UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON D C 20555

MAY 0 3 1984

MEMORANDUM FOR: Files

THRU: William O. Miller, Chief, License Fee Management Branch, ADM

FROM: C. James Holloway, Jr., Assistant Chief, License Fee Management Branch, ADM

SUBJECT: BLACK FOX 1 & 2 CONSTRUCTION PERMIT REVIEW COSTS

By letter dated August 8, 1975, the Public Service Company of Oklahoma (PSO) filed an application for a Construction Permit to build two nuclear power plants designated as Black Fox 1 & 2. An application fee of $125,000 was submitted in accordance with 170.21 A.4.a.

On April 6, 1982, PSO filed a request to withdraw the application and terminate the proceedings for Black Fox 1 & 2 (Enclosure-1) with the Atomic Safety and Licensing Board Panel (ASLBP), and by order dated March 7, 1983 (Enclosure-2), the ASLBP terminated the proceeding. The NRC, by letter dated June 22, 1983 to PSO, revoked the limited work authorization.

In accordance with 10 CFR 170 concerning the assessment of fees for withdrawn applications, we have reviewed the costs incurred by the various program offices from the date the application was filed to the date of withdrawal of the application. Enclosure 3 is a summary of the review costs as well as the supporting documentation from the program offices. Enclosure 3 shows that $1,383,247 was expended for the review of Unit 1 and $30,675 was expended for the review of Unit 2.

The application was filed and reviewed under the Commission's standardization program (standardized design-reference systems concept). Therefore, for purposes of assessing the costs of the review, the CP fees in 10 CFR 170.21 A.4.a. are the maximum allowable for recovery. The maximum that can be assessed for the review of Unit 1 is $978,600 ($125,000 + $853,600). The maximum that can be assessed for the review of Unit 2 is $162,500. Since the costs of the review for Unit 1 exceed the maximum, and Unit 2 are less than the maximum fees prescribed by regulation, $978,600 would be applicable to Unit 1, and $30,675 would be applicable to Unit 2. The total cost recoverable under the Commission's regulations for both units is $1,009,275. Since PSO paid an application fee of

ENCLOSURE 5

$125,000, this amount has been deducted from the total cost leaving a balance due of $884,275 for review of the application. We plan to notify the Division of Accounting and Finance to bill for the Commission's cost of reviewing the withdrawn construction permit application.

C. James Holloway, Jr., Assistant Chief
License Fee Management Branch
Office of Administration

Enclosures:
1. 4/6/82 Motion By Applicant to Terminate Proceeding
2. 3/7/83 ASLBP Termination of Proceedings
3. Summary of Costs and Supporting Documentation

4/6/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of the Application of)
)
Public Service Company of Oklahoma,)
Associated Electric Cooperative,) Docket Nos. STN 50-556
and) STN 50-557
Western Farmers Electric Cooperative)
)
(Black Fox Station, Units 1 and 2))

MOTION FOR TERMINATION OF PROCEEDING AND WITHDRAWAL OF APPLICATION

Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative ("Applicants") announced their decision, on February 16, 1982, to cancel the Black Fox Station nuclear project. In light of this decision, Applicants hereby move the Atomic Safety and Licensing Board, pursuant to 10 C.F.R. § 2.107, to enter an order terminating the instant proceeding and permitting Applicants to withdraw, without prejudice, their application for construction permits. In support of the Motion, Applicants state:

1. In August 1975, Applicants submitted an application to the United States Nuclear Regulatory Commission (the "Commission") seeking the permits necessary for the construction of the Black Fox Station as a nuclear generating

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Enclosure - 1

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facility. The Environmental Report submitted by Applicants, in support of the application, clearly demonstrated the long-run economic prudence of constructing a nuclear facility as opposed to a comparable fossil-fueled generating station. In 1975, Applicants estimated the costs of nuclear Units 1 and 2, with in-service dates of 1983 and 1985, to be approximately $624 per kilowatt and $645 per kilowatt, respectively.

2. The Commission's safety hearings in the Black Fox proceeding were completed in February 1979. At the close of these hearings, a complete cost reassessment and scheduling update performed by the Applicants established mid-1985 and mid-1988 as commercial operation dates for Black Fox's two nuclear units. The estimated cost of construction had risen to $1,038 per kilowatt during the interim three and one-half years since the previous estimate. It was Applicants' belief, however, that these schedule delays and estimated cost increases associated with the Black Fox project were typical in the industry and that the nuclear project was still the most economical way to meet projected capacity needs.

3. Soon after the close of the safety hearings, and before any decision or construction permits were issued with respect to the Black Fox facility, the accident at the Three Mile Island Unit 2 nuclear facility occurred. This totally unexpected event placed the Applicants in a unique

position, having commenced work pursuant to a limited Work Authorization and having the safety hearing record complete, but facing indefinite time delays and cost increases before the actual issuance of construction permits. No other pending construction permit applicant faced a similar situation.

4. The resulting three-year moratorium on nuclear licensing imposed by the Commission as a result of the Three Mile Island accident drastically and irreversibly escalated the cost of the Black Fox facility. Today, Applicants' cost estimate for the Black Fox project, based on PSO financing costs and in-service dates of 1993 for Unit 1 and 1995 for Unit 2, has jumped to $4,472 per kilowatt. Further, Applicants now fear that the promise of future backfitting requirements will cause Black Fox costs to continue escalating at an unknown and uncontrollable rate.

5. Applicants announced their decision to cancel the Black Fox Station nuclear project on February 16, 1982. This decision was conveyed to the Atomic Safety and Licensing Board and parties by counsel for the Applicants during a conference telephone call which was held at 4:00 p.m. Eastern Standard Time on February 16, 1982.

6. In order to insure a complete record in this case, Applicants filed the prepared testimony regarding the Black Fox Station project, which was presented during a rate

case before the Oklahoma Corporation Commission; a report by Touche-Ross, a consulting firm under contract to the Oklahoma Corporation Commission; and the January 15, 1982, Order issued by the Oklahoma Corporation Commission, portions of which reference the Black Fox Station.

7. Applicants intend to preserve the Black Fox site for construction of future power-generating projects and are presently reviewing the Black Fox site for the purpose of developing an appropriate site restoration plan consistent with the ultimate dedication of the site for future power-generating projects. This plan will be submitted to the NRC Staff for its review and approval.

8. Paragraphs 1 through 7 establish that good cause exists for permitting withdrawal, without prejudice, of the application for construction permits and, further, Applicants assert that no prejudice will accrue as a result of such action. See, In the Matter of Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), Docket No. 50-376, ALAB-662, 14 NRC ____ (1981); In the Matter of Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), Docket No. 50-463-CP, ALAB-657, 14 NRC ____ (1981).

For good cause shown, Applicants' "Motion for Termination of Proceeding and Withdrawal of Application" should be granted.

Respectfully submitted,

Joseph Gallo
Counsel for Public Service Company of Oklahoma

ISHAM, LINCOLN & BEALE
Suite 840
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9730

Dated: April 6, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of the Application of Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative (Black Fox Station, Units 1 and 2)	)	Docket Nos. STN 50-556 STN 50-557

CERTIFICATE OF SERVICE

I hereby certify that copies of the MOTION FOR TERMINATION OF PROCEEDING AND WITHDRAWAL OF APPLICATION in the above-captioned proceeding were served upon the persons shown below by deposit in the United States mail, first-class postage prepaid, this 6th day of April, 1982.

