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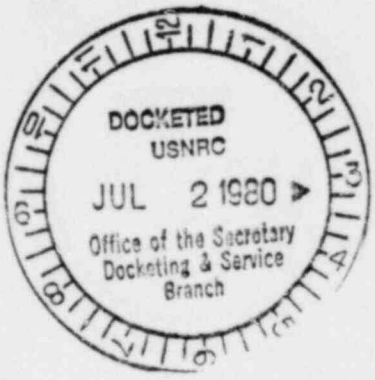

Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Request for Hearing, Extension of Comment Period, Extension of Implementation Schedule and Renotice; Response to Rulemaking Concerning "Fire Protection Program For Nuclear Plants Operating Prior to January 1, 1979" (45 Fed. Reg. 36082, May 29, 1980)

Dear Mr. Chilk:

I. INTRODUCTION

By the captioned notice, the Nuclear Regulatory Commission ("NRC" or "Commission") published for public comment proposed regulations which would impose "certain minimum provisions for fire protection in ... nuclear power plants" operating prior to January 1, 1979. (45 Fed Reg. at 36082).

On behalf of Baltimore Gas & Electric Company, Boston Edison Company, Commonwealth Edison Company, Florida Power and Light Company, Northeast Utilities Service Company, and Yankee Atomic Electric Company, we submit the following response. We believe that there are certain fundamental shortcomings in the proposed regulations from both the

L-4-1, Pt 50

procedural due process standpoints. These shortcomings can only be cured by extending the comment period, extending the implementation schedule, conducting proper value-impact and environmental analyses, and renoticing the proposed regulations. In addition, initiation and completion of adjudicatory hearings on specific aspects of the proposed regulations is required. We hereby request that the Commission conduct such hearings, extend the comment and implementation periods, perform the referenced analyses and renotice the proposed regulation. The specifics as to the scope and justification for such requests are discussed herein.

II. SUMMARY OF POSITION

The proposed regulations are apparently predicated upon the assumptions that regulatory developments have progressed too slowly and that NRC licensees have been dilatory in upgrading their fire protection capabilities. We believe that an examination of the fire protection matter belies these assumptions and should serve to compel the alteration of the proposed, expedited notice and comment rulemaking approach. At a minimum, the facts should cause the Commission to recognize and give credit for the significant time, money and resources expended to date by industry in satisfying NRC fire protection criteria and guidance.

If notice and comment rulemaking is pursued, such should be limited to those regulations which do not

seek to impose substantial and extensive backfits on existing plants. With regard to those items which do require substantial and extensive backfits or which otherwise seek to modify existing licenses, we submit that adjudicatory hearings are necessary as a matter of sound regulatory policy, administrative due process, and pertinent law.

In sum, the proposed regulations are legally deficient, as summarized below:

1. The backfitting requirements to be imposed by the proposed regulations cannot be implemented by informal notice and comment rulemaking. The Commission's regulations (10 CFR §2.204 and §50.109) provide for (and due process and fundamental fairness require) an opportunity for adjudicatory hearings when such backfitting requirements (and thus license modifications) are sought to be imposed.
2. The implementation schedule set forth in the proposed regulations is premised upon an erroneous factual basis and is unnecessarily rigid. The orderly progress of fire protection system improvements to date has already provided a significant additional measure of safety at operating reactors. To disrupt this orderly program with an arbitrary and hasty implementation schedule may compromise safety, and may impose undue burdens on operating

reactors which may be unable to comply on time due to energy needs during peak seasonal demands, unavailability of equipment, the magnitude of the task, or other constraints. Of course, the need for adjudicatory hearings discussed above, as well as the other matters addressed below, will require an extension of the implementation schedule.

3. The thirty-day comment period is also premised upon an erroneous factual basis and is clearly inadequate and inconsistent with administrative due process. This position is reinforced by those aspects of the proposed rule which attempt to codify Staff interpretations of past guidance and thus raise for the first time the prospect that such interpretations (which may be the subject of valid dispute) may become binding regulations.
4. Neither an adequate value-impact statement nor any environmental analysis has been prepared. Commission policy and pertinent laws mandate that such analyses be performed prior to completion of rulemaking. Thus, promulgation of the proposed regulations on the basis of the existing value-impact analysis, and in the absence of an environmental analysis, would be flawed.
5. The proposed regulations must be clarified and subsequently renoticed. Many of the critical

elements of the proposed regulations are so vague and ambiguous, that effective public comment on the complex technical issues involved is precluded.

III. FACTUAL BACKGROUND

The proposed rule apparently is predicated upon an erroneous assumption that licensees have been dilatory in upgrading fire protection capabilities. In order to demonstrate that licensees in fact have not been dilatory, we have elected to recount the history of fire protection development for a typical power reactor -- Pilgrim Nuclear Power Station, Unit No. 1. That discussion is attached hereto as Attachment A. It provides a capsule view of pertinent developments since 1975, and demonstrates that an orderly implementation of fire protection improvements has been effected from that time to date. The Commission should recognize, of course, that the facts for Pilgrim likely will not apply precisely to other reactors. This is due to several factors, not the least of which is the fact that site and design provisions vary for reactors, and that fire protection systems are highly plant-specific. Nevertheless, we view a discussion of Pilgrim as perhaps the most compelling manner in which we can illustrate what industry has done in the fire protection area, and to present the unfair

and unnecessary impacts which implementation of the fire protection regulations on the schedule as proposed will have on this and other licensees.

The experience at Pilgrim reflects that information has been furnished to the NRC Staff in good faith; that resolution was obtained on most matters as reflected in the Staff Safety Evaluation Report (SER); that the remaining items were identified in the SER as open items; that additional information was timely supplied by the licensee in good faith to resolve these open items; that the Staff has not had time to review this information (presently due to the post-TMI burdens imposed on the Staff);1/ and that the Staff has arbitrarily, unilaterally and without informing licensees, determined that the open items constitute areas where agreement could not be reached.

Against this background, which clearly demonstrates the cooperative spirit of industry in attempting to resolve outstanding matters, we submit that the instant rulemaking is in fact unnecessary, for it was "[b]ecause of the . . . differences between the Staff and the licensees in the interpretation of the Staff's guidelines" that the Commission determined that "it is timely and necessary for the Commission to state what the minimum fire protection

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1/ We submit that the lack of timely Staff review of utility plans for implementation of Staff guidance regarding fire protection has significantly impaired attempts to comply with an implementation schedule which assumed such timely review.

requirements will be in each of these contested areas of concern." (45 Fed. Reg. at 36083). The Staff's supporting document to the Commissioners underscores this fact when it states that "[t]he rule is necessary primarily to complete approximately 50 generic-type open issues scattered throughout the operating plants."(Memorandum to the Commissioners from Robert B. Minogue, "Fire Protection Actions," SECY-80-88 at p. 5, February 13, 1980 ("SECY-80-88")). We submit that, using Pilgrim as an illustration, these "differences" i.e., "open items", did not, to any great extent, exist; that if the Staff had reviewed submitted information and interfaced with licensees, the alleged basis for these proposed regulations would be found to be lacking.

If the Commission determines after reviewing these comments to continue with rulemaking, we nevertheless urge that the Commission take certain actions to remedy the gross inequities which are inherent in the proposed course. As the facts reveal, conscientious licensees, such as Boston Edison, have expended significant time, money and resources in satisfying Staff requirements and in working to resolve open items. They have modified facilities and installed fire protection systems in reliance on the stability of the Staff's fire protection requirements. Commission regulations which would significantly alter that course

fly in the face of fundamental fairness and should be avoided. Specifically, the regulations should limit the need for Staff reanalysis. Those aspects which are refinements of material contained in Staff guidance documents should not be the subject of further inquiry if corrective action has been taken; rather, focus should be directed to assessing compliance with the totally new requirements of the proposed rule.

