PROPOSED RULE 10 CFR 170 (45 FR 74493) (4)

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December 8, 1980

Secretary to the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Proposed Amendment to 10 C.F.R. Part 170
(45 Fed. Reg. 74493 (1980))

Dear Sir:

In response to the November 10, 1980, Federal Register notice (45 Fed. Reg. 74493), we submit the attached comments on the Commission's proposed "interpretative rule" concerning 10 C.F.R. Part 170. The comments are submitted on behalf of Alabama Power Company, Delmarva Power & Light Company, The Detroit Edison Company, New England Power Company, New York State Electric & Gas Corporation, Northeast Utilities Company, Ohio Edison Company, Omaha Public Power District, Philadelphia Electric Company, Power Authority of the State of New York, Potomac Electric Power Company, Public Service Electric & Gas Company, San Diego Gas & Electric Company, The Toledo Edison Company, and Wisconsin Electric Power Company.

Very truly yours,

Gerald Charnoff

encl

Acknowledged by card. 12/12/80

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COMMENTS ON
PROPOSED AMENDMENT TO 10 C.F.R. PART 170

I. INTRODUCTION

In the November 10, 1980 Federal Register, the Nuclear Regulatory Commission published for comment a proposed "interpretative rule" concerning 10 C.F.R. Part 170. 45 Fed. Reg. 74493 (1980). The Federal Register notice states that the purpose of the proposed rule is

> to clarify that fees for review will be charged, as appropriate, when review of an application is completed, whether by issuance of a permit, license or other approval, or by denial or withdrawal of an application, or by any other event that brings active Commission review of the application to an end.

The notice further states that the proposed new language "merely restates what the Commission's rule has been on collecting fees for withdrawn or otherwise terminated applications since the promulgation of revisions to 10 C.F.R. Part 170 (43 FR 7418)". 45 Fed. Reg. at 74494 (1980). According to the notice, this so-called "clarifying language" is to be applied to all license applications on file with the Commission on or after March 23, 1978, the effective date of the current fee regulations.

On behalf of Alabama Power Company, Delmarva Power & Light Company, The Detroit Edison Company, New England Power Company, New York State Electric & Gas Corporation, Northeast Utilities Company, Ohio Edison Company, Omaha Public Power District, Philadelphia Electric Company, Power Authority of the State of New York, Potomac Electric Power Company, Public Service Electric & Gas Company, San Diego Gas & Electric Company, The Toledo Edison Company and Wisconsin Electric Power Company, we submit the following comments on the proposed rule. The comments address the fee rule as it applies to power reactors, although the principles are, we believe, generally applicable.

We submit that the current rule, which has been in effect since March 23, 1978, cannot reasonably be interpreted to authorize the imposition of fees (beyond the initial application fee itself) for power reactor applications that are withdrawn.

As shown below, it is undisputed that the fee regulations in effect before March 23, 1978, did not contemplate assessment of fees, other than the initial application fee, on withdrawn applications.[1] There is nothing in the language or administrative history of the 1978 rule to suggest that the Commission intended any change in this policy. To the contrary, it

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1 An application presumably is considered "withdrawn" for fee purposes whenever the applicant formally expresses an intent to withdraw its application, even though the withdrawal may require some action by the Commission to be "effective."

appears that in promulgating the 1978 fee regulations, the Commission considered the problem of withdrawn applications and deliberately chose to adhere to the previous practice of retaining the initial application fee but charging no other license fee when an application is withdrawn. Accordingly, the Commission's proposed amendment to Part 170 is far from a simple "interpretation" or "clarification" of the current fee rules. Rather, it is a substantive amendment by which the Commission for the first time seeks to impose license fees on withdrawn applications. Finally, we believe that the Commission's attempt to apply the new amendment retroactively to all applications pending on or after March 23, 1978, constitutes impermissible, unauthorized and inequitable agency action.