Sheldon J. Wolfe, Esquire
Administrative Judge
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Paul W. Purdom
Administrative Judge
U. S. Nuclear Regulatory Commission
c/o Environmental Studies Group
Drexel University
32nd and Chestnut Streets
Philadelphia, PA 19104

Docketing and Service Section
Office of the Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board Panel
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Joseph Gallo
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

MAR 0 1983

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Dr. Paul W. Purdom
Frederick J. Shon

In the Matter of	ASLBP Docket No. 76-304-02 CP
PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC. and WESTERN FARMERS ELECTRIC COOPERATIVE	(NRC Docket Nos: STN 50-556 STN 50-557)
(Black Fox Station, Units 1 and 2)	March 7, 1983

ORDER
(Granting, Without Prejudice, But Subject To Conditions, Applicants' Motion To Terminate and To Withdraw)

MEMORANDUM

On January 23, 1983, Applicants filed a Motion For Termination Of Proceeding And Withdrawal Of Application.* The NRC Staff responded on February 7, 1983, and on February 25, 1983, the State of Oklahoma, as an interested State, advised that it did not intend to file any objections to the instant motion. Intervenors did not file a response.

Applicants' Motion, supported by the affidavit of their Black Fox Station Project Manager, states in pertinent part at pages 6-8:

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* On June 18, 1982, in an unpublished Memorandum and Order, the Board denied, without prejudice, Applicants' original Motion filed on April 6, 1982.

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Enclosure - 1

"On November 26, 1982, Public Service Company of Oklahoma ("PSO") publicly announced plans for the construction of Inola Station, a coal-fired electric power-generating station, to be built at the site of the cancelled Black Fox Station nuclear project. Current plans provide for commercial operation of Inola Station Unit 1 at the Black Fox site during 1992 with Unit 2 to follow during 1994....Tentative long-range plans ultimately provide for the construction of up to four coal-fired units at the cancelled Black Fox site."

* * * * * *

"The final decision on whether some or all of the construction improvements accomplished under the Black Fox Station LWA, as amended, will be utilized at the large coal-fired electric generating complex should be made during the design of the Inola Station layout and site facilities, currently expected to begin during 1984."

* * * * * *

"As design and construction efforts for Inola Station progress, Applicants commit to dismantle unnecessary Black Fox site improvements which will not be utilized and to return disturbed site areas to conditions consistent with the site development and environmental requirements of a coal-fired electric power-generating station. During the interim period, the Applicants will complete the soil stabilization program approved by the NRC Staff and will maintain the site so as not to adversely impact the surrounding offsite environment."

In light of the Applicants' commitments, and provided that its two recommended conditions are imposed, the Staff requests that the instant motion be granted. The Applicants have not objected to the imposition of these conditions.

ORDER

Upon our consideration of the Staff's assurance that it will continuously monitor the remedial action required by the two conditions, pursuant to 10 C.F.R. § 2.107, it is, this 7th day of March, 1983

ORDERED

1. That Applicants' Motion For Termination Of Proceeding And Withdrawal Of Application to construct the Black Fox Station, Units 1 and 2, is granted, without prejudice, subject to the two following conditions:

a) Subject to the NRC Staff's monitoring and approval, Applicants shall implement their Black Fox Station Soil Stabilization and Erosion Control Plan, as approved by the Staff on September 24, 1982, by no later than October 1, 1983, and

b) Subject to the NRC Staff's monitoring and approval, Applicants shall dismantle those site improvements, not to be utilized at the Inola Station, in such a manner as not to cause any onsite or offsite detrimental environmental impacts.

2. That the Licensing Board's Partial Initial Decision, LBP-78-26, 8 NRC 102(1978), authorizing the issuance of a limited work authorization for Black Fox Station, Units 1 and 2, is vacated.

3. That the Director of Nuclear Reactor Regulation (a) is authorized to revoke the outstanding limited work authorization, as amended, and (b) will cause to be published in the Federal Register a notice of the withdrawal of the application for a construction permit.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Sheldon J. Wolfe

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 7th day of March, 1983.

Public Service Company of Oklahoma

Black Fox 1 & 2

CP Withdrawn March 7, 1983

Docket 50-556, 50-557

170.21 A.4.a.

Program Office Review	Professional Staff-hours Expended	Costs Per Professional Staff-hour	Staff-hour Costs	Contractual Costs	Total Costs
Unit-1					
NRR	26,845	$39	$1,046,955	$300,576	$1,347,531
IE	793.5	36	28,566	-	28,566
ACRS	143.0	50	7,150	-	7,150
				Unit-1 Cost:	$1,383,247
Unit-2					
IE	675.0	36	$24,300	-	$24,300
ACRS	127.5	50	6,375	-	6,375
				Unit-2 Cost:	$ 30,675
				Total Cost:	$1,413,922

The total Unit 1 cost exceeds the maximum cost for the review as provided for in 170.21 A.4.a. ($978,600) and the total Unit 2 cost is less than the maximum fee as provided for in 170.21 A.4.a. ($162,500). Since only an application fee of $125,000 has been paid, the balance due NRC is as follows:

Unit 1 (Maximum Fee):	$978,600
Unit 2 (Full Cost) :	30,675
	$1,009,275
Less Application Fee Paid:	-125,000
Balance Due:	$ 884,275

1/ We have not included 6,537 professional staff-hours for the contested hearing. We have included 300 professional staff-hours in Unit 1 which represents the normal NRR effort for the required mandatory hearing phase of the CP review.

to import stallions from CEM countries to States approved for such purpose.

Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure with respect to this emergency action is impracticable, unnecessary and contrary to the public interest, and good cause is found for making this emergency action effective less than 30 days after publication of this document in the Federal Register.

Section 92.2(i)(2) of Title 9, Code of Federal Regulations (9 CFR 92.2(i)(2)), among other things, authorizes the importation of male horses (stallions over 731 days of age) into the United States from countries affected with contagious equine metritis (CEM) when specific requirements to prevent their introducing CEM into the United States are met, and the animals imported are moved into specified States for further inspection, treatment and testing by the State of destination. The amendment established minimum standards which a State must meet in order to be approved to receive stallions imported from CEM-affected countries. These standards contain treatment, testing and handling procedures believed necessary to insure that the stallions being imported into the United States are free of the contagion of CEM.

This document deletes the State of Texas from the list of specifically approved States to receive such horses on the basis of a request made by that State and since the agreement entered into between the State of Texas and the Department to provide additional inspection, treatment and testing of such horses to further insure their freedom from CEM as required by the regulations has been cancelled by the State of Texas.

PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

Accordingly, Part 92, Title 9, Code of Federal Regulations, is amended as follows:

§ 92.4 [Amended]

Section 92.4(a)(5)(ii) is amended by removing "The State of Texas" from the list of States approved to receive stallions pursuant to § 92.2(i)(2)(iv) of the regulations.

(... 6, 7, 8, 10, 28 Stat. 416, as amended, 417, sec. 2, 32 Stat. 792, as amended, sec. 306, 46 Stat. 689, as amended, secs. 2, 3, 4, 11, 76 Stat. 129, 130, 132; 19 U.S.C. 1306, 21 U.S.C. 102-105, 111, 134a, 134b, 134c, 134f)

Done at Washington, D.C., this 1st day of October 1981.

J. K. Atwell,

Deputy Administrator, Veterinary Services.

[FR Doc. 81-29134 Filed 10-6-81; 8:45 am]

BILLING CODE 3410-34-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 170

Fees for Review of Applications

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is promulgating an interpretative rule to clarify that fees for review of power reactor license applications and major fuel cycle license applications 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.

EFFECTIVE DATE: November 6, 1981.

FOR FURTHER INFORMATION CONTACT: William O. Miller, Chief, License Fee Management Branch, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: 301-492-7225.