Lastly, the Commission should recognize that contrary to Staff representations, significant aspects of the proposed rule raise new matter (i.e., were not "well known" to industry). Accordingly, the constrained comment period and implementation schedule should be modified.

IV. ARGUMENT

A. ADJUDICATORY HEARINGS SHOULD BE CONDUCTED FOR CERTAIN ASPECTS OF THE PROPOSED REGULATIONS

Commission regulations, due process and the compelling circumstances surrounding this matter require that the appropriate forum for resolution of genuine and significant disputes regarding various aspects of the proposed regulations be adjudicatory, trial-type hearings. Accordingly, as set forth below, each of the members of this group formally requests that the Commission commence an adjudicatory proceeding on their docket regarding Items III.G, III.L, III.N, III.P, and/or III.Q of Appendix R of the

proposed regulations. 2/

Licensees are not seeking an extensive delay; each would be committed to completing the adjudicatory hearings in an expeditious fashion. What is sought is an opportunity to ventilate, on the record (through presentation of testimony and cross-examination of witnesses), inter alia, the basis of the Staff's position that the proposed requirements in question (Items III.G, III.L, III.N, III.P and/or III.Q of Appendix R) are necessary on the schedule proposed. 3/

a. NRC Regulations Require That The Proposed Rule Be Subject To Adjudication Prior To Final Decision

Commission regulations vest in a licensee a right to an adjudicatory hearing where Commission actions result in modifications to a license. 4/ Subpart B to 10 CFR Part 2, provides in pertinent part that where the Commission seeks to modify a license, the licensee may demand a hearing. (10 CFR §2.204). Further, Subpart B to 10 CFR Part 2, makes it clear that such hearing is adjudicatory in nature.

While §2.204 is entitled "Order for Modification of License", its application is not limited to situations where modifications are instituted only by order. Rather,

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2/ To be clear, not all members of this group wish to litigate all five items referenced above. In addition, some members of the group may wish to pursue other items such as III.H, III.I and III.J.

3/ See footnote 2/, supra.

4/ It is clear that the proposed regulations would require extensive modifications to existing structures and changes to facility technical specifications, and, as such, would require modification of licenses.

rulemaking procedures, entailing substantive and extensive modification requirements, are also to be governed by §2.204. To hold otherwise would circumvent the protection that the section was intended to afford to a licensee regarding actions that would modify the terms of the license initially awarded. 5/

As discussed in this and the following section, we maintain that the instant Commission action is, in effect, issuance of an order, 6/ and that the Commission must look not to the label ("rulemaking") of the action contemplated, but rather to the substantive and practical effect of the action (the imposition of a substantial backfit modification to a license) in determining the proper procedural avenue for Commission action.

5/ It is of no moment that a licensee may subsequently be entitled to a hearing, for at this point in time Commission policy will have been established in the form of the instant regulations.

6/ In SECY-80-88 the Staff curiously recommends that the Commission "State its intention to issue orders under 10 CFR 2.204 for any future site specific fire protection issues not covered by this proposed rule." (SECY-80-88 at p. 7). We maintain that the subject matter of the instant proposed regulations is site specific. Accordingly, under the Staff's logic, §2.204 should apply to the fire protection matters raised in this rulemaking.

The distinction between adjudication (i.e., an order) and rulemaking is set forth in PBW Stock Exchange, Inc. v. Securities and Exchange Comm'n, 485 F.2d 718 (3rd Cir. 1973). Therein the Court stated that rulemaking "involves the concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it." (485 F.2d at 732). Further, rules "ordinarily look to the future and are applied prospectively only, whereas orders are directed retrospectively, typically applying law and policy to past facts." (Id.; Accord, American Express Co. v. U.S., 472 F.2d 1050, 1055 (C.C.P.A. 1973)). In addition, the Supreme Court stated that adjudication uniquely involves resolution of disputed adjudicatory facts 7/ which results in some specific determinative consequences for the parties involved. U.S. v. Florida East

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7/ The distinction between legislative facts and adjudicative facts has been well summarized by Professor Davis:

> Adjudicative facts are the facts about the parties and their activities, business, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive, or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. 1 Davis, Administrative Law Treatise §7.02 at 413 (1958).

Coast R. Co., 410 U.S. 224, 247 (1973); International Telephone & Telegraph Co. v. Local 134, 419 U.S. 428, 443 (1975).

In the instant case, it is clear that the proposed regulations are directed retrospectively and seek to resolve generically previous individual cases which are at various stages of resolution, viz., some of the proposed rules are evidently aimed at one utility or one licensee with whom the Staff could not reach agreement on that requirement.8/ Indeed, the very roots of the proposed regulations rest in conflict between the NRC Staff and certain licensees regarding disagreements as to the application of General Design Criterion 3, Appendix A to 10 CFR Part 50, to their individual plants. (45 Fed. Reg. at 36082-3).

> Because of the . . . differences between the Staff and the licensees in the interpretation of the Staff's guidelines, it is timely and necessary for the Commission to state what the minimum fire protection requirements will be in each of these contested areas of concern. This proposed rule and its Appendix R have been developed to establish the minimum acceptable fire protection requirements necessary to resolve these contested areas of concern for nuclear power plants operating prior to January 1, 1979. [45 Fed. Reg. at 36083 (emphasis added)].

8/ See Transcript of ACRS Subcommittee on Fire Protection Meeting of December 5, 1979, at 16. In this regard, we agree with the position of Myer Bender, Chairman of the ACRS Subcommittee on Fire Protection that "it is a poor reason for having a rule, because one utility disagrees." Id.

In addition, an examination of the basic facts in dispute reveals that such are indeed adjudicative in nature. For example, the NRC Staff takes the position that Appendix A to BTP 9.5-1 "provides acceptable fire protection alternatives for areas where, depending on the construction and operational status of a given plant, the guidance of BTP 9.5-1 would be difficult or impossible to apply without major design or construction changes." (SECY-80-88 at p. 2). Thus, it is the NRC Staff's position that implementation of Appendix A to BTP 9.5-1 would not be "difficult or impossible" at any given plant. The proposed regulations are based on BTP 9.5-1 and Appendix A thereto, and thus, their reasonableness, in large measure, rests upon the above-noted Staff position regarding ease of implementation. (Id. at p. 4). However, we submit that implementation of requirements contained in the proposed regulations are, depending on the facility, extremely complex requiring major design changes, and, in some cases, may well be impossible.

Another example of the disputed adjudicatory facts in issue involves 10 CFR §50.109 which holds that, as a condition precedent to an action requiring a backfit (such as proposed by the Commission), the NRC must "find" that the

backfit "will provide substantial, additional protection which is required for the public health and safety or the common defense and security." 9/ We submit that such findings require a case-by-case examination of the condition at each facility to determine if each proposed regulation requiring such backfit, in light of the improvements made at each facility as previously required by the NRC, will provide such "substantial, additional protection." This position is consistent with that of the NRC Staff in requesting review by the Regulatory Requirements Review Committee ("RRRC") of Appendix A to BTP 9.5-1, the forerunner to these regulations:

> The survey [conducted by the NRC Staff] indicates a wide variation in plant fire protection system designs. It would appear that the Appendix would involve backfitting in some plants which appear to have no fixed fire protection systems in areas such as cable spreading rooms or diesel generator rooms. In any event, each plant will be reviewed individually and a cost-effectiveness assessment will be made for any backfit. [Letter from Robert E. Heineman, Director of Division of Systems Safety, NRC, to E.G. Case, Chairman of Regulatory Requirements Review Committee, Re: "Request for RRRC Consideration - Appendix A To Branch Technical Position APCSB 9.5-1, 'Guidelines For Fire Protection For Nuclear Power Plants Under Review And Construction; And Operating'" at Enclosure at p. 4 (July 14, 1976) (emphasis added)].

