POLICY ISSUE
(Affirmation)

November 25, 1985 SECY-85-371

For: The Commission

From: William H. Briggs, Jr., Solicitor

Subject: REQUEST FOR REFUND OF BLACK FOX LICENSE FEE

Discussion: The co-owners of the Black Fox Station, Units 1 and 2 petitioned the NRC staff to exempt it from paying the license fee it owed the Commission after it withdrew its Black Fox construction permit application. (Enclosure 1) The NRC staff denied the request. (Enclosure 2) Licensee paid the $1,061,161 fee (including interest and penalty for late payment) in protest and has requested the Commission to reverse the staff's decision. It has also requested it be provided the material demonstrating how the fee was calculated. (Enclosure 3) Attached for your consideration is a draft order responding to petitioners' request. (Enclosure 4)

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Contact:
Trip Rothschild
x4-1465

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William H. Briggs, Jr.
Solicitor

Enclosures:
As stated

Per the request of Chairman Palladino, Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Tuesday, December 3, 1985. Affirmation is tentatively scheduled for Wednesday, December 4, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, November 29, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analtyical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Enclosure 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of the Application of	)	
PUBLIC SERVICE COMPANY OF OKLAHOMA,	)	
ASSOCIATED ELECTRIC COOPERATIVE, INC.,	)	Docket Nos.
AND	)	STN 50-556
WESTERN FARMERS ELECTRIC COOPERATIVE	)	STN 50-557
(Black Fox Station, Units 1 and 2)	)	

APPLICATION FOR WAIVER OF WITHDRAWAL FEES
UNDER 10 C.F.R. § 170.12(b)

PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC., and WESTERN FARMERS ELECTRIC COOPERATIVE (the "BFS Co-Owners") respectfully ask the Nuclear Regulatory Commission (the "N.R.C.") to waive fees for withdrawal of their nuclear construction-permit application. A total withdrawal fee of $1,009,275 has been charged against the cancelled Black Fox Station nuclear project (the "BFS Project"). Of this, the BFS Co-Owners paid $125,000 when they filed their construction-permit application for the BFS Project in 1975. By color of 10 C.F.R. § 170.12(b), the N.R.C. issued invoice #C0203 dated May 3, 1984 for the $884,275 balance plus interest at the rate of .75% per month.

The BFS Co-Owners' request for a waiver of this withdrawal fee rests upon the unique facts surrounding their construction-

permit application. These facts show that assessment of withdrawal fees against the BFS Co-Owners would violate the fairness, public-policy, and value-to-applicant principles of the Independent Offices Appropriation Act of 1952, Title V, 31 U.S.C.A. § 9701(b) (West 1983) (the "IOAA"). In support of this request, the BFS Co-Owners state:

1. Before November 1981, withdrawal of a construction-permit application was charge-free under 10 C.F.R. § 170.12(b). Except for the initial non-refundable fee, no additional fees fell due for the N.R.C.'s review of a construction-permit application unless such application were ultimately granted.

2. For withdrawals on or after November 6, 1981, a newly-adopted version of 10 C.F.R. § 170.12(b) imposes a withdrawal fee equal to the fee that would have been due had the construction-permit application actually been granted.

3. Apart from this change in N.R.C. fee rules, every assessment of withdrawal fees must comply with the principles of the IOAA: The withdrawal fee must be fair as applied to each withdrawing construction-permit applicant. The amount of the fee must be computed from the N.R.C.'s actual costs expended for the individual application withdrawn. The withdrawal fee charged against each withdrawing applicant must depend upon the value of the N.R.C.'s service to that applicant. The withdrawal fee must not contravene any public policy associated with assessment of such a fee. Finally, assessment of the withdrawal fee must rest

upon the relevant facts surrounding the withdrawing construction-permit applicant. See 31 U.S.C.A. § 9701(b)(1) & (2)(A)-(D) (West 1983).

4. The BFS Co-Owners filed their application for the BFS construction-permit in August 1975. A Limited Work Authorization issued for the BFS Project in July 1978. The administrative record was completed in February 1979. Issuance of the construction-permit seemed almost assured in ordinary course.

5. But less than one month after completion of the BFS administrative record, the accident occurred at Three Mile Island in March 1979. For the next three years, N.R.C. actions and inactions foreclosed issuance of the BFS construction-permit. Understandably, the Three Mile Island accident triggered safety concerns. But BFS safety design differed materially from the reactor units at Three Mile Island. Even so, the BFS Co-Owners cooperated actively and fully from the very start, as the N.R.C. sought to dictate new safety requirements that the BFS Co-Owners might meet to avoid another accident like Three Mile Island. This N.R.C. effort, however, to adopt new safety requirements proved almost interminable. The difficulty was not only regulatory inactivity, but activity with constantly changing course and focus. By January 1982, when the N.R.C. spoke with any finality about new safety requirements and design, the economic viability of BFS as a project was destroyed.

6. The BFS Project became economically infeasible because of what new safety requirements the N.R.C. formulated and the long stall in their formulation. Whatever the justification for the N.R.C.'s regulatory actions between 1979 and 1982, such actions are the sole reason for demise of the BFS Project. As between the N.R.C. and the BFS Co-Owners, then, the N.R.C. must bear the ultimate responsibility for why the BFS Co-Owners were forced to withdraw their construction-permit application. Most pertinently to the withdrawal fee of almost a million dollars now sought by the N.R.C., it was even N.R.C. actions which prevented the BFS Co-Owners from effecting withdrawal before November 6, 1981 when they could have easily avoided such a withdrawal fee altogether.

7. The relevant facts surrounding the BFS Co-Owners and their Project are unique. To show that such facts render assessment of any withdrawal fees unfair, contrary to public policy, and otherwise impermissible under the IOAA, 31 U.S.C.A. § 9701(b), the BFS Co-Owners simultaneously submit with the present Application their Brief In Support Of Application For Waiver Of Withdrawal Fees Under 10 C.F.R. § 170.12(b).

WHEREFORE, the BFS Co-Owners respectfully ask the Nuclear Regulatory Commission:

(A) to waive withdrawal fees for the cancelled Black Fox Station nuclear project; and

(B) to set this matter for informal hearings and meetings with representatives of the Nuclear Regulatory Commission, so that

further elaboration and factual exchange may be conducted on the present fee-waiver Application.

Respectfully submitted,

DOERNER, STUART, SAUNDERS,
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By: _____
Albert J. Givray

_____
Hilary I. Zarrow

Attorneys for Public Service Company of Oklahoma, Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative, as Co-Owners of the cancelled Black Fox Station nuclear project

CERTIFICATE OF FILING

I hereby certify that on the 14th day of June, 1985, I deposited in the U.S. Mails, postage prepaid, one original and three true and correct copies of the above and foregoing Application For Waiver Of Withdrawal Fees Under 10 C.F.R. § 170.12(b) addressed as follows:

William O. Miller, Chief
License Fee Management Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert Fonner, Esq.
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Accompanying such original and copies was a written request that the same be filed of record with the United States Nuclear Regulatory Commission.

