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July 7, 1980

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

Re: Possible Amendments to the "Immediate Effectiveness" Rule, 10 C.F.R. §2.764

Dear Mr. Chilk:

By notice issued on May 16, 1980, and published on May 22, 1980, 45 Fed. Reg. 34279, the Commission has requested public comment on various proposed changes in its regulations. The notice states that the Commission is considering five options. The first three options would eliminate the present "immediately effective" rule with respect to most future decisions authorizing the issuance of a construction permit. The fourth option would relax existing standards for a stay of the issuance of a construction permit. The fifth option would retain the present system unchanged.

As attorneys representing a number of utilities involved in the Commission's licensing process, we wish to offer comments on the notice. It is our position that the Commission should adopt the fifth option, retention of the present system, with a minor modification set forth below.

Pf. 2

Acknowledged by card. 7-9-80

The Commission's notice indicates that the proposed rulemaking is based upon NUREG-0646, "Report of the Advisory Committee on Construction During Adjudication". By letter to you dated March 17, 1980, we have already commented on NUREG-0646. We would ask that our earlier letter be considered in response to the instant notice.

By a sharply-divided vote, NUREG-0644 recommends that the Commission adopt Option B as set forth in the notice. We believe that that recommendation flies in the face of three key findings in the report.

1. "No construction permit has ever been refused on appeal from a Licensing Board decision. Thus, there is no instance in which an appellate reversal has shown that environmental impacts were wrongly permitted under the immediate effectiveness rule." NUREG-0646 at 1-1.

2. "The immediate effectiveness rule saves money. If effectiveness were postponed to allow for appellate review, the applicant would be required to 'carry,' during the period of postponement, its investment up to the point of the construction permit (with no benefit in return)." Id. at 1-2.

3. "[N]o proponent of a stay has ever prevailed ultimately on the merits." Id. at 1-3.

We submit that those findings require the conclusion that the present system is working very well indeed. If so, there is no reason to change it.

We do not wish to burden the Commission with a detailed response to each of the other findings contained in the report. Findings 2 and 5 are effectively rebutted in the Separate Views contained in Appendix M to NUREG-0646. Finding 6, while correct, is misleading. Of course "substantial" environmental impacts may occur when construction is commenced while administrative review is pending. But it is most unlikely that those impacts will be irreversible. Thus, Finding 6 is at best a makeweight. Findings 7, 8, 11, 12, 13, 14, and 15 add little to the discussion and certainly do not contradict the conclusion that the present system works.

Finding 10 suggests that the present system disadvantages intervenors because they "do not have a fair opportunity to file a stay motion." NUREG-0646 at 1-4. While the relatively large number of cases in which stays have been sought suggests that the burden is not insuperable,

we believe that it would be appropriate to modify the rule to provide that an initial decision granting a limited work authorization or a construction permit shall be effective 15 business days after it is served. That would allow three weeks for the preparation of stay papers before any work could be started.

Finding 4 correctly states that: "For pending . . . projects, postponement [of effectiveness] may delay operation." Notwithstanding that finding, the notice states that any change will be applied to "all applications for construction permits which have not begun hearings." 45 Fed. Reg. 34282. While there may be very few viable applications left in that category, it is clearly unfair to make any significant departure from immediate effectiveness applicable to an application filed in reliance on its availability. Any change should apply only to applications not yet docketed.

The Commission has also asked for comment on two "other devices" to "aid" its appellate review function. We have addressed those "other devices" in our March 17 letter, to which we have nothing to add.

In conclusion, we reiterate that the public interest has been both protected and served by the immediate effectiveness rule. It should not be changed.

Sincerely,

Le Boeuf, Lamb, Leiby & MacRae