9/ While Section 50.109 does not relieve a licensee from compliance with rules and regulations of the NRC, it does provide the safeguard that a licensee which complies with such rules and regulations should not, absent the requisite Section 50.109 finding, be exposed to facility modifications on the basis of new regulations which in effect change requirements upon which the licensee relied.

Further, this position is consistent with the findings of the RRRC which after review, placed Appendix A to BTP 9.5-1 in the following Category:

> Further staff consideration of the need for backfitting appears necessary for certain identified items of the regulatory position. A Category II determination reflects the judgment that existing plants should be evaluated to determine their status with regard to these safety issues and to determine the need for backfitting on existing plants, designs and sites on a "case-by-case" basis.

Rogovin, Three Mile Island, A Report To The Commissioners And To The Public, Vol. II, Part I Section IA3(a) at pp. 39 and 41 (Jan. 1980). (See Letter from Edson G. Case, Chairman, RRRC to Lee V. Gossick, Executive Director for Operations, NRC, Re: "Regulatory Requirements Review Committee Meeting No. 31, July 11, 1975" at p. 2 (September 24, 1975); See also Letter from Case to Gossick, Re: "Regulatory Requirements Review Committee Meeting No. 52, August 18, 1976" at p. 2 (September 14, 1976)).

In sum, the proposed requirements of the NRC Staff contained in the proposed regulations are retrospective in nature, arose out of individual contested issues, involve adjudicatory facts which must be decided on a case-by-case basis, and will clearly result in a determination of the consequences for the individual parties involved. Thus, we submit that the proposed regulations are, in effect,

adjudication (i.e., orders) and, thus, clearly subject to the provisions of 10 CFR §2.204. 10/

A final point in this discussion adds support to the necessity of adjudicatory hearings. In testimony before the Subcommittee on Reorganization, Research, and International Organizations of the Senate Committee on Government Operations, Mr. L. Manning Muntzing (Director of Regulation, AEC) responded to questions by Senator Ribicoff (Chairman of the Subcommittee) concerning how the Commission dealt with "ratcheting", i.e., backfitting, in the following colloquy:

> MR. MUNTZING: The Commission's regulations provide that when the Commission decides some additional safety characteristics must be incorporated into a facility, the burden is on the Commission to establish that a significant safety advancement will be achieved by that addition.
> SENATOR RIBICOFF: What do you mean "the burden is on the Commission"? What do you have to do? Have hearings? Do you go to court? Or do you just put out a regulation and expect it to be complied with? How is this done?
> MR. MUNTZING: There are various alternatives. We start first with the Commission rulemaking proceedings, or Commission licensing actions,

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10/ The Commission states that licensees will be required to implement "all requirements of this rule in its effective form, including whatever changes may result from public comment" by November 1, 1980. (45 Fed. Reg. at 36083). The Commission states that few, if any exceptions will be granted. It is clear that to avoid possible shutdown, work on the extensive modifications required would have had to commence well before a final decision on these regulations is issued. Thus we maintain that the proposed regulations constitutes orders requiring modification of licenses and, as such, are subject to the hearing rights required by 10 CFR §2.204.

> and these involve public hearings. And after that process, people certainly have the right to litigate the matters in court. ["To Establish a Department of Energy and National Resources", Energy Research and Development Administration and A Nuclear Safety and Licensing Commission: Hearings on S. 2135 and S. 2744. Before the Subcommittee on Reorganization, Research, and International Organizations of the Senate Committee on Government Operations, 93d Cong., Second Sess. 327 (1974) (Emphasis added)].

The clear indication is that "public hearings" should be afforded licensees subject to backfitting requirements, whether such requirements are imposed by rule or by order. 11/

More recently, the NRC Staff indicated to the ACRS Subcommittee on Fire Protection that they believed the purpose of going to rulemaking was not to avoid the individual hearings that could result if the requirements were imposed by orders. Instead they indicated that the rule

> is made to consolidate hearings, if there is going to be a hearing to consolidate them into one, rather than to have 20 or 30 separate ones on individual points. [Robert Ferguson, Division of Operating Reactors, NRC. Transcript Subcommittee on Fire Protection, ACRS, Meeting of December 5, 1979, at 25].

Thus, the Staff does not deny that the opportunity for case-by-case review should be afforded. Instead, they apparently are concerned with consolidating consideration of issues where more than one plant seeks resolution of an "individual point."

11/ For the reasons stated herein, we maintain such hearings should be adjudicatory.

On the basis of the above, it is clear that the NRC regulations require adjudicatory hearings. The members of this group would limit the scope of such hearings to the discrete matters referenced above.

2. Due Process Mandates An Adjudicatory Proceeding Prior To Final Action On Certain Aspects Of The Proposed Regulations

In addition to the requirements contained in Commission regulations, noted above, regarding the right to adjudicatory proceedings, it is clear that considerations of due process and fairness 12/ also require additional procedural protection other than that set forth in the notice and comment provision of Section 4 of the APA under which the instant rulemaking action is proceeding. 13/

We, of course, recognize the general principle that agencies are free to fashion their own rules of procedure. (Vermont Yankee Nuclear Power Corp. v. NRDC, 535 U.S. 519 (1978)). However, this does not mean that agencies are free

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12/ The courts have consistently held that the constitutional due process protections are applicable to revocation, suspension or modification of a public utility license in that such involves the taking of a protected right. Los Angeles v. Los Angeles Power & Electric Corp., 251 U.S. 32, 39 (1919). See also Monogahela Navigation Company v. United States, 148 U.S. 312, 336-37 (1893); United States v. Brooklyn Union Gas Company, 168 F.2d 391, 394 (2nd Cir. 1948); City

13/ We maintain that additional requirements pursuant to Section 5 of the Administrative Procedure Act ("APA"), 5 U.S.C. §554 are required and necessary.

to violate due process rights in the name of rulemaking. For example, in Vermont Yankee the Court noted that "constitutional constraints" or "extremely compelling circumstances" overrode the free will of agencies to fashion their own procedure. (435 U.S. at 543).

With regard to such constitutional constraints, the Supreme Court in United States v. Florida East Coast R. Co., 410 U.S. 224 (1973) in analyzing cases regarding government rulemaking action in violation of constitutional due process noted:

> [W]hile the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. [410 U.S. at 245].

Thus, where a proceeding is adjudicatory in nature, involving adjudicative facts as opposed to legislative facts, and is applicable to individuals exceptionally affected upon individual grounds, due process requires that resolution be in an adjudicatory proceeding. See, Zamora v. Immigration and Naturalization Service, 534 F.2d 1055, 1062 (2nd Cir. 1976); Independent Bankers Ass'n of Georgia v. Board of Governors of Federal Reserve System, 516 F.2d 1206 (D.C. Cir. 1975); Patagonia Corp. v. Board of Governors of Federal Reserve System, 517 F.2d 803, 816 (9th Cir. 1975).