II. THE CURRENT NRC REGULATIONS DO NOT AUTHORIZE ADDITIONAL FEES FOR WITHDRAWN APPLICATIONS

A. The Statutory Framework

The statutory basis for the imposition of application and license fees by the NRC is found in Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a (1976) ("IOAA"), which sets forth a general grant of authority to federal agencies to prescribe "by regulation" appropriate and fair fees, charges and prices for work performed and services rendered. The IOAA does not itself set or require fee schedules. Thus, if a particular agency fails to include certain

fees or charges in its implementing regulations, those fees cannot be collected. Indeed, this point weighed heavily in the Court of Claims' recent decision in Alyeska Pipeline Service Co. v. United States 624 F.2d 1005, 1009 (Ct. Cl. 1980), wherein it was stated:

> The general rule applicable to all agencies, as provided in the Independent Offices Appropriation Act, 31 U.S.C. 483a (1976), is that the government may obtain reimbursement of its expenses in issuing licenses or permits only pursuant to authorizing regulations. (emphasis added)

Accordingly, the Commission is without statutory authority to collect fees on withdrawn applications unless its regulations specifically authorize such fees.

B. History of the NRC's Fee Regulations

Turning to the NRC's current implementing regulations under the IOAA, 10 C.F.R. Part 170, we find no legitimate basis for the Commission's contention that provision has been made therein, either directly or by fair inference, for the payment of fees (other than the application fee) for NRC review of applications that are withdrawn before issuance of the license or permit. Indeed, the very Staff paper that recommended the proposed "interpretative rule" openly acknowledged that "Part 170 does not explicitly state that a fee for review will be charged on the withdrawal of an application."[2] The reason why

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2 Fees for Withdrawn Applications for Power Reactor Construction Permits, Operating Licenses, and Other Approvals

no such provision was included in the regulation is readily explainable: in a word, Part 170 already contained a mechanism for handling the costs associated with agency review of applications that are subsequently withdrawn. Since fee regulations were first proposed by the Commission in 1967, the Commission has required a fee payment by the applicant upon the filing of the construction permit application. While this application fee was at first relatively modest, it was escalated in the early 1970's to a substantial amount.[3] From the start, Part 170 has made this initial application fee a nonrefundable obligation, even if the application were subsequently withdrawn. Thus, § 170.12(a) as originally proposed in 1967, provided:

> All application fees will be charged <u>irrespective of the Commission's disposition of the application or a withdrawal of the application</u>.

32 Fed. Reg. at 3997 (1967) (emphasis added). This language has remained in the fee regulation ever since. <u>See</u> 43 Fed. Reg. at 7218 (1978).

(continued)
or Reviews, SECY-80-364 (August 4, 1980). At most, SECY-80-364 argues that the imposition of such fees is not inconsistent with fee guidelines approved by the Commission and the Court of Appeals in <u>Mississippi Power & Light Co. v. NRC</u>, 601 F.2d 223 (5th Cir. 1979), <u>cert. denied</u>, 444 U.S. 1102 (1980), and is "analogous" to fees imposed by § 170.21 for "special projects and reviews." SECY-80-364 at 3.

3 The application fee for power reactors was first proposed at $2,500 (32 Fed. Reg. 3995, 3997 (1967)). It was increased to $25,000 (36 Fed. Reg. 145, 146 (1971)), then to $70,000 (37 Fed. Reg. 8074, 8075 (1972)), and finally to $125,000 (38 Fed. Reg. 18443 (1973)).

The purpose of the non-refundable application fee is obvious. It is to receive "up front" a substantial sum so that if an application were withdrawn, the Commission's review effort to the date of withdrawal would not go entirely uncompensated. The Commission itself so stated in the 1977 proposed regulations which preceded promulgation of the current regulations in 1978. There, the Commission described in detail the development of its fees, explaining the purpose of the application fee for power reactors in the following terms:

> The application fee is part of the construction permit fee moved up front so that when applications for nuclear power plants are withdrawn, cancelled or denied, the Commission will recover part of its review costs.

42 Fed. Reg. at 22159 (1977) (emphasis added).[4] In light of this explicit acknowledgement by the Commission of the mechanism in the proposed rule for dealing with the review costs of withdrawn applications, any change thereafter in the Commission's fee requirements for such applications should have been set forth in its implementing regulations clearly and unambiguously. We have searched in vain for any indication that the Commission has altered its position in this regard since 1977.[5] Our search even included a request under the

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4 It is noteworthy that this language was not called to the Commission's attention in SECY-80-364. Nor is it acknowledged in the November 10, 1980 Federal Register notice. It may be that those who prepared SECY-80-364 were not aware of this language when SECY-80-364 was issued.

