic regions. It will not result in significant effects on competition, employment, investments, productivity, innovations, or the ability of United States-based enterprises to compete with foreign-

based enterprises in domestic or export market.

William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, Pub. L. 986-354 (5 U.S.C. 601), because it reflects current marketing practices.

This amendment makes the following changes in the standards:

- (1) Adds pumpkin to the standards to provide official levels of quality.
- (2) Rewords the definitions for "similar varietal characteristics," "fairly well matured" and "well matured" in the interest of clarity and application of standards to pumpkin.
- (3) Provides for determining percentages on the basis of count when squash or pumpkin are fairly uniform in size.
- (4) Establishes a constant sample size to maintain uniformity in inspection procedures when in bulk or bulk bins.

Lacking official standards for pumpkin, industry members have frequently indicated an interest in standards for pumpkin similar to those for grades of fall and winter type squash. Pumpkin belong to the same biological family and have similar physical characteristics. Adding pumpkin to the U.S. Standards for Grades of Fall and Winter Type Squash will permit grade certification of official levels of quality.

A proposal to amend the U.S. Standards for Grades of Fall and Winter Type Squash was published in the Federal Register on July 11, 1983 (48 FR 31658-31659) with a comment period ending September 9, 1983. Copies of the proposal were widely distributed to interested persons for review and comment. No comments were received.

The U.S. Department of Agriculture has determined that the issuance of these amended standards will benefit industry by providing a means for a more uniform basis for trading.

It is found that it is contrary to public and industry interests to postpone the effective date until 30 days after publication in the Federal Register [5 U.S.C. 533] and good cause exists for making this amendment effective upon publication in that:

- (1) The harvesting of fall and winter type squash, as well as pumpkin,

generally begins the latter part of September.

(2) This rule remains the same as the proposed rule.

#### List of Subjects in 7 CFR Part 51

Agricultural commodities.

#### PART 51—[AMENDED]

Accordingly, the Subpart United States Standards for Grades of Fall and Winter Type Squash is revised to read as follows:

#### Subpart—United States Standards for Grades of Fall and Winter Type Squash and Pumpkin

Sec.	
51.4030	General.
51.4031	Grades.
51.4032	Size.
51.4033	Tolerances.
51.4034	Application of tolerances.
51.4035	Definitions.
* * *	

#### Subpart—United States Standards for Grades of Fall and Winter Type Squash and Pumpkin<sup>1</sup>

##### § 51.4030 General.

These grade standards apply to squash and pumpkin, both of the cucurbit family (*Cucurbita pepo*, *C. moshata*, *C. maxima*, *C. mixta*), having a hard shell and mature seeds.

##### § 51.4031 Grades.

(a) "U.S. No. 1" consists of squash or pumpkin which meet the following requirements:

- (1) Basic requirements:
  - (i) Similar varietal characteristics;
  - (ii) Well matured; and,
  - (iii) Not broken or cracked.
- (2) Free from: Soft rot or wet breakdown.

(3) Free from damage by:

- (i) Scars;
  - (ii) Dry rot;
  - (iii) Freezing;
  - (iv) Dirt;
  - (v) Disease;
  - (vi) Insects; and,
  - (vii) Mechanical or other means.
- (4) Tolerances [See § 51.4033].

(b) "U.S. No. 2" consists of squash or pumpkin which meet the following requirements:

<sup>1</sup>Compliance with the provisions of these standards shall not excuse failure to comply with provisions of applicable Federal or State laws.

- (1) Basic requirements:  
 (i) Similar varietal characteristics;  
 (ii) Fairly well matured; and,  
 (iii) Not broken or cracked.

(2) Free from: Soft rot or wet breakdown.

(3) Free from serious damage by:

- (i) Scars;  
 (ii) Dry rot;  
 (iii) Freezing;  
 (iv) Dirt;  
 (v) Disease;  
 (vi) Insects; and,  
 (vii) Mechanical or other means.  
 (4) Tolerances (See § 51.4033).

#### § 51.4032 Size.

Minimum and/or maximum size of any lot of squash or pumpkin may be specified in connection with the grade in terms of whole pounds and/or fractions thereof.

#### § 51.4033 Tolerances.

In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by weight or by count when fairly uniform in size, are provided as specified:

(a) *Defects.* Ten percent for specimens in any lot which fail to meet the requirements of the specified grade: *Provided.* That included in this amount not more than 2 percent shall be allowed for soft rot or wet breakdown or serious damage by dry rot.

(b) *Size.* Five percent in any lot for specimens which are smaller than a specified minimum weight, and 15 percent which are larger than a specified maximum weight.

#### § 51.4034 Application of tolerances.

When packed in containers the entire contents shall be sample or when in bulk or bulk bins, the sample shall consist of approximately 50 pounds or 25 specimens when fairly uniform in size. Samples are subject to the following limitations:

(a) For a tolerance of 10 percent or more, individual samples in any lot may contain not more than one and one-half times the tolerance specified, except that when the individual sample contains 15 specimens or less, individual samples may contain not more than double the tolerance specified: *Provided.* That at least two defective or off-size specimens may be permitted in any individual sample: *And Provided Further.* That the average for the entire lot is within the tolerance specified for the grade.

(b) For a tolerance of less than 10 percent, individual samples in any lot may contain not more than double the tolerance specified: *Provided.* That at

least one defective or off-size specimen may be permitted in any individual sample: *And Provided Further.* That the average for the entire lot is within the tolerance specified for the grade.

#### § 51.4035 Definitions.

(a) "Similar varietal characteristics" means having the same general characteristics, such as shape, texture and color.

(b) "Well matured" means reaching a stage of development which is indicative of good handling and keeping quality for the variety.

(c) "Fairly well matured" means reaching a stage of development in which the outer skin (shell) is not tender.

(d) "Cracked" means split open, exposing the flesh.

(e) "Damage" means any specific defect described in this section or an equally objectionable variation of any one of these defects, any other defect or any combination of defects, which materially detracts from the appearance or edible or marketing quality. The following specific defects shall be considered as damage:

(1) Scars, except stem scars caused by rodents or other means, which are not well healed and corked over, or which cover more than 10 percent of the surface in the aggregate, or which form depressions or pits that materially affect the appearance.

(2) Stem scars which are unhealed on varieties which normally retain their stems after harvesting.

(3) Dry rot which affects an area more than 1 inch (2.5cm) in diameter in the aggregate on a 10 pound (4.5kg) specimen or correspondingly smaller or larger areas depending on the size of the specimen.

(f) "Serious damage" means any specific defect described in this section; or an equally objectionable variation of any one of these defects, any other defect or any combination of defects which seriously detracts from the appearance or the edible or marketing quality. The following specific defects shall be considered as serious damage:

(1) Scars, except stem scars, caused by rodents or other means which are not well healed or corked over, or which cover more than 25 percent of the surface in the aggregate, or which form depressions or pits that seriously affect the appearance.

(2) Dry rot which affects an area more than 2 inches (5cm) in diameter in the aggregate on a 10 pound (4.5kg) specimen, or correspondingly smaller or larger areas depending on the size of the specimen.

(Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, as amended, 1090, as amended (7 U.S.C. 1622, 1624))

Done at Washington, D.C., on October 6, 1983.

Eddie F. Kimbrell,

Deputy Administrator, Commodity Services.

[FR Doc. 83-27792 Filed 10-12-83; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 908

[Valencia Orange Regs. 321 and 320, Amdt. 1]

#### Valencia Oranges Grown in Arizona and Designated Part of California; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This regulation establishes the quantity of fresh California-Arizona Valencia oranges that may be shipped to market during the period October 14–October 20, 1983, and increases the quantity of such oranges that may be so shipped during the period October 7–October 13, 1983. Such action is needed to provide for orderly marketing of fresh Valencia oranges for the period specified due to the marketing situation confronting the orange industry.

**DATES:** This regulation becomes effective October 14, 1983, and the amendment is effective for the period October 7–October 13, 1983.