As previously discussed, (supra at pp. 11-15), we submit that in this instance the issues in dispute are adjudicatory in nature involving specific facilities, which will be substantially affected on individual grounds. Thus, we maintain that due process mandates resolution of such disputed facts in an adjudicatory proceeding.

In Vermont Yankee, supra, the Supreme Court also noted that additional procedural protection may be required in the event of "extremely compelling circumstances." 435 U.S. at 543. We submit that such a situation exists in the instant case.

The subject matter giving rise to these proposed regulations has in one form or another been the subject of extensive debate and negotiations between the NRC Staff and industry since 1975. (45 Fed. Reg. at 36802). Now, the NRC Staff, after resolving all associated issues with the majority of the licensees and during the course of negotiations with the others, has precipitously cancelled all such agreements and negotiations and sought the promulgation of these proposed regulations. (45 Fed. Reg. at 36803). These actions may not be regarded as "compelling circumstances" if the topic of discussion was of minor impact. However, the proposed regulations, if implemented in their present form, will have a tremendous impact on this

nation. Based upon current indications, it is unlikely that any utility will be in compliance with the implementation schedule proposed in the regulations. Accordingly, all 68 operating units could be off-line on November 2, 1980. Needless to say, the impact on the economy would be severe; the goal of energy self-sufficiency would be compromised. As stated in Attachment A, the cost of implementation for one plant may range from $25 million to $100 million. Comments filed on behalf of the utility industry, by the Edison Electric Institute, reflect figures within that range. Such costs do not include the expense of replacement power, which, if available, will be necessary while plants are shutdown to implement the requirements. These costs could approximate $640,000 per day. See Attachment A at p. 11. Clearly, the possibility of arbitrarily shutting down nuclear plants (the most economical source of baseload power) for significant periods of time, and expending hundreds of millions of dollars on implementation of presently controversial regulations warrants careful attention and is a "compelling circumstance" that requires additional due process considerations.

In addition, we submit that the NRC Staff's rationale behind resolving these issues in an informal rulemaking as opposed to an adjudicatory setting is also a compelling

circumstance which warrants additional due process considerations. Clearly, the NRC Staff's and industry's intentions during the major period of discussion on these issues was that if resolution could not be achieved through informal negotiations, orders pursuant to 10 CFR §2.204 would be issued. (SECY 80-88 at pp. 1-5). Of course, in such an event, procedures would afford an affected licensee the opportunity to contest the bases of the order in an adjudicatory setting. However, the NRC Staff suddenly and unilaterally concluded otherwise and sought issuance of these proposed regulations by informal, notice and comment rulemaking. Significantly, the turning point in the Staff's thinking apparently came in April 1979, and was based on comments from the Office of the Executive Legal Director ("OELD") regarding issuance of an order requiring implementation of one of the proposed rules (SECY-80-88 at p. 3). Therein OELD seriously questioned the basis of the subject rule as follows:

> In the first instance, the Staff's evaluation does not make an overwhelming case for five-person brigades. Although some reasons justifying a minimum of five persons are given, the evaluation discusses for the most part the general objectives and expected performance of a fire brigade without demonstrating a strong link between those objectives and actions and the proposed five-person minimum brigade. Indeed, why cannot a four-person brigade effectively perform those functions and achieve those objectives? Why are five persons enough? The Staff's evaluation leaves these questions essentially unanswered.

* * *

> Before we issue orders to compel licensees to accept a five-person brigade, I think we ought to be more certain that the technical basis for the orders can withstand the likely challenges in the adjudicatory process than we seem to be now. It appears likely that some licensees will fight the requirement, and they may demonstrate in a hearing to the satisfaction of the Licensing or Appeal Board why the five-person requirement is not necessary at their individual plants. [SECY-80-88, Enclosure C at pp. 1-2 (emphasis added)].

To avoid this dilemma, OELD, in noting that the number of individuals on the fire brigade may well be a policy question, recommended treatment of the issue by informal rulemaking. The Staff also indicated they chose to pursue rulemaking on other issues as well because there was "no real basis for . . . [or]. . . record for establishing an order" where some licensees and the Staff had disagreements over the interpretation of fire protection guidance in Appendix A to BTP 9.5-1. 14/

We submit that the lack of an adequate case supporting imposition of requirements is not a valid reason for seeking issuance of such requirements in a forum where they cannot be effectively scrutinized. And, indeed, absent an adjudicatory setting, the bases for the Staff's proposed

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14/ Subcommittee on Fire Protection, ACRS, Transcript of December 5, 1979 Meeting, at 10-11.

requirements will never be subject to the close scrutiny that an action of this magnitude requires. While it is not our intention to specifically contest the five-man rule, the Staff action in this regard illustrates a philosophy of seeking rulemaking to avoid close scrutiny, which we submit should not be countenenced. We maintain that this is particularly the case where, as here, issues are plant-specific and, thus, better resolved with significant input from the utility technical experts. In this regard we note the Court's discussion in International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973):

> . . . a right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses. [Accord, Bunker Hill v. EPA, 572 F.2d 1286 (9th Cir. 1977); NRDC v. NRC, 539 F.2d 824, 839 (2nd Cir. 1976); Mobil Oil Co. v. FPC, 483 F.2d 1238, 1263 (D.C. Cir. 1973)].

In sum, we submit that, in this particular instance, circumstances exist which set the proposed regulations apart from typical rulemaking actions which are subject to informal, notice and comment rulemaking procedures. Further, we maintain that such circumstances are so compelling that without additional procedural protections the due process rights of licensees will be violated. Thus, we submit that the Commission should grant this petition to conduct adjudicatory, trial-type hearings on the issues previously noted.

In any event, should the Commission find that adjudicatory hearings are not required by statute, regulations or considerations of due process, we submit that from the facts stated in this document, as a matter of sound regulatory practice, the Commission should, in its discretion, approve the request for resolution of the noted issues in an adjudicatory setting.

B. THE COMMISSION SHOULD EXTEND THE IMPLEMENTATION DEADLINE

The deadlines 15/ for implementation of many of the proposed fire protection measures contained in the proposed regulations should be extended. This position is based upon an examination of the proper facts. It also takes into account the need for adjudicatory hearings as discussed supra and positions concerning notice and extension of the rulemaking proceeding discussed infra. The actions of the Commission and the NRC Staff demonstrate that no danger to the

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15/ The proposed regulations set forth several compliance dates (i.e., November 1, 1980, for all items except for alternate or dedicated shutdown capability; April 1, 1981 for implementation of alternate shutdown capability; December 1, 1981 for dedicated shutdown capability; August 1, 1980 for the submittal of plans and schedules to accommodate alternate or dedicated shutdown capability). We take issue with each of these dates as being too constrained in light of the pertinent facts.

public health and safety would be posed by granting this extenson.

The Commission's rationale for imposing the strict implementation schedule is premised upon Staff representations that licensees have been, in effect, on notice of the proposed fire protection requirements for some time. The Commission stated that:

> since the issues involved are well known and have been under discussion for several years, the Commission does not anticipate changes in the rule's action deadline as a result of further comments received. [45 Fed. Reg. at 36082] 16/

That Commission's premise is wrong on both counts.

First, as previously noted, many of the specific fire protection requirements set forth in the proposed rule are new. (See also Attachment A, p. 10.) Most licensees were unaware of these items until the proposed rule was published. 17/

16/ See also, Petition for Emergency and Remedial Action, ___ NRC ___, CLI-80-21 (May 23, 1980) (Slip Op. at p. 19); SECY 80-88 at p. 5.