5 In fact, the 1978 Federal Register notice adopting the current fee regulations refers back to the 1977 notice for

Freedom of Information Act, 5 U.S.C. § 552 (1976), for all documents that supported the Commission's assertion that it intended in promulgating the 1978 rule to assess fees for withdrawn applications (beyond the initial application fee). The Commission's response to this request was that it had "[n]o records."[6]

A review of the recent history of the fee regulation is illuminating. The 1977 proposed revision to Part 170 was the subject of extensive public comment. An examination of these comments reveals that no one took issue with the Commission's decision to continue to use the initial application fee as the mechanism for recovering costs of withdrawn applications. Nor did anyone so much as indicate that Commission policy on this point might for some reason be susceptible to another "interpretation" that could perhaps permit a different fee arrangement with respect to applications that were withdrawn, denied, suspended or postponed. Moreover at a public meeting to explain the 1977 proposals, the NRC Staff further reinforced the understanding that no change was intended by stating that fees for construction permits and operating licenses would be collected "on the same basis as we have in the past".[7]

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its description of the fee computation method and the NRC's fee guidelines. 43 Fed. Reg. at 7211 (1978).

6 See Letter from Jay E. Silberg to Director, Office of Administration, dated October 30, 1980 (Item 9) and NRC FOIA Response 80-536 (letter from J. M. Felton, Director, Division of Rules and Regulations, to Jay E. Silberg, dated November 21, 1980, Appendix, Category 9).

7 Public Meeting to Review the Proposed Schedule of Fees, Guidelines and Method of Computation (May 12, 1977), Transcript at 21.

The significance of this reaffirmation of the NRC's past practice should not be lightly dismissed. In 1974, following the Supreme Court decisions in National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974), the NRC proposed a radical revision to its existing fee schedules and structures. One of the major departures proposed at that time was to provide that fees for construction permits and operating licenses

> would be payable in three equal installments as the Regulatory Staff processes the application. This amendment would eliminate the current procedure of collecting such fees only at the time the permit or license is issued.

39 Fed. Reg. 39734 (1974). Pursuant to this proposal, the first installment would be paid 6 months after the application was filed, the second 12 months after filing, and the third either 18 months after filing or at the time the license was issued, whichever is sooner.

This "pay-as-you-go" scheme would clearly have required applicants to submit periodic payments with respect to costs incurred during the review process whether a license issued after completion of the NRC review or the review terminated prematurely by virtue of an applicant's decision to withdraw. Significantly, however, following consideration of this 1974 proposal, the Commission elected not to adopt the fee installment procedure, but to retain the payment scheme based on an

initial non-refundable deposit and a subsequent fee payment on issuance of a permit or license. Thus, the 1974 proposal was superseded by the 1977 proposal when the Commission determined to proceed "on the same basis [as] in the past" (note 7, supra).

C. Promulgation of the Current Regulations in 1978

Changes were made to the 1977 proposals when the revised fee schedules were promulgated in 1978. Contrary to what seems to be implied in SECY-80-364, these modifications had nothing to do with the assessment of additional fees for withdrawn applications. The existing requirement in § 170.12(a) for a non-refundable payment by each applicant on filing its application "irrespective of the Commission's disposition of the application or a withdrawal of the application" remained untouched without any indication that its essential purposes, as earlier described by the Commission, had changed in any respect. What the Commission did change by the 1978 amendments to Part 170 was an entirely separate part of the fee regulation -- one dealing not with recovering any additional costs of processing withdrawn applications, but rather with assuring that the fees for completed reviews would not exceed the incurred costs and with the timing of fee payment for construction permits and operating licenses.

Under the 1977 proposal, the fees for construction permits and operating licenses were payable when the permit or license was issued.[8] In 1978, the Commission revised this payment requirement so that the obligation no longer came due, as a matter of regulation, on issuance of the license, but instead was tied to "notification by the Commission when review of the project is completed." The new language read as follows:

> Fees for construction permits, operating licenses, and materials licenses, are payable upon notification by the Commission when review of the project is completed.

10 C.F.R. § 170.12(b), 43 Fed. Reg. at 7218-7219 (1978). A similar provision was also added in 1978 to footnote 3 to the Schedule of Facility Fees:

> When review of the permit, license, approval or amendment is complete, the expenditures for professional manpower and appropriate support services will be determined and the resultant fee assessed, but in no event will the fee exceed that

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8 10 C.F.R. § 170.12(b), as embodied in the 1977 proposal, provided:

> Fees for construction permits and operating licenses are payable when the construction permit or operating license is issued. No construction permit or operating license will be issued by the Commission until the full amount of the fee prescribed in this part has been paid.

