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Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chilk:

Pursuant to the Federal Register Notice published May 22, (45 Fed. Reg. 34,279), the following comments on possible amendments to NRC's "immediate effectiveness" rule are provided on behalf of Boston Edison Company, Houston Lighting and Power Company and Puget Sound Power and Light Company.

1. The Commission has prepared extensive studies (NUREG-0646 and NUREG-0648) to explore modification or elimination of the immediate effectiveness rule (10 C.F.R. § 2.764). The operation of Section 2.764 has already been suspended. 10 C.F.R. Part 2, Appendix B.*/ We believe that, for the following reasons, Section 2.764 should be reinstated and that the immediate effectiveness rule should not be amended.

The driving force for amendment of Section 2.764 is apparently the Seabrook proceeding -- a case which has had a "tortuous" and "byzantine" administrative history. Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221, 1224 (1st Cir., 1979). We believe that Seabrook was atypical and does not supply a basis upon which to change a fundamental rule with respect to nuclear power plant licensing. Seabrook involved complex factual matters and an extraordinary interrelationship with the Environmental Protection Agency (EPA) during a period in which neither NRC nor EPA had experience with the other's policies and procedures. The Commission should not use Seabrook as its justification to change NRC rules.

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*/ The Commission indicated that, because of the TMI-2 accident, the suspension of Section 2.764 would permit increased Commission supervision of adjudicatory proceedings. 44 Fed. Reg. 65,049, November 9, 1979.

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2. Only Option E (retention of the present system) provides any degree of certainty essential to planning facility construction. Under Option A, a licensing board would be required to determine whether its initial decision should be immediately effective. If the board found "any substantial question on an issue which could be affected by the early stages of construction at the site," the Appeal Board would be required to resolve the merits of the "substantial question" before construction could begin. A substantial question, under Option A, means that the unsuccessful party on an issue has demonstrated "substantial non-frivolous arguments which could be raised on appeal." The notice indicates that Option A is, in effect, the functional equivalent of retention of Section 2.764 but replacement of the Virginia Petroleum Jobbers standards with liberalized stay standards. We oppose this proposal. The Virginia Petroleum Jobbers standards govern the granting of stays pending appellate review.*/ These standards are codified in 10 C.F.R. § 2.788(c) (42 Fed. Reg. 22,128) (1977)) and have been followed by the NRC both before and after the codification. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420-21 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-58, 4 AEC 951, 952 (1972); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 69 at n.6 (Jan. 30, 1979); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 529 (Nov. 2, 1978), reconsideration denied, ALAB-508, 8 NRC 559 (Nov. 24, 1978). The Virginia Petroleum Jobbers criteria are well settled law within the courts and the Commission. They specify that all of the conflicting interests and injuries be weighed in each case and that primary consideration should be given to the public interest. In our view the continuation of the immediate effectiveness rule together with the application of the Virginia Petroleum Jobbers criteria continues to represent the most appropriate accommodation of the interests involved.

Option B provides that construction "would begin only after final appellate review" of construction-related issues. However, Option B indicates that, during appellate review of

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*/ Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). See also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842 (D.C. Cir. 1977); Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 576-77 (5th Cir. 1974).

these issues, the construction permit safety issues would concurrently be heard by the licensing board. By providing appellate review at the same time the licensing proceeding is ongoing, the Option affords parties with one attorney an opportunity to request lengthy extensions to participate in one or the other proceeding. Indeed, the Option specifically provides for such delay.

Option C would simply repeal the immediate effectiveness rule and prevent any construction pending a final agency decision. Option D would make it necessary for a party objecting to construction to seek a stay, but would significantly ease the requirements for obtaining a stay. Both Options are objectionable because both are likely to permit lengthy delays in the final decision on a construction permit. These delays of unknown length cannot be factored into the pre-application planning process. Scheduling for a final agency decision (with Appeal Board and Commission review) is increasingly difficult. Commission reviews in Black Fox and Sterling demonstrate the problem. In Sterling, the Commission granted a petition for review on March 8, 1979 and issued its decision on May 29, 1980. The Commission accepted a certified question in Black Fox on February 20, 1980 and has not yet reached a decision. Moreover, consideration must be given to the fact that the "immediate effectiveness" rule is applicable only after the public has had an opportunity to participate in the NEPA process and any requested hearings. We believe the rule is an acceptable balance of competing interests and is necessary for power plant planning. We, therefore, oppose any change in Section 2.764.

3. We believe that the increased use of referred rulings and Commission monitoring of licensing proceedings could be beneficial if conducted on a timely basis. However, we do not believe that these methods require any change in 10 C.F.R. Part 2. The Commission has ample authority to "reach down" at any time during a proceeding to consider important issues. See 10 C.F.R. §§ 2.718(i), 2.785(d).

Thank you for providing this opportunity to comment on the options under review by the Commission on this important matter.

Sincerely,

Frederic S. Gray

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FSG/gmh