17/ We note that the Staff was careful not to say in its paper on fire protection presented to the Commission that the specific proposals in the proposed rule were stated in NRC guidelines. Instead, the Staff stated that those requirements were "stated in or derived from the NRC [fire protection] guidelines." SECY-80-88 at p. 4 (emphasis added).

Second, it is clear that if licensees did not know of specific fire protection actions until recently they cannot be expected to have prepared for implementing those requirements. Also, even if some licensees knew the Staff position regarding specific fire protection measures and continued to discuss those with the Staff, so long as those licensees reasonably believed that the measures were not inflexible requirements but remained NRC guidance, those licensees were justified in seeking to fulfill the objectives of the guidance without implementing the specific action called for by the proposed regulations. The Commission is not justified, therefore, in demanding a short implementation schedule.

We believe that the new deadline should be reasonably related to the ability of licensees to implement the changes on an orderly basis, given the vagaries of hardware procurement and other relevant factors. We believe such reexamination would compel the Commission to extend the deadline significantly.

No threat to the public health and safety is posed by permitting plants to continue operating beyond the compliance dates in question. Those NRC Staff members who have examined the fire protection issue closely have concluded that:

> Because all operating plants have already implemented most of the requirements of Appendix A to BTP9.5-1, there is no "threat" to public health and safety in proceeding with a proposed rule. The rule is necessary primarily to complete approximately 50 generic-type open issues scattered throughout the operating plants. [SECY-80-88 at p. 5.]

The Staff evidently did not perceive a threat to the public health and safety in the event that the proposed requirements were not implemented by a certain date, but were instead interested in a quick resolution of "open issues" which arose at some plants. In fact, the issue of fire protection has been under examination for several years by the Staff, and the Staff presumably would have directed the issue to the Commission earlier if there was evidence of a threat to the public health and safety absent immediate implementation of fire protection measures at operating plants. Instead, the Staff demonstrated its satisfaction that the public health and safety was adequately protected at most plants when it issued fire protection SER's for those facilities. It seems clear that <u>but for</u> the absence of agreement between the Staff and certain licensees, the Staff would have been satisfied that the public health and safety would be protected by case-by-case resolution and the issuance of SER's

and would not have felt compelled to seek a rulemaking on fire protection. Consequently, there does not appear to be a compelling public health and safety reason for imposing the strict deadline on all operating plants with respect to all proposed fire protection measures. 18/

Furthermore, the Commission may itself create a threat to the public health and safety if all proposed fire protection requirements must be implemented at all operating reactors on the schedule presently called for. Commissioners Hendrie and Kennedy both noted that the combination of new fire protection requirements and the Three Mile Island requirements could "make it impossible for licensees to complete all of these measures in a carefully considered and thorough fashion," 45 Fed. Reg. at 36083. In fact, those Commissioners found that the fire protection measures were not so urgent, in light of the number of improvements already implemented, to run the risk of shutting down plants

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18/ We are cognizant that the proposed regulations contain requirements which exceed the standards to which the SER's were compared. However, we do not feel that public health and safety are compromised while these matters are being discussed in rulemaking. Indeed, the NRC Staff has stated that the public health and safety will not be compromised during the pendancy of an ongoing rulemaking proceeding. SECY-80-88 at p. 6.

or having the "improvements [made] in a hasty fashion." 45 Fed. Reg. at 36083. While we do not believe any licensee would implement requirements in an unsafe manner, the point to be drawn from the comments of Commissioners Hendrie and Kennedy is that there is no health and safety justification for imposing the short implementation schedule, and the Commission might actually be creating a risk to the public health and safety by doing so.

Lastly, and perhaps most significant, the grave economic and social impacts associated with the present implementation schedule call for its immediate relaxation. Specifically, it appears extremely unlikely that any measureable segment of industry will be able to comply with the present schedule. The result will be that "[n]o plant would be allowed to continue operating after November 1, 1980. . . ." Such could lead to the shutdown of all 68 operating plants. The impact of such a situation on power reliability and, thus, on the economy of this nation as a whole needs no explanation.

C. THE COMMENT PERIOD MUST BE EXPANDED

We maintain that the 30 day comment period provided for in the proposed rule (45 Fed. Reg. at 36088) does not

"provide fair treatment for persons affected by the rule" 19/ and fails to allow the Commission to benefit from the "input and expertise of interested parties." 20/ The Commission evidently believes a short comment period is warranted because sufficient opportunity for public comment has been provided in the past and licensees have known and discussed these "issues" for "several years." 21/ This position, however, fails to recognize the distinction between "industry" commenting on guidance documents such as Branch Technical Positions and Regulatory Guides, both of which are subject to challenge in adjuciatory proceedings and may be deviated from upon an appropriate showing, and

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19/ Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35.(D.C. Cir. (1977)

20/ National Tour Brokers Association v. U.S., 591 F.2d 896, 902 (D.C. Cir. 1978).

21/ 45 Fed. Reg. at 36083.

the "public" commenting on proposed Commission regulations, which are not generally subject to such challenges. Indeed, the Commission's position assumes that all members of the public would closely follow agency actions with respect to guidance documents and provide comment thereon as if such documents were binding regulations. In short this is not the case. In addition, as previously noted, aspects of the specific requirements in the proposed regulation are new and thus, neither industry nor the public has previously had an opportunity to comment on them. We submit that the Commission position is unsupportable and provides no sound justification for limiting the comment period to 30 days.

The complexities of the regulations, in combination with their detailed interrelation to specific facilities and the magnitude of their impact, warrant at the very least a 60 day comment period. 22/ To provide less would, as a practical matter, preclude effective public comment. In fact, Commission policy set forth in its Progress Report to the President and Congress regarding its plans for volun-

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22/ We note that the Staff perceived one of the advantages of proposing a rule rather than issuing orders as being that the former "would permit full public review and comment on the rule with the possibility of more desirable options and/or solutions being proposed." SECY-80-88 at p. 5. The Commission, on the other hand, has precluded itself from reaping this benefit by imposing the short comment period.

tarily implementing Executive Order 12044, "Improving Government Regulation" 43 Fed. Reg. 34358 (August 3, 1978), provides for a 60 day period.

Recent developments add further support to our request for extension of the comment period. On June 16, 1980 we filed a Freedom of Information Act Request with the NRC pursuant to 10 CFR Part 9. 10 CFR §9.8 provides that such information will be made available within 10 working days of the request, i.e., on June 30, 1980. We have been informed by the NRC that they will be unable to fully comply within the time constraints of §9.8. Under such circumstances our ability to adequately assess the basis for the Staff and Commission action and, consequently, our ability to comment, has been compromised. Due process dictates that the time for comment be extended until such information has been provided and we have had an opportunity to properly assess it.

In sum, we maintain that the 30 day comment period provided was insufficient to achieve effective public input, and urge the Commission to extend the comment period.