Similar language had existed since the original fee regulations. 32 Fed. Reg. at 3997 (1967).

shown in the schedule of facility fees.

10 C.F.R. § 170.21, footnote 3 (43 Fed. Reg. at 7220).

SECY-80-364 now argues that upon the withdrawal of an application, the NRC Staff review "is complete" and fees for the review accomplished prior to this "completion" can then be assessed. This argument finds no support in the language of the 1978 amendment or in the Commission's explanation of its actions. The changes in § 170.12(b) and footnote 3 to § 170.21 were not brought about to deal with withdrawn applications. Rather, they were intended to reflect a change in the overall facility fees concept. Prior to the 1978 revisions, the amount of fees to be paid by an applicant on issuance of a permit or license was a flat amount specified in the Schedule of Facility Fees that bore no necessary correlation to the actual costs associated with full agency review of the particular application.[9] The new system adopted in 1978 was to be far more sensitive to actual costs. Under the 1978 revisions, after all Staff work had been completed on a particular application, the Staff was to determine the review costs actually incurred in that proceeding. The amount was then to be assessed up to the maximum amount specified in the fee schedule.

In moving to this more precise case-by-case analysis, the Commission was responding to public comments that the proposed

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9 See, e.g., § 170.21 (38 Fed. Reg. at 18443 (1973)).

1977 regulations "fail[ed] to provide an incentive for industry to standardize and, in fact, may serve as a disincentive." 43 Fed. Reg. at 7213 (1978). This was cause for concern to the Commission because of its stated belief that the cost of licensing reviews would decrease as industry standardization increased. Its 1978 revisions therefore were designed to encourage such standardization by providing a mechanism for a corresponding decrease in fees as actual costs decreased and by setting a ceiling on the maximum assessment that could be made. 43 Fed. Reg. at 7214. Thus, the first (and presumably most significant) change from the 1977 proposals, as described in the 1978 Federal Register notice, was the following:

> CHANGES INCORPORATED IN FINAL RULE 1. The schedule of facility fees has been revised to provide that charges for construction permits, operating licenses, facility manufacturing licenses, review of standardized reference designs filed by vendors and architect-engineers, and topical report reviews will be based on the expenditures for professional manpower and appropriate support services required to process the application or request. Such charges will not exceed the fees shown in § 170.21.

43 Fed. Reg. at 7216.

Since the fee under the new rule was to be based on actual review costs, it was obviously no longer possible to collect a flat sum automatically upon issuance of a construction permit or an operating license. Rather, an opportunity had to be provided for the Commission to calculate the actual costs after all review work had been completed. Thus, § 170.12(b) was

changed so that construction permit and operating license fees were payable "upon notification by the Commission when the review of the project is completed." This new language in § 170.12(b), which was also added to footnote 3 of § 170.21, had nothing to do with the separate issue of fee payments on withdrawal of an application, but was simply designed to accommodate the new requirement for calculating fees based on actual costs.[10] Indeed, this is how the Commission itself described the amendment to § 170.12(b):

> The regulation in § 170.12 concerning the remittance of fees by applicants and licensees has been revised in its entirety to accommodate the amended rule.

43 Fed. Reg. at 7216. Surely if the new language of § 170.12(b) had been intended as a policy change on the fee treatment of withdrawn applications, a more precise description of its intended effect would have been required.[11]

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10 The historical development of Part 170 clearly supports this analysis. In the 1977 proposal, the concept of fee payment upon completion of the NRC review appeared for reprocessing facilities. § 170.21, fn. 7, 42 Fed. Reg. at 22163 (1977). The explanation for this provision was the uncertainty of the review costs. 42 Fed. Reg. at 22161 (1977). Since the Commission acknowledges that the 1977 proposal did not permit assessment of fees for withdrawn applications, 45 Fed. Reg. at 74494, the payment on completion language, which also appeared in 1977, cannot support such an assessment.