**FOR FURTHER INFORMATION CONTACT:** William J. Doyle, 202-447-5975.

#### SUPPLEMENTARY INFORMATION:

##### Findings

This rule has been reviewed under USDA procedures and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities. This action is designed to promote orderly marketing of the California-Arizona Valencia orange crop for the benefit of producers and will not substantially affect costs for the directly regulated handlers.

This regulation and amendment are issued under the marketing agreement, as amended, and Order No. 908, as amended (7 CFR Part 908), regulating the handling of Valencia oranges grown in Arizona and designated part of California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The action

is based upon the recommendation and information submitted by the Valencia Orange Administrative Committee and upon other available information. It is hereby found that this action will tend to effectuate the declared policy of the Act.

This action is consistent with the marketing policy for 1982-83. The marketing policy was recommended by the committee following discussion at a public meeting on February 22, 1983. The committee met again publicly on October 11, 1983, at Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended a quantity of Valencia oranges deemed advisable to be handled during the specified weeks. The committee reports the demand for Valencia oranges is slightly improved but slow.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation and amendment are based and the effective date necessary to effectuate the declared policy of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting, and the amendment relieves restrictions on the handling of Valencia oranges. It is necessary to effectuate the declared purposes of the Act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

#### List of Subjects in 7 CFR Part 908

Marketing agreements and orders, California, Arizona, Oranges (Valencia).

#### PART 908—[AMENDED]

1. Section 908.621 is added as follows:

##### § 908.621 Valencia orange regulation 321.

The quantities of Valencia oranges grown in California and Arizona which may be handled during the period October 14, 1983, through October 20, 1983 are established as follows:

- (a) District 1: 462,000 cartons;
- (b) District 2: 588,000 cartons;
- (c) District 3: Unlimited cartons.

2. § 908.620 Valencia Orange Regulation 320 (48 FR 45526), is hereby amended by revising paragraphs (a), (b), and (c) to read:

##### § 908.620 Valencia orange regulation 320.

- (a) District 1: 550,000 cartons;
- (b) District 2: 700,000 cartons;
- (c) District 3: Unlimited cartons

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Dated: October 12, 1983.

Charles R. Brader,

Director, Fruit and Vegetable  
Division, Agricultural Marketing Service.

[FR Doc. 83-28146 Filed 10-12-83; 12:06 pm]

BILLING CODE 3410-02-M

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Parts 2 and 50

#### Temporary Operating Licenses

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting amendments to its "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2 and to its regulations in 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," providing for the issuance of temporary operating licenses for nuclear power reactors. Pub. L. 97-415, enacted on January 4, 1983, amended section 192 of the Atomic Energy Act of 1954 (the Act), to authorize the NRC to issue such licenses. Section 192, initially added to the Act on June 2, 1972, authorized the Atomic Energy Commission (AEC) to issue temporary operating licenses for nuclear power reactors under certain prescribed circumstances. (The AEC's licensing authority was transferred to the NRC in 1975.) The authority under the original section 192 expired, however, on October 30, 1973. To the extent that the amended section 192 is in substance the same as the original section, the implementing regulations in the amendments to Parts 2 and 50 are also similar in substance to the now expired regulations which were initially published in 1972 to implement the section. The amendments to Parts 2 and 50 set out below are designed to conform Commission regulations and procedures to the new temporary operating licensing authority.

**EFFECTIVE DATE:** November 14, 1983.

**ADDRESSES:** Copies of comments received on the amendments and of the documents described below may be examined in the Commission's Public Document Room at 1717 H Street, NW., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Thomas F. Dorian, Esq., Office of the Executive Legal Director, U.S. Nuclear

Regulatory Commission, Washington, D.C. 20555 Telephone: (301) 492-8690.

**SUPPLEMENTARY INFORMATION:** The supplementary information below is divided into three sections. The first sets out the background for the rule. The second responds to the comments on the proposed rule. And the third section describes the provisions of the final rule.

#### I. Background

After the March 1979 accident at the Three Mile Island nuclear power plant, the NRC focused its attention on evaluating the accident and its implications for the safe regulation of nuclear power in this country and on developing the necessary regulatory improvements for continued operation of nuclear power plants. During this period, construction continued on those nuclear power plants with construction permits, although NRC applied only very limited effort to preparing and meeting the necessary safety reviews and hearing requirements for the issuance of operating licenses for these facilities. Largely as a result of this state of affairs, in late 1980 it was argued that there was a possibility that delays would occur between the time when construction of some of these plants would be sufficiently completed to allow fuel loading and the start of operations and the time when all requirements for the issuance of operating licenses (including the hearing requirements of the Atomic Energy Act) would be met.

Under the Atomic Energy Act of 1954, as amended (the Act), no person may operate a nuclear power plant without first obtaining an operating license from the NRC. A formal on-the-record evidentiary hearing must be held—and a decision rendered on the basis of that record—if requested by any person whose interest may be affected, before the Commission may issue an operating license. Before the enactment of Public Law 97-415, in a case where a hearing is held, the Commission lacked the authority to authorize fuel loading and low-power operation and testing on the basis of its safety and environmental evaluation; a utility was required instead to await authorization in the course of the hearing process. See 10 CFR 50.57(c).

It was argued that, notwithstanding the administrative changes to the licensing process designed to reduce the time required to complete the licensing of these plants, there remains a possibility that some licensing delays might occur for some of the plants scheduled to be completed in the near futures. In order to obviate the

possibility of such delays ever occurring, on March 18, 1981, the Commission submitted a legislative proposal to amend the Act so as to authorize the Commission to issue a temporary operating license for a nuclear power plant, allowing operation and testing, in advance of the conduct or completion of an on-the-record evidentiary hearing on contested issues relating to the final operating license. Public Law 97-415 is the final legislative product of the Commission's proposal. It is an "extraordinary and temporary cure for an extraordinary and temporary situation." Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 35 (1982).

## II. Responses to Public Comments on Proposed Rule

The Commission published a proposed rule in the *Federal Register* on April 18, 1983 for 30-days public comment (48 FR 14928). Thirteen commenters commented on the proposed rule. Six of the 13 commenters generally supported the rule and seven opposed it. The strongest and principal opposition came from commenters that thought that Long Island Lighting Company's Shoreham nuclear power plant is perhaps the sole candidate for a temporary operating license.

The comments and responses can be separated into the categories discussed below (a fuller analysis is provided in the response to comments available in the Public Document Room):

### A. Ex Parte and Separation of Functions

One of the most controversial topics was the Commission's position on the application of the *ex parte* rule and separation of functions to the temporary operating licensing process.

As proposed, Subpart C to 10 CFR Part 2, "Procedures Under Section 192 for the Issuance of Temporary Operating Licenses," would simply have added procedural requirements to 10 CFR Part 2 needed to implement the temporary operating licensing authority in section 192 of the Act, as provided for in a new § 50.57(d) of 10 CFR Part 50. Unlike the hearing process on the final operating license, the legislation makes clear that the temporary operating licensing process would not be subject to the hearing requirements of section 189a. of the Act; thus, the process need not be subject to the requirements of Subpart A or to all the requirements of Subpart G of the Rules of Practice in 10 CFR Part 2. As explained in the preamble of the proposed rule, the Commission decided, however, that certain sections of Subpart G would be applied to resolve needless controversy about such items as the filing of papers, service on

parties, and so on. These were 10 CFR 2.701, 2.702 and 2.708-2.712, relating to service and filing of documents, maintaining a docket, and time computations and extensions; § 2.713, relating to appearance and practice before the Commission; § 2.758, generally prohibiting challenges to the Commission's rules; and § 2.772, generally granting the Commission's Secretary the authority to rule on procedural matters.