SUPPLEMENTARY INFORMATION: Based upon the language of 10 CFR 170.12(b) and of footnote 3 to 10 CFR 170.21 (footnote 3 reads in pertinent part as follows: "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 shown in the schedule of facility fees." " ") the Commission has been billing power reactor construction permit applicants for the actual costs of review of withdrawn applications up to the time the applicant withdraws the application from Commission consideration.

It was the Commission's intent in promulgating 10 CFR Part 170 that charges be assessed whenever a review is brought to an end, whether by reason of issuance of a license, a denial of an application, or by its withdrawal, suspension or postponement. These charges are authorized and directed under Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) and supported by judicial decision upholding charges for government services rendered to applicants based upon cost to the agency. See *e.g., Mississippi Power and Light v. NRC*, 601 F. 2d 223 (1979) *cert. denied* 444 U.S. 1102 (1980), and cases cited therein. The fee guidelines approved by the Commission and the Court of Appeals in *Mississippi Power and Light v. NRC, supra*, make clear the Commission's position that the review of an application at the request of an applicant is a service for which a charge may be made. Under the guidelines, fees may be assessed for services rendered at the request of an applicant whether or not these services are linked to or result in the issuance of a permit or license. For example, the guidelines support the inclusion in the fee schedule of "special projects and reviews" that do not result in issuance of permits, licenses or approvals but are yet subject to a fee for the service based upon actual cost. (10 CFR 170.21, Schedule F). The review given a power reactor application that does not end in a permit or license is analogous to a special project with respect to the work performed and the service rendered to the applicant.

The interpretative amendments to 10 CFR 170.12 are intended to remove any possibility of misunderstanding the Commission's intent to charge fees on withdrawal or denial of an application and in appropriate cases of suspension or postponement of action on an application. The Commission will consider billing an applicant for costs incurred in the processing and review of an application upon either a statement of intent by the applicant to postpone further review effort or a delay in the construction schedule which causes the staff to postpone further review. In the event an application is reinstated without significant changes, or review effort recommenced, subsequent charges will accrue only from the time of reinstatement or recommencement of review effort. In these cases the aggregate of charges for review of applications covered by the actual cost principle will not exceed the scheduled amount for the class of facility.

Although the impetus for issuing this interpretative rule stems from the withdrawal of power reactor construction permit applications, the interpretative amendments also apply to certain materials licenses applications subject to the actual cost principle as stated in footnote 4 to 10 CFR 170.31. These are primarily major fuel processing and fabrication plants, waste storage and disposal facilities, spent fuel storage facilities, uranium milling plants, evaluation of casks and packages, and special projects.

ENCLOSURE 3

Since the 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 CFR Part 170 (43 FR 7218; February 21, 1978), the clarifying language is applicable to all license applications on file before the Commission on or after March 23, 1978, the effective date of the current version of 10 CFR Part 170, as well as to those received after adoption of the clarifying language.

Although the rules' changes in these amendments are interpretative only and could have been published effective immediately without notice and comment under 5 U.S.C. 553(b), and without the customary 30 days notice under 5 U.S.C. 553(d), the Commission decided to solicit public comment prior to adopting the clarifying language. (See 45 FR 74493, November 10, 1980.)

Four comments were received. All objected to the proposed rule. A 29-page comment submitted by Shaw, Pittman, Potts and Trowbridge, a law firm representing several electric utilities, claimed that the proposed rule could not be regarded as an interpretation of the existing fee rules, effective since March 23, 1978, but rather amounted to "a substantive amendment by which the Commission for the first time seeks to impose license fees on withdrawn applications." To support this claim the Shaw, Pittman comment argued that the 1978 fee regulation, 10 CFR Part 170, made no provision, "either directly or by fair inference," for the payment of fees, other than the application fee, for review of license applications that are withdrawn before a license or construction permit issues. Accordingly, Shaw, Pittman asserted that the NRC cannot, as the proposed interpretative rule would do, impose fees to recover costs incurred in processing license applications that were on file on or after March 23, 1978 but have since been withdrawn. "Even assuming that the Independent Offices Appropriation Act (IOAA) would permit the assessment of such fees for withdrawn applications," this commenter concluded, "at the most, the Commission can assess license fees on withdrawn applications only in connection with services and benefits rendered by the Commission after the effective date of the proposed amendment."

The other commenters generally agreed with the Shaw, Pittman position that fees for withdrawn applications were not imposed by the 1978 fee regulations and therefore cannot be imposed by an "interpretative" rule based on those regulations. The other commenters also raised the argument that the Commission lacks statutory authority to imposed fees for withdrawn applications because the applicant has received no "special benefit" when an application has been withdrawn. Public Service Company of Oklahoma, for example, noted that it "shared the widespread interpretation of Part 170 that such fees were to be charged only upon *successful* completion of review." (Commenter's emphasis.)

In response to these comments the Commission reaffirms at the outset its conclusion that NRC review of a license application constitutes a "special benefit" subject to a fee under the IOAA, whether or not a license issues after completion of the review. The NRC's work in performing these reviews is a service rendered at the request of the applicant. The Commission's fee guidelines, set out in the 1978 notice promulgating the present fee schedule, made it plain that under the IOAA fees could be assessed to recover the cost of providing these services:

> Fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. The term "special benefits" includes services rendered at the request of a recipient and all services necessary for the issuance of a required permit, license, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations or obligations under the Commission's regulations.

See the Commission's fee guidelines (43 FR 7211, February 21, 1978). These guidelines were quoted with approval in *Mississippi Power and Light* v. *NRC*, *supra*. There is thus no doubt that pursuant to the IOAA and the fee guidelines the Commission has authority to impose a fee to recover the cost of processing a license application that has been withdrawn.

The notice of final rulemaking also made clear that under the fee schedules effective March 23, 1978, the Commission intended to exert this authority by imposing all fees allowed by the guidelines, barring exceptional circumstances. The relevant language from the notice is as follows:

> These guidelines determine whether or not the Commission may charge a fee for a particular service and what the maximum fee may be. In keeping with the sense of Congress expressed in the Independent Offices Appropriation Act of 1952 that agency activities performed on behalf of persons the agency serves "shall be self-sustaining to the full extent possible," the Commission is generally obliged to impose the fees allowed by these guidelines where it is fair and equitable to do so. The Commission recognizes that in exceptional circumstances fairness may require that a fee be set at a level below the cost of rendering the service. However, the Commission's discretion to reduce fees for certain service categories is limited by the IOAA mandate and by the requirement that a consistent and fundamentally fair fee structure must accord equal treatment to similarly situated recipients of agency services. [43 FR 7211 (February 21, 1978)].

Those NRC activities and services which the Commission did intend to exclude from cost recovery were identified with specificity in the notice. See 43 FR 7212, 7213. None of the services specified as exempt from fees could reasonably be interpreted to include review of license applications later withdrawn. Nor is there any suggestion or reason to believe that the Commission would have regarded it as generally unfair or inequitable to recover the costs of reviewing license applications which turn out to be unsuccessful. Rather, the notice of final rulemaking stated that "(t)hose regulatory services which provide special benefit to applicants and licensees include: 1. The *processing* and *reviewing* of applications or requests for construction permits, operating licenses, manufacturing licenses, materials licenses * * *" [43 FR 7213 (emphasis added)]. As this language indicates, the notice tied "special benefits" to the processing and reviewing, not necessarily to the issuance of the license itself. Amended language in the fee regulation, 10 CFR 170.12(b), confirmed this emphasis on completion of review rather than license issuance as the fee-triggering event:[1]

> 10 CFR 170.12(b) *License Fees.*
> Fees for construction permits, operating licenses, manufacturing licenses, and materials licenses, are payable upon notification by the Commission when the review of the project is completed.