11 The statement accompanying a promulgated rule must identify the major policy issues ventilated and why the agency reacted to them as it did. National Ind. Sand Ass'n v. Marshall, 601 F.2d 689, 716 (3d Cir. 1979). Moreover, if the NRC had attempted in 1978 to deal with fees for withdrawn

Since the Commission did not attach any great significance to the new language of § 170.12(b), and certainly was totally silent on any implication that the change might have on the question of fees for withdrawn applications, the Commission cannot now argue that in 1978 it intentionally changed the groundrules for such fees. Indeed, the fact is that even the 1978 version of § 170.12(b) continues to refer to "fees for construction permits, operating licenses, manufacturing licenses, and materials licenses." This is hardly a basis for arguing that § 170.12(b) as of 1978 was intended to authorize fees in cases where no license or permit was issued. The courts have rejected similar after-the-fact "interpretations" by administrative agencies. For example, in Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Em. App. 1978), the court rejected an interpretation of Federal Energy Administration regulations based on FEA's uncommunicated intent:

> In fairness to the regulated, the provisions of the regulation should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover.

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applications on a different basis than that proposed in 1977, it would likely have been invalid. Where a rule as finally issued is substantially different from that proposed and the difference was not discussed in the rulemaking proceeding, the courts have held that the opportunity for public comment was denied and have invalidated the rule. See, e.g., American Frozen Foods Institute v. Train, 539 F.2d 107 (D.C. Cir. 1976); Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972).

596 F.2d at 1064, quoting Tobin v. Edward S. Wagner Co., 187 F.2d 977 (2d Cir. 1951) (Frank, J.). The court went on to hold that it

> will not cure that defect by parroting the strained post hoc "interpretation" which the agency expressed for the first time on February 1, 1976.

596 F.2d at 1064, quoting Standard Oil Co. v. Federal Energy Administration, 453 F. Supp. 203, 245-46 (N.D. Ohio 1978). We believe that the "interpretative rule" at issue here is subject to the same infirmity.

D. Explicit Treatment of Withdrawal in Other Fee Contexts

Another point that substantially undermines the Commission's "after-the-fact" interpretation of its fee regulations deserves special mention. Part 170 is not totally silent with respect to the matter of withdrawn applications; where the NRC felt that it was important to deal with the consequences of a withdrawn application in Part 170, it did so explicitly.

For example, § 170.12(a) clearly states that the initial application fee will not be refunded upon "a withdrawal of the application." The NRC thus demonstrated that it was fully aware of the possibility of withdrawn applications when it promulgated Part 170. If the Commission really intended in 1978 to assess additional license fees on withdrawn applications, it could have and would have said so explicitly in

§ 170.12(b). The explicit treatment given to withdrawn applications in certain parts of the regulation argues forcefully against implying other consequences of withdrawal where not explicitly addressed. This is particularly so where the Commission has provided detailed regulatory treatment of withdrawn applications in other contexts. For example, 10 C.F.R. § 2.107 spells out the procedures for withdrawing an application, once again showing that when the Commission wanted to deal with withdrawn applications, it knew how to do so and did so explicitly.

An equally telling example appears in footnote 4 to § 170.21, which deals with fees for "special projects and reviews", such as early site reviews. A site that is the subject of an early site review may simultaneously be the subject of a construction permit application. Footnote 4 did not appear in the 1977 proposal, but was added in the 1978 rule as finally promulgated in order to address the license fee implications of this double application situation.[12] It provides as follows:

> Where a fee has been paid for a facility early site review, the charge will be deducted from the fee for a construction permit issued for that site. A separate charge will not be assessed for a site review where the person requesting the review has an application for a construction permit on file for the same site,

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12 Indeed, footnote 4 was the only language dealing with withdrawn applications that was added to Part 170 in 1978.

except where the application is withdrawn by the applicant or denied by the Commission. (emphasis added)

Footnote 4 is based on the premise that the fee for a site review will ordinarily be included in the construction permit fee. The final "except" clause is necessary so that the early site review fee can be collected separately in the event that the construction permit application is withdrawn and no construction permit fee can be charged.[13] However, if the Commission is correct in its "interpretation" here -- that the current regulations were always intended to require payment of license fees on withdrawn construction permit applications -- then the "except" clause in footnote 4 would be rendered totally meaningless and redundant. This is so because the construction permit fee still would be payable despite withdrawal and would include the costs of the NRC review of the site portion of the application. In short, there would be no need for a special proviso to ensure collection of the site review fee upon withdrawal of the construction permit application. Furthermore, when the Commission's new "interpretation" is applied together with a literal reading of the "except" clause in footnote 4, it appears that the Commission

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13 Of course, no fee would be payable for an early site review, even if completed, where a complete application was filed prior to the effective date of the 1978 regulations. The Commission specifically exempted such applications from payment of fees. See 43 Fed. Reg. 7214-15. In no event should or can the Commission's new "interpretative rule" alter this exemption granted in 1978.

technically could collect a separate site review fee in addition to a fee on the withdrawn construction permit application. This obviously would result in an illegal double recovery by the Commission.