Albert J. Givray

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I hereby certify that on the 14th day of June, 1985, I deposited in the U.S. Mails, postage prepaid, one original and three true and correct copies of the above and foregoing Brief In Support Of Application For Waiver Of Withdrawal Fees Under 10 C.F.R. §170.12(b), addressed as follows:

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Albert J. Givray

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

Docket Nos.
STN 50-556
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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)

BRIEF IN SUPPORT OF APPLICATION FOR WAIVER OF WITHDRAWAL FEES UNDER 10 C.F.R. §170.12(b)

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June 12, 1985

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BRIEF IN SUPPORT OF APPLICATION FOR
WAIVER OF WITHDRAWAL FEES UNDER 10 C.F.R. §170.12(b)

Introduction

This matter comes before the Nuclear Regulatory Commission (the "Commission" or "N.R.C.") on an Application For Waiver Of Withdrawal Fees Under 10 C.F.R. §170.12(b). This Application is made by Public Service Company of Oklahoma, Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative as co-owners of the cancelled Black Fox Station nuclear project (respectively, the "BFS Project" and the "BFS Co-Owners").

The contested fees relate to the BFS Co-Owners' withdrawal of their application for a construction permit to build their BFS Project. The total of such fee is $1,009,275. Of this, $125,000 was paid in 1975 when the BFS Co-Owners first applied for a nuclear construction permit. By invoice #C0203 dated May 3, 1984, the N.R.C. sought a fee balance of $884,275 (plus interest at $6,632.06 per month) following withdrawal of such construction-permit application from further N.R.C. consideration.

The BFS Co-Owners respectfully submit that the Commission's assessment of such a withdrawal fee against them violates the

principles of the Independent Offices Appropriation Act of 1952, 31 U.S.C.A. § 9701 (West 1983). Specifically, the unique circumstances surrounding the BFS Project show that a withdrawal fee in the million-dollar range is manifestly unfair. It contravenes the N.R.C.'s public policy of nuclear regulatory reform. And it does not fairly reflect "value" to the BFS Co-Owners as required by 31 U.S.C.A. § 9701.

The unfairness comes from two parallel lines of regulatory developments, both within sole N.R.C. control, which finally intersected to the severe prejudice of the BFS Co-Owners and their nuclear Project. One line is the N.R.C.'s actions to adopt new safety requirements for nuclear construction permits to be issued after the March 1979 accident at Three Mile Island. The other line traces the N.R.C.'s adoption of a new regulation to charge, for the first time ever, a withdrawal fee against any construction-permit application withdrawn on or after November 6, 1981.

Especially after March 1979, the BFS Co-Owners acted in good faith and with utmost dispatch in their willingness to comply with each N.R.C. pronouncement on new safety requirements. When the N.R.C. eventually spoke in January 1982 with completeness and finality on such safety requirements, the BFS Co-Owners took only one month to assess that the BFS Project was no longer economically feasible, and to withdraw their construction-permit application. But by then, the new rule on withdrawal fees had taken effect. Thus, regulatory events not only stalled the BFS Project from early 1979 to early 1982 and destroyed the Project's

economic viability, but also deprived the BFS Co-Owners of any meaningful opportunity to withdraw their construction-permit application before November 1981 when they would have been spared a million-dollar withdrawal fee.

Therefore, the principles of fairness, public policy, and value to recipient as embodied in 31 U.S.C.A. § 9701 call for waiver of the withdrawal fee now sought from the BFS Co-Owners under 10 C.F.R. §170.12(b). That such waiver is both warranted and proper appears from the relevant facts and their unique effect upon the BFS Co-Owners as set forth more fully below.

Factual Background

On December 23, 1975, Public Service Company of Oklahoma had its application docketed for a nuclear license to construct and operate the BFS Project on behalf of itself and Associated Electric Cooperative, Inc. In July 1976, Western Farmers Electric Cooperative joined the Project. Public hearings were held periodically between 1976 and 1978 on issues relating to site suitability and the environment. The Atomic Safety and Licensing Board (the "ASLB") reached a favorable partial initial decision concerning the BFS Project on July 25, 1978. From this decision, the Commission issued the BFS Project a Limited Work Authorization ("LWA") on July 26, 1978. The BFS Co-Owners thereupon began preparatory work on their nuclear power project. At the same, they worked to complete the administrative record for issuance of a full nuclear construction permit. Completion of this record was achieved February 1979.

From 1975 through February 1979, the BFS Co-Owners proceeded diligently towards N.R.C. issuance of the necessary construction permit. The regulatory rules and process for obtaining such permit were straightforward and predictable. The administrative proceedings duly progressed as expected.

The last essential step for construction-permit issuance was the conclusion of the public hearings on radiological health and safety before the ASLB. Once these hearings concluded and the administrative record was closed in February 1979, the Commission's issuance of a construction permit for the BFS Project seemed assured. This predictable administrative procedure, however, was soon crippled.

On March 28, 1979, the accident occurred at Metropolitan Edison's Three Mile Island Unit 2 ("TMI-2") nuclear-fueled, electric generating station. That such an accident would disrupt the N.R.C.'s usual administrative processes could be expected. That a licensing pause might ensue in issuance of construction permits could also be expected as the N.R.C. considered adoption of new safety requirements for all nuclear projects. What could not be expected was a three-year period of unsteady regulatory developments marked by a constantly shifting N.R.C. course on new safety requirements and delay after delay in construction-permit issuance. Throughout this period, the BFS Co-Owners kept close contact with the Commission in an effort to remove any and all safety obstacles to issuance of a construction permit for the BFS Project. These three-year developments may be summarized as follows:

On August 20, 1979, the Commission issued a licensing basis on safety, only to receive sharp criticism from the Kemeny Commission for issuing such rules prior to receiving the Kemeny Commission's own report on the accident at TMI-2. With licensing rules still unavailable, the BFS Co-Owners petitioned the Commission on September 5, 1979 to establish its new safety rules so that the BFS Project could proceed. The Commission published its Interim Statement of Policy and Procedure on October 10, 1979. See 44 Fed. Reg. 58,559 (1979).

While the Interim Statement allowed the Commission staff to proceed with licensing on an ad hoc case-by-case basis, it provided the BFS Co-Owners with no delineation of what safety adaptations or design modifications would be required before their construction permit could issue. This case-by-case procedure led to still more discussion between the BFS Co-Owners and the Commission as various alternatives and requirements were considered. Each time the BFS Co-Owners reasonably believed that the Commission's new safety requirements were final or nearly final, the Commission changed its requirements or adopted additional ones.

Simultaneously with its inconclusive activities on safety, the Commission also began amending certain procedural rules not related to safety. For example, the Commission mandated additional appellate channels of licensing review before any new nuclear construction permit could issue. The BFS Project thus stood on shifting sands: The BFS Co-Owners could neither predict the Commission's new safety requirements nor rely upon the

Commission's established procedures for processing pending applications. Worse, the Commission's technical requirements on safety were often changed with only seldom explanation why the BFS Co-Owners' design and safety proposals did not meet the requirements.