Finally, the notice of final rulemaking announced a major change in the Commission's method of determining fees. Henceforth, facility fees were to be based on the Commission's actual "expenditures for professional manpower and appropriate support services required to process the application or request." 43 FR 7216. The switch to an actual-cost basis, as distinguished from fixed fees based on the average cost for issuing a particular type of license, made it possible to determine and impose a fee based on the actual cost for any license review, even when, because of withdrawal or

[1] The superseded rule, 10 CFR 170.12(b) (1977), had stated:

> Fees * * * are payable when the construction permit manufacturing license operating license is issued.

some other reason for termination, the review was completed at an atypical intermediate stage short of license issuance.

For the reasons given in the above discussion, the Commission has concluded that the notice of final rulemaking and the language in the final rule itself gave fair and adequate notice to license applicants that for applications on file after March 23, 1978 the Commission would charge a fee for withdrawn applications. The fee would be sufficient to recover the costs the NRC had incurred in reviewing those applications, to the extent the costs were not already covered by the application fee. The commenters' arguments to the contrary place unwarranted emphasis on certain language in 10 CFR 170.12(a), dealing with application fees, which provides that "(a)ll application fees will be charged irrespective of the Commission's disposition of the application or a withdrawal of the application." The commenters assert that this language, which appeared in the original 1969 proposed fee regulations and remains unchanged in the current version of the regulations, must be taken as the Commission's total and exclusive mechanism for recovering review costs of withdrawn applications. Yet it is clear that the power reactor construction permit application fee, presently set at $125,000, falls far below the cost which the Commission can incur in reviewing an application prior to withdrawal.[2] It does, of course, guarantee the NRC at least partial cost recovery should an applicant become insolvent, but one could not reasonably interpret the 10 CFR 170.12(a) provision for retention of this fee as by itself a fulfillment of the Commission's expressed intent in the 1978 regulations to recover to the full extent allowable the cost of providing special benefits.

The commenters are correct that prior to adoption of the 1978 rule the Commission's regulations did not provide for recovery of withdrawn application costs beyond the amount of the application fee. Fees in addition to the application fee became payable only "when the construction permit * * * is issued." See 10 CFR 170.12(b) (1977). See also the proposed § 170.12(b) in the Commission's 1977 notice of proposed rulemaking. 42 FR 22149, 22162 (May 2, 1977). The commenters are not justified, however, in concluding that in the 1978 rule the Commission intended to continue this treatment of withdrawn applications. In addition to changed language in 170.12(b), a clear signal that the practice had changed was the switch in the 1978 final rule to an actual-cost basis for determining fees, which made practical the assessment of fees reflecting the actual review costs for a withdrawn application, to be collected "when the review, is completed," 10 CFR 170.12(b) (1979).[3] From this amended language in 170.12(b), viewed in the context of the overall rulemaking emphasis on cost recovery, it should have been plain that under the new fee schedule an applicant cannot avoid review cost already incurred by withdrawing the application. Fees assessed after March 23, 1978 for the review of construction permit (CP) or operating license (OL) applications, whether withdrawn or resulting in the issuance of a CP or OL, were to be based on the actual manpower and contractual services costs expended for the review. The maximum fee for a CP or OL prescribed by regulation is assessed and collected upon issuance of the CP or OL. The actual human resource expended for the review is determined after issuance of the CP or OL and the utility is notified whether or not a refund may be due. If the application is withdrawn, the human resource expended is determined after the licensing board has dismissed the case (if a hearing has commenced), and the utility is billed accordingly. Once an application (CP or OL) is filed and the staff begins review, the costs associated with the review are costs that are covered by § 170.12(b) rather than cost subject to the scope of § 170.12(a). The revised language of § 170.12(b) reflects this change.

The Shaw, Pittman comments cite 10 CFR 170.21, footnote 4, dealing with early site reviews, as a supposed contradiction to the Commission's position that the 1978 rules impose fees for withdrawn applications. Footnote 4 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, *except where the application is withdrawn by the applicant or denied by the Commission.* (Commenter's emphasis)

The comment states:

> 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. 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 cost of the NRC review of the site portion of the application. In short, there would be no need for a special provision to ensure collection of the site review fee upon withdrawal of the construction permit application.

The comment is correct that Footnote 4 rests on the premise that the fee for an early site review (ESR) will ordinarily be included in the CP fee, but the comment has misinterpreted the "except where * * *" clause. Footnote 4 is intended to cover early site reviews filed under Appendix Q of the regulations. The "except" clause is necessary so that the early site review fee can be collected separately in the event that the *early site review* application (Appendix Q) is withdrawn, not the CP application. An applicant might very well withdraw the ESR Appendix Q application without withdrawing the Part 50 CP application, for example, in a case where the applicant finds a more suitable site for a proposed plant while the ESR for the site initially selected is still in progress. Thus, the "except" clause is not meaningless and redundant. In fact, the language reinforces the Commission's intent to treat withdrawn Appendix Q applications the same as withdrawn CP applications, that is, charge for them if they are withdrawn.

The commenter also suggests that, if the Commission can collect a fee for a withdrawn CP application, then by a literal reading of footnote 4 the Commission could collect an illegal double recovery by charging for the ESR as well. The following example of how footnote 4 might work in practice demonstrates that no such double recovery is possible, although technically the Commission could recover a separate early site review fee in addition to a fee for the withdrawn

[2] The Commission has incurred costs of 6.1 million dollars in reviewing eight construction permit applications that have been withdrawn and billed since March 23, 1978. The application fees received from these applicants total only $945,000. Other applications have also been withdrawn for which the NRC has not yet completed the billing process.

[3] The change to an actual cost basis was not part of the rule proposed in 1977 but was adopted by the Commission in the final rule promulgated in 1978. Compared to the previous flat fee assessments this change benefits applicants by assuring that the fee for a facility license will not exceed the actual cost of processing (or a fixed fee set out in the schedule, whichever is lower), thereby giving applicants an opportunity to reduce their licensing costs below the level of fixed fees.

construction permit application. Collection of separate fees could come about as follows: (1) An Appendix Q application is filed and review is started by the Commission, (2) the applicant subsequently files a CP application which incorporates by reference the Appendix Q ESR and review begins on the reactor design, (3) site problems develop and the applicant withdraws the Appendix Q application, (4) applicant requests continuation of CP design review while looking for another site, (5) applicant subsequently withdraws the CP application. Footnote 4 of § 170.21 allows the Commission to immediately bill the applicant for the Appendix Q application upon withdrawal despite the fact that there is an active CP application on file and being reviewed. When the CP application is subsequently withdrawn, the Commission could bill for the Office of Nuclear Reactor Regulation (NRR) design review and Office of Inspection and Enforcement (IE) quality assurance work that has been completed from the date the application was filed to the date of withdrawal. There could never be illegal double recovery by the Commission since the fees for both reviews would be based on the actual manpower expended separately for, (1) the Appendix Q review and (2) the CP design work.

One commenter called attention to the express exemption from fees for withdrawal of application for early site reviews and argued that this exemption militated against charging a fee for a withdrawn application. It is correct that the Commission authorized an exemption from fees for certain early site reviews requested before March 23, 1978, in order to avoid an appearance of retroactively imposing a fee for a type of review where *no* fee had been prescribed by the regulations. This exemption was granted in the March 1978 notice of final rulemaking and is limited to early site reviews requested as special projects. It thus applies only to early site reviews requested under Appendix Q to 10 CFR Part 50, and not to early site reviews conducted as part of a standard construction permit review (see 10 CFR 2.101(a-1)).