Accordingly, the argument that in 1978 the Commission intended to charge fees on withdrawn applications can be made only if one is prepared to assume that the Commission deliberately inserted in footnote 4 a redundant and unnecessary clause that could yield an illegal double fee recovery by the Commission. Such irrational regulatory behavior cannot properly be attributed to an administrative agency. To the contrary, the only logical conclusion is that the Commission would not have included the "except" clause in footnote 4 if it truly intended in 1978 that fees could be charged on withdrawn construction permit applications. Yet the Commission did add the "except" clause to the final rule in 1978, which plainly demonstrates that the Commission expressly considered the problem of withdrawn applications and chose to adhere to the prior practice of charging no fee for withdrawn applications other than the initial application filing fee.

E. The NRC's Fee Guidelines

Similarly, the fee guidelines approved by the Commission and by the Court of Appeals in Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102

(1980), provide no support for the Commission's current position. There are two obvious reasons for reaching such a conclusion. First, the guidelines are not themselves regulations. Rather than setting forth rules or directives that must be adhered to, they attempt to define the outer limits of permissible agency conduct. This is clearly reflected in the Commission's own description of the fee guidelines as a means to "determine whether or not the Commission may charge a fee for a particular service and what the maximum fee may be." 43 Fed. Reg. at 7211 (emphasis added). It is, however, the regulations promulgated under IOAA -- and those regulations alone -- which determine what agency charges can be made (see pp. 3-4 supra). Thus, small comfort is to be derived from the fact that the NRC guidelines arguably go farther than the regulations permit. For, if a fee assessment on withdrawal is not covered by the regulations, it cannot be incorporated therein by inference merely because it may come within the broader confines of the guidelines.

The second reason why the guidelines are not pertinent here is that the guidelines were formulated prior to the time when the Commission now claims it first manifested an intent to assess additional fees on withdrawn applications. According to the November 10, 1980 Federal Register notice, the Commission's so-called "rule" that fees were to be assessed for the review costs of withdrawn applications came into existence in February, 1978:

> [T]he new language [proposed in the November 10, 1980 notice] merely restates what the Commission's rule has been on collecting fees for withdrawn or otherwise terminated applications since the promulgation of revisions to 10 CFR Part 170 (43 FR 7418) . . .

45 Fed. Reg. at 74494 (emphasis added). Yet the guidelines appeared in essentially their current form in the 1977 proposed rulemaking.[14] See 43 Fed. Reg. at 7211. Since even the Commission does not appear to be asserting that the 1977 proposed revisions to Part 170 would have authorized license fees for the review of withdrawn applications[15], the guidelines can provide no independent basis for interpreting the regulations to include additional license fees for withdrawn applications.

III. THE NRC'S INTERPRETATION WOULD PERMIT AN IMPERMISSIBLE RETROACTIVE FEE ASSESSMENT

The Commission's proposed amendment to Part 170 would by its terms apply retroactively to "all applications for

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14 Although there are very minor differences in the wording between the 1977 and 1978 versions of the guidelines, these differences do not appear significant to the issue at hand. Nor were the differences important enough to be discussed by the Commission in the Federal Register statement accompanying the 1978 rules.

15 This is because the 1977 proposal was still structured in terms of fee payment upon license issuance (§ 170.12(b), 42 Fed. Reg. at 22162) and because of the explicit language quoted above that the non-refundable application fee was intended as the mechanism for dealing with the review costs for withdrawn applications.

licenses, permits, approvals or requests for review of special projects on file with the Commission on or after March 23, 1978". Such retroactive application of the amendment would impose a severe hardship on large numbers of applicants in a manner that is wholly improper and invalid.[16]

As noted above, neither the 1978 fee regulations nor the earlier versions of Part 170 could reasonably have been understood to require payment of license fees on withdrawn applications in addition to the initial application fee. Utilities have heretofore proceeded on the justifiable assumption that no such withdrawal fee was contemplated, and thus they have not taken withdrawal fees into consideration as events in recent years have prompted a reevaluation of power generation plans. Now, for the first time, the Commission is attempting to assess fees under the new proposal that could have been avoided if the application on file had been withdrawn prior to March 23, 1978. According to the "interpretative rule", substantial monetary charges will now be imposed retroactively for costs associated with agency reviews that