D. THE COMMISSION'S DEFECTIVE VALUE-IMPACT ANALYSIS MUST BE AMENDED AND REPUBLISHED

In January 1978, the Commission, reacting to concerns regarding elimination of unnecessary costs resulting from

regulatory action, adopted as the policy of the Nuclear Regulatory Commission "that value impact analyses be conducted for any [non-routine and non-recurring] proposed regulatory actions that might impose a significant burden on the public (where the term public is defined in its broadest sense)." (footnotes omitted). "Guidelines For Conducting Value-Impact Analysis" at pp. i, iii, and 5 (NRC January 1978) ("Guidelines"). 23/ 24/ The Commission emphasized that value-impact analyses were to be prepared not only for proposed regulations but also "[a]ll Commission papers classified as either 'Commission Action Items', 'Policy Session Items', or 'Consent Calendar Items', . . ." (Id. at iii); "Branch Technical Positions and new or revised regulatory guides" (Id. at ii); and "new reporting requirements." (Id. at 5 note ***). From the foregoing, it is clear, and the NRC does not dispute, that with regard to the proposed regulations a value-impact analysis is required. Indeed, the NRC Staff has prepared a document entitled "Value/Impact Assessment of Proposed Fire Protection Rule" (Enclosure B to SECY-80-88). We maintain that the NRC Staff value-impact analysis is totally deficient and, accordingly, must be amended.

23/ See also, "Value Impact Guidelines," SECY-77-388 (July 1977) and SECY 77-388A (November 1977).

24/ "Regulatory action" is defined as "an action taken in direct support of the NRC's mission to protect the safety of, and safeguard the public, and to protect the national security and the environment." (Guidelines at p. 32).

A value-impact analysis "is a method enabling comparison of consequences associated with alternatives identified to satisfy some objective or to meet some goal." (Guidelines at p. 1). Elements of a value-impact statement should include (1) a statement of objectives, (2) a description of the setting and background of the problem, (3) identification and definitions of alternatives, (4) estimates of incremental benefits/values and associated costs/impacts of alternatives, and (5) identification of criteria for assessing or ranking of alternatives. (Guidelines at pp. iv-v and Appendix III). Of particular importance is the identification of alternatives and the documentation of the relative values and impacts associated therewith. 25/ As the Commission stated:

> Value-impact statements should not confront Commissioners with a "Hobson's choice". Thomas Hobson was a 17th Century liveryman who offered his customers the choice of taking the horse nearest the door, or no horse at all. Staff work should always recognize the difference between recommending policy alternatives versus giving "the" answer. Although consideration of additional alternatives may lead to greater demands on the analyst's time, it is often the case that preliminary analysis will indicate the dominance of one or two alternatives (i.e., one or two that are clearly superior in terms of low costs or high effectiveness). The "inferior" alternatives would require only brief reference in the value-impact statement. (Guidelines at p. 15-16).

25/ To illustrate this point, the Commission stated "if compared with the most effective action there exists an alternative which would provide 60-70% of the value for 10-15% of the cost impact then the Commission should be made aware of this possibility." (Id. at 14-15).

Based upon the above requirements, the Staff's "Value/Impact Assessment" is totally inadequate. The Staff document fails to identify a single alternative to the proposed regulations, much less criteria for assessing alternatives. In addition, the Staff document completely ignores the requirement to quantify and comprehensively evaluate the impact of the proposed regulations. (See Guidelines at pp. 23-26). In short, the Staff's "Value/Impact Analysis" is grossly deficient and must be amended. In this regard, we maintain that the magnitude of the impact of the proposed regulations 26/ mandates that the amended analysis be extremely comprehensive. As the Commission stated, "the depth or extensiveness of a value-impact analysis should depend on the magnitude of the expected costs and benefits associated with the proposed action. . . . " (Guidelines at p. iii).

E. NRC HAS FAILED TO PERFORM A NEPA ANALYSIS FOR THE RULEMAKING

The Commission has relied upon its Staff's unsupported determination that, pursuant to 10 CFR §51.5(d), an environmental impact statement, appraisal, or negative

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26/ Attachment A, the comments of the Edison Electric Institute, and the comments of various utilities filed in response to this instant rulemaking identify implementation costs in the $25-$100 million per plant range. It should be noted that these cost figures pertain to equipment and manpower; they do not include replacement power costs. The Commission's guidance document instructs that this latter cost is also to be considered in a value-impact analysis.

declaration is not required because the proposed regulations are "non-substantive and insignificant from the standpoint of environmental impact". We maintain that the Staff's conclusion, which is devoid of any analysis, is totally unsupported by the facts (e.g., it is clear that the proposed regulations are far from non-substantive and insignificant from the standpoint of environmental impact.) For example, Section III.A. of Appendix R, requires that "[t]wo fresh water supplies shall be provided to furnish necessary water volume . . . ." The section further notes that "[t]wo separate redundant suctions from a large body of fresh water will satisfy [this] requirement . . . ." Such a provision gives rise to environmental issues such as entrainment and impingement. On this basis, we maintain that an environmental review was and is warranted.

Without passing on the need for an environmental impact statement we maintain that, at a minimum, the NRC has an obligation to issue an appropriate environmental impact appraisal documenting why it believes that the proposed action does not require preparation of an environmental impact statement. 10 CFR §51,7. See also Scientists'

Institute For Public Information, Inc. v. AEC, 481 F.2d 1079, 1094-95 (D.C. Cir. 1973); Arizona Public Service Co. v. Federal Power Commission, 483 F.2d 1275, 1282 (D.C. Cir. 1973); Asphalt Roofing Manufacturing Assoc. v. ICC, 567 F.2d 994, 1005 (D.C. Cir. 1977).

F. RENOTICE

1. The Ambiguity Of The Proposed Regulation With Regard To Critical Items Requires That It Be Renoticed

The Courts have held that the Administrative Procedure Act, 5 U.S.C. §§551 et seq., requires that the opportunity for comment on proposed rulemaking "must give all interested persons a reasonable opportunity to participate and present their views.27/ In addition, the initial notice of a proposed rule is inadequate and does not satisfy the requirements of the APA if even a single important topic in the final rule is not addressed in the proposed rule. 28/ Furthermore, the procedures utilized in rulemaking must

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27/ Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1099 (5th Cir. 1976).

28/ See, Wagner Electric Corporation v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972).

afford affected persons "fair treatment." 29/ With respect to the notice of proposed rulemaking, "the parties [must] ha[ve] fair notice of exactly what the [agency] propose[s] to do...," 30/ "so that interested parties may offer informed criticism and comments" on the proposed rule. 31/ It is against this background that the procedures thus far utilized for public participation in this rulemaking proceeding should be evaluated to determine whether due process has been accorded. We maintain it has not.

The ambiguity of the proposed rules is so extensive with respect to critical technical requirements that an effective opportunity to comment has been precluded. For example, Appendix R, III.G. identifies in the first

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29/ Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 (D.C. Cir.), cert. denied 434 U.S. 829 (1977).

30/ U.S. v. Florida East Coast R. Co., 410 U.S. 224, 241 (1973).

31/ Ethyl Corporation v. EPA, 541 F.2d 1, 48 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). Also, when the proposed regulations will have 'a substantial impact' on the purportedly regulated parties, the lack of compliance with the prior notice and comment requirements of the APA can be fatal. National Helium Corp. v. FEA, 569 F.2d 1137, 1146 (Emer. Ct. App. 1978). See also Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975), vacated and remanded on other grounds sub nom. EPA v. Brown, 431 U.S. 99 (1977).

paragraph that alternate shutdown capacity is an optional protective feature which will ensure the achieving and maintaining of safe shutdown conditions; however, in the same section at 2.C, alternate shutdown capability is no longer an option, but is rather defined as a minimum fire protective feature; Appendix R, III.N calls for the testing of fire barriers with a pressure differential across them, but fails to define the pressure differential; Appendix R, III.Q is totally lacking in definition.

Until such language is clarified, licensees will be unable to effectively present their views on these topics. Only then would the Commission have provided "fair notice" of the issues involved and afforded interested parties the opportunity to offer "informed" comments.