In August 1981--some 2½ years after completion of the BFS administrative record--the Commission met to codify a "policy" on final safety and non-safety licensing requirements. With the actual regulations yet unpublished, the BFS Co-Owners used this "policy" to begin immediate re-evaluation of construction costs and schedule estimates for their Project. This August 1981 "policy" gave the BFS Co-Owners the very first opportunity since the March 1979 TMI-2 accident to re-evaluate the BFS Project's economic feasibility under the new safety and design requirements. Even so, re-evaluation was incomplete because the August 1981 "policy" left open certain provisions concerning hydrogen control. Finality on these provisions was essential before the BFS Co-Owners could meaningfully decide whether to proceed with the Project or whether to withdraw their construction-permit application.

Finality in all new safety, design, and licensing requirements, including those left open in August 1981, came on January 15, 1982. On that date, the Commission fully and finally published for the first time what would be required for all new issuances of construction permits. Immediately, the BFS Co-Owners began intensive consideration with the utmost expediency to assess for the first time what they had been unable to assess for almost

three years: the impact of the complete new regulations upon their BFS Project.

Only one month after first awareness of the new regulations, the BFS Co-Owners were able to reach a decision they had tried so hard to reach since March 1979. Unfortunately, three years of shifting regulatory developments and delay had finally rendered the BFS Project no longer economically feasible. A project valued at several hundred million dollars had to be cancelled. The intensity of the BFS Co-Owners' disappointment and frustration is expressed in their February 16, 1982 letter[1/] advising the Commission that regulatory developments had forced the BFS Co-Owners to withdraw their construction-permit application. Ironically, the BFS Co-Owners' withdrawal coincided with the effective date of the Commission's final safety requirements published on January 15, 1982.

The BFS Co-Owners were thereafter reminded that such withdrawal carried with it more than the loss of a valuable project. Parallel to the regulatory developments on new safety requirements, the N.R.C. had undertaken to amend fee assessments against nuclear license applications. On October 7, 1981, the Commission adopted a regulation charging for the first time ever a fee against withdrawn construction-permit applications. See 46 Fed. Reg. 49,573--49,577 (1981). The effective date of this new withdrawal-fee rule was November 6, 1981. Every construction-

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1/ The letter was from Public Service Company's President Martin E. Fate, Jr., to Harold R. Denton, Director of Nuclear Reactor Regulation.

permit application withdrawn after November 6, 1981 would carry with it a withdrawal fee equal to the fee charged as though the construction-permit had actually issued.

The new rule on withdrawal fees was adopted several months before the Commission adopted (on January 15, 1982) the complete and final rules on post-TMI-2 safety, design, and licensing requirements. When the new withdrawal-fee rule was adopted, the BFS Co-Owners could not make a meaningful decision regarding withdrawal of their construction-permit application because the BFS Co-Owners still could not reasonably know what the Commission's complete and final safety requirements might be.

The BFS Co-Owners thus faced a Hobson's choice: avoid a million-dollar fee by withdrawing before knowing whether the BFS Project could remain feasible, or wait until the Commission fully and finally pronounced new safety requirements but incur a million-dollar fee for the wait. For a project so many years in the making, the BFS Co-Owners could do nothing but wait for the Commission to act completely and with finality. As with past regulatory delays, this wait was dictated entirely by N.R.C. actions.

In the end, the BFS Co-Owners were pushed (by only a slim margin) to withdraw after the critical November 6, 1981 date of the new fee rule. Accordingly, it would be unfair and contrary to public policy to saddle the BFS Co-Owners with a million-dollar withdrawal fee which they could have easily avoided, but for N.R.C. actions.

Argument

(I)

CHARGING THE BLACK FOX STATION CO-OWNERS WITH A WITHDRAWAL FEE UNDER 10 C.F.R. §170.12(b) WOULD VIOLATE THE FAIRNESS, PUBLIC-POLICY, AND VALUE-TO-APPLICANT PRINCIPLES OF 31 U.S.C.A. § 9701; ACCORDINGLY, THE COMMISSION SHOULD WAIVE SUCH A FEE HERE.

The N.R.C.'s authority for imposing a fee upon withdrawal of a construction-permit application comes from Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C.A. § 9701 (West 1983) (the "IOAA"). Section 9701 grants authority to federal agencies to prescribe by regulation proper fees and charges for agency services rendered:

> "(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be --
>
> (1) fair; and
>
> (2) based on --
>
> (A) the costs to the Government;
>
> (B) the value of the service or thing to the recipient;
>
> (C) public policy or interest served; and
>
> (D) other relevant facts."

31 U.S.C.A. § 9701 (West 1983) (formerly codified at 31 U.S.C.A. § 483a).

The IOAA does not itself set or require fee schedules. If a particular agency fails to include certain fees or charges in its implementing regulations, those fees cannot be collected. Thus,

the N.R.C. is without statutory authority to collect fees on withdrawn construction-permit applications unless its own regulations specifically authorize such fees. See New England Power Co. v. NRC, 683 F.2d 12, 15 (1st Cir. 1982).

By the time the BFS Co-Owners were able to withdraw their construction-permit application, the N.R.C. had amended 10 C.F.R. §170.12(b) to provide:

> "(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."

See 46 Fed. Reg. 49,576 (Oct. 7, 1981) (effective Nov. 6, 1931). Before this October 1981 amendment, no regulation properly empowered the N.R.C. to charge withdrawal fees of the kind presently sought from the BFS Co-Owners. See New England Power, 683 F.2d at 17-18. But even withdrawal fees sought under the amended version of Section 170.12(b) must meet the mandates of the IOAA. Therefore, such fees

(i) must be fair as applied to each construction-permit application being withdrawn,

(ii) must be based upon the actual cost incurred by the N.R.C. on the individual application withdrawn,

(iii) must depend upon the value of the N.R.C.'s service to the applicant of the withdrawn construction permit,

(iv) must not contravene public policy as it bears upon the withdrawing applicant or his application, and

(v) must rest upon the relevant facts affecting the withdrawn construction-permit application.

See 31 U.S.C.A. § 9701(b) (West 1983). Applying these principles to the unique facts of the BFS Project shows that charging the BFS Co-Owners with a million-dollar withdrawal fee violates the fairness, public-policy, and value-to-applicant principles of Section 9701.[2/] The violation of these principles appears from two lines of N.R.C. regulatory developments which unfolded in parallel between March 1979 and January 1982: formulation of new safety requirements in the aftermath of the accident at TMI-2 and adoption of a new withdrawal-fee rule effective November 1981.

A. N.R.C. Formulation of New Safety Requirements: Completion of the administrative record for the BFS Co-Owners' construction-permit application occurred in February 1979; the ever-changing regulatory course of the N.R.C. during the next three years was the sole reason for the BFS Co-Owners' forced withdrawal of such application.

The BFS Co-Owners filed their original application for a nuclear construction permit on August 8, 1975. After extensive public review, they were granted a LWA on July 26, 1978. This allowed non-safety related work to begin.

Once the BFS Co-Owners had procured their LWA, they moved to the second phase of the construction-permit licensing process.