In sum, the Commission does not find persuasive the commenters' assertions that the fee regulations adopted on March 23, 1978 provide no basis for the Commission to impose fees recovering the costs of processing applications withdrawn since that time. The proposed interpretative rule, 45 FR 74[illegible] does not add substantively to the provisions already in the Commission's regulations. This being the case, the Commission rejects the commenters' characterization of the proposed rule as "an impermissible retroactive fee assessment" which will impose "severe hardship on large numbers of applicants." The Commission sees no unfairness or "severe hardship" in requiring persons who have requested and received NRC review of license applications to pay the costs of that review in accordance with the IOAA, the intent of Congress, and the intent of the Commission as expressed in the Statement of Consideration for the final rule and the language of the rule itself.[4] Applicants presumably entered into the licensing process prepared to pay the costs of review in the expectation that a license would eventually issue. In claiming "hardship" the commenters have not demonstrated that applicants' decisions to seek licenses or to put off withdrawing applications already before the Commission have in fact hinged on any reasonable belief that review costs would be picked up by the NRC whenever the applicant should choose to declare the quest for a license abandoned. The Commission rejects these general contentions of "hardship" and concludes that there is no unfairness in imposing fees for withdrawn applications in the manner described by the proposed interpretative rule.

Pursuant to Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a), the Atomic Energy Act of 1954, as amended, and Sections 552 and 553 of Title 5 of the United States Code, notice is hereby given that the following amendments to Part 170, Title 10, Chapter I, Code of Federal Regulations, are adopted subject to codification.

[4] Although the interpretative rule is not "retroactive," as the commenters have characterized it, if it were the Commission would find ample legal authority for imposing such a rule. In *SEC v. Chenery Corp.*, 332 U.S. 194 (1974), cited by the Commenters, for example, the Supreme Court held that retroactive rulemaking was not *per se* forbidden and that "retroactivity must be balanced against the mischief of producing a result which is contrary to statutory design or to legal and equitable principles." The commenters, referring to *Chenery*, see no "mischief" in applying the Commission's interpretative rule prospectively only, but the Commission would regard it a substantial mischief unnecessarily to impose on the public treasury costs of more than six million dollars incurred by the government in performing services at the request of private beneficiaries (see footnote 2 above), albeit the requesters have now changed their minds about wanting those services, especially where Congress has made plain its intention that such costs should be recovered.

PART 170—FEES FOR FACILITIES AND MATERIALS LICENSES AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for Part 170 is revised to read as follows:

Authority: Sec. 501, 65 Stat. 290 (31 U.S.C. 483a); Sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201w); Sec. 201(f), Pub. L. 93-438, 88 Stat. 1243 (42 U.S.C. 5841).

2. In § 170.12, paragraphs (b), (e), and (f) are revised, and a new paragraph (i) is added, to read as follows:

§ 170.12 Payment of fees.

* * * * *

(b) *License fees.* Fees for review of applications for construction permits, operating licenses, manufacturing licenses, and materials licenses, are payable upon notification by the Commission when the review of the project is completed. For the purposes of this part the review of a project is completed when a permit or license is issued, or an application for a permit or license is denied, withdrawn, suspended, or action on the application is postponed.

* * * * *

(e) *Approval Fees.* Fees for review of applications for spent fuel cask and shipping container approvals, standardized spent fuel facility design approvals, and construction approvals are payable upon notification by the Commission when the review of the project is completed. For the purposes of this part the review of a project is completed when the approval is issued, or the application for an approval is denied, withdrawn, suspended, or action on the application is postponed. Fees for facility reference standardized design approvals will be paid in five (5) installments based on payment of 20 percent of the approval fee (see footnote 3 § 170.21) as each of the first five (5) units of the approved design are referenced in an application(s) filed by a utility or utilities. In the event the standardized design approval application is denied, withdrawn, suspended, or action on the application is postponed, fees will be collected when the review is completed and the five (5) installment payment procedure will not apply.

(f) *Special Project Fees.* Fees for review of special projects are payable upon notification by the Commission when the review of the project is completed. For the purposes of this part the review of the project is completed upon notification by the staff that it has finished its review, upon withdrawal of

the request, or suspension or postponement of further review.

* * * * *

(i) This section applies to all applications for licenses, permits, approvals or requests for review of special projects on file with the Commission on or after March 23, 1978.

Dated at Washington, D.C. this 1st day of October 1981.

Samuel Chilk,

Secretary of the Commission.

[FR Doc. 81-28201 Filed 10-6-81; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL RESERVE SYSTEM

12 CFR Parts 207, 220, 221, and 224

[Regs. G, T, U and X]

List of OTC Margin Stocks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The List of OTC Margin Stocks is comprised of stocks traded over-the-counter (OTC) that have been determined by the Board of Governors of the Federal Reserve System to be subject to margin requirements under certain Federal Reserve regulations. The List is published from time to time by the Board as a guide for lenders subject to the regulations and the general public. This document sets forth additions to or deletion from the previously published List and will serve to give notice to the public about the changed status of certain stocks.

EFFECTIVE DATE: October 5, 1981.

FOR FURTHER INFORMATION CONTACT: Jamie Lenoci, Financial Analyst, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, 202-452-2781.

SUPPLEMENTARY INFORMATION: Set forth below are stocks representing additions to or deletions from the Board's List of stocks traded over-the-counter on file at the Office of the Federal Register as of April 6, 1981. The List, as amended, includes those stocks that the Board of Governors has found meet the criteria specified by the Board and thus have the degree of national investor interest, the depth and breadth of market, the availability of information respecting the stock and its issuer to warrant incorporating such stocks within the requirements of Regulations G, T, U, and X. Copies of the current List may be obtained from any Federal Reserve Bank. A copy is also on file at the Office of the Federal Register.[1]

