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The Light company
Houston Lighting & Power

P.O. Box 1700 Houston, Texas 77001 (713) 228-9211

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U. S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, DC 20555

South Texas Project Electric Generating Station
Units 1 & 2
Docket Nos. STN 50-498, STN 50-499
Comments on Proposed Revision of
Part 170 and Part 171 Fee Schedules

Houston Lighting & Power Company hereby submits comments in response to the proposed rule, entitled "Revision of Fee Schedules," issued on June 27, 1988 and published at 53 Fed. Reg. 24077 (1988). The proposed rule would amend the fee schedules found in Parts 170 and 171 of the Commission's regulations. Our comments are directed to certain aspects of each part.

Part 170

Our principal objection to the proposed revisions of Part 170 relates to the removal of the current ceilings on the collection of fees. As the Commission recognizes, these ceilings "were established by the Commission at the request of the regulated industry as a means of assigning predictability as to what the final costs of a regulatory service would be." 53 Fed. Reg. at 24679. We submit that the reasons for assigning predictability are as compelling today as they were when the Commission imposed the ceilings. Indeed, because of the proposed increase in the agency-wide professional staff-hour rate, considerations of predictability more than ever require the retention of ceilings.

Part 171

We have several objections to the proposed revisions of Part 171 of the Commission's regulations. First, the proposal does not remove the most fundamental of the defects which we and others have identified concerning the Commission's present system for assessment and collection of annual fees under Part 171. The Commission continues to believe that there has been delegated to it authority to assess and collect annual fees for "generic" regulatory services benefiting broad "classes" or "types" of power reactor licensees.

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53 Fed. Reg. at 27078, 24080-82. It does not feel compelled to identify any special benefits rendered to individual licensees, as the Commission believes that such a matching of special benefits and fees is not required by Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), as amended by Section 5601 of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"). In the Commission's opinion, the requirement that fees match "individually identifiable services" is applicable only to Part 170 fees assessed under the authority of Title V of the Independent Offices Appropriation Act of 1951. Id. at 24078.

We expressed our strong disagreement with the Commission's interpretation of its statutory authority to collect annual fees in comments filed on our behalf on July 16, 1986, when the Commission first proposed to add Part 171 to its regulations. When the Commission issued a final rule providing for the recovery of the "generic" costs of regulating classes of licensees, 51 Fed. Reg. 33244 (1986), we sought judicial review. That effort resulted in the split decision in Florida Power & Light Co. v. United States, Nos. 86-1512, et al. (D.C. Cir. May 13, 1988), upon which the Commission now relies. However, we are seeking review of that decision in the Supreme Court. In the meantime, we continue to express our belief that amended Section 7601 of COBRA, when read in the context of the body of judicial decisions construing similar user fee statutes, compels the Commission to first identify specific services benefiting individual licensees before proceeding to assess annual fees intended to recoup the costs associated with these services. In brief, the proposed rule relies upon legal judgements which we questioned in our July 16, 1986 comments and have continued to question in the on-going litigation over the legality of the Commission's annual fee legislations. We therefore incorporate herein the views which we have expressed in the comments and in the litigation.

The Commission reads Section 5601 of OBRA as removing the 33 percent ceiling found in Section 7601 of COBRA and inserting in its place a direction that the agency collect at least 45 percent of its budget during fiscal years 1988 and 1989. 53 Fed. Reg. at 24078. The commission reasons that as its fee collections now can exceed the percentage target found in the governing statute, there no longer is any need to provide refunds if this target is exceeded. Id. at 24078, 24084. We submit the Commission is in error in reading the 45 percent referred to in OBRA as a floor rather than a ceiling. In adopting its view, the Commission failed to consider the single best explanation of the unclear language of OBRA, namely, the statement of Senator Simpson on the floor of Congress clarifying the intention of Congress in enacting the provision. 133 Cong. Rec. S18685 (daily ed. Dec. 21, 1987).

Senator Simpson explained that the "contorted" and "convoluted" language of Section 5601 is attributable to the arcane Congressional Budget Office "scoring" process and the "crediting" of user fees to certain Congressional committees. Id at 18685-87. Stripped of unnecessary complexities, Section 5601 of OBRA "authorizes the NRC to collect increased user fees in an amount up to 45 percent of the agency's budget for 2 fiscal years--fiscal years 1988 and 1989." Id at 18685 (emphasis added).

The legislative history of Section 5601 therefore clearly suggests that the Commission is mistaken in treating the 45 percent referred to in the legislation as a floor rather than as a ceiling. Regardless of whether the Commission 's correct or incorrect in its belief that it legally can recover the "generic' costs of regulating classes of licensees, it must take action to ensure that the aggregate of its fee collections does not exceed 45 percent of the NRC's 1988 and 1989 fiscal year budgets. The obvious method of ensuring this result is to retain the refund mechanism found in Part 171.21 of the Commission's annual fee regulations.

J. H. Goldberg
Group Vice President
Nuclear

JHG/PLW/nl

cc:

Regional Administrator, Region IV
Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

George Dick
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Jack E. Bess
Resident Inspector/Operations
c/o U. S. Nuclear Regulatory Commission
P. O. Box 910
Bay City, TX 77414

Don L. Garrison
Resident Inspector/Construction
c/o U. S. Nuclear Regulatory Commission
P. O. Box 910
Bay City, TX 77414

J. R. Newman, Esquire
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Washington, DC 20036

R. L. Range/R. P. Verret
Central Power & Light Company
P. O. Box 2121
Corpus Christi, TX 78403

R. John Miner (2 copies)
Chief Operating Officer
City of Austin Electric Utility
721 Barton Springs Road
Austin, TX 78704

R. J. Costello/M. T. Hardt
City Public Service Board
P. O. Box 1771
San Antonio, TX 78296

Rufus S. Scott
Associated General Counsel
Houston Lighting & Power Company
P. O. Box 1700
Houston, TX 77001

INPO
Records Center
1100 Circle 75 Parkway
Atlanta, Ga. 30339-3064

Dr. Joseph M. Hendrie
50 Bellport Lane
Bellport, NY 11713