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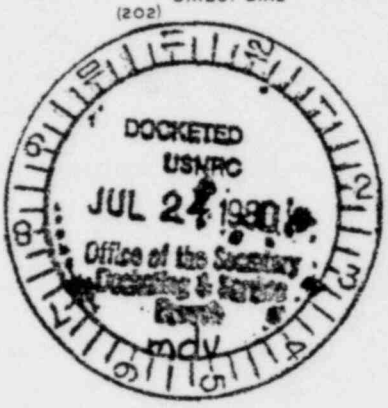

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rulemaking Regarding "Possible Amendments to 'Immediate Effectiveness' Rule" (Fed. Reg. 34279, May 22, 1980)

Dear Mr. Chilk:

By the captioned notice, the Nuclear Regulatory Commission ("NRC" or "Commission") stated its intent to consider possible amendments to the "immediate effectiveness" rule and "stay" provision embodied in 10 CFR §2.764 and §2.788, respectively. Therein the Commission sought public comment on the present rules and on several proposed alternatives to those rules. Accordingly, we respectfully submit the following comments. 1/

As requested by the Commission (45 Fed. Reg. at 34279), we incorporate by reference comments filed by this office on this subject on behalf of several utilities on February 9, 1979 ("Study of Nuclear Power Plant Construction During Adjudication (44 Fed. Reg. 3794, January 18, 1979)") and December 10, 1979 ("Suspension of 10 CFR §2.764 and Statement

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1/ While the public comment period expired on July 7, 1980, we sought and on July 17, 1980 received oral permission to file comments on July 21, 1980.

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of Policy on Conduct of Adjudicatory Proceedings (44 Fed. Reg. 65049, November 9, 1979)"), and those filed independently by Washington Public Power Supply System on July 11, 1979 ("WPPSS Comments on NRC Study of Nuclear Power Plant Construction During Adjudication (44 Fed. Reg. 33883, June 13, 1979)"). As stated therein, we maintain that there is no rational basis or public policy reason for making substantial modifications to the current rules regarding the immediate effectiveness of initial decisions. 2/ In addition to the comments contained in our previous submittals, noted above, we provide the following comments.

The Commission's Advisory Committee on Construction During Adjudication, in its final report (NUREG-06436), sets forth four potential disadvantages to retention of the present rules. NUREG-06436 at pp. 4-8 and 4-9. The most serious of these disadvantages, as proposed by the Committee, is that the current rules create an adverse public perception which is associated with the start of initial construction efforts during the pendancy of an appeal. Id. The Advisory Committee reasons that the "public" may feel that continued pursuit of an appeal is futile in the face of such on-going construction, and thus, public participation and the quality of the administrative review process may decrease.

We respond, in short, that this position is clearly not supported by the facts and experience under the current rules, which indicate that appeals of initial decisions are the rule and not the exception even though construction activities are on-going (e.g., Seabrook and Midland). We submit, and the facts clearly support, that the immediate effectiveness rule has had minimal, if any, adverse impact upon the public's pursuit of appeals, and no apparent adverse impact upon the public's perception of the licensing process. In short, if adverse public perception is a disadvantage to retention of the current rules, it is a very minor disadvantage. Conversely, the benefits to the public and to applicants of retaining the current rules are significant. Both will benefit because power reactors will be completed on a shorter schedule and at a lower cost than if significant delays in commencement of construction follow issuance of initial decisions.

2/ In this regard, we do not object to an automatic stay of approximately 15 days in all contested construction permit cases to afford opposing parties a full opportunity to file stay papers.

The Committee cites as a second, even less serious disadvantage to retention of the current rules the "risk of serious economic and social dislocation due to temporary stays or reversals on the merits." Id. However, no initial decision authorizing construction has ever been reversed on the merits (Id. at 3-1) (due in large measure to the exhaustive staff review of applications) and apparently only one case has resulted in suspension of construction efforts after issuance of an initial decision (i.e. Seabrook). Against these facts, the Committee's concern certainly cannot be viewed as significant. Indeed, such a risk is far less than that shouldered by each utility which seeks an operating license since there is no assurance that such a license will be granted even after complete construction of the facility. In any event, the consequences of this very slight risk is borne by the utility itself. If this risk is too great it is the utility management, and not the NRC, who should, after appropriate analysis, decide whether or not to proceed with construction during the appeal process. In sum, we submit that the economic risk associated with retention of the current rules clearly does not weigh against such retention.3/

The final two disadvantages to retention of current rules cited by the Committee relate to the Committee's assertion that such retention "ensures that in most cases substantial construction will have occurred before the Commission, and to a lesser extent the Appeal Board, has its initial opportunity to consider the issues presented by the case" and, further, that "substantial and often irreversible environmental impacts will occur before the administrative process is complete." The basis for these stated disadvantages is apparently the Committee's position that (1) current rules preclude the Commission and/or Appeal Board from reviewing "troublesome cases" prior to commencement of construction and (2) the quality of reviews of applications by the NRC Staff, the ACRS and Licensing Boards is questionable. We submit that such a position is erroneous.