It was noted in the preamble of the proposed rule that 10 CFR 2.719 and 2.780, relating to separation of functions and *ex parte* communications, would not apply. However, the Commission also noted that it is sensitive to the concern that the informal contacts that would be allowed thereby should not be extensive and that they should not result in significant data or argument that are both relied on by the Commission in its temporary operating licensing decision and unavailable to the parties for comment before the decision. It was thus stated that, if informal contacts do take place which provide significant data or argument and which are both relied on by the Commission and unavailable to the parties, then that data or argument will be made available for comment before the decision. The Commission's decision not to apply separation of functions and *ex parte* rules to temporary operating licensing reflected a preference not to apply rules intended for formal, trial type proceedings, and was based on the belief that operating licensing and temporary operating licensing proceedings on a given plant are separate proceedings for the purpose of application of the formal hearing requirements of the Administrative Procedure Act (APA). It was argued that the amendment to section 192 of the Act states that section 189a. of the Act does not apply to a temporary operating licensing proceeding; thus, if section 189a. does not apply, then the APA's formal hearing requirements do not apply either. It was also noted that the Commission's consideration of informal communications with the parties in an informal temporary operating licensing proceeding would not prevent the Commission from eventually considering, as necessary, issues arising from the formal operating licensing proceeding. And it was stated that information provided in the informal proceeding would not be used in the formal proceeding, unless it is formally included in the record.

In this context, the Commission also noted the Conference Committee's statement that, under section 192, the Commission cannot issue a temporary

operating license before "all significant safety issues specific to the facility in question have been resolved to the Commission's satisfaction." See Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 35 (1982).

Two Commissioners disagreed with the Commission's position. Commissioner Asselstine stated in additional views to the *Federal Register* notice:

I strongly disagree with the Commission majority's decision *not* to apply the provisions of 10 CFR Sections 2.719 and 2.780, relating to separation of functions and *ex parte* communications, as part of the procedural requirements for implementing the temporary operating license authority in Section 192 of the Atomic Energy Act of 1954, as amended.

In all likelihood, the issues that will be raised before the Commission in the temporary operating license proceedings under the provisions of Section 192 will be similar to, or the same as, the issues being adjudicated in the hearing in the final operating license proceedings. By permitting the NRC staff and the applicant, among others, to make informal off-the-record contacts with the Commission on these issues during the temporary operating license proceedings, the Commission majority's proposed rule presents a grave risk of contaminating the formal on-the-record operating license proceeding. I do not believe that this risk of contaminating the final operating license proceeding can be avoided easily if informal, off-the-record contacts on similar issues arising in the temporary license proceedings are permitted. In order to assure procedural fairness in our operating license proceedings, I would apply our regulations relating to separation of functions and *ex parte* communications to temporary operating license proceedings, just as we now do for final operating license proceedings.

Commissioner Gilinsky also stated his separate views in the *Federal Register* notice:

I have voted against the Temporary Operating License rule because of the Commission's decision to exempt Temporary Operating License proceedings from the *ex parte* and separation of functions rules. This would mean that the Commission's staff, applicants and intervenors would be free to contact individual Commissioners as well as the Commission's Office of General Counsel and Office of Policy Evaluation to argue their respective position on the temporary operating license." (A sentence of explanation which appeared in the penultimate draft and which the Commission was too modest to leave in the final version.)

This decision is but another example of the Commission's deep-seated hostility toward informing the public and involving it in NRC's proceedings. The decision is incompatible with the basic notions of fairness which underline the *ex parte* rules since the temporary operating license issues will inevitably be quite similar to the issues in the

operating license hearing which will be going on at the same time. As has so often happened, the course chosen by the Commission is likely to be self-defeating: it is bound to result in endless litigation.

**Comments.** Three commenters supported the Commission's position. They argued that the decision was in accord with the legislation, that it would permit the Commission direct access to its staff, and that it would prevent delays.

Five commenters opposed the Commission's position. They argued, among other things, that it was a violation of due process, citing *Home Box Office*, 567 F. 2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 809 (1977), and *United States Lines v. Federal Maritime Commission*, 584 F. 2d 519 (D.C. Cir. 1978); that the Commission's proposed safeguards to prevent tainting of the process were inadequate; that the operating license proceeding inevitably would be contaminated, since the issues and parties are likely to be identical; that the Commission's justification for suspending the *ex parte* rule was inadequate, being at best a vague preference for avoiding formal rules; that the Commission's assertion that it may permit *ex parte* contacts because the temporary operating license proceeding is not governed by the formal hearing requirements of the APA was unsound and illegal under such cases as *Home Box Office*; and, finally, that, though section 11 of the legislation specifies that a notice and comment format is to be used for temporary operating licenses, precluding argument about such hearing procedures as cross examination, its legislative history emphasizes the need for a "detailed procedural framework" to govern the process; this point, tied to the fact that the legislation expressly subjects the Commission's decision to judicial review, underscores the importance of strict adherence to all prevailing rules of administrative law except those expressly waived by the Act; in turn, this means that the APA's *ex parte* prohibitions should apply.

**Response.** The Commission has reviewed carefully both sides of the issue. Though it believes that the legislation gives it adequate flexibility to avoid subjecting the temporary operating licensing process to the formal, trial type hearing requirements of section 189a. of the Act, the Commission has decided to modify slightly its position about not applying the *ex parte* rule (§ 2.780) and separation of functions requirements (§ 2.719) to the temporary operating licensing proceeding.

The Commission's position, as set forth in § 2.305 of the final rule, is that, for the purpose of expeditiously acting on the petition for a temporary operating license, it continues to believe that it may need to communicate with its staff. However, oral communications between the Commission's staff and the Commissioners, members of their immediate staffs, or other NRC officials who advise the Commissioners, in the exercise of their quasi-judicial functions, on the merits of any substantive matter at issue in the temporary operating licensing proceeding will be distilled promptly in a fair, written summary, placed in the Commission's Public Document Room, and quickly made available to the parties in the proceedings. A copy of any written communication will also be placed in the Public Document Room and, similarly, quickly made available. These procedures will not apply to communications not prohibited by 10 CFR 2.780, such as status reports and discussions about generic health or safety problems.

Turning to the issue of communications from persons outside the Commission about substantive matters at issue in a temporary operating licensing proceeding, the Commission believes that the comments above as to the need for communications with the staff do not apply with equal force to communications with parties outside the Commission. Thus, the prohibitions of § 2.780 apply in the latter case. Therefore, the Commission will not entertain *ex parte* communications in this context, and persons outside the Commission wishing to communicate with the Commission will be required to use the normal comment procedures outlined in the final rule. If oral or written communications do occur, however, they will be treated using the procedures described in this comment response. The parties will be afforded an additional opportunity to comment to the extent that informal contacts do take place as described above, and such contacts provide significant new data or argument which the Commission proposes to rely upon in making its decision.

#### B. Emergency Planning

Section 50.57(d)(2) of the proposed rule provided, among other things, that the initial petition for a temporary operating license may be filed after the filing of a State, local or utility emergency preparedness plan for the facility.

**Comments.** Emergency planning was also a controversial topic. One

commenter supported the proposed rule. This commenter first noted that the proposed rule does not directly address emergency planning requirements. Citing Cong. Rec. E 5057 and E 5060-61 (Dec. 10, 1982), the commenter then stated that the proposed rule is consistent with the legislation's history and with existing § 50.47(d).

Three commenters opposed the proposed rule. One commenter argued that the final rule should (1) explicitly state that a full Commission review of on-site and off-site emergency preparedness is a necessary prerequisite for issuance of a temporary operating license, (2) explain how the Commission will conduct its review, and (3) should set forth explicitly that the findings of the Federal Emergency Management Agency (FEMA), called for under § 50.47(a)(2), also must be received and evaluated by the Commission before it considers issuance of the temporary operating license.

Another commenter stated that NRC's existing regulations require the adoption of a local off-site radiological emergency response plan and that, in the absence of such a plan, no operating license could be issued simply on the basis of a utility plan. The commenter argued that, to the extent that the new § 50.57(d) is contrary to that existing regulatory requirement, the tempt to issue a temporary operating license would be directly at odds with the unavoidable fact that no operating license could be issued where no local off-site emergency plan exists. Thus, the "extraordinary remedy" of the temporary operating license would be useless and any attempt to use it would only result in a greater degree of litigation—not the expeditious licensing of a nuclear facility whose future is certain.

A third commenter argued that the proposed rule should specifically require (1) the filing of an off-site plan, (2) a finding that such a plan is implementable, and (3) require the performance of an acceptable exercise before operation above 5 percent power.

