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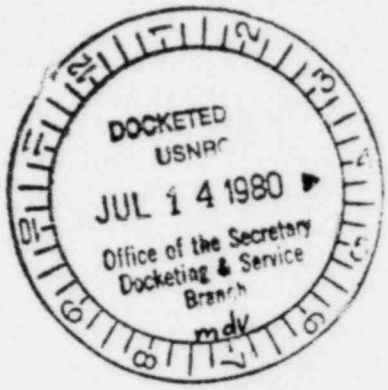

July 7, 1980

Secretary
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Re: Possible Amendments To
"Immediate Effectiveness" Rule, 45
Fed. Reg. 23479 (1980)

Dear Commissioners:

The following comments are submitted on behalf of Commonwealth Edison Company ("Edison") which has a major interest in the Commission's deliberations regarding possible amendments to the immediate effectiveness rule. Edison currently operates seven nuclear units, holds construction permits for six units, and has initiated early site review proceedings in regard of two additional units.

In general, Edison believes that the only acceptable option identified in the Commission's notice is Option E which would retain the present system unchanged. Our reasoning is as follows. To the extent the present system impacts the decision making process at all, these impacts are only felt with respect to environmental, and not safety related concerns. This is because the "sunk cost" doctrine is only relevant to the agency environmental cost/benefit analysis. If for one reason or another the agency deems that construction, as authorized by a limited work authorization or construction permit, endangers the health and safety of the public, the fact that there have been significant construction expenditures will not be relevant to the decision whether to permit continued construction of the facility. Therefore,

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any possibility of prejudice resulting from the present rule would only be related to environmental, and not safety, considerations. And, such prejudice can only result from the application of the sunk cost doctrine regarding environmental impacts which occur prior to appellate review.

As the Court in New England Coalition on Nuclear Pollution v. NRC 582 F.2d 87 (1st Cir. 1978) recognized, any problems associated with the sunk cost doctrine in relation to consideration of environmental impacts can be avoided if the Commission wisely uses its power to stay initial decisions. Section 2.788(g) of the Commission's Rules of Practice permits the issuance, on an extremely expedited basis, of an order temporarily staying the effectiveness of a decision authorizing construction. Accordingly, if a proponent of a stay motion can meet the Virginia Petroleum Jobbers criteria for issuing a stay as set forth in 10 CFR §2.788(e), there is almost no possibility that the party's interests will be prejudiced in any manner whatsoever.

Edison has not been able to identify any reasons why the traditional judicial standards which govern when stays should be issued, as stated in Virginia Petroleum Jobbers, should not similarly govern NRC licensing proceedings. In particular, we would emphasize the importance of the "probability of success" factor to a determination whether to grant a stay. Although no single factor enunciated in Virginia Petroleum Jobbers is absolutely dispositive, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977), the probability of success simply must be taken into account in ruling on stay motions. It takes little skill or imagination for one to argue irreparable injury, public interest, etc., yet if a party cannot establish that his position has at least a substantial chance of success, the granting of a stay will only result in needless and wasteful delay.

There is one change in policy which, if implemented, would further reduce the possibility of prejudice resulting from the immediate effectiveness rule. To the extent that

there are errors made by Licensing Boards which require remand for further consideration of environmental issues, we believe that these errors most often arise because of the Board's refusal to entertain specific issues and not because of improper consideration of those issues actually considered. Thus, better and expedited issue certification to the Appeal Board or Commission would lessen the likelihood of reversible error. Although we believe that the procedural regulations for issue certification are adequate as written, the Licensing Boards should be encouraged to certify questions more frequently when there is doubt as to whether the issue is properly before the Board. Such a policy, when utilized in conjunction with the Commission's regulations governing stays, would essentially eliminate any possible problems associated with the immediate effectiveness rule.

For the reasons stated above, Edison submits that Option E, as modified by our proposal regarding the use of issue certification would best further the policies and goals of the Atomic Energy Act and of NEPA. However, some of the remaining options outlined in the Commission's notice are clearly superior to others. We will therefore presently address the relative merits of the remaining suggested alternatives by order, in Edison's view, of their acceptability.

OPTION D

Under this Option the Commission proposes to significantly loosen the standards for obtaining a stay, and automatically delay the effectiveness of an initial decision to permit a party to request the issuance of a stay. A stay would be granted if the "appeal presents a substantial question concerning an issue related to the commencement of construction."