3/ In this regard, we maintain that it is irrational to alter the current rules based on a virtually nonexistent risk of economic penalty and replace it with a system in which delay and, thus, economic penalty is inherent.

With respect to Commission involvement in the licensing process, we maintain that application of, inter alia, the "immediate effectiveness" rule together with judicious administration of the "stay" provisions of 10 CFR §2.764, and §2.788, the certiorari procedure of 10 CFR §2.786, and the referral and certification provisions of 10 CFR §2.718 and §2.730, provides the Commission and the Appeal Board a completely satisfactory means of becoming more involved in the licensing process by selectively interceding in various proceedings. In addition, the Commissioners always have the capability to become more actively involved in the licensing process through their inherent oversight authority. The Commission recognizes that current rules do not preclude its greater involvement in the early stages of the licensing process. In fact, the Commission has stated its intent to consider increased use of referred rulings and Commission monitoring of licensing board proceedings. 45 Fed. Reg. at 34282. In short, there is no merit to the view that current rules preclude the Commission and Appeal Board from total or selective involvement in licensing actions prior to initiation of construction.

As to the quality of NRC review, the fact that no licenses have been ultimately revoked on appeal (after the application has traversed the long and arduous path of NRC Staff, ACRS, and Licensing Board review) is indicative of the quality and thoroughness of NRC review. Indeed, the Commission is unique from all other agencies in this regard. No other industry is so highly regulated, or requires for approval of a license to construct a facility such a comprehensive review by the agency staff, a second review by an independent body of experts, and then litigation of the entire issue before a tribunal of two technical experts and one lawyer who are authorized to pursue issues sua sponte. Indeed, the fact that initial decisions are ultimately upheld is not a matter of happenstance, but is rather an indication of the quality of the review process in which questionable applications are withdrawn in the course of the review or problem areas are otherwise resolved. Id. at p. 3-1. In short, there is no basis for questioning the quality of the review process which leads to issuance of an initial decision.

We submit that the purported disadvantages of retention of the current rules cited by the Committee are insignificant and do not weigh heavily against doing so. On the other hand, the advantages of retention of the present approach, including the predictability and expedition of the licensing process (see NUREG 06436 at pp. 4-6 and 4-7), clearly weigh in favor of retaining the current rules.4/

The alternatives to retention of the current rules that the Commission proposes each has significant disadvantages (see NUREG-06436 at pp. 1-7 through 1-16) not the least of which is significant delays in the licensing process. Id. For example, Alternatives A and D contain a modified stay standard which would require issuance of a stay upon the existence of "any substantial question on an issue which could be affected by the early stages of construction at the site." 45 Fed. Reg. at pp. 34280-34281. We maintain that such a relaxed standard could, in effect, result in a stay of virtually every initial decision, a result which obviously would work against the public interest.5/ In short, we see no rational basis for rejecting a workable system which has few disadvantages and prevents undue delay in the licensing process, with a system which is unknown, has serious disadvantages and in which delay is inherent.

4/ That the current rules prevent commitments of resources that may result in irreparable harm to the environment prior to appellate review is clear from an analysis of the Appeal Board decisions in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1) ALAB-192, 7 AEC 420 (1974) and ALAB-200, 7 AEC 483 (1974).

5/ In this regard, we maintain that the current stay standards provide a flexible and proper balancing of, primarily, irreparable harm and likelihood of success on the merits, to achieve a fair and equitable means of determining when an initial decision should be stayed. Thus, as in Bailly, supra, where the certainty of irreparable harm was high, the necessity of a substantial showing of likelihood of success on the merits was significantly decreased. Bailly stands for one proposition, that the present system works.

In addition, we note that while this rulemaking proceeding is not designed to address or modify the rules regarding the immediate effectiveness of initial decisions in operating licensing cases (45 Fed. Reg. at 34279), some of the alternatives (i.e., Alternatives A, B, C and D) delete the language of 10 CFR §2.764 which makes such initial decisions immediately effective. 6/ We submit that treatment of such issues is clearly beyond the scope of the Committee's report and the instant rulemaking proceeding. In any event, we submit that there is no factual supporting basis for modifying the current rules as they apply to operating licenses and thus, if it is the Commission's intent to address such issues, the Commission should first direct that studies be conducted, and provide the public an opportunity to comment on such studies. See Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831, 842 (5th Cir. 1978); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) cert. denied 417 U.S. 921 (1974).

From the foregoing we strongly urge the Commission to reject the proposed alternatives to the current rules, and, with the exception of the modification addressed in note 2 above, to retain such rules intact. We appreciate the opportunity to provide the Commission with our views on this important area.

Respectfully submitted,

J. Michael McGarry, III
Nicholas S. Reynolds
Malcolm H. Philips, Jr.

6/ We, of course, are cognizant of the temporary suspension of 10 CFR §2.764. However, when this suspension is lifted, the immediate effectiveness of initial decisions authorizing issuance of operating licenses should be unaffected by the instant rulemaking.