**Response.** The Commission believes that the proposed rule need not be modified. Neither the text of section 192 itself nor the legislative history cited by the commenters prohibits the Commission from applying 10 CFR 50.47(d) to temporary operating licenses for fuel loading and operation under 5 percent power. Further, more is involved in its decision to grant or deny a temporary operating license than, under new § 50.57(d)(2), the simple filing of a State, local, or utility emergency preparedness plan for the facility. Before the Commission can grant such a

license, it must determine, *inter alia*, that "all requirements of law, other than the conduct or completion of any required hearing on the final operating license, are met" and that, "in accordance with such requirements, there is reasonable assurance that temporary operation of the facility, in accordance with the terms and conditions of the license, will provide adequate protection to the public health and safety and the environment." This means that 10 CFR 50.47(d) will apply to temporary operating licenses for fuel loading and operation under 5 percent power, and that § 50.47(a) will apply to temporary operating licenses for operation over 5 percent power. The Commission believes that it is unnecessary to repeat this in the rule itself.

### C. Deadline for Requesting a Temporary Operating License

The proposed rule provided in § 2.301 that, because NRC's authority to issue new temporary operating licenses expires on December 31, 1983, an applicant seeking such a license must file its written petition by November 23, 1983.

*Comments.* Two commenters stated that the proposed filing deadline date is too near the expiration of NRC's authority to allow for publication of the petition in the *Federal Register*, for full response to the petition by interested persons, and for a fair and reasoned decision by NRC based on the information before it. One commenter therefore requested that the Commission change the deadline for filing a petition to October 15, 1983, and a second to October 1, 1983.

*Response.* The Commission agrees with the commenters that a more reasonable deadline date is needed for the filing of the applications, to include more time for its decision and to make more time available for the necessary procedural steps. The Commission debated whether to include a deadline based on a fixed amount of time before the applicant's need date, thereby guaranteeing adequate time for the necessary staff and Commission reviews. However, because its authority to issue a temporary operating license will expire relatively soon, it decided to set a fixed and certain date. The deadline of November 23, 1983 in § 2.301(a) has been changed to November 14, 1983, thereby allowing more time for the requisite activities and decisions. (See discussion below for additional reasons for extending the deadline.) It should be noted that proposed legislation is pending in Congress which would extend the

Commission's authority to issue temporary operating licenses to September 30, 1985. (See H.R. 98-103, Part 2, at 1 and 17.) If the legislation is enacted, this rule will be changed accordingly.

### D. Affidavits and Responsive Affidavits

The proposed rule provided for the filing of a petition by an applicant, accompanied by affidavits, and for responsive affidavits by interested parties. §§ 2.301, 2.302, 2.304, and 50.57(d)(3). Proposed §§ 2.303 and 50.57(d)(4) also provided that any person may file affidavits in support of, or in opposition to, the petition within 30 days after the publication of such notice in the *Federal Register*. This language is identical to that found in amended section 192a. of the Act. These provisions proved somewhat contentious and elicited various comments in four areas.

#### 1. Possible NRC Staff Responsive Affidavits

*Comment.* One commenter noted that the staff is not required to file affidavits and stated that the final rule should specifically state whether or not the staff would file any documents (except the Safety Evaluation Report). The commenter also argued that, if the staff does file responsive affidavits, interested parties—including both the applicant and intervenors—should be permitted to respond to those affidavits.

*Response.* The Commission has rejected the comment. The staff may or may not wish to file a responsive affidavit under §§ 2.303, 2.304, and 50.57(d). It is not required to file one, though, if it does, it is required, just as any other party, to serve it on the parties to the proceeding.

As a separate matter, the Commission has clarified in §§ 2.303 and 2.304 that "responsive affidavits" can be filed either in support of or in opposition to the petition for a temporary operating license.

#### 2. Thirty-day Response Period

*Comments.* The same commenter pointed out that the 30-day response period may not allow interested persons a real opportunity in some circumstances to participate in the temporary operating licensing proceeding. The commenter requested that the final rule should provide explicitly that the 30-day period for the filing of responsive affidavits may be extended where justified by factors such as the number or complexity of issues raised by the petition or the length of the affidavits involved.

In this same vein, another commenter requested the Commission either to forbid the applicant from submitting affidavits and other material in support of its application during the 30-day comment period (thereby perhaps flooding the Commission with supporting affidavits on the last day of the comment period and precluding public comment thereon) or to extend the comment period to allow 30 additional days in which post-application submissions by the applicant may be rebutted.

A third commenter believed it a mistake, as a matter of policy, that § 2.711, involving extensions and reductions of time limits, would apply, and requested the Commission to prescribe specifically the time within which a responsive affidavit may be filed, as it has with respect to affidavits in § 2.303.

*Response.* The three comments are rejected. The regulation simply follows the legislation which specifically provides for the 30-day comment period. The Commission expects an applicant to submit all relevant supporting information with its petition, to allow the Commission and its staff time to review that information and to provide an adequate response time to the public. Aside from the 30-day response period, the Commission would apply § 2.711 to the extent it believes necessary in the circumstances. It wishes to make clear though, and has modified the final rule accordingly, that the last 30-day response period will be initiated only after the applicant has filed its last document which provides substantive data or argument material to the granting of its application. If the applicant files such additional documents after it has filed its petition, these and the petition will be retitled in the *Federal Register*, for the purpose of initiating a new 30-day period.

#### 3. Responsive Affidavits: Material Facts and Necessary Findings

In describing the contents of affidavits that may be filed in response to a petition for a temporary operating license, proposed § 2.304 provided that such affidavits should state the "material facts as to which it is contended that there exists a substantial issue regarding the issuance of the temporary operating license."

*Comments.* A commenter requested the Commission to make clear that an opponent of the petition should be required to make a *prima facie* showing that the issues it seeks to raise involve "significant safety issues specific to the facility in question," and, similarly,

requested that the Commission amend proposed § 2.304 to provide that the responsive affidavits be limited to those significant safety issues which have been raised in the final operating licensing proceeding.

Another commenter argued that the affidavits should do no more than repeat the contentions and the evidence at issue in the concurrent Atomic Safety and Licensing Board (ASLB) hearings, stating its belief that the ASLB is the proper forum to resolve the contentions before it in the first instance and that it would defeat the intent of Congress for the Commission to duplicate the ASLB's role.

*Response.* Both requests are rejected. The Commission believes that the prescribed standard is restrictive enough, considering the informal nature of the hearing. Any higher standard would cast the proceeding in the mold of an adjudicatory, trial type hearing. With respect to the second point raised by the commenter, the Commission expects that most and perhaps all of the responsive affidavits will involve significant safety issues previously raised; nevertheless, it does not wish to preclude anyone from raising new safety issues, if these concern material facts that are relevant to issuance of the temporary operating license and that must be resolved before the Commission can make the requisite three findings in § 50.57(d)(5).

#### 4. Deadline on Commission Action.

On a related matter, proposed § 2.303 provided that the Commission will act "as expeditiously as possible" following the receipt of responsive affidavits to reach a determination on the petition.

*Comment.* A commenter argued that the Commission impose upon itself deadline of December 31, 1983, for acting on such petitions.

*Response.* The request is rejected. The Commission has moved the applicant's deadline for submitting its petition to October 15, thereby allowing everyone, including itself, time to take the necessary actions and to make the requisite decisions.

#### E. Definition of Requirements of Law

Proposed § 50.57(d)(5) set forth the findings that the Commission must make to issue or, subsequently, to amend a temporary operating license. The first required finding is that "in all respects other than the conduct or completion of any required hearing, the requirements of law are met."

*Comment.* A commenter noted that this provision simply repeats the language of amended section 192b.(f) of the Act. The commenter requested that

the final rule make clear that the requirements of law include the Act, other applicable statutory provisions regarding nuclear power, and the NRC's regulations, particularly those in 10 CFR Part 50, promulgated pursuant to those laws.

*Response.* The request is rejected. The cited provision appears in many places in the Commission's regulations, e.g., § 50.12(a). It is clear that the phrase refers to all applicable statutes and regulations.