2/ The BFS Co-Owners have not yet completed a proper review to verify that the withdrawal fee charged against them rests upon the actual costs of the N.R.C.'s work performed on their individual construction-permit application. The BFS Co-Owners reserve the right, should it become necessary, to conduct such a review and to challenge the withdrawal fee if the N.R.C. cannot substantiate actual costs as required.

This began with public hearings before the ASLB on the radiological health and safety of the BFS Project. The administrative record was completed on February 28, 1979. The BFS Co-Owners were advised that a decision by the ASLB could be expected by June 15, 1979. With their construction permit virtually assured, the BFS Co-Owners used a July 1979 target date in their cost calculations for actual issuance.

However, less than a month after completion of the BFS administration record, the TMI-2 accident intervened on March 28, 1979. Understandably, this accident disrupted the Commission's usual processes as the Commission paused to reconsider the safety aspects of all nuclear power projects, those operating and those still on the drawing board.

But for at least three reasons, this pause unfairly stalled issuance of a construction permit for the BFS Project. First, the safety design of the BFS reactor differed materially from the design at TMI-2. TMI-2 was a pressurized water reactor ("PWR"). The BFS reactor was to be a boiling water reactor ("BWR"). Whatever the concerns about the PWR design, those concerns did not reasonably extend to the BFS Project's BWR design.

Second, even assuming that the PWR and BWR designs were equally suspect, several projects with the same BWR design as the BFS Project had received construction permits before the TMI-2 accident.[3/] But unlike the BFS Project, these projects were

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3/ Detroit Edison's Fermi 2, Cincinnati G&E's Zimmer, Washington Public Power's Hanfort 2, Long Island Lighting Co.'s Shoreham, Commonwealth Edison's LaSalle 1 & 2, Pennsylvania

allowed to continue with active construction despite the TMI-2 accident.

For example, the BFS design was substantially the same as the Tennessee Valley Authority units. Construction of these units was freely permitted, virtually unhampered by the TMI-2 accident. But as a "near-term" project, the BFS construction permit was placed on hold by the Commission. Such disparate treatment of projects so similarly designed makes little sense.

A third reason why the BFS construction permit should not have been halted comes from the BFS Project's uniqueness among other "near-term" projects. Of all the near-term projects, only BFS had an LWA. And only BFS was under construction at the time of the TMI-2 accident. It should thus have been treated like the active-construction projects which BFS so closely resembled.

In the aftermath of Three Mile Island, ample cause existed for the Commission's safety concerns. But no matter how well-intentioned, these concerns did not justify the Commission's indefinite and blanket halt upon all pending construction-permit applications, without distinguishing the potentially dangerous (PWR designs like TMI-2) from the reasonably safe (BWR designs like BFS).

The Commission's blanket halt against all pending construction applications seems especially difficult to justify, given the

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P&L's Susquehanna 1 & 2, Mississippi P&L's Grand Gulf 1 & 2, Philadelphia Electric's Limerick 1 & 2, Illinois Power's Clinton 1 & 2, Gulf States' River Bend 1 & 2, Cleveland Electric's Perry 1 & 2, TVA's Hartsville A1 and A2, Hartsville B1 & B2, and Phipps Bend 1 & 2.

Commission's decision to allow other projects already underway to proceed freely toward completion. Safety concerns would have compelled the Commission to halt even projects already in construction. Since these were closer to completion, they posed far more threat to safety than construction permits not yet issued.

Nevertheless, the Commission did not stop any BWR plants in construction. Thus, while the BFS construction permit stood stalled, other utilities constructing units similar to BFS were allowed to continue unabated.

Despite all efforts by the BFS Co-Owners, the Commission would not progress towards granting the BFS Co-Owners their construction permit. Instead, three years passed of Commission inconsistent action and inaction, until the BFS Project lost its economic feasibility. Eventually, the Commission's regulatory course caused the BFS Project's cancellation and the BFS Co-Owners' withdrawal of their construction-permit application in early 1982.

The regulatory developments which led to the demise of the BFS Project began shortly after completion of the administrative record on construction-permit issuance. In June 1979, the BFS Co-Owners and other construction-permit applicants met with Harold Denton, Director of Nuclear Reactor Regulation. Mr. Denton verbally requested that the utilities prepare for submission plant-specific evaluations of the "lessons learned" from Three Mile Island. The BFS Co-Owners had closely followed the activity of the Advisory Committee on Reactor Safeguards and its analysis

of the accident. They were thus able to submit such a "lessons learned" report promptly on June 15, 1979. Their report was comprehensive in its 80-page assessment of the accident's relationship to the BWR design and operation of the BFS Project. The BFS Co-Owners' report was the first such "lessons learned" statement in the industry. On July 27, 1979, shortly after meeting again with Mr. Denton, the BFS Co-Owners submitted supplementary documentation and pledged commitment to the Commission's newly-issued Short-Term Lessons Learned Report, NUREG-0578.

The BFS Co-Owners then requested that the ASLB reopen the BFS proceedings so that the BFS Co-Owners could commit publicly to the Commission's post-TMI-2 licensing and safety requirements. On August 20, 1979, Mr. Denton's staff issued licensing recommendations, formally consolidating other guidance to which the BFS Co-Owners had already committed. Even so, the BFS Co-Owners once again on August 24, 1979 affirmed their commitment to these recommendations and guidance. Ironically, on the same day, the Kemeny Commission on the Accident at Three Mile Island severely criticized Mr. Denton for proposing licensing changes before completion of the Kemeny Commission's own report and findings. Through no fault of the BFS Co-Owners, the licensing process thus came to a standstill for at least the second time since the February 1979 completion of the BFS administrative record.

The BFS Co-Owners then directed their efforts towards the Commission itself. On September 5, 1979, they filed a "Motion for Commission Action" asking for resumption of the licensing process

towards construction-permit issuance. On October 10, 1979, the Commission issued its Interim Policy Statement. Though applicable to all pending licensing matters, the Interim Policy Statement responded directly to the BFS Co-Owners' Motion. The Interim Policy Statement authorized the Commission staff to proceed by its own discretion in individual cases where the staff felt satisfied with relevant TMI-2 investigations. This Interim Policy opened the door for ad hoc administrative review, which in turn provided very little predictability to utilities (like the BFS Co-Owners) awaiting construction permits. Neither this Interim Policy nor any other signal from the Commission gave the BFS Co-Owners even a hint (expressly or impliedly) that issuance of their construction permit might be long in coming. Instead, the Commission encouraged the BFS Co-Owners to be patient.

On October 10, 1979, the N.R.C. staff submitted yet another set of new licensing and safety requirements to the BFS Co-Owners. On October 12, 1979, the BFS Co-Owners pledged commitment to these new requirements. As before, the BFS Co-Owners reasonably believed that these new requirements were substantially final. But again, the BFS Co-Owners would soon be disappointed. A possibility of progress appeared on October 25, 1979, when the ASLB ordered interested parties to confer informally about a schedule for reopened public hearings on new safety requirements and other issues to be considered. But only five days later, on October 30, 1979, the Kemeny Commission report was made public. It recommended sweeping changes to N.R.C. practices. This spelled yet more uncertainty in the licensing process for the BFS Project.