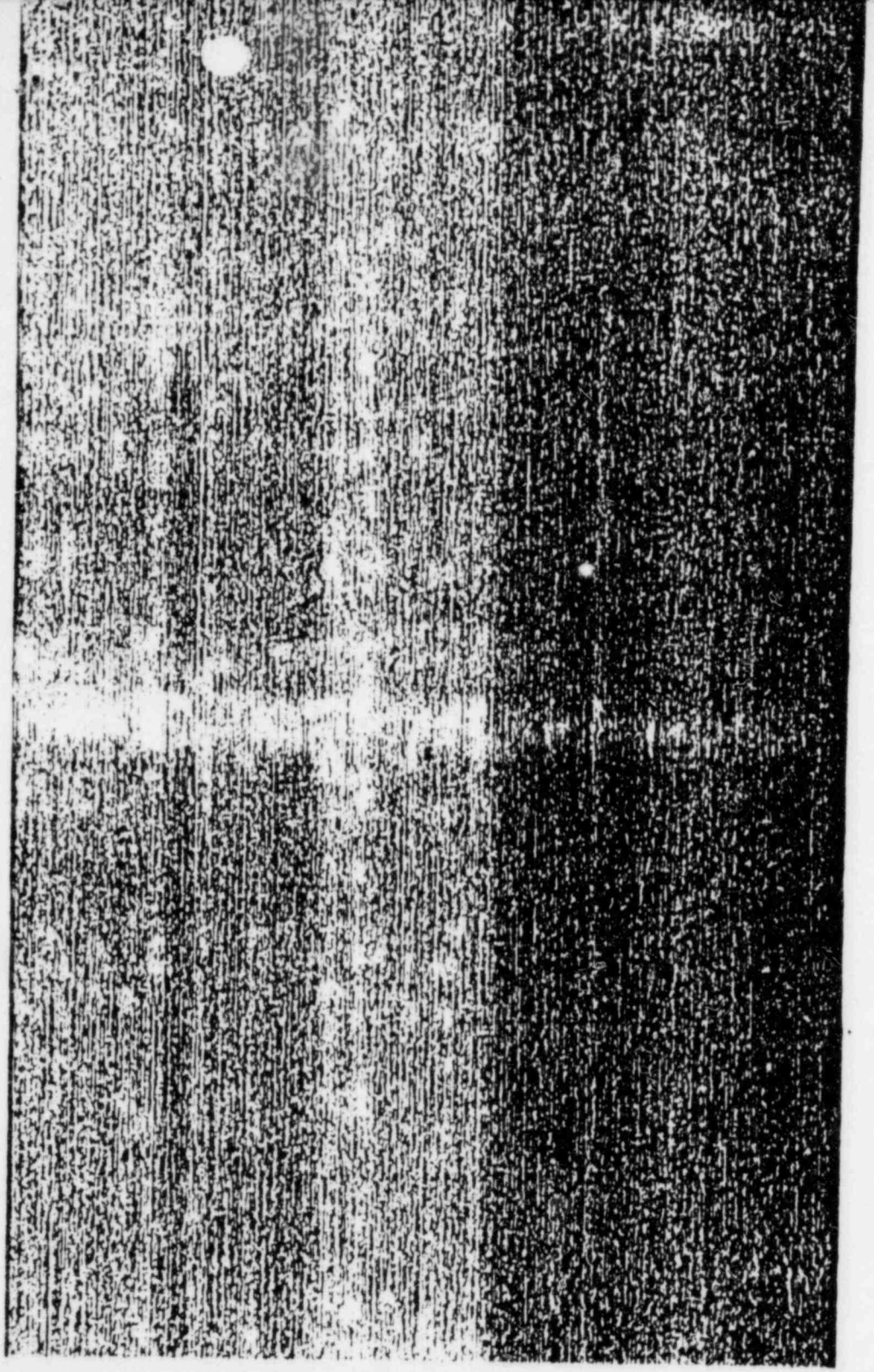
The requirements of 5 U.S.C. 553 with respect to notice and public participation were not followed in connection with the issuance of this amendment due to the objective character of the criteria for inclusion on the List specified in 12 CFR 207.5 (d) and (e), 220.8 (h) and (i), and 221.4 (d) and (e). No additional useful information would be gained by public participation. The requirements of 5 U.S.C. 553 with respect to deferred effective date have not been followed in connection with the issuance of this amendment because the Board finds that it is in the public interest to facilitate investment and credit decisions based in whole or in part upon the composition of this List as soon as possible.

Accordingly, pursuant to the authority of sections 7 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78g and 78w) and in accordance with § 207.2(f)(2) of Regulation G, § 220.2(e)(2) of Regulation T, and § 221.3(d)(2) of Regulation U, there are set forth below additions to and deletions from the Board's List:

Additions to List

AM Cable TV Industries, Inc.
$.10 par common
Advanced Systems, Inc.
$.10 par common
All American Industries, Inc.
$.10 par common
Alpine Geophysical Corporation
$.10 par common
Altair Corporation (Puerto Rico)
$1.00 par common
Amber Resources Company
$.003125 par common
Amdisco Corporation
$1.00 par common
American City Bank (Los Angeles)
$2.50 par capital
American Management Systems, Inc.
$.01 par common
American Metals Service, Inc.
$.01 par common
American Solar King Corporation
No par common
Amoskeag Company
No par common
Anacomp, Inc.
9½% convertible subordinated debentures
Andrew Corporation
$1.00 par common
Antares Oil Corporation
$.01 par common
Applicon Inc.
$.05 par common
Aracca Petroleum Corporation
$.01 par common
Avery Coal Co., Inc.
$.10 par common
Bancorp Hawaii, Inc.
$1.00 par cumulative convertible preferred
BancTec, Inc.
$.01 par common
Bio-Medical Sciences, Inc.
$.01 par common
Brock Hotel Corporation
$.10 par common
Burton/Hawks, Inc.
$.01 par common
CGA Computer Associates Inc.
$.10 par common
Calvin Exploration, Inc.
$.01 par common
Checkpoint Systems, Inc.
$.10 par common
Cheezem Development Corporation
$.01 par common
City Federal Savings and Loan Association (New Jersey)
$.01 par common
Clinical Sciences Inc.
$.01 par common
Cognitronics Corporation
$.20 par common
Commerce Southwest Inc.
$1.00 par convertible preferred Class A,
$8.00 par convertible preferred
Communications Corporation of America
$.01 par common
Compucorp
No par common
Computer Data Systems, Inc.
$.10 par common
Computer Usage Company
$.25 par common
Consul Corporation
$.01 par common
Continuum Company, Inc., The
$.10 par common
Corcom, Inc.
No par common
Countrywide Credit Industries, Inc.
$.05 par common
Crested Butte Silver Mining, Inc.
$.001 par common
Crowley Foods, Inc.
$5.00 par common
D. A. B. Industries, Inc.
$1.00 par common
Dicomed Corporation
$.03 par common
Dimis, Inc.
$.01 par common
Discovery Oil, Ltd.
No par common
Dominion Mortgage & Realty Trust
$.10 par shares of beneficial interest
Electromagnetic Sciences, Inc.
$.10 par common
Electrospace Systems, Inc.
$.10 par common
Empire Oil & Gas Company
No par common
ENZO Biochem, Inc.
$.01 par common
Excel Energy Corporation
$.01 par common
Fingermatrix, Inc.
$.01 par common
First Coinvestors, Inc.
$.05 par common
First Federal Savings and Loan Association of Raleigh
$1.00 par common
Flagship Banks Inc.
No par cumulative convertible preferred

[1] Copy of current List filed as part of original document.



United States Court of Appeals
For the First Circuit

No. 81-1839

NEW ENGLAND POWER COMPANY, ET AL.,

PETITIONERS,

v.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
and
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF A REGULATION OF
THE NUCLEAR REGULATORY COMMISSION

Before
CAMPBELL and BREYER, *Circuit Judges*,
and PETTINE,* *District Judge*.

Gerald Charnoff, with whom *Jay E. Silberg*, *James B. Hamlin*, and *Shaw, Pittman, Potts & Trowbridge* were on brief, for petitioners.

Peter G. Crane, Acting Assistant General Counsel, with whom *E. Leo Slaggie*, Acting Solicitor, *Richard P. Levi*, Attorney, Office of the General Counsel, United States Nuclear Regulatory Commission, *Anne S. Almy* and *Robert L. Klarquist*, Attorneys, United States Department of Justice, were on brief, for respondents.

July 19, 1982

CAMPBELL, *Circuit Judge*. Petitioning power companies seek review pursuant to 28 U.S.C. § 2342(4), 42 U.S.C. § 2239(b), of an interpretative rule promulgated by the Nuclear Regulatory Commission ("NRC"), 46 Fed. Reg. 49,573 (1981). The challenged rule allows the NRC to base fees charged to applicants for nuclear reactor licenses upon

* Of the District of Rhode Island, sitting by designation.

ENCLOSURE 4

agency costs, and to collect such fees even though the applications are voluntarily withdrawn before final agency action thereon.[1]

The licenses at issue are so-called construction permits which utilities wishing to build nuclear power plants must first obtain from the NRC. *See* 42 U.S.C. § 2235; Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.; see generally Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526 (1978). The application for such a permit must show in detail the preliminary design of the facility as well as much other highly technical information. *See* 10 C.F.R. § 50.34. Review by the NRC of a single application, we are told, may consume many thousands of man-hours. To recoup its expenses, the NRC wishes to charge fees related to the actual expenses incurred in reviewing applications and to collect such fees whether or not the application is subsequently withdrawn. Petitioners argue that the NRC lacked authority to promulgate its fees rule under Title V of the Independent Offices Appropriation Act of 1952 ("IOAA"), 31 U.S.C. § 483a, and that even if such authority existed, the rule's interpretation of earlier regulations, 10 C.F.R. Part 170, as permitting the fees is unwarranted. In either case, petitioners contend that they may not legally be assessed fees on applications withdrawn before the rule became effective on November 6, 1981.

