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

ATTN: Docketing and Service Branch

Re: Rules of Practice for Domestic Licensing Proceedings, Expediting the NRC Hearing Process

Dear Mr. Chilk:

In the Federal Register of March 18, 1981 the Commission published for comment certain proposed changes in the Rules of Practice with the stated purpose of facilitating expedited conduct of adjudicatory proceedings on applications to construct or operate nuclear power plants. (46 Fed. Reg. 17216) Under the date of March 13, 1981 notice of such proposed changes was also given to counsel for parties in pending licensing proceedings with specific questions to counsel as to "how the proposed changes would affect the quality of the licensing board decision and your ability to participate, and on the time savings that might be achieved". In response to these notices, the following comments and suggestions are offered on behalf of Boston Edison Company.

As the lead applicant in a construction permit proceeding (Pilgrim Unit 2, Docket No. 50-471) which surely either holds or is rapidly approaching a record in terms of duration for such a proceeding, Boston Edison Company applauds the Commission for its stated goal, as exemplified by the instant rulemaking, of expediting the NRC hearing process. Although the immediate impetus for this rulemaking may be the situation which has been allowed to develop with respect to operating license applicants who have virtually completed construction but still await completion of hearings, the situation with respect to long-pending construction permit applicants is no less outrageous. Whereas OL applicants may complete construction before receipt of an OL, Boston Edison

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is in a situation where it very probably could have completed construction, had it been allowed to do so, before receipt of a CP. The costs of such a tortuous process to applicants, ratepayers and the nation are astronomical -- including sunk costs in the hundreds of millions of dollars, and interest thereon, even before ground is broken; escalation in the cost of components and labor as the project is delayed; not to mention the foregone benefit to the nation of avoiding the import of millions of barrels of oil.

Unfortunately, given the tremendous need for positive steps to expedite licensing proceedings, Boston Edison really doesn't see much in the proposed rule which would actually result in significant time savings. Although some of the suggestions are definitely in the right direction, virtually all of the time savings contemplated by the proposed rule changes could be just as effectively accomplished within the framework of the existing Rules of Practice, assuming reasonable application by the Licensing Boards of their existing authority and discretion to set schedules and control the course of hearings. Such existing authority is not inconsiderable and includes the setting of schedules (10 CFR §§ 2.751a, 2.752), the control of discovery (10 CFR §2.740(b)) and the conduct of proceedings (10 CFR §§ 2.756, 2.757). We believe that use by the Licensing Boards of their existing authority coupled with firm leadership, supervision and establishment of goals by the Commission would be far more effective than technical amendments of the type proffered in the proposed rule.

Turning to the specific amendments proposed in the Commission's notice, we have the following comments. The fine tuning amendments suggested in the proposed rule, such as doing away with the requirement for written orders on certain motions and permitting the Chairman of a Licensing Board to act alone on certain prehearing matters, may save a few days in some cases and are certainly innocuous; however, these matters have never been a significant hold-up in the conduct of any proceeding and the Licensing Board already has the power to minimize such delay greatly through prompt action. The rule doing away with an applicant's reply findings will certainly save ten days; however, there will also be a loss in the effective briefing of issues by eliminating the reply brief. A substitute suggestion would be for all parties to file initial briefs at the same time (e.g., within 20 or 30 days) with all parties having a right to file a reply brief

within a further ten days. The net result would still be a reduction of time but this would retain the important right of a reply brief. It should be recognized that an applicant in a proceeding with many intervenors and contentions, not all of which are being pressed with the same degree of effort, may not be fully aware of the arguments being principally relied upon by an intervenor until seeing the intervenor's brief. As a result we oppose deletion of the right to a reply brief.