On November 9, 1979, the Commission made several significant changes to non-safety rules and regulations. See 44 Fed. Reg. 65,049 (1979). First, it modified its adjudicatory procedures by suspending the "immediate-effectiveness" rule. Second, the Commission mandated Appeal Board and full Commission review prior to any further license issuance. This effectively denied the BFS Co-Owners' September 5, 1979 Motion which had sought Commission action under procedures as existed before these latest rule changes. Thus, the BFS Co-Owners once again stood without meaningful delineation of any new safety or licensing requirements. The Commission simply continued to encourage the BFS Co-Owners to persevere through the administrative process, implying that neither the new safety requirements nor the needed construction permits were far from reach. Especially given these encouraging signals, the BFS Co-Owners could at no time have reasonably inferred that the Commission's regulatory course would lead to a long-term (or even mid-term) delay in constructionpermit issuance.

Prompted by such signals, the BFS Co-Owners on November 16, 1979 filed another Motion for Clarification asking the Commission to specify a policy for proceeding ahead and to reconcile the Commission's Interim Policy with the public statements of the Commission's then Chairman Hendrie regarding a "licensing pause." The N.R.C. never responded to this Motion.

As the months passed, the lack of N.R.C. progress persisted in formulating new safety requirements, in processing applications, and in issuance of any construction permits. At the same

time, the holders of construction permits for units identical to the BFS design were allowed to proceed unabated even in their safety-related construction. Of the six projects awaiting construction permits, only the BFS Project had a completed administrative record on safety and only the BFS Project had a LWA. Thus, the BFS Project far more resembled a permit-issued project than a pre-permit project. No matter what the justification for the standstill in new permit issuances, such standstill should not have extended to the BFS Project. Instead, the BFS Project should have been treated as a permit-issued project by unimpeded issuance of a construction permit.

Not until May 1980 did Mr. Denton make an actual commitment to the BFS Co-Owners that his staff would develop the necessary new safety requirements and would bring them before the Commission. Thus, after countless promises and almost five years since initial application, the BFS Co-Owners felt reasonably assured that the new safety requirements were close at hand. But a set of new requirements was not actually presented to the BFS Co-Owners until August 1980. More importantly, the requirements actually presented differed markedly from what Mr. Denton had promised in July. It thus seemed almost as if the more guidance the N.R.C. promised, the less predictability the BFS Co-Owners could expect.

The next signal from the N.R.C. concerning new safety requirements came in March 1981. The Commission's "Proposed Final Rules" were published on March 23, 1981. See 46 Fed. Reg. 18,045 (1981). Solicitation of comments and considerable debate led the

Commission to approve some new safety requirements as "policy" on May 21, 1981, and again on August 27, 1981. Before a Final Rule was published five months later on January 15, 1982, see 47 Fed. Reg. 2,286 (1982), the new safety requirements underwent still further changes from their August 1981 version. The Final Rule took effect February 16, 1982. It had resulted from a rulemaking process which had formally begun in October 1980.

Not until the January 1982 publication of this Final Rule did the N.R.C. fully and finally specify the new safety requirements that would apply to the BFS Project. Without this January 1982 pronouncement from the N.R.C., the BFS Project could not possibly have proceeded past its completed administrative record of February 1979.

Thus, for almost three years between February 1979 and January 1982, the BFS Co-Owners found themselves in a regulatory holding pattern. They were led to believe at each cycle of this pattern that their construction permit was just a step away. Reasonable escape from the holding pattern was impossible absent a clear signal from the Commission. This did not come until January 15, 1982. Without such a signal, the BFS Co-Owners could not make any meaningful decision on whether to continue their efforts or to withdraw their construction-permit application. Had the Commission spoken decisively at any point during the three-year period, the BFS Co-Owners could have meaningfully assessed whether it was still feasible to press the BFS Project forward. Even if the Commission had ignored the BFS Co-Owners' pleas altogether (consistency was the key), they would have duly realized the

improbablility of success on their construction permit. Either way, the BFS Co-Owners would have been afforded a meaningful opportunity to withdraw long before they did in February 1982.

The regulatory holding pattern eventually took its toll. It unfairly forced the BFS Co-Owners to cancel their Project for economic infeasibility. But beyond the unfairness of having lost a valuable nuclear project lay the ultimate degree of unfairness for the BFS Co-Owners: a new rule imposing a million-dollar fee for the forced withdrawal of the BFS construction-permit application. The denied opportunity for early withdrawal was key to avoiding this unfairness because the new fee rule took effect in November 1981, only three months before the BFS Co-Owners were first able to withdraw in February 1982.

B. N.R.C. Adoption Of New Withdrawal Fees: Were it not for regulatory developments controlled exclusively by the N.R.C., the BFS Co-Owners could have fully avoided a million-dollar withdrawal fee.

Alongside the regulatory developments on new safety requirements, the N.R.C. initiated rule amendments shifting from charge-free withdrawals to full fee assessment for withdrawn construction-permit applications. The N.R.C. controlled these two lines of regulatory developments at all times. In the end, the N.R.C.'s course on new safety requirements caused the BFS Co-Owners to be unfairly subjected to the new withdrawal-fee rule.

This effect upon the BFS Co-Owners is unique. Every other applicant situated at all similarly to the BFS Co-Owners had a free and meaningful choice to avoid any withdrawal fees by withdrawing before the effective date of the new fee rule. Given

these unique circumstances, charging a withdrawal fee against the BFS Co-Owners is not only unfair, but contravenes the public policy of regulatory reform which the N.R.C. has so carefully sought to advance. And whatever value may inhere in the N.R.C.'s services for the BFS construction-permit application, such value is dwarfed by the monumental loss in value from the forced cancelling of the BFS Project.

When the BFS Co-Owners first applied for a construction permit in 1975, the N.R.C. regulations imposed no charge whatsoever for subsequent withdrawal of such application. See New England Power Co. v. NRC, 683 F.2d 12, 15 (1st Cir. 1982). This no-fee rule continued when the BFS administrative record was completed four years later in February 1979. See id. at 16-17. Withdrawals of construction-permit applications remained charge-free for another two and one-half years, until October 1981 when the N.R.C. finally adopted a contrary rule. See id. at 18.

The new rule took effect on November 6, 1981. It applied retroactively in that it imposed withdrawal fees on all construction-permit applications filed before November 6, 1981 and withdrawn thereafter. The new rule, however, gave one month's lead time in which any application might be withdrawn without suffering a fee. Parties with applications pending in October 1981 were thus meant to have a free choice and meaningful opportunity to decide whether to withdraw their constructionpermit application before November 6, 1981, and thereby to avoid all withdrawal fees under the new rule.

Among such pending applicants, however, the BFS Co-Owners occupied a unique position. The period surrounding October 1981 marked the most crucial phase in the construction-permit application of the BFS Project. It was during this time that the Commission seemed to come closest in delineating new safety requirements which would allow the BFS Co-Owners to decide once and for all whether to continue pressing or whether to withdraw their construction-permit application.