#### F. Public Disclosure

The proposed rule excluding § 2.790 from being applied to a temporary operating licensing proceeding. That section provides, among other things, that NRC documents, in general, will be made available for inspection and copying.

*Comment.* A commenter argued that the Commission had made no attempt to justify exempting NRC documents concerning temporary operating licenses from disclosure and that the policy reasons behind the requirements of public disclosure embodied in § 2.790 should apply with equal or greater force to a temporary operating licensing proceeding.

*Response.* The comment is accepted. The Commission sees on valid reason for exempting NRC documents concerning temporary operating licenses from disclosure under the provisions of § 2.790.

#### G. Availability of Information

Proposed § 2.305(b) excluded NRC's rules regarding discovery from being applied to a temporary operating licensing proceeding. Instead, proposed § 2.302 provided for exchanges of information limited to affidavits, exhibits, and a list of documents relied upon to support the facts stated in the affidavit. The documents themselves would be made available only at a particular location.

*Comment.* A commenter stated that this list of documents may not provide adequate information to interested parties and requested that the rules should provide an expeditious mechanism by which interested parties can obtain documents, other than those listed by the applicant, which are important to the issues involved.

*Response.* The request is rejected. The Commission expects the applicant to submit or refer to all the necessary information for it to make an informed decision and for the public to be able to comment reasonably. Thus, all supporting documentation shall be available for inspection. Failure of the applicant to do so will result in denial

of its application. (See also the response at paragraph D(2) above.) The commenter's request is simply another way of saying that it would like some form of discovery. Though the request appears reasonable, at first glance, the attendant administrative requirements would be too complex and would conflict with the need for expeditious proceedings.

#### H. Oral Argument

Proposed § 2.308 provided that, ordinarily, informal procedures will be used to resolve particular issues as they arise, i.e., ordinarily formal adjudicatory procedures would not be used.

*Comments.* A commenter requested that the final rule provide that the Commission will not deny an application for a temporary operating license without first giving the applicant a chance to make an oral presentation to the Commission.

Another commenter requested that the final rule should provide the Commission with discretion to order oral argument, where a major legal issue might be in controversy and the Commission would benefit from hearing parties' views on the matter and where the parties, having filed extensive affidavits, might comment orally on each other's filings.

A third commenter requested that the Commission delete the term "ordinarily" from the final rule, arguing that section 192b. provides that the requirements of section 189a. of the Act "shall not apply to the issuance or amendment of a temporary operating license" and that, therefore, Congress clearly intended that the Commission not use formal adjudicatory procedures in the issuance of temporary operating licenses.

*Response.* The three requests are rejected. Section 2.308 as proposed contained ample flexibility for the Commission to order oral argument, if it believes that it is necessary to the proper disposition of the proceeding. Moreover, under the legislation the Commission retains authority to choose among the procedures it wishes to apply to a temporary operating licensing proceeding. The term "ordinarily" was added to show that the Commission could use adjudicatory procedures to resolve particular issues.

#### I. Consideration of Commission Findings in Final Operating Licensing Proceeding

Proposed § 2.306 provided that no party shall argue the issuance or denial of a temporary operating license in support of its position in a proceeding

for the issuance of a final operating license.

*Comment.* A commenter requested the Commission to clarify this provision to provide that, while the issuance of such a temporary operating license *per se* may not be used by a party in support of its position in a proceeding for the issuance of the final operating license, some Commission rulings contained in the final order authorizing the issuance of a temporary operating license may be used by any party in the final operating licensing proceeding.

*Response.* The request is rejected. A presiding ASLB in a formal, on-the-record adjudication should not be held to the Commission's findings in a short and expedited informal proceeding in which the issues may not have been fully briefed and argued.

#### J. Notification to the Commission

Proposed § 2.307 provided that any party to a hearing required pursuant to section 189a. of the Act shall promptly notify the Commission of any information that the terms and conditions of the temporary operating license are not being met or that those terms and conditions are not sufficient.

*Comment.* A commenter requested that the Commission require that such notice be made by affidavit and that it be accompanied by a statement of the material facts supporting the assertion. The commenter also requested that this provision afford the licensee an opportunity to respond by affidavit to any information provided to Commission pursuant to this provision.

*Response.* The request is accepted in part. The Commission agrees that a notification under § 2.307 should be accompanied by a statement of material facts and that a holder of a temporary operating license should be able to respond. Section 2.307 has been changed accordingly. The Commission, however, has rejected the request that the notification and response take the form of affidavits, because this requirement would add unnecessary formality.

#### K. Duration of License

Proposed §§ 2.301 and 50.57(d) (1) and (7) provided, among other things, that the Commission will limit the duration of a temporary operating license or an amendment to a "specified time."

*Comment.* A commenter stated that the specified time should in all cases be the date a full operating license is issued, arguing that issuance for a duration less than the time of the issuance of a full power operating license would only create a need to amend the license solely for the purpose of extending its duration.

*Response.* The request is rejected. The Commission agrees with the commenter that it could issue a temporary operating license that would continue in effect until a full power operating license is granted. The proposed section would not have barred the Commission from doing so. However, the rule does provide the Commission with the flexibility to issue the temporary operating license for a shorter time, if particular circumstances indicate that that is desirable or necessary.

### III. Final Rule

#### A. Framework

A person applying for an operating license for a nuclear power plant, which is licensed under sections 103 or 104b. of the Act and as to which a hearing is otherwise required under section 189a. of the Act, could apply for a temporary operating license, pending final action by the Commission on the application for the final operating license. The temporary operating license for the facility would authorize fuel loading, testing and operation at a specific power level to be determined by the Commission. The initial petition would have to be limited to power levels not to exceed 5 percent of the nuclear facility's rated full thermal power, and the Commission could not initially authorize a higher power level. After the temporary operating license is issued, the licensee may file one or more additional petitions with the Commission to allow facility operation up to full power in staged increases in power level beyond the initial 5 percent limitation. All authorizations for temporary operating licenses under section 192 and these implementing regulations must be pursuant to a vote and a final order of the Commission itself and cannot be delegated to the NRC staff. The authorizations themselves lie within the discretion of the Commission. This means, among other things, that the Commission in a temporary operating license would authorize both a given power level and the time it deems appropriate for operation at that level before issuance of the full power license.

The present authority and procedures in § 50.57(c) of the regulations (under which a presiding ASLB may, on motion, and after a decision based on the evidentiary record or upon agreement of the parties to the contested proceeding, authorize the issuance of a fuel load or low-power and testing license) remain available and are not affected at all by these regulations implementing section 192 of the Act. Thus, temporary operating licensing authority is not

coupled to the present § 50.57(c), and a licensee proceeding under § 50.57(c) may also proceed separately under § 50.57(d) without any rights being waived under § 50.57(c). If a licensee already has a low power license and wishes to go to higher or full power using the temporary operating license procedure (that is, it wants to translate its low power authority under § 50.57(c) to low power authority under § 50.57(d) and then to go to higher power under § 50.57(d) for some specified time period), it need simply petition the Commission for an initial temporary operating license. In its petition it should show that it is in satisfactory compliance with § 50.57(d) and that the temporary operating license for low power would be in all respects the same as or more restrictive than the low power license. Although the Commission does not wish to require *pro forma* acts, a licensee in the situation described above should show that the time periods and authorized power level for both types of licenses are compatible. Additionally, if the licensee wishes the Commission to act more quickly and to simplify the Commission's considerations, it may want to show that the parties affected by this situation (ordinarily the parties in the proceeding under § 50.57(c)) have not waived their rights and agree to its proposed course of action; consequently, to make sure that there truly is an agreement and that everyone's rights are being protected, in these circumstances the Commission expects the licensee to demonstrate to it (under the procedures described in § 2.301 *et seq.*, described later) that affected parties were on notice of and have not objected to the licensee's proposed action. The licensee need not make such a showing; however, if it does not wish to or can not make such a showing, though the Commission may still issue the temporary operating license, it may have to use additional procedures to make its decision.