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16 The Commission has characterized the proposed revision of Part 170 as simply "interpretative" or "clarifying," rather than a substantive amendment to the regulations. As shown above, this characterization will not withstand scrutiny. In any event, however the revision is characterized, the analysis of its retroactive impact remains the same, and the courts will not hesitate to invalidate a retroactive rule merely because the agency has labeled it "interpretative." See, e.g., Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980) (retroactive agency "interpretation" of regulation invalid).

occurred not only prior to the effective date of the current proposal, but also well before the March 23, 1978 date. This fundamental unfairness renders the Commission's proposed amendment arbitrary and unreasonable under the Administrative Procedure Act, 5 U.S.C. § 706 (1976), and invalid under the well-established limitations on an administrative agency's power to enforce retroactive regulations.

In the leading case of SEC v. Chenery Corp., 332 U.S. 194 (1947), the Supreme Court held that administrative rules may be applied retroactively only if "the ill effect of the retroactive application" is outweighed by the need to avoid some "mischief" that is "contrary to a statutory design or to legal and equitable principles." 332 U.S. at 203. Accord, Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 389-90 (D.C. Cir. 1972). Judge Friendly's opinion in NLRB v. Majestic Weaving Co., 335 F.2d 854 (2d Cir. 1966), is one of the most widely quoted applications of the "balancing" approach outlined in Chenery. In Majestic Weaving, the court was highly critical of the Board's attempt to apply a rule retroactively:

> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer previously left without, see NLRB v. Pease Oil Co., 279 F.2d 135, 137-139 (2 Cir. 1960), or shortens the period in which a collective bargaining agreement may bar a new election, see Leedom v. International Bhd. of Elec. Workers, 107

> U.S. App.D.C. 357, 278 F.2d 237, 243 (1960), or imposes a more severe remedy for conduct already prohibited, see NLRB v. A. P. W. Prods. Co., supra. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.

355 F.2d at 860 (emphasis added).

This passage is fully applicable here. The Commission is attempting to assess a very large financial charge that the utilities could well have avoided if the Commission had made known in 1978 or earlier its new disposition to charge license fees on withdrawn applications. Such agency action has been regularly invalidated by the courts. As stated in Boston Edison Co. v. FPC, 557 F.2d 845 (D.C. Cir.), cert. denied, 434 U.S. 956 (1977):

> Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.

557 F.2d at 849 (emphasis added).

Pursuant to this settled principle, the Commission may not change its fee rules by retroactive application to prior events; it must apply its new rule on withdrawn applications only prospectively as of the date it takes effect. This means that at most the Commission can properly assess license fees on withdrawn applications only for services -- assuming they

qualify as special benefits within the meaning of the IOAA -- that an applicant requests or causes the Commission to perform after the effective date of the amendment. In addition, as the above passage from Boston Edison states, adequate notice must be given as to any change in the Commission's standards or rules. Obviously such notice is essential so that the persons being regulated can adjust their conduct in accordance with the regulatory changes.

This concept of advance notice was virtually decisive in Public Service Co. v. Andrus, 433 F. Supp. 144 (D. Colo. 1977), a case decided on facts highly similar to those involved here. In that case, the agency sought to increase its fees for processing and monitoring applications for rights-of-way across public lands. The regulation increasing the fees was published on April 23, 1975, but was effective only with respect to applications pending on June 1, 1975. The court sustained the rule against a retroactivity attack, but only because the applicants

> were warned in advance of the effective date of the regulation that if applications were pending on June 1, 1975 the applicant would become liable for proper costs of processing and monitoring. Cf., N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). Plaintiffs had the option to withdraw their applications before June 1, 1975, but chose not to do so.

433 F. Supp. at 154 (emphasis added).

A similar line of cases involves an HEW regulation calling for the reimbursement of accelerated depreciation payments

previously made to Medicare providers. In each case the retroactive effect of the regulation was sustained principally because the regulation contained a six-month grace period during which the providers could withdraw from the Medicare program and avoid the depreciation recapture. Springdale Convalescent Center v. Mathews, 545 F.2d 943, 956 (5th Cir. 1977); Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger, 543 F.2d 703, 708 (9th Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977); Summit Nursing Home, Inc. v. United States, 572 F.2d 737, 744 (Ct. Cl. 1978).