Still, the Commission's delineation stood incomplete in October 1981. The BFS Co-Owners had only the Commission's August 1981 "policy" to guide them. Significant gaps in that "policy" kept the BFS Co-Owners riveted to further N.R.C. pronouncements key in determining whether the BFS Project was still economically feasible.

The key N.R.C. pronouncements did not come until January 15, 1982, over two months after the new withdrawal-fee rule had already taken effect. Even so, the BFS Co-Owners took only one month to reach a decision which they had waited to reach for over three years.

Had the N.R.C. adopted a consistent course on new safety requirements during those three years, the BFS Co-Owners could have easily reached a proceed-versus-withdrawal decision before November 1981, and thereby have avoided a million-dollar withdrawal fee. The BFS Co-Owners could not have reasonably anticipated such a new fee either when they initially applied for a construction permit in 1975 or at any time during the next six years until 1981. Accord, New England Power, 683 F.2d at 15, 17.

Even if the N.R.C. had completely ignored the BFS Co-Owners' pleas between February 1979 and mid 1981, the BFS Co-Owners would have realized after six months, one year, or certainly after two years that a construction permit could not reasonably be expected. They could have thus withdrawn their construction-permit application freely, and would have done so, during the rule's avoidance period between October 7 and November 6, 1981.

The depth of N.R.C. responsibility for unfairly subjecting the BFS Co-Owners to the new withdrawal-fee rule appears most vividly from the timing of events between August 1981 and February 1982. Once the N.R.C. fully and finally promulgated its new safety requirements in January 1982, the BFS Co-Owners took only one month to make their withdrawal decision. At no time before January 1982 did those new safety requirements carry any reliable measure of finality or completeness. N.R.C. actions had changed them or otherwise unsettled them so many times before that the BFS Co-Owners could not reasonably rely on anything less than promulgation of a full and final rule concerning new safety requirements.

The N.R.C.'s August 1981 pronouncement seemed at long last to approach settled finality, but it was critically incomplete and it still characterized the new safety requirements merely as "policy." Had the N.R.C. spoken even as late as August 1981 with any completeness and reliable finality, the BFS Co-Owners would still have taken one month (as they actually did) to withdraw their construction-permit application. But they would have avoided the unfairness of a million-dollar withdrawal fee because

their month would have run not from January 1982, but from August 1981. The BFS Co-Owners' withdrawal would have thus come in September 1981, long before the November 6, 1981 effective date of the new withdrawal-fee rule, and even before the October 1981 adoption date of such a rule.

Even if the N.R.C. had fully and finally spoken on new safety requirements as late as October 7, 1981, when the N.R.C. actually adopted the new withdrawal-fee rule, the BFS Co-Owners could still have avoided the million-dollar fee now sought from them. If the BFS Co-Owners knew on October 7, 1981, what they learned for the first time on January 15, 1982, the BFS Co-Owners would have again taken only one month to withdraw. But since the month would have run from October 7, 1981, the BFS Co-Owners would again have withdrawn before the November 6, 1981 effective date of the new fee rule. Although the BFS Co-Owners would still have lost the BFS Project, they could have escaped the stinging unfairness of an additional million-dollar expense in withdrawal fees.

Being forced to pay a million-dollar fee is especially unfair, given the retroactive impact of the new withdrawal-fee rule. Such unfairness may be illustrated by Public Service Company of Colorado v. Andrus, 433 F. Supp. 144 (D. Colo. 1977), and New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982).

In Andrus, the Bureau of Land Management (the "BLM") adopted a new rule charging certain fees, not charged previously, for right-of-way applications. The new rule reached even applications pending on the rule's effective date. The Andrus court expressly acknowledged the retroactivity in such a rule:

> "The fact that the regulations provide for recovery of all chargeable costs involved in processing application[s] then pending seems a clear indication that some retroactive effect was anticipated and intended."

Andrus, 433 F. Supp. at 154 (emphasis in original).

The Andrus court also held, as did the court in New England Power, that illegality results when retroactive enforcement of a fee rule impacts unreasonably or unjustifiably upon an applicant covered by the rule. See id.; New England Power, 683 F.2d at 15 & n.4, 17-18. For example, the New England Power court declared unreasonable the N.R.C.'s attempt to enforce its new withdrawal-fee rule retroactively against a withdrawal achieved before the November 1981 effective date of the new rule. New England Power does not control the BFS Co-Owners' post-November 1981 withdrawal, because its holding leaves open whether unique circumstances like those of the BFS Co-Owners warrant fee-waiver relief when the new rule's retroactive aspects have added to unfairness.

Andrus, however, does address the key to the unfairness suffered by the BFS Co-Owners. The contesting applicants in Andrus sought relief from fees which did not exist when their applications had been filed, but which were being charged merely because their applications were pending before the BLM when the new rule took effect. Given the circumstances surrounding those applicants, the Andrus court could not conclude that such retroactive aspect was unreasonable. But crucial to the court's conclusion was that the contesting applicants actually had a free choice and a meaningful opportunity to withdraw before the new rule became effective:

> "Plaintiffs [contesting applicants] were not mislead [sic] by the BLM. Instead, they were warned in advance of the effective date of the regulations that if applications were pending on June 1, 1975 the applicant would become liable for proper costs of processing and monitoring. Plaintiffs had the option to withdraw their applications before June 1, 1975, but chose not to do so."

Andrus, 433 F. Supp. at 154 (citations omitted).

By contrast, the BFS Co-Owners were misled--not intentionally, but misled nevertheless by the combined effect of the N.R.C.'s regulatory developments on new safety requirements and new withdrawal fees. The new fee rule in November 1981 marked a sharp departure from the past charge-free rule governing withdrawals of construction-permit applications. Concededly, the BFS Co-Owners had thirty days' advance notice before such new fee rule formally took effect. But solely because of the N.R.C., the BFS Co-Owners lacked the free choice and the meaningful opportunity to withdraw, both so key to fairness. Had the Andrus court faced these unique circumstances of the BFS Co-Owners, the court would have undoubtedly acknowledged the unfairness of subjecting the BFS Co-Owners to a million-dollar withdrawal fee.

Given the combined effect of the regulatory developments which severely and uniquely prejudiced the BFS Co-Owners, charging them with a withdrawal fee would violate the principles of the IOAA, 31 U.S.C.A. § 9701(b). First, such a fee would be manifestly unfair. See id. § 9701(b)(1). Nothing which the BFS Co-Owners did, failed to do, or could have done is to blame for the delayed withdrawal of their construction-permit application. Whatever the justification, the N.R.C.'s own actions are solely

responsible for denying the BFS Co-Owners a timely and meaningful opportunity to effect withdrawal.