In delineating the circumstances under which petitions may be filed and conditions under which the Commission may exercise its authority, it has carefully followed the prescriptions in section 11 of Pub. L. 97-415. These provisions are reflected in the amendments to Parts 2 and 50. In essence, these amendments would establish a detailed procedural framework for considering and issuing temporary operating licenses. Section 192, as amended, and its accompanying legislative history clearly contemplate that the procedural framework is both useful and needed to govern the

Commission's actions in exercising the new authority and to preserve for the public its right to participate in licensing decisions.

*B. Final Subpart C to 10 CFR Part 2—  
"Procedures Under Section 192 for the  
Issuance of Temporary Operating  
Licenses"*

Subpart C provides all of the necessary procedural guidance on requests for, and Commission authorization of, temporary operating licenses. Briefly, subpart C provides:

- For the application for a temporary operating license or for an amendment to that license to be filed in the form of a written petition. The written petition with supporting affidavits, must be served on all parties to the proceeding for the issuance of the final operating license.

- The initial petition must be limited to power levels not to exceed 5 percent of rated full thermal power. After the issuance of the temporary operating license, the licensee may file and serve subsequent petitions to amend the temporary operating license by incremental increases in power levels in excess of the initial 5 percent limitation. Each new petition can request only one incremental increase.

- The subpart provides general guidance on the contents and requirements for affidavits which may be filed in support of or in opposition to petitions for the issuance, or the amendment, of temporary operating licenses.

- The Commissioners and their advisors will be able to communicate with the regulatory staff, provided that summaries of such communications, if oral, and copies of such communications, if written, are promptly made available to the parties and the public.

- The final rule provides for prompt publication of notices of petitions for temporary operating licenses as well as for amendments to such licenses and also provides for a 30-day period for public comment for each set of applicant's filings which provides substantive data or argument material to the granting of its application. The notice will inform interested persons about the way they can obtain access to the petition and its supporting affidavits. Such access is needed so that such persons might, as the rules also provide, file and serve responsive affidavits to the petition.

- The final rule does not specify a time after the 30-day public comment period for Commission action on the petition. In keeping with the purpose of the temporary operating license

authority, the rule provides that the Commission will act as expeditiously as possible on petitions for temporary operating licenses and for amendments to such licenses.

- Issuance of a temporary operating license or an amendment must be pursuant to a final order of the Commission itself, which recites the reasons called for in section 192 of the Act and in § 50.57(d) of the regulations. As called for by the legislation, the order would be transmitted upon its issuance to the Committees on Interior and Insular Affairs and Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate. The final order of the Commission would be subject to judicial review under section 189b. of the Act. As discussed before, pursuant to the legislation, the requirements of section 189a. of the Act would not apply to the issuance or amendment of a temporary operating license. Thus, the legislation authorizes the Commission to use procedures other than formal adjudicatory procedures in issuing a temporary operating license. In this regard, the Commission will develop informal procedures case-by-case to resolve particular issues as they arise.

- The final rule restates the procedural constraints in section 192 to assure that the issuance of a temporary operating license does not prejudice the outcome of the licensing hearing for that nuclear power plant or prejudice the rights of any party to the hearing to raise any proper issue in that hearing and to have that issue decided.

- As discussed above, the rule requires, as does section 192, that any party to the final operating license hearing, or any licensing board member conducting the hearing, promptly notify the Commission about any information made available as part of that hearing: (1) That the terms and conditions of the temporary operating license are not being met or (2) that they are insufficient to provide reasonable assurance that operation of the facility during the period of the temporary operating license will provide adequate protection to the public health and safety and to the environment. The notification must be accompanied by a statement of material facts supporting the assertion, and it must be served on all the parties to the proceedings.

- The rule states that a temporary operating license is subject to modification, suspension or revocation, or to the imposition of civil penalties pursuant to sections 186 and 234 of the Act and subpart B of 10 CFR Part 2.

- Finally, the Commission notes that, pursuant to section 192d. of the Act, it will exert its best efforts to adopt appropriate administrative remedies to minimize the need for the issuance of temporary operating licenses. This is in keeping with the conferees' agreement in the Conference Report that a temporary operating license should be a "last resort remedy, to be employed only when no other alternative is available." Conf. Rep. No. 97-884, 97th Cong., 2d Sess. at 36 (1982). The Commission will also ensure that any administrative remedies it adopts will not themselves infringe upon the right of any party to a full and fair hearing under the Act, again in keeping with the conferees' expectations. *Id.* And, lastly, the Commission will notify the Committees on Interior and Insular Affairs and Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate of all administrative remedies it proposes to adopt, also in keeping with the conferees' intentions. *Id.*

*C. Final § 50.57(d) of 10 CFR Part 50*

Under the final rule, new § 50.57(d) would be added to reflect the substance of the temporary operating licensing authority granted by Pub. L. 97-415 and the special provisions which must be satisfied before the Commission exercises this authority. Pursuant to section 11 of that law and § 50.57(d), the following requirements would be applicable to a petition for and the issuance of a temporary operating license and amendments to that license:

- A petition for the issuance of a temporary operating license could not be filed with the Commission until the Advisory Committee on Reactor Safeguards (ACRS) report, the NRC staff's initial safety evaluation report (SER) and the staff's supplement to this report (SSER) prepared in response to the ACRS report for the plant, the NRC staff's final environmental statement, and, as discussed above, a State, local or utility emergency plan have been filed.

- The initial petition for a temporary operating license and amendments to that license would be handled as described above.

- After the issuance of a temporary operating license, subsequent petitions from the utility for increased power levels, notice and public comment periods on each new petition, and the determinations by the Commission called for by section 192 (and implemented in this new § 50.57(d)) would be required before the Commission could allow operation at

power levels beyond the initial 5 percent low-power testing level.

- Before issuing a temporary operating license or amending the license to allow operation at an increased power level, NRC must provide notice of the request for such authority and a 30-day period for public comment.

- Upon the expiration of the 30-day comment period, the Commission could issue the temporary operating license, or amend the license to allow temporary operation at a power level in excess of the initial license limitation, as the case may be, if the Commission itself determined that: (1) All requirements of law, other than the conduct or completion of any required hearing on the final operating license, are met; (2) in accordance with such requirements, there is reasonable assurance that temporary operation of facility, in accordance with the terms and conditions of the license, will provide adequate protection to the public health and safety and the environment; and (3) denial of the temporary operating license will result in delay between the time when the facility is sufficiently completed, in the judgment of the Commission, to permit issuance of the temporary operating license, and the time when a final operating license for the facility would otherwise be issued. For a petition to amend the temporary operating license to permit operation at a power level in excess of 5 percent of the facility's rated full thermal power, the Commission's findings must, of course, be directed to operation at the increased power level which would be authorized by the amendment.

- Any final Commission order authorizing the issuance of a temporary operating license pursuant to section 192 (i.e., as distinguished from an order which may be issued by a presiding ASLB under paragraph (c) of § 50.57) of the Act must recite with specificity the reasons justifying the findings required by that section and § 50.57(d). The order must be sent upon issuance to the Committees described above.

- The temporary operating license would contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for its extension.

- The Commission would suspend the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license (and on which a hearing under section 189a, is being conducted) with due diligence. The Commission could, of course, suspend the license for other

reasons, such as in the interest of public health and safety.

- As discussed above, the Commission also wishes to note that section 192 provides that the Commission's authority to issue new temporary operating licenses will expire on December 31, 1983. Since the Commission cannot issue new temporary operating licenses after December 31, 1983, it expects any licensee that wishes to apply for such a license to do so before November 14, 1983, to allow it to act before its authority expires. See § 2.301. Licensees should also note that their licenses will not expire on that date; section 192 simply states that the Commission's authority to issue a new temporary operating license will expire on December 31, 1983. It is also clear that the Commission retains its authority to suspend the temporary operating license, if it finds that the applicant is not prosecuting its application for the final operating license with due diligence. See § 2.306. Finally, where the Commission has issued a new temporary operating license before December 31, 1983, and, subsequently, the licensee requests an amendment to that license, this provision does not preclude the Commission from amending that license after December 31, 1983.