I.

The rule here under review was promulgated under the IOAA, which provides as follows:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

31 U.S.C. § 483a. Petitioners argue that when an application is withdrawn, the utility receives no "benefit" or "thing of value" from the review work done up until that time by the NRC, since no permit is granted. They point in particular to

[1] A 1978 NRC regulation provided that fees were payable when review by the NRC was completed. The 1981 interpretative rule adds explicitly that "review . . . is completed" when an application is withdrawn, and not just when a license is actually issued. *See infra* at page 7.

the narrow reading of the IOAA adopted by the Supreme Court in *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974), and *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974), asserting that these cases require conferral of a "special benefit" not present here before any fee may be imposed. We are satisfied, however, that the review work performed by the NRC at the request of an applicant constitutes a sufficiently substantial and particularized benefit to the applicant to justify the imposition of fees under the Court's reading of the IOAA.

In *National Cable Television*, the Court distinguished "taxes," which may only be levied by Congress, from "fees," which may properly be charged by agencies. 415 U.S. at 340-41. The difference is that, unlike a tax, a fee "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant" to engage in a regulated activity, and is charged for agency action which "bestows a benefit on the applicant, not shared by other members of society."[2] *Id.* In *New England Power*, the Court stressed that fees under the IOAA may represent "only specific charges for specific services to specific individuals or companies," 415 U.S. at 349, and that only identifiable recipients of benefits may be assessed fees, *id.* at 349-51.

Fees for work done before an application is withdrawn pass muster under these standards. They represent charges for work done at the utility's request; they benefit the utility by assisting it in meeting its legal obligations which are prerequisite to the issuance of a permit; and the services may clearly be attributed to the specific applying utility. In *New*

[2] Petitioners seize on other language in the opinions which uses the actual grant of a license as an example of a benefit for which a fee may be charged. Such examples are not surprising, since the facts in these cases involved actual grants. There is no indication that the Court even considered, much less meant to prohibit, fees in the absence of such grants. The same may be said for the legislative history cited by petitioners.

England Power, the Supreme Court quoted with approval a Bureau of the Budget document which suggests that the fees here could properly be authorized. The document states that fees could be charged when a service "[i]s performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public."[3] 415 U.S. at 349 n.3.

Circuit court cases decided after *National Cable Television* and *New England Power* also provide strong support. In *Mississippi Power & Light Co.* v. *NRC*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980), the court upheld fees for the cost of environmental reviews of nuclear reactor applications, "because [such reviews] are a prerequisite to the issuance of a license." *Id.* at 231. Since the reviews were "a necessary part of the cost of providing a special benefit," *i.e.*, the license, fees could properly be assessed for their cost. *Id.* Similarly, the cost of certain hearings could also be charged because they are an "integral part of the process of approving an applicant's license." *Id.* Here, too, the work done is a necessary part of the process of obtaining a license. That the utility subsequently withdraws its application does not defeat the fact that it has already received a benefit by virtue of the work already done at its request. Similarly, in *Electronic Industries Association* v. *FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976), the court stated that fees may be charged for services which an agency must render in order for a firm to comply with regulatory requirements, since such services "create an independent private benefit" in addition to any benefit to the general public. Again, the fees here could properly be assessed under such a standard. We thus have no difficulty in concluding that the NRC could promulgate a regulation under the IOAA which would charge fees for any review

[3] While the few examples given did not include the fact pattern here, the standard itself would seem to encompass the situation, and there is no indication that the examples were meant to be exhaustive.

work actually performed on construction permit applications even when the applications are later withdrawn.

II.

A more difficult question is presented by petitioners' second argument, which maintains that charges may not in any event be collected on applications withdrawn prior to the effective date of the interpretative rule under review. The NRC does not dispute the proposition that the IOAA itself only authorizes the prescribing of fees *by regulation* — it does not provide for charging fees unsanctioned in the first instance by an adequate regulation. *See Alyeska Pipeline Service Co. v. United States*, 624 F.2d 1005, 1009-10 (Ct. Claims 1980). Nor does the NRC argue that the instant interpretative rule, adopted in 1981, may itself be given retroactive effect so as to apply to applications withdrawn before its effective date.[4] Rather, its position is that the fees regulation, as it stood prior to the adoption of the interpretative rule, in and of itself adequately authorized the imposition of fees for work done on applications which are later withdrawn. *See infra* page 8. The petitioning utilities argue vigorously that the prior regulation did not give them adequate notice that fees would be charged on withdrawn applications. We believe they are correct.

Up until 1968, the agency[5] did not charge fees for its regulatory activities. In 1968, regulations were issued authorizing fees that were either fixed in amount or were variable

[4] *See* Brief for Respondents at 43-44. *But cf.* 46 Fed. Reg. 49,573, 49,576 n.4 (rule not retroactive, but NRC asserts it could adopt such a rule if it wished). To the extent the NRC does claim the authority to adopt a retroactive fees rule, *see id.*, we reject its position as unsupported by the IOAA and as destructive of petitioners' justifiable reliance on the regulations as they previously read, *see* page 8, *infra*. *See generally SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[5] Before enactment of the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.*, the Atomic Energy Commission regulated the nuclear power industry.

with the size of the reactor; the fees were not based on the actual cost of the work performed on an individual application. 33 Fed. Reg. 10,923. As codified at 10 C.F.R. § 170.12(b), the agency's rules provided that fees for construction permits would be payable when the provisional or final permit was issued. 33 Fed. Reg. at 10,926. The provisional permit language was later placed in a footnote, with the text reading as follows:

> 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.

10 C.F.R. § 170.12(b), promulgated at 37 Fed. Reg. 8,074, 8,075 (1972). Changes were proposed in 1974, 39 Fed. Reg. 39,734, 39,735, and in 1977, 42 Fed. Reg. 22,149, 22,162, but no actual changes were made until the 1978 promulgation at 43 Fed. Reg. 7,210, 7,218-19, after which the rule read as follows:

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

The 1981 interpretative rule here under review adds the following sentence to the 1978 version of section 170.12(b):

> For the purpose of this part the review of a project is completed when a permit or license is issued, or an application for a permit or license is denied, withdrawn, suspended, or action on the application is postponed.

46 Fed. Reg. 49,573, 49,576 (1981).

At the outset, we note that while the petition for review formally concerns the 1981 regulation, we are actually dealing with the 1978 regulation. The NRC concedes that fees (other than an application filing fee not here at issue) for work on withdrawn applications were not authorized prior to 1978. *See* 46 Fed. Reg. 49,573, 49,575 (1981). The question is whether the change in the regulation in 1978 may fairly be

characterized as authorizing the NRC to assess and collect the cost-based fees following the withdrawal of applications when the predecessor regulations had not done so.

The NRC views the 1981 regulation as a mere clarification of the 1978 regulation which, it says, provided at that time (*i.e.*, in 1978) "fair and adequate notice" of its adoption of the policy later spelled out expressly in the 1981 interpretative rule. As we have already noted, the NRC does not argue that the new language should be applied retroactively to petitioners' withdrawn applications. *See supra* page 6 & note 4. Rather it simply contends that as the 1981 rule did no more than state what was inherent in the 1978 regulation, the agency could freely apply that interpretation from the date of the 1978 regulation onward.