Second, a withdrawal fee here would violate the public-policy principle of the IOAA. See 31 U.S.C.A. § 9701(b)(2)(C). Since Three Mile Island, the N.R.C. has brought about considerable regulatory reform in the nuclear industry. A key goal of such reform is, and should be, to discourage premature withdrawals of construction-permit applications. Imposing a withdrawal fee against the BFS Co-Owners would violate that public policy, because it would mean that the BFS Co-Owners should have prematurely withdrawn their construction-permit application when it might have been saved.

Finally, a withdrawal fee here would violate the principle in the IOAA that such a fee must be for value given to the withdrawing applicant. See 31 U.S.C.A. § 9701(b)(2)(B). Ordinarily, the application process for a construction permit imparts a value gain to an applicant like the BFS Co-Owners. See New England Power, 683 F.2d at 14. But here, such value gain must be viewed against the tremendous value loss stemming from the forced cancellation of the BFS Project. The unique facts surrounding the construction permit sought by the BFS Co-Owners show that the only residual value is a net value loss of several hundred million dollars. Beyond such loss are the substantial expenses incurred by the BFS Co-Owners between March 1979 and

February 1982 in pursuing their construction permit.[4/] Imposing an additional million-dollar expense would be particularly harsh.

Applied to the unique circumstances of the BFS Co-Owners, see 31 U.S.C.A. § 9701(b)(2)(D), the principles of the IOAA call for waiver of withdrawal fees that might ordinarily be due under 10 C.F.R. §170.12(b). To further the ends of fairness and public policy, the Commission should grant the BFS Co-Owners' request for waiver of such withdrawal fees. As appears more fully in Proposition (II) infra, such waiver would affect no other applicant for a construction-permit and would lead to no unfavorable administrative precedent.

4/ Whatever actual costs (see note 2 supra) the N.R.C. itself might have incurred on the BFS application after March 1979, such costs cannot be fairly viewed as imparting any value to the BFS Co-Owners. The N.R.C. must assume responsibility for the three years' costs triggered by its own non-formulation of full and final new safety requirements. Under no circumstances should such costs be shifted to the BFS Co-Owners or their Project.

(II)

GRANTING A FEE WAIVER TO THE UNIQUELY SITUATED CO-OWNERS OF THE BLACK FOX STATION PROJECT WOULD ESTABLISH NO UNFAVORABLE PRECEDENT AND WOULD AFFECT NO OTHER NUCLEAR CONSTRUCTION-PERMIT APPLICANT.

The unique circumstances that led to the withdrawal of the construction-permit application for the BFS Project distinguish the BFS Co-Owners from all other like applicants. When the TMI-2 accident occurred, only five pre-construction projects had nuclear permit applications pending besides the BFS Project: Pilgrim 2, Pebble Springs, Allens Creek, Perkins, and Skagit. The BFS Co-Owners' present request for waiver of withdrawal fees could affect at most the owners of these five nuclear projects. But the facts of each such project show that none would warrant a waiver of withdrawal fees like the BFS Project.

Pilgrim 2 was cancelled in 1981. The N.R.C. assessed a withdrawal fee under 10 C.F.R. § 170.12(b). But the decision in New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982), rendered assessment of such fees improper against Pilgrim 2 as impermissibly retroactive. Unlike the BFS Project, then, the owners of Pilgrim 2 have no need to seek a waiver of withdrawal fees.

Pebble Springs, Allens Creek, and Perkins were all cancelled in 1982. The N.R.C. has assessed withdrawal fees against Pebble Springs and Allens Creek. Both paid them. Since neither sought waiver of such fees, neither can be expected to lodge a request for such waiver hereafter. The BFS Project differs from both Pebble Springs and Allens Creek in two other key respects. Unlike

Third, the construction site of the Skagit project was changed during the course of Commission review. This necessitated great additional input from the Commission. Such a change in construction site may well have superseded the N.R.C.'s non-formulation of new safety requirements as the cause for why the Skagit owners had to withdraw their construction-permit application. In sharp contrast, the construction site for the BFS Project was never changed. The sole reason for the forced withdrawal of the BFS construction-permit application was the three-year regulatory developments surrounding new safety requirements.

A last key difference between the Skagit owners and the BFS Co-Owners lies in the timing of their respective withdrawals. The Skagit owners withdrew their construction-permit application in 1983, well over a year after the N.R.C. had finally issued its full and final new safety requirements. By contrast, the BFS Co-Owners took only one month to effect withdrawal. They missed escape from the new withdrawal-fee rule by only a slim margin. The Skagit owners, on the other hand, withdrew long after the new withdrawal-fee rule took effect. Therefore, the Skagit owners are far less likely to show that they were tied to N.R.C. control as tightly as the BFS Co-Owners were.

In sum, regulatory developments controlled by the N.R.C. have not affected any other construction-permit applicant as uniquely or unfairly as the BFS Co-Owners. Whatever hardship other applicants may have suffered by withdrawal of their construction-permit applications, none can trace hardship as the BFS Co-Owners

can so directly to N.R.C. actions. Therefore, granting the BFS Co-Owners' present request for a fee waiver would yield an administrative decision limited to the unique facts of the BFS Co-Owners and their Project. Such a waiver would lead to no unfavorable administrative precedent which might hamper the N.R.C.'s collection of withdrawal fees in other cases.

Conclusion

Almost from the very start, truly unique facts have surrounded the construction-permit application of the BFS Co-Owners. Safety concerns in the aftermath of Three Mile Island clouded further issuance of construction permits. Operating under a Limited Work Authorization and with full permit issuance imminent, the BFS Co-Owners endeavored vigorously to do almost anything required by the N.R.C.'s safety concerns. But for almost three years, from March 1979 to January 1982, the N.R.C. adopted an unsteady (if not unstable) course of actions and policies on what safety modifications would be required in the design of the BFS Project. Time after time during these three years, the N.R.C. seemed to take a given direction in formulating new safety requirements, only to retreat from such direction. This ever-changing shift in N.R.C. course kept the BFS Co-Owners at bay, ready to fulfill every N.R.C. safety suggestion in the hope that the current suggestion might become the needed full and final safety requirements.

During this unsteady course on new safety requirements, the N.R.C. embarked on a parallel course to amend its fee rules

governing withdrawals of construction-permit applications. Departing from all past rules, the N.R.C. eventually adopted a rule which imposes substantial fees upon withdrawal of an application for a nuclear construction permit. The N.R.C.'s course on new safety requirements and its course on new withdrawal fees ultimately intersected and unfairly prejudiced the BFS Co-Owners.

Had the N.R.C. not conveyed so many conflicting signals about the prospects for construction-permit issuance, the BFS Co-Owners would have been able to withdraw their permit application before withdrawal fees unexpectedly became the new rule. Albeit well-intentioned, the N.R.C.'s own actions were solely responsible for denying to the BFS Co-Owners a meaningful opportunity to effect withdrawal without a million-dollar consequence.

Of all the applicants conceivably affected by the new withdrawal-fee rule, only the BFS Co-Owners have so directly and unfairly suffered hardship from the N.R.C. regulatory process. Given this uniqueness, granting the BFS Co-Owners' request for a waiver of withdrawal fees creates no unfavorable administrative precedent. The BFS Co-Owners ask for an opportunity to meet with representatives of the N.R.C. and to participate at an informal hearing, so that further elaboration and factual exchange may take place on the points of this Brief.