#### Paperwork Reduction Act Statement

This rule contains no new or amended requirements for recordkeeping, reporting, plans or procedures, applications or any other type of information collection reviewable by the Office of Management and Budget under the Paperwork Reduction Act.

#### Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121. Since these companies are dominant in their service areas, this final rule does not fall within the purview of the Act.

#### Regulatory Analysis

The Commission has prepared a Regulatory Analysis on these amendments, assessing the costs and

benefits and resource impacts. It may be found in SECY-83-16, 16A and 16B, and examined at the address indicated above.

Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of Title 5 of the United States Code, the following amendments to 10 CFR Parts 2 and 50 are published as a document subject to codification.

#### List of Subjects

##### 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

##### 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Inter-governmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting requirements.

#### PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

**Authority:** Secs. 161.181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 400 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 68 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2238, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.300-2.309 also issued under Pub. L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C.

2039). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

2. A new subpart C is added to 10 CFR Part 2 to read as follows:

**Subpart C—Procedures Under Section 192 for the Issuance of Temporary Operating Licenses**

Sec.	
2.300	Scope of subpart.
2.301	Filing of petition and accompanying affidavits.
2.302	Contents of affidavits.
2.303	Notice of petition.
2.304	Responsive affidavits.
2.305	Commission authorization.
2.306	Hearing on final operating license.
2.307	Notification to the Commission.
2.308	Use of informal procedures.
2.309	Enforcement.

**Subpart C—Procedures Under Section 192 for the Issuance of Temporary Operating Licenses**

**§ 2.300 Scope of subpart.**

This subpart prescribes the procedures for issuing a temporary operating license and specifies the framework for Commission determinations. These procedures apply in any proceeding where an applicant has applied for a final operating license for a utilization facility (licensable under sections 103 of 104b. of the Atomic Energy Act (Act) and otherwise requiring a licensing hearing pursuant to section 189a.) and the applicant, pursuant to section 192 of the Act and § 50.57(d) of this chapter, petitions the Commission for a temporary operating license authorizing fuel loading, testing, and initial low power operation (or for an amendment to a temporary operating license authorizing operation at an increased power level), pending action by the Commission on the application for the final operating license.

**§ 2.301 Filing of petition and accompanying affidavits.**

(a) Before November 14, 1983, an applicant for an operating license may file a written petition for a temporary operating license with the Commission for each such facility. At the same time that the applicant files with the Commission for its temporary operating license, it must serve the petition, including the accompanying affidavits, on all parties to the proceeding for the issuance of the final operating license. The applicant may file any such petition at any time after the documents called for by section 192 of the Act and § 50.57(d) of this chapter are issued.

(b) The initial petition for a temporary operating license for each such facility shall, in accordance with section 192 of the Act and § 50.57(d) of this chapter, be limited initially to a specified time and

to a power level not to exceed 5 percent of the facility's rated full thermal power for that specified time. After the Commission issues a temporary operating license for any such facility, the licensee may file subsequent petitions with the Commission, using the procedure described in paragraph (a), which request the Commission to amend the temporary operating license to allow facility operation at incremental stages beyond the initial 5 percent level for specified times, up to and including operation at full power, pending completion of the proceeding on the final operating license.

(c) The Commission has full discretion to determine the initial power level up to 5 percent and the incremental increases in power levels it will authorize and the period for which the authorization is granted. It will not grant a temporary operating license or an amendment to that license for a period lasting beyond the date the final operating license is granted; and the temporary operating license and any amendments to that license will expire when the final operating license is issued.

**§ 2.302 Contents of affidavits.**

The applicant's petition for a temporary operating license or an amendment to that license shall be accompanied by an affidavit or affidavits setting forth the specific facts upon which the petitioner relies to justify issuance of the temporary operating license or the amendment to that license. Any such affidavit and any affidavit filed in response shall state separately the specific facts and arguments and include the exhibits upon which the person relies. The facts asserted in any affidavit filed shall be sworn to or affirmed by persons having knowledge of those facts, and a statement to this effect shall affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would be available to substantiate orally the facts asserted, as the Commission deems appropriate. Any such affidavit shall be accompanied by a list of documents relied on to support the facts stated in the affidavit and such documents shall be or have been provided to the Commission so that they can be made available for inspection.

**§ 2.303 Notice of petition.**

(a) The Commission will promptly publish notice of each petition for issuance of a temporary operating license and any subsequent petitions for amendments to that license in the *Federal Register* and in such trade or news publications as the Commission

deems appropriate in order to give reasonable notice to persons who might have a potential interest in the grant of such a temporary operating license or an amendment to that license. The notice will inform such persons of the arrangements for their access to the petition and supporting affidavits. Any person may file responsive affidavits in support of, or in opposition to, the petition within 30 days after the publication of such notice in the *Federal Register*. The Commission thereafter will act as expeditiously as possible to reach a determination on such petitions.

(b) If, after it has filed its petition, the applicant files additional documents which provide substantive data or argument material to the issuance of its temporary operating license, these and the petition will be noticed to initiate a new 30-day period.

**§ 2.304 Responsive affidavits.**

Responsive affidavits in support of an application for a temporary operating license shall be accompanied by a short and concise statement of the material facts which support the issuance of that license. Responsive affidavits in opposition to the petition shall be accompanied by a short and concise statement of the material facts as to which it is contended that there exists a substantial issue concerning the issuance of the temporary operating license or an amendment to that license. Any responsive affidavit and any accompanying statement shall be served on all parties to the proceeding for the issuance of the final operating license. Any document referenced in support of a responsive affidavit shall be or have been provided to the Commission so that it can be made available for inspection.

**§ 2.305 Commission authorization.**

(a) Issuance of a temporary operating license or an amendment to that license shall be pursuant to a final order of the Commission itself which recites the reasons for such authorization as called for in section 192 of the Act and § 50.57(d) of this chapter.

(b) The requirements of section 189a. of the Act with respect to the issuance of or an amendment to a utilization facility license shall not apply to the issuance of or an amendment to a temporary operating license. Except as provided in paragraphs (b) (1) and (2) of this section, Subparts A and G of this part, shall not apply.

(1) Sections 2.701, 2.702, 2.708-2.713, 2.758, 2.772, and 2.790 of subpart G of this part shall apply to the consideration of a petition for the issuance of or an

amendment to such a temporary operating license:

(2) That portion of § 2.780 of Subpart G of this part which prohibits communications with persons outside the Commission shall apply. Communications between the Commissioners, their immediate staffs and other NRC officials who advise the Commissioners in the exercise of their quasi-judicial functions, and the regulatory staff, shall be permitted. Copies of any such written communications and summaries of any such oral communications, except communications not prohibited by § 2.780, shall be placed promptly in the public document room and served on the parties to the proceedings.

#### § 2.306 Hearing on final operating license.

(a) Issuance of a temporary operating license under section 192 of the Act and § 50.57(d) of this chapter shall not prejudice the right of any party in a proceeding for the issuance of the final operating license to pursue properly admitted issues in a hearing required pursuant to section 189a. of the Act. Failure to assert any ground for denial or limitation of such a temporary operating license shall not bar the assertion of such ground in connection with the issuance of a subsequent final operating license. No party shall argue the issuance or denial of a temporary operating license by the Commission as support for its position in a proceeding for the issuance of the final operating license.

(b) Any hearing on the application for the final operating license for a facility required pursuant to section 189a. of the Act shall be concluded as promptly as practicable. The Commission will suspend the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license with due diligence. The Commission may suspend the license for other public health and safety or common defense and security reasons.

#### § 2.307 Notification to the Commission

(a) Any party to a hearing required pursuant to section 189a. of the Act on the final operating license for a facility for which a temporary operating license has been issued under section 192 of the Act and § 50.57(d) of this chapter, and any member of the Atomic Safety and Licensing Board (ASLB) conducting such a hearing, shall promptly notify the Commission of any information that:

(1) The terms and conditions of the temporary operating license are not being met; or that

(2) Such terms and conditions are not sufficient to provide reasonable assurance that operation of the facility will provide adequate protection to the public health and safety and to the environment during the period of the facility's temporary operation.