2. The Inadequacy Of Commission Documents Relied Upon Requires Renotice

It is clear that the agency rulemaking process, including notice and comment rulemaking pursuant to Section 4 of the Administrative Procedure Act 32/, "contemplates that rules will be made through a genuine dialogue between agency

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32/ 5 U.S.C. §553.

experts and concerned members of the public." 33/ As such, it is incumbent upon the agency involved in such rulemaking to assure that material used in support of an agency decision is made known to the public in advance of the agency decision. As the Court in United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977) stated in rejecting an agency's action:

> To supress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads in the direction of arbitrary decisionmaking.

In the same vein, when the Consumer Product Safety Commission failed to make a study available to the public until after the comment period had passed, the Court disallowed consideration of the study because it was "not exposed. . . to the full public scrutiny which would encourage confidence in its accuracy." Aqua Slide 'N Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831, 842 (5th Cir. 1978). Accord, Portland Cement Ass'n v. Ruckelshaus, 486

33/ Judge Wright, "The Courts and the Rulemaking Process: The Limits of Judicial Review." Conn. L. Rev. 375, 381 (1974).

F.2d 375, 393 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974). 34/

Applying the above noted case law to the issues here, it is clear that in rendering a decision regarding the proposed regulations, the Commission will evaluate and rely upon, inter alia, the values and impacts associated with the proposed regulations and alternatives thereto, as set forth in an amended value impact statement; 35/ 36/ the environmental impact of the proposed regulations and alternatives thereto; 37/ and the Staff recommendations

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34/ See also Green v. McElroy, 360 U.S. 474, 496-7 (1959) wherein Chief Justice Warren stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

35/ If the Commission were to disregard the value-impact analysis, such would be violative of its policy pronouncement as contained in its response to the President regarding improving government regulations. Therein, the Commission stressed its reliance upon value-impact analyses. See 43 Fed. Reg. 34358 (August 3, 1978).

36/ Indeed, a "primary purpose of the [value-impact] analysis is to document explicitly any value judgments and assumptions made thereby allowing the Commission, the public, and licensee to better understand and evaluate the basis for the recommendation or decision." (Guidelines at p. 4).

37/ Such reliance is required by the National Environmental Policy Act of 1969. See also 10 CFR §51.50(d).

regarding the finding required by 10 CFR 50.109 concerning "substantial additional protection." 38/ In that such documents will be relevant considerations regarding the basis of the Commission's decision, the public has the right to provide the Commission with comments thereon prior to such decision. Thus, we maintain that after issuance or amendment of such documents, the proposed rule must be renoticed to provide for effective public comment.

V. CONCLUSION

For the above stated reasons, the proposed regulations must be renoticed, the time for comment extended and the implementation period enlarged. In addition, several

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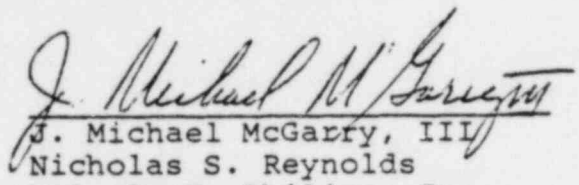
38/ In this regard, we note the Staff's position concerning considerations involving the required backfitting finding:

> We believe that the decision must be one of judgment. Yet this decision must be guided by assessments of the likelihood and consequences of the safety concern, the impacts of implementing corrective action, and the need to assure that there is a balancing of potential sources of risk. The actions which have been identified are directed to accomplishing this objective. [SECY-79-8, Subject, "Improving The Process For Determining The Need For New Reactor Requirements." Enclosure 1 at p. 4 (January 2, 1979)].

matters contained within the proposed rule and as noted herein should be made the subject of an adjudicatory hearing. We request expeditious treatment of these requests.

Respectfully submitted,



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ATTACHMENT A

The Boston Edison Company's Experience at Pilgrim Nuclear Power Station, Unit No. 1

The Pilgrim Nuclear Power Station Unit No. 1, owned and operated by Boston Edison Company, commenced commercial operation in July 1972. The plant was designed and constructed in conformance with then-current applicable codes and standards which reflected "state of the art" technology at that time.

Following a fire at Brown's Ferry Nuclear Station in March 1975, the NRC initiated an evaluation of the need for improving the fire protection programs at all nuclear power plants. As part of this evaluation, the NRC in February 1976, published a report titled, "Recommendations Related to Brown's Ferry Fire," NUREG-0050. This report recommended that improvements in fire prevention and fire control be made in most existing facilities, and that consideration be given to design features which would increase the ability of nuclear plants to withstand fires without the loss of important functions. To implement these recommendations, the NRC initiated a program for reevaluation of fire protection programs at all licensed nuclear power plants.

Subsequently, the NRC issued new guidelines for fire protection which reflected the recommendations in NUREG-0050. These guidelines were contained in the following documents:

- "Standard Review Plan for the Review of Safety Analysis Report for Nuclear Power Plants," NUREG-75/087, Section 9.5.1, "Fire Protection," May 1976, which includes "Guidelines for Fire Protection for Nuclear Power Plants" (BTP APCSB 9.5-1), May 1, 1976.

- "Guidelines for Fire Protection for Nuclear Power Plants" (Appendix A to BTP APCSB 9.5-1), August 23, 1976.

- "Supplementary Guidance on Information Needed for Fire Protection Program Evaluation," September 30, 1976.

As these documents were issued, all licensees were requested to: (1) compare their fire protection programs with the new guidelines; and (2) analyze the consequences of a postulated fire in each plant area. In response, a comprehensive evaluation of the Pilgrim facility was performed and the results were submitted to the NRC, in March 1977, as "Fire Protection System Review APCSB 9.5-1 for the Pilgrim Nuclear Power Station." This report identified aspects which were both in conformance and not in conformance with the Staff's guidelines. Boston Edison agreed to take necessary steps to achieve conformance with many of these items. Other aspects with which Boston Edison was not in conformance were believed to reflect adequately the "state of the art" at that time, and Boston Edison sought to discuss these aspects with the Staff.

A series of meetings was held between Boston Edison and the NRC Staff to discuss all aspects of the evolving regulatory approach for fire protection. The Staff also visited the Pilgrim facility to verify the adequacy of the information contained in the Boston Edison report and to resolve many of the items deemed open by the Staff.

As a result of the interaction between Boston Edison and the Staff, many of the items were resolved to the satisfaction of the Staff, while some remained outstanding. Further interaction ensued, leading to a preliminary agreement between Boston Edison and the Staff. That agreement resulted in imposition of the requirements which eventually appeared in Amendment No. 35 to Facility Operating License No. DPR-35 for the Pilgrim facility, which was issued December 21, 1978.

Amendment No. 35 contained revised Technical Specifications and a Safety Evaluation Report (SER) which supported Amendment No. 35. The SER contained a summary of the modifications that were required and a list of incomplete items which were to be resolved. Completion dates were specified and are set forth below in Table 3.1 and Table 3.2.