The suggestion with respect to summary disposition motions could be of benefit assuming there are discrete matters which could be so disposed of without diverting the Licensing Board's attention from on-going proceedings. While we agree that it might be useful to do away with the relatively artificial forty-five day period of 10 CFR § 2.748, we believe a more worthwhile focus would be upon the process whereby contentions are admitted into proceedings in the first place, perhaps by establishment of a threshhold test of significance, or by requiring an offer of proof, or by prohibiting or restricting contentions to be "proved" solely by cross-examination. Certainly the type of contention recently subjected to summary disposition in the Allens Creek proceeding (dealing with the establishment of marine biomass farms in the Gulf of Mexico) is exactly the type of contention which should have never been admitted at all rather than proceed through the wasteful process of admitting the contention and then summarily disposing of it ten months later.

Finally, with respect to discovery, we believe that the proposed rule changes do not go nearly far enough. For NRC construction permit proceedings all parties will typically have PSAR's, SER's, ER's, FES's and pre-filed testimony already in their hands well before the start of hearings. In addition, with the Freedom of Information Act, parties have ready access to Staff information outside of the strictures of any on-going proceeding. The traditional needs for discovery - to discover the basis for an opponent's position, to prepare for cross-examination and to prepare rebuttal testimony - are not present and routine discovery should be completely eliminated, absent some pressing need in a particular situation. The suggested changes regarding discovery against the Staff may be acceptable as a first step; however, we believe serious attention should be given to doing away with discovery in its entirety in ASLB proceedings.

Moving beyond the possible minor changes discussed in the proposed rule, there are a number of other matters which we believe the Commission might well consider as it examines the possibility of expediting licensing proceedings. First, in the case of construction permit applicants, is for the Commission to finalize and issue the long-awaited rule identifying post-TMI licensing requirements. Such rule should clearly define all post-TMI requirements and should bring into play the provisions of 10 CFR §2.758 insofar as adjudicatory challenges to the requirements of such rule are prohibited. In the case of operating license applicants the present "policy" should be recast into the form of a rule with a similar restriction on adjudicatory challenges. Clearly the establishment of such a rule is the Commission's responsibility and the matter of deciding the sufficiency of the response to Three Mile Island should not be left by default to case-by-case adjudications measured against some unknown standard.

A second priority is for the Commission to allocate sufficient Staff resources to the review of applications. Virtually all time frames for hearings are measured against the issuance by the Staff of an SER or similar document. The time for such review typically far exceeds the total time addressed by the minor changes in the proposed rule and thus is a prime area for expediting the overall process.

A third area of concern, as discussed previously, is discovery. Although we believe that most of the discovery which occurs in these proceedings is of little value or is a fishing expedition, one very clear area in which time savings may be achieved is for parties to complete discovery to the maximum extent possible during the period of Staff review -- certainly there is no reason for parties to sit on their hands awaiting Staff issuance of an SER or a supplemental SER and only then to think about discovery. In the present Pilgrim Unit 2 proceeding, for example, the Company filed its PSAR Amendment dealing with emergency planning in October, 1980 (and a supplemental amendment answering Staff questions in March, 1981); however, the intervenor (with the Staff's apparent agreement) proposes to await the Staff issuance of a supplemental SER dealing with emergency planning before they have to begin discovery or redefine their previous contention. Such sequencing of steps obviously extends the total time necessary to complete the process.

A fourth suggestion in this area is the repeal of Appendix B to Part 2. Aside from the mechanical addition of sixty or eighty days to the time period for licensing through the suspension of 10 CFR §2.764, the statement of policy injects a considerable measure of uncertainty into the process -- particularly in the determination by the Licensing Board that applicable licensing requirements have been met. Obviously, such uncertainty will not only act to increase the time necessary for hearings to address the broader range of issues which may or may not be relevant but will also increase the decisional time for a Licensing Board which seeks to apply such an ill-defined standard. We believe Appendix B was originally contemplated only as an interim measure while TMI licensing requirements were formulated and, with their formulation, Appendix B should be rescinded.