We agree with petitioners that the 1978 regulation did not provide them with adequate notice of the change the NRC now attributes to it. While an agency's interpretation of its own regulations is of course entitled to substantial deference, it would be unfair in these circumstances to sanction a *post hoc* attempt to breathe new meaning into a regulation where such meaning was not evident at the time it was promulgated. *See generally Forbes Health Systems* v. *Harris*, 661 F.2d 282, 285-86 (3d Cir. 1981). By expressly requiring in the IOAA that fees be prescribed by regulation, Congress evidenced its concern that such fees be communicated in advance to those who would have to bear them, thus permitting them to take intelligent action to avoid undesired consequences. For the purpose of assessing the validity of charges from 1978-81, the question is not simply whether the 1978 regulation may have stated a principle capable of extension in the manner spelled out in the 1981 interpretative rule, but whether the 1978 regulation itself, taken in context, fairly put petitioners on notice of this extension in 1978-81, before the interpretative rule was adopted. We do not think it did.

The 1978 regulation made no express mention of any change from the prior rule that fees would not be assessed on withdrawn applications. Not until 1981 was express language to this effect added to section 170.12(b). The absence of an explicit declaration of any alteration in the consistently followed prior practice is in itself probative on the issues of the NRC's intent at the time and whether petitioners were given adequate notice of the alleged change. *Cf. American Frozen Food Institute* v. *Train*, 539 F.2d 107, 135 (D.C. Cir. 1976) (notice of rulemaking held inadequate where final rule added standard without prior notice); *compare United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 243 (1973) (notice of proceeding "fairly advised" interested parties of agency's proposed order).

The NRC nonetheless points to three places where it contends that adequate notice of a change in 1978 was given. We find none of them sufficient. First, in the supplementary information accompanying the 1977 fees proposal, the agency listed as one of its "guidelines for fee development" that fees may be assessed for "all services necessary for the issuance of a required permit." 42 Fed. Reg. 22,149, 22,150. This alone certainly does not indicate a change in the prior practice, for the 1977 proposed rule itself did not change the previous rule that fees would be payable when the permit was issued, thus providing no basis for charging fees on withdrawn applications. *Id.* at 22,162. The supplementary information accompanying notice of the final rule in 1978 adds that the NRC "is generally obliged to impose the fees allowed by these guidelines where it is fair and equitable to do so." 43 Fed. Reg. 7,210, 7,211. We do not find this additional language sufficiently specific to indicate a change in the longstanding rule on withdrawn applications.

The NRC relies secondly on the changed language of section 170.12(b) in 1978, contending that, especially when combined with the guidelines, it gives adequate notice of an intent to charge fees on withdrawn applications. The only explanation of the change — from payment when the permit is issued to when review is completed — in the 1978 notice,

however, was simply that section 170.12 had been "revised in its entirety to accommodate the amended rule." 43 Fed. Reg. at 7,217. Again, we see no indication that the change here alleged was contemplated or made public.[8] *Cf., e.g., National Industrial Sand Association* v. *Marshall*, 601 F.2d 689, 716-17 (3d Cir. 1979) (describing importance of agency articulation of reasons for its actions). The NRC does not claim that it changed its rule in 1978 for the purpose of charging for work done on withdrawn applications in response to comments submitted on the proposed rule. *Compare BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 643 (1st Cir. 1979), *cert. denied sub nom. Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096 (1980). We thus find nothing in the changes made in 1978 from the 1977 proposal or the earlier rule which may fairly be characterized as giving notice of a change in the prior practice.

The NRC's third argument is that a change in 1978 from flat fees to fees for work actually done gives such notice. Again, we disagree. Given the history and the context, *see infra*, this change alone bears no necessary relationship to whether fees would be charged on withdrawn applications. It does not provide the "clear signal" claimed for it by the NRC. 46 Fed. Reg. 49,573, 49,575. Indeed, this change provides a reasonable explanation for the change in section 170.12(b), which would allow time for the actual review costs to be determined, something which might not be possible precisely at the time the permit was issued.

In addition to the lack of any clear sign that the NRC was changing its policy on withdrawn applications in 1978, other factors suggest that the agency in fact intended no such change at that time. For example, footnote 4 to section 170.12 as promulgated in 1978, 43 Fed. Reg. at 7,220, states in relevant part,

[8] Even the NRC admits in its brief that in 1977 and 1978, "the question of withdrawn applications was foremost in no one's mind, and was at best a secondary consideration."

> 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, except where the application is withdrawn by the applicant or denied by the Commission.

While the import of this language is not entirely clear — the NRC acknowledges in its brief that it is "not a model of drafting" and that it misinterpreted the footnote in the 1981 notice accompanying the interpretative rule under review, 46 Fed. Reg. at 49,575 — it does seem to suggest that even in 1978, the NRC intended not to charge for withdrawn applications, for the following reason. The purpose of the footnote is to ensure that a utility will not be assessed twice for a single site review, once for the review itself, and again as part of the fee for a construction permit. The "except" clause at the end could then reasonably be interpreted as indicating that no construction permit fee — as opposed to an early site review fee — would be assessed on a withdrawn application, thus obviating the need to prevent a double assessment.

Further, the NRC was perfectly capable of explicitly charging fees on withdrawn applications and in fact did so with respect to the initial flat filing fee, which is "charged irrespective of the Commission's disposition of the application or a withdrawal of the application." 10 C.F.R. § 170.12(a). This explicit rule stands in sharp contrast to that of the immediately following paragraph on fees for permits and licenses, which contained no such language prior to 1981. Again, this may be interpreted as evidence of an intent not to charge fees beyond those for the initial filing on withdrawn applications.

For these reasons, we do not think that the fees regulation as promulgated in 1978 gave adequate notice of an intent to charge fees for work on applications which are later

withdrawn. *Cf. Morton* v. *Ruiz*, 415 U.S. 199 (1974). The regulation was at best ambiguous on the agency's intentions as respects imposition of fees (other than the filing fee) in cases where the application is withdrawn prior to license issuance. This being so, and given the interest of the petitioners in knowing their financial exposure so that they could minimize it by, for example, withdrawing earlier, we are unable to say, for purposes of 31 U.S.C. § 483a, that the regulation existing between 1978 and 1981 adequately "prescribe[d]" the fee which the NRC now seeks to impose. Fees may not be charged pursuant to the 1978 version of section 170.12(b) on work done on construction permit applications withdrawn before the effective date of the 1981 rule.[7]

The petition for review is granted.

[7] While the NRC denominates its 1981 rule as an "interpretative" one, it apparently gave notice of and solicited comments on the proposed rule; the issue of whether proper notice and comment procedures were followed with respect to the 1981 rule is not before us; accordingly, we do not pass on it. (We do hold, *supra*, that the NRC was authorized by the IOAA to adopt such a rule prospectively.)

Adm. Office, U.S. Courts — Addison C. Critchell & Son, Inc.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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August 19, 1983

MEMORANDUM FOR: William O. Miller, Chief
License Fee Management Branch
Office of Administration

FROM: Herbert N. Berkow, Chief
Management Analysis Branch
Planning and Program Analysis Staff, NRR

SUBJECT: NRR COSTS ASSOCIATED WITH BLACK FOX 1&2 CP REVIEW

As requested by your July 29, 1983 memorandum, we have reviewed the printout of professional staff hours associated with the review of Black Fox 1&2. There were 33,082 regular, and 2,369 non-regular professional staff hours associated with this review. Of regular hours, 6,537 were charged to the contested hearing.

There were $300,576 expended in contractual costs.

Herbert N. Berkow

Herbert N. Berkow, Chief
Management Analysis Branch
Planning and Program Analysis Staff, NRR

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