TABLE 3.1

IMPLEMENTATION DATE FOR LICENSE
PROPOSED MODIFICATIONS

ITEM		DATE
3.1.1	Fire Detection Systems	next refueling outage
3.1.2	Water Suppression Systems and Equipment	11-1-79
3.1.3	Gas Fire Suppression Systems	5-1-79
3.1.5	Lighting Systems	3-1-80
3.1.6	Fire Retardant Cable Coating and Fire Stops	3-1-80
3.1.7	Fire Doors	8-1-79
3.1.8	Fire Dampers	3-1-80
3.1.11	Control of Combustibles	9-1-79
3.1.12	Portable Extinguishers	1-1-79
3.1.13	Administrative Controls and Quality Assurance	9-1-79
3.1.14	Exposed Steel Protection*	3-1-80
3.1.15	Supervision of Detection and Actuation Circuits	2-1-79
3.1.16	Self Contained Breathing Apparatus*	12-1-78
3.1.17	Communication Systems*	3-1-80
3.1.18	Alternate Shutdown Capability*	10-1-79
3.1.19	Penetration Seals*	7-1-79

*NOTE: The design for these modifications will be subject to further staff review prior to implementation, and will be submitted as soon as possible to allow sufficient time for the review. Six months lead time is considered appropriate, where possible.

TABLE 3.2

COMPLETION DATES FOR INCOMPLETE ITEMS

ITEM		DATE
3.2.1	Safe Shutdown Analysis	10-1-79
3.2.2	Testing Fire Detectors	3-1-80
3.2.3	Battery Room Ventilation Air Flow Monitor	11-1-78
3.2.4	Cable Combustibility	3-1-80
3.2.5	Prevention of Spread of Combustible Liquid Fire via Drain Systems	3-1-79
3.2.6	Suppression of Charcoal Fire in Augmented Off-Gas System	12-1-78
3.2.7	DC Power System Hazard Analysis	2-1-79
3.2.8	CO2 System Discharge Test	3-1-80

NOTE: If analysis results indicate modifications are required, the design details will be due within 6 months of the analysis submittal date and design implementation within 12 months of the analysis submittal date, with implementation no later than October 1980.

Extensions, consistent with attaining the October 1980 implementation date, were sought with respect to various items in Table 3.1 and are discussed below. (Items not referenced here had been completed and thus no extension was necessary).

(a) Some items required plant shutdown; and it was considered desirable to perform the necessary work at the next scheduled outage. (Nos. 3.1.1, 3.1.6, 3.1.18 and 3.1.19)

(b) Some items required additional time because of difficulties that would be encountered during implementation. (Nos. 3.1.2, 3.1.6, 3.1.14, and 3.1.19.)

(c) Some items required long lead time to procure material/equipment. (Nos. 3.1.2, 3.1.7, and 3.1.19)

(d) Some items were postponed because of special consideration such as ALARA, availability of manpower, unavailability of testing facilities, time limitations necessitated by engineering research, etc. (Nos. 3.1.1, 3.1.2, 3.1.3, 3.1.6, 3.1.18 and 3.1.19).

At the current time, the only items in Table 3.1 that remain to be completed are Nos. 3.1.1, 3.1.2 and 3.1.19. Items 3.1.1 and 3.1.2 are in progress. Item 3.1.1 is approximately sixty percent complete and will be completed by September 1, 1980. Item 3.1.2 is approximately ninety percent complete and will be completed by August 1, 1980. As to Item 3.1.19, Boston Edison retained the Franklin Institute (Philadelphia, Pennsylvania) to conduct qualification tests of typical penetration seals that exist at Pilgrim. A preliminary test report was submitted to the NRC in October 1979 and a final test report was submitted in May 1980. The reports indicate that some of the seals would require upgrading to comply with the 3-hour fire rating. Boston Edison requested a timely review of the findings of the

test reports so that the upgrading process could be completed by October 1,1980. To date, Boston Edison Company has not received any official correspondence concerning these reports.

The above described lack of NRC review is not an isolated instance. For example, with regard to Item 3.1.18, Alternate Shutdown Capability, Boston Edison submitted a conceptual design in October 1979. On October 22, 1979, the NRC requested additional information for Item 3.1.18. Boston Edison Company's final submittal for this item (January 1980) modified its earlier submittal to reflect the additional information requested. To date, no official response has been received from the NRC. The Alternate Shutdown Capability design submitted by Boston Edison was similar to the design developed for the Trojan Nuclear Power Station which had been favorably received and evaluated by the NRC. Because this modification had to be completed during the recent outage (January 2nd to May 18th), Boston Edison expressed concern to the NRC that timely review by the Staff was necessary if the modification was to be completed on schedule. Lacking any formal response, Boston Edison proceeded to implement the modification. (The cost of this modification was approximately $500,000.)

With regard to the items listed in Table 3.2, Boston Edison did not request an extension of any of the initial completion dates as specified by the NRC. The analyses required by Item 3.2.1 were submitted for NRC review on January 21, 1980. No response has been received to date.

A report prepared by NUTECH for Boston Edison and four other utilities, was submitted to the NRC in October 1979. Boston Edison feels this report on in situ testing of fire detectors was adequate to complete its responsibility in regard to Item 3.2.2. To date, no response has been received from the NRC.

Based on the NRC acceptance of the design of Item 3.2.3, Boston Edison has completed the required fire modifications for the battery room ventilation.

In regard to Item 3.2.4, an analysis of the cable installed at Pilgrim was conducted in order to determine compliance with IEEE 383-Flame Test. Appropriate documents from the applicable cable manufacturers, which supported the analysis, were submitted to the NRC in March 1980. To date, no response has been received from the NRC.

The analyses for Items 3.2.5 and 3.2.6, and subsequent discussions between Boston Edison and the NRC Staff, resulted in their acceptance.

A detailed analysis for Item 3.2.7 was submitted in Feburary 1979; no official response has been received to date.

The CO2 dump test, Item 3.2.8, has been the subject of correspondence and telephone conversations between the NRC and Boston Edison. Boston Edison presented engineering justification for delaying conducting this test until all factors, such as thermal shock and spurious signals, resulting from tests conducted at other facilities, had been addressed. During a telephone conversation, the NRC informed Boston Edison that an extension would "probably" be granted in completing this item.

In summary, Boston Edison will complete all items in Table 3.1, except Item 3.1.19. As stated earlier, completion of this item requires a response from the NRC. In Table 3.2, Items 3.2.1, 3.2.2, 3.2.4, 3.2.7 and 3.2.8 require response from the NRC prior to completion.

On May 19, 1980, the NRC published proposed regulations regarding fire protection. If enacted, these regulations would be applicable to Pilgrim. Boston Edison's examination of the requirements set forth in proposed

Appendix R to 10 CFR Part 50 reflects that 2 of the items are totally new (III.P, III..Q) and that 12 of the items involve new matter, i.e., refinements (III.A, III.E, III.F, III.G, III.H, III.I, III.J, III.K. III.L, III.M, III.N, III.O). As reflected above, due to the Staff's silence on fire protection matters, Boston Edison did not receive sufficient advance warning as to these new matters. Accordingly, despite its best efforts, Boston Edison does not see how it could be in complete compliance with the implementation schedules with respect to the 14 above identified items. (Boston Edison will be in compliance with items III.B, III.C, and III.D on November 1, 1980.) This situation results from delays in purchase of equipment, allocation of time and resources necessary to perform the design and analysis and the actual time necessary to implement the items. With the exception of items III.L, III.N, III.P, and III.Q, Boston Edison contemplates that, if necessary, it could complete the other 10 items on a reasonable extension of the implementation schedule. As to items III.L, III.N, III.P, and III.Q, it is extremely difficult to even begin to determine the timeframe, except to state that it will be lengthy.

Boston Edison has endeavored to calculate the costs that would be entailed in performing these proposed

backfitting requirements. However, given the severe time constraints that have been imposed, these calculations are far from precise. It is Boston Edison's best judgment, under the circumstances, that the proposed modifications would necessitate the expenditure of $25-$100 million. This figure does not include replacement power costs which are on the order of $640,000 per day.