One final subject the Company would like to address concerns the suggested eight month schedule for hearings contained in the Supplementary Information accompanying the proposed rule. Inasmuch as Boston Edison is now in its eighth year of proceedings since the docketing of the Pilgrim Unit 2 application and since we anticipate more supplemental SER's and associated hearings before the process is complete, we have some significant concerns with the contemplated schedule as applied to our situation. First is the fact that the schedule totally omits the significance of the period prior to day zero on the schedule when the supplemental SER is issued. There is no reason for waiting for a supplemental SER before a party may conduct discovery or state and revise his contentions. Typically, there is nothing new in the way of information in a supplemental SER inasmuch as the SER is only the Staff's evaluation of that which the applicant had already submitted some months before. Thus we would suggest that the 95 days prior to hearings could easily be compressed by over 2/3 with only a period for review of the SER and for the filing of testimony. If the supplemental SER contains significant new information or if there is good cause, then the time might be extended to allow some discovery or review of contentions; but the excessively formal pre-hearing schedule is not likely to be necessary or appropriate for a mid-stream proceeding which is merely awaiting a last SER supplement. Similarly, the times allowed for Licensing Board actions during the pre-hearing period also appear excessive.

In addition to the pre-hearing time allotments, we would also question the appropriateness of the 40 day period allotted for hearings. Unless the hearings are to cover all safety issues, which is certainly not the case in the remaining Pilgrim Unit 2 hearings or in a number of other pending proceedings, the 40 days is far too long a time period. At a minimum we believe that hearings should be expected to be held on consecutive days and weeks until completion (rather than spread out with a week here and a day there which has been typical of some proceedings). Also, we would question the time of 65 days allotted for a decision by the Licensing Board. Clearly the time should depend upon the complexity and number of the issues and where, as in the Pilgrim Unit 2 proceeding, remaining hearings need address only one or two issues, the time should be shortened accordingly. Unfortunately, our experience has been that decisions covering a larger number of issues (e.g., the recent Partial Initial Decision in the Pilgrim Unit 2 proceeding) have taken as much as 14 months. Furthermore, the decisional time allowed in the schedule does not even begin to address the post-decisional time required by Appendix B to Part 2. In short, we submit that the suggested eight month schedule is unrealistic and inadequate as a planning basis for the hearing process.

In conclusion, Boston Edison wishes to reiterate strongly its view that the essential problem with the timeliness of NRC licensing action is not the relatively minor rules that allow a few days for written decisions or for replies. Rather, we would urge the NRC to focus upon the areas wherein existing authority and discretion can be employed to obtain significant time savings. Within the sphere of the hearings process such changes would include significant restrictions on the time for and amount of discovery, more restrictive standards for the admission of contentions, greater assignment of staff resources to prepare SER's and other hearing documents and greater assignment of resources to Licensing Boards to allow decisions on a prompter schedule. More importantly, we believe there should be much greater exercise by Licensing Boards of their existing authority to move proceedings along by requiring parties to meet their schedular obligations and by excluding inquiry into frivolous or unsupported areas of contention. Also, we would urge that the role of the Appeal Boards be closely examined, including the question of whether such Boards should be eliminated in their entirety. Certainly

the number of frivolous appeals which are taken, without any sanctions whatsoever imposed upon the appealing party (see, e.g., ALAB-631, dealing with an appeal on a question of the scope of cross-examination), only encourages a view by some that the licensing and hearing process is a game. Finally, the role of the Commission itself in expediting the process must be acknowledged. The Commission first has a clear responsibility for establishing by regulation a well-defined licensing basis which is not subject to challenge in adjudicatory proceedings. The Commission should then, through the establishment of goals and by the exercise of leadership, make it clearly understood that the hearing process must move forward if the Commission is to do its job properly. This message can be delivered through statements of policy, through review of Appeal Board and Licensing Board decisions and through the proper allotment of Commission resources. What is important is that the message be delivered as soon as possible before more applicants or potential applicants are forced to conclude that the NRC licensing process is a dead end.

Respectfully submitted,

William S. Stowe

WSS/mg

cc: Chairman Joseph M. Hendrie
Commissioner John F. Ahearne
Commissioner Peter A. Bradford
Commissioner Victor Gilinsky