In stark contrast to these cases, the Commission has given no advance warning that license fees would be assessed on withdrawn applications, and it has provided no grace period or other opportunity for withdrawal of applications prior to the effective date of the new rule. This is plainly not the sort of advance notice that the Boston Edison court had in mind or that would survive judicial scrutiny under the cases cited above.

Under all the circumstances, it is clear that retroactive application of the Commission's proposed amendment to Part 170 will have -- in the words of the Chenery opinion -- an "ill effect" on utilities and their customers that is substantial both in terms of the dollar amounts involved and in terms of the fundamental unfairness of disrupting settled expectations and attaching adverse consequences to actions after they have been taken. Balanced against this ill effect, there is no

"mischief" that would result if the proposed amendment were limited to prospective operation. Certainly the statutory design of the IOAA does not necessitate retroactive application of the proposed amendment. As shown above, the IOAA by its terms does not require collection of license fees on withdrawn applications.[17] Indeed, the statute is more susceptible to the opposite interpretation -- that fees may not be collected when no license or permit is issued and the applicant has derived no special benefit from the Government. See FPC v. New England Power Co., 415 U.S. 345, 349-50 (1974).

Moreover, as discussed above, the IOAA permits assessment of fees only pursuant to specific implementing regulations. Here, of course, there were no such regulations covering withdrawn applications during the pertinent periods. On this point, the recent decision of the Court of Claims in Alyeska Pipeline Service Co. v. United States, supra, provides considerable guidance. In Alyeska, the Government sought to collect more than $12 million in fees for processing the

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17 For example, no such requirement is imposed by agencies such as the Civil Aeronautics Board, Federal Aviation Administration, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Maritime Administration and Securities and Exchange Commission. Only one regulation has been found which calls for fees on withdrawn applications. 43 C.F.R. § 2802.1-2 (1979) (Bureau of Land Management). It is significant, however, that the Bureau of Land Management has statutory authority for its regulations independent of the IOAA namely, the Public Land Administration Act, 43 U.S.C. §§ 1371, 1374 (1976), and the 1973 amendments to the Mineral Leasing Act, 87 Stat. 576, 579. See Public Service Co. v. Andrus, supra.

plaintiff's application to build the trans-Alaska oil pipeline. In 1975, the Interior Department adopted regulations that would have allowed imposition of such a fee. However, the Department had performed its services in connection with the pipeline application before 1975, at a time when the regulations provided for only a $10 application fee. The court held that under the IOAA fees may be collected only for services rendered by the Government during a period when specific regulations authorizing the fees are in effect. Since the Interior Department's regulations were not adopted until after the work on the pipeline application had been completed, the assessment of a $12 million fee pursuant to those regulations was held invalid.

The Alyeska case demonstrates beyond doubt that the statutory design and purposes of the IOAA are not sufficient to call for retroactive application of an agency's fee regulations. Certainly the court identified no "mischief" that would be avoided by such a retroactive application. Here, as in Alyeska, there were no regulations allowing assessment of license fees on withdrawn applications at the time the Commission performed its work on those applications, and therefore no such fees can properly be collected.

In summary, we believe that the ill effects of applying the proposed amendment to Part 170 retroactively clearly outweigh any "mischief" that might be caused by applying the amendment prospectively only. Accordingly, under SEC v.

Chenery Corp., the proposed amendment is invalid to the extent of its retroactive application.

IV. CONCLUSION

As the foregoing discussion demonstrates, the Commission's proposed amendment to Part 170 is not a simple "interpretation" of existing rules, but in fact constitutes a sharp departure from the Commission's long-standing policy of not assessing license fees on withdrawn applications other than the initial application fee.

The 1978 rules made changes in the Commission's fee procedures, but nothing in the language or history of those rules, or in the NRC's fee guidelines, suggested a change in the fee treatment of withdrawn applications. Rather, the 1978 rules clearly carried forward the prior practice of retaining the initial application fee in the event of a withdrawn application, but charging no additional license fees. It is only now, with the proposed "interpretation" at issue here, that the Commission's regulations would assess additional license fees on withdrawn applications. This "interpretation is inconsistent with any reasonable analysis of the current regulation and its history.

Finally, we believe that it would be both unfair and improper to apply this substantial policy change retroactively to actions taken in the past. Even assuming that the IOAA would permit the assessment of such fees for withdrawn applications, at the most, the Commission can assess license fees on