Edison is concerned that the term "substantial question" is overly broad and may therefore not provide sufficient guidance to a decision maker in determining whether to grant a stay. If this term were adopted as part of §2.788, as a practical matter it may well serve to create

a presumption that no decision on a particular issue should be immediately effective if that issue were intensely contested below. This result would clearly be unfortunate, for under such circumstances, it would be extremely likely that a significant amount of consideration was given to the issue, and that therefore the judgment of the Board with respect to the issue was truly informed.

As we have emphasized earlier in these comments, Edison believes that the fundamental factor which must be considered in deciding stay motions concerns the likelihood that the proponent of the motion will prevail on the merits. If this factor is disregarded, the possibility of needless delay and unnecessary depletion of administrative resources is extremely likely.

Edison assumes that the scope of any stay order granted pursuant to Option D would be limited in the same way as indicated in Option A; that is, where the issue which presented a "substantial question" concerned a specific area which would not be affected by continued construction in other areas, no stay or such unrelated construction would be entered. For example, an issue might arise concerning the optimum location of a river screenhouse to keep environmental impacts to a minimum. If this were the case, it would not be necessary to delay construction of other, unrelated facilities, pending the determination on appeal concerning the proper location of the screenhouse. In the event the Commission decides to adopt Option D, the regulation should therefore provide that a stay will issue with respect to the effectiveness of a decision permitting construction only as it relates to the question presented on appeal.

OPTION A

Insofar as under Option A the Commission proposes to adopt the liberalized stay standards proposed under Option D, we would refer you to above discussion with respect to our concerns regarding these standards.

With respect to the remaining issues presented by Option A, Edison opposes the notion that a Licensing Board should in every case be required to make a separate ruling on the question of whether its initial decision should be effective. For, if all the parties to a contested proceeding are of the opinion that the initial decision adequately addresses their concerns, it would seem that an independent finding regarding the effectiveness of that decision would be a needless and wasteful effort. Therefore, a procedure which requires the initiation of stay requests by a party who did not prevail on a particular issue would be clearly preferable to the requirements proposed by Option A.

Finally, Edison prefers Option D over Option A because the burden of demonstrating that a "substantial question" exists should be upon the party which did not prevail on the specific issue.

OPTION B

Edison submits that the proposal to delay construction until all LWA issues have been resolved on appeal, as contained in Option B, is totally unacceptable.

First, as we stated above, any problems associated with the immediate effectiveness rule result only from the prejudice to a party which might result from the "sunk cost" doctrine. This doctrine is only relevant to environmental (LWA_1) issues not safety concerns (LWA_2). To the extent an applicant constructs structures or systems which may later be deemed a threat to the public health and safety, these structures or systems will have to be modified regardless of the amount previously expended thereon by the applicant. Therefore, the suggestion that construction must await a determination on appeal with respect to safety issues appears to be an attempt to remedy what is, in essence, a nonexistent problem. In the event the Commission decides to adopt procedures such as those proposed in Option B only the effectiveness of an LWA_1, i.e. the initial decision on all issues related to NEPA, should be affected by the modified regulations.

With respect to the broader issues raised by Option B, and Option C, Edison would like to point out that inherent in the proposal that the immediate effectiveness rule be repealed, in whole or in part, is the assumption that the NRC Staff and the Licensing Boards which decide whether or not to issue LWA's or construction permits do not or may not in the future adequately carry out their respective duties. Given Edison's experience to date, there is no foundation for such an assumption. Accordingly, unless a party can demonstrate that there is a substantial likelihood that serious error was made in reaching an initial decision and that such error may result in significant harm to that party's interests, through the use of the current regulations governing stays, the decision should have immediate effect. After all, this is precisely the standard which has been effectively utilized in the federal judicial system. If the concern is that the Staff and the Licensing Boards cannot adequately evaluate environmental consequences related to the construction of nuclear facilities, the obvious solution is to internally restructure the agency and not alter the immediate effectiveness rule.

OPTION C

Our comments relating to Option B are also germane to Option C. In addition, we would point out that if the Commission were to adopt the modifications proposed in Option C, such action could only be viewed as regulatory overkill. For, the only problems which are purported to result from the immediate effectiveness rule relate to the possibility that irreversible environmental impacts may result from the application of the rule. There is therefore no basis whatever for adopting a system, such as the one proposed in Option C, which would result in delaying construction because of the existence of issues on appeal which are not affected by early construction activities.

Edison appreciates the opportunity to comment on these important matters and we are hopeful that these comments will be of assistance to the Commission.

Respectfully submitted,

D. L. Peoples

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Director of Nuclear Licensing
Commonwealth Edison Company