(b) The notification shall be accompanied by a statement of material facts supporting the assertion, and it shall be served on all the parties to the proceedings.

(c) The holder of a temporary operating license may respond to the notification. Any response shall be served on all the parties to the proceedings.

#### § 2.308 Use of informal procedures.

The Commission ordinarily will not use formal adjudicatory procedures in issuing a temporary operating license and will develop informal procedures case-by-case to resolve particular issues as they arise.

#### § 2.309 Enforcement.

The Commission may modify, suspend or revoke a temporary operating license, or impose a civil penalty pursuant to sections 186 and 234 of the Act and Subpart B of this part.

### PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

3. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 68 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2071, 2073 (42 U.S.C. 2133, 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100-50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c) and 50.54 are issued under sec. 161, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

4. In § 50.57 of 10 CFR Part 50, a new paragraph (d) is added to read as follows:

#### § 50.57 Issuance of operating license.

\* \* \* \* \*

#### (d)(1) Temporary operating license.

An applicant for an operating license, in a case where a hearing is required in a pending proceeding for the final operating license for a facility required to be licensed under sections 103 or 104b. of the Act, pending final action by the Commission on the application for the final operating license, may petition the Commission in writing, pursuant to section 192 of the Act, to § 2.305 of this chapter, and to this paragraph for (i) a temporary operating license for the facility authorizing fuel loading, testing, and operation at up to 5 percent rated full thermal power for a specified time and (ii) an amendment to the temporary operating license requesting for a specified time an incremental increase of the power level beyond that initially granted by the Commission up to full power. The Commission has full discretion to determine the initial power level up to 5 percent and the incremental increases in power levels it will authorize and the period for which the authorization is granted. It will not grant a temporary operating license or an amendment to that license for a period lasting beyond the date the final operating license is granted; and the temporary operating license and any amendments to that license will expire when the final operating license is issued.

(2) The initial petition for a temporary operating license for each such facility may be filed at any time after the filing of:

(i) The report of the Advisory Committee on Reactor Safeguards (ACRS) required by subsection 182b. of the Act;

(ii) The initial safety evaluation report (SER) on the application by the regulatory staff and the staff's first supplement to the SER prepared in response to the ACRS report;

(iii) The staff's final detailed statement on the environmental impact of the facility prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; and

(iv) A State, local, or utility emergency preparedness plan for the facility.

(3) Each petition for the issuance of a temporary operating license, or for an amendment to that license allowing operation at a specific power level greater than that authorized in the initial temporary operating license, shall be accompanied by an affidavit or affidavits setting forth the specific facts upon which the petitioner relies to justify issuance of the temporary operating license or the amendment to that license.

(4) The Commission will publish a notice of each such petition in the *Federal Register* and in such trade or news publications as it deems appropriate to give reasonable notice to any persons who might have a potential interest in the grant of such a temporary operating license or amendment. The notice will inform such persons of the arrangements for their access to the petition and supporting affidavits. Any person may file affidavits in support of, or in opposition to, the petition within 30 days after the publication of such notice in the *Federal Register*.

(5) With respect to any such petition, the Commission may issue a temporary operating license, or subsequently amend the license to authorize temporary operation at a specific power level greater than that authorized in the initial temporary operating license, as determined by the Commission, upon finding that:

(i) In all respects, other than the conduct or completion of any required hearing, the requirements of law are met;

(ii) In accordance with such requirements, there is reasonable assurance that operation of the facility during the period of the temporary operating license in accordance with its terms and conditions will provide adequate protection to the public health and safety and to the environment during the period of temporary operation; and

(iii) Denial of the temporary operating license will result in delay between the date on which construction of the facility is sufficiently completed, in the judgment of the Commission, to permit issuance of the temporary operating license and the date on which a final operating license for such facility would otherwise be issued under the Act.

(6) Any final Commission order authorizing the issuance of any temporary operating license or an amendment to that license pursuant to section 192 of the Act and this paragraph will recite with specificity the reasons justifying the findings required by that section and this paragraph, and will be transmitted upon its issuance to the Committees on Interior and Insular Affairs and Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate.

(7) The temporary operating license will become effective upon its issuance and will contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for its extension.

(8) The Commission will suspend the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license with due diligence.

(9) The authority to issue new temporary operating licenses under section 192 of the Act and this paragraph expires on December 31, 1983.

Dated at Washington, D.C., this 6th day of October, 1983.

For the Nuclear Regulatory Commission,

Samuel J. Chilk,

Secretary to the Commission.

#### Additional Views of Commissioner Gilinsky

The Commission's decision to apply more relaxed *ex parte* and separation of functions rules to the Temporary Operating License proceeding will very likely raise questions about the Commission's motives and result in more fruitless litigation and delay. The *ex parte* and separation of functions rules should apply uniformly to regular and temporary licenses, especially since similar, and possibly identical, issues are involved.

I agree, however, that the present *ex parte* and separation of functions rules are unduly narrow and should be modified to allow the Commission to communicate directly with the NRC staff and non-parties in licensing cases. To accomplish this, we need to: (1) End the NRC staff's role as a full party in our proceedings; and, (2) make some use of the flexibility afforded to initial licensing by the Administrative Procedures Act. These changes would strike a reasonable balance between the requirements of fairness and the Commission's need to have ready access to information.

#### Additional Views of Commissioner Asselstine

When this rule was issued in proposed form, I disagreed with the Commission majority's decision not to apply the provisions of 10 CFR 2.719 and 2.780, relating to separation of functions and *ex parte* communications, as part of the procedural requirements for implementing the temporary operating license authority in section 192 of the Atomic Energy Act of 1954, as amended. I pointed out at the time that in all likelihood, the issues that will be raised before the Commission in the temporary operating license proceeding under the provision of section 192 will be similar to, or the same as, the issues being adjudicated in the hearing in the final operating license proceeding. I therefore concluded that by permitting the NRC staff, the applicant and other parties in the OL proceeding to make informal, off-the-record contacts with the Commission on these issues during the temporary operating licensing (TOL) proceeding, the proposed rule presented the grave risk of contaminating the formal, on-the-record operating license proceeding. For this reason, I recommended applying the Commission's separation of functions and *ex parte* restrictions to the temporary operating license proceeding as well.

After reviewing the comments received on the proposed rule, a majority of the Commission has now agreed to apply the Commission's separation of functions and *ex*

*parte* restrictions to the applicant and intervenors in the TOL proceeding. However, the majority continues to insist upon preserving the opportunity, during the TOL proceeding, to consult privately with the NRC staff on issues that are being contested in the formal operating license proceeding and on which the staff is advocating a position as a part to that proceeding. Even though a written summary of these private contacts would be made, I believe that this approach with respect to the NRC staff has the real potential to create at least the appearance of unfairness in the Commission's role as ultimate judge on the contested issues in the operating license proceeding. This approach will almost certainly lead to challenges to the validity of some Commission decisions in operating license proceedings, thereby providing a new source of uncertainty and unpredictability in our licensing process.

Moreover, I believe that the majority's approach is not necessary to assure that the NRC staff's advice can be made available to the Commission. Even if the Commission's separation of functions and *ex parte* restrictions were to apply to the TOL proceeding, the Commission would be free to consult informally with the staff on general information, on generic issues and on issues that are not being contested in the OL proceeding. In the case of these contested issues, the Commission would be free to hear the advice of the staff in the TOL proceeding as long as the meeting is public, and other parties are notified in advance, are given an opportunity to attend and are given an opportunity to provide their own comments orally or in writing. In my view, these restrictions still permit the Commission to hear from the staff in a manner that will avoid the appearance of unfairness in the Commission's subsequent decision on the contested issues in the operating license proceeding.

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## DEPARTMENT OF ENERGY

### 10 CFR Part 710

#### Defense Programs; Changes in Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material

AGENCY: Department of Energy.

ACTION: Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending 10 CFR Part 710, entitled, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material" to delegate the authority to suspend DOE access authorization to the Managers of its Field Operations. Under the previous regulation, only the Assistant Secretary for Defense