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U.S. NUCLEAR REGULATORY COMMISSION

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

Re: Proposed Rulemaking to Regulate Design Changes Following Issuance of a Construction Permit

Dear Mr. Chilk:

On December 11, 1980, the Nuclear Regulatory Commission published an advance notice of proposed rulemaking to limit the right of a construction permit holder to make changes in the plant under construction without prior Commission approval. 45 Fed. Reg. 81602. As attorneys representing a number of utilities involved in the Commission's licensing process, we wish to offer comments on the proposed rulemaking.

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Acknowledged By Card 2/6/81

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In general, we believe that it is unwise to change the Commission's regulations in the absence of a showing that the existing regulatory scheme is not functioning properly. In the present case, we do not believe that the Commission has supplied an adequate justification for a change in this particular area of its regulations.

The advance notice of proposed rulemaking identifies "three major problems" with the existing process. The "problems" identified in the notice are the same as those identified in the staff paper (SECY-80-90) that underlies the proposed rulemaking. It should be noted that neither document presents any concrete examples of the alleged problems. They are simply presented as hypothetical concerns.

In reality, we believe that there is no basis for the concerns expressed.

1. It is asserted that there is no clear basis upon which the Office of Nuclear Reactor Regulation can assess when a formal construction permit amendment is required. This is a non-problem, for two reasons. First, in the absence of a statutory requirement for a construction permit amendment, there is no need for guidance as to when NRR should require an amendment. Second, it is well understood that changes in plant design made during construction are at the applicant's risk and are subject to

plenary review at the operating license stage. Under those circumstances, a prudent applicant will notify the staff in advance of major changes and seek informal or formal concurrence. That is the current practice. It has given NRR the opportunity to review significant changes while relieving both applicants and the staff of the necessity to document and review a large number of insignificant changes.

2. It is said that there is no clear basis on which the Office of Inspection and Enforcement can enforce requirements in a construction permit. That is really not the case. I&E routinely reviews each applicant's quality assurance program even prior to docketing and works closely with applicants to develop more detailed and complete QA procedures prior to the commencement of construction. Thereafter, I&E audits each plant under construction against its approved QA program. To our knowledge, I&E has not experienced any particular difficulties in taking enforcement action against licensees for deficiencies in their QA programs or for failure to follow established QA procedures. To the extent that greater formality is perceived to be desirable, this could be achieved within the Commission's existing regulatory framework, as outlined below.

3. It is asserted that the existing lack of definite ground rules leads to additional litigation in

construction permit hearings. No examples are given, and we are not aware of cases in which this has posed any serious problem. In any event, we do not understand how the adoption of a new rule could preclude an intervenor from proposing license conditions if the intervenor wished to do so.

While we believe that existing regulations are adequate, and that the status quo should be preserved, we perceive one area in which the operation of the present system could be clarified. Once an applicant's QA program has been accepted by I&E, staff could propose a construction permit license condition that would require the applicant to adhere to its QA program and to notify I&E promptly of each change in the program. This would follow existing practice, but it would put to rest any possible doubts concerning I&E's power to take enforcement actions. Changes in a QA program would not require prior approval by I&E, so no delay in construction would result, and no significant additional review burden would be imposed on the staff.

The Commission should studiously avoid any change in its regulations that would enlarge existing statutory requirements for construction permit amendments. The recent decision in Sholly v. NRC, F.2d , No. 80-1691 (D.C. Cir.) has been interpreted by many to impose an

inflexible requirement for a public hearing, whenever requested, on even the most routine CP amendment. Until the Sholly case is reversed, or corrective legislation has been passed, any expanded requirement for CP amendments will present severe problems both for the Commission and for the nuclear industry.

While we perceive no need for change in the status quo, we acknowledge that the fifth alternative presented in the Commission's notice has merit as an option for future reform of the licensing process. Such reform, however, must take place in the context of legislative changes to the Atomic Energy Act. So long as an operating license hearing is required at the request of any interested person, the Commission cannot successfully compress a two-stage review process into a single stage. If the Commission considers one-step licensing to be desirable, it should concentrate its efforts on legislation to authorize that result.

We hope that the Commission will defer indefinitely any change in its regulations in this area. Should it choose to make changes, care should be taken that such changes do not adversely affect the rights of existing construction permit holders. As a practical matter, we do not see how any change that is made retroactively applicable would not have an adverse effect. Accordingly, it is

strongly recommended that any changes that may be adopted be applicable only to construction permit applications filed after the effective date of the change.

Sincerely,

Le Boeuf, Lamb, Leiby & MacRae