For all these reasons, the BFS Co-Owners respectfully submit that the waiver they seek is amply warranted. Public policy supports it. Fairness compels it.

Respectfully submitted,

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Enclosure 2

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON D C 20555

SEP 18 1985

Public Service Company of Oklahoma
ATTN: Mr. Martin E. Fate, Jr., President
P.O. Box 201
Tulsa, Oklahoma 74102

Dear Mr. Fate:

This is in response to your letter dated June 12, 1985, requesting waiver of 10 CFR 170 fees for costs incurred for the review of the withdrawn Black Fox Station (BFS) construction permit application. In a meeting on January 29, 1985, Vaughn L. Conrad and Albert J. Givray informed the NRC staff that the co-applicants took exception to the fee assessed for the BFS application and planned to petition for a waiver of fees. This letter also responds to the June 14, 1985 letter from the firm of Doerner, Stuart, Saunders, Daniel and Anderson, which submitted a brief in support of the request for a waiver of fees and a request for informal hearings on the matter.

Addressing the latter request first, in accordance with NRC practice (copy enclosed), a meeting with a licensee/permittee/applicant to discuss assessed fees may be requested by the NRC "at its option" to "receive further evidence or arguments supporting the debtor's contentions." In this instance, you have already provided sufficient evidence and argument for the NRC to reach a decision in this matter. Accordingly, we see no productive basis for a meeting or a "hearing."

Public Service Company of Oklahoma (PSO), on behalf of the co-owners of the Black Fox Station, argues that the assessment of fees for the withdrawn CP application "would violate the fairness, public-policy, and value-to-applicant principles of the Independent Offices Appropriation Act of 1952" (IOAA) (now codified in 31 U.S.C. 9701). PSO also contends that the assessment of fees would be a retroactive application of the November 6, 1981 amendment to 10 CFR 170 (46 F.R. 49573-577, October 7, 1981). In support of its contentions, PSO alleges that, but for the inordinate delay in NRC promulgation of its post Three Mile Island-2 (TMI-2) safety and non-safety licensing requirements, the co-owners would have made the decision to withdraw the application long before they did, thereby avoiding the withdrawn application fee requirements.

PSO takes the position that the BFS application should have received special treatment by the NRC after the TMI-2 accident because of its unique licensing status and the extensive effort expended in construction at the site under the Limited Work Authorization (LWA). It is also stated that delays in decisions affecting NRC licensing and policy following the TMI-2 accident removed any meaningful opportunity for the co-owners to withdraw the CP application in time to avoid Part 170 withdrawal fees for the application.

As you stated in your request for the waiver, the August 1981 NRC "policy" on final safety and non-safety licensing requirements was incomplete with respect to hydrogen control. However, PSO could have considered this policy as a minimum basis for the "final" requirements, especially against the historical background of the pre-TMI-accident years. Further, you contend that because the NRC's hydrogen control requirements were not final at that time, the co-owners were unable to determine the feasibility of the project and make a decision whether or not to withdraw the application. The underlying assumption appears to be that the analyses of feasibility are so precise that the question could be settled with one additional set of data. Feasibility analysis, like the regulatory environment itself, is fraught with uncertainties related to assumptions. The issue of hydrogen control requirements could have been weighed by the co-owners, and they could have reasonably assumed implementation of hydrogen control systems. While the choice in August 1981 was a difficult one, the co-owners were not denied either a free choice or meaningful opportunity to exercise their option to continue or withdraw their CP application.

Prior to the TMI-2 accident, the regulatory environment was subject to uncertainties and evolving requirements. This was to be expected in a new industry and particularly one so complex as the nuclear industry where safety is a major concern and the Commission's top priority. At no time should the Commission's safety requirements be considered final. The TMI-2 accident resulted in a thorough reevaluation of the entire nuclear power plant licensing process and requirements. This reevaluation has been and continues to be a difficult and time-consuming process. But this process did not produce unfairness in the treatment of the BFS application. The NRC's practice was and remains to process every application in an expeditious and fair manner with the overriding concern being public safety. Obviously, the decision to apply for a permit, expend application and construction funds, and finally to withdraw the application was solely that of BFS project management. The Commission is limited to regulation of safety for the nuclear facilities to be built and/or operated by applicants.

The Commission does not agree that the November 6, 1981 amendment to 10 CFR Part 170 was applied retroactively. On November 10, 1980, the Commission published a notice of its intent to charge a fee to recover its review costs when the 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 an active Commission review of the application to an end (45 Fed. Reg. 74493, 1980). The Commission proposed to charge the fee for any withdrawal dating back to March 23, 1978. Thus, applicants were informed of the Commission's intent to recover its costs for withdrawn applications a year before the effective date of the rule. This was sixteen months before a preliminary notice of withdrawal was filed for BFS. (Formal notice of withdrawal was not filed with the ASLBP until April 6, 1982, five months after the effective date of the rule.) In New England Power v. NRC, 683 F.2d 12 (1st Cir. 1982), the court held that the Commission may charge for the review of witndrawn applications prior to issuance of a permit, license or approval, under the promulgated regulation, but only for review of applications withdrawn after November 6, 1981 (effective date of the rule). An understanding that owners of BFS might not have been liable for the fee if the application had been withdrawn prior to November 6, 1981, was not possible until the issuance of the court's opinion in New England Power or July 19, 1982. Thus, the Commission's licensing actions could not have deprived you of an opportunity to avoid the fee by withdrawal before November 6, 1981, since that opportunity was not apparent until July 19, 1982. The rule as published gave no lead time to withdraw without a fee.

With respect to the question regarding the value of NRC services associated with the processing and review of applications, it was held in Mississippi Power and Light v. U.S. Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), that review work performed by the NRC at the request of an applicant constitutes substantial and particularized benefit to the applicant and justifies the imposition of fees under IOAA. The review work performed in this instance was clearly attributable to the application filed by the co-owners of BFS.

The Commission does not consider the BFS construction permit application as a unique situation meriting special treatment. The co-owners of BFS freely chose to apply for the permit and LWA. The extensive investment made by the co-owners in construction at the site prior to the issuance of a construction permit was a BFS management decision. Likewise, the decision and timing to withdraw the application was a decision of management.

For the reasons stated above, your request for a waiver of fees is denied.

As you know, PSO was billed by the NRC on May 8, 1984, for $884,275 (after a prior notification on May 3 that the bill would be forthcoming). This amount, plus the $125,000 application fee (previously paid by BFS) covers the NRC costs incurred in the review of the construction permit application for the Black Fox Station. There followed additional correspondence wherein your Company asked for waiver of interest (denied), a meeting (granted), a letter (February 1, 1985) informing the NRC that your Company would apply to the Chairman of NRC for a waiver of fees, etc., and the letter and brief to which this letter responds. (It is further noted that you were specifically advised by letter dated February 6, 1985, that "there have been no waivers (exemptions) from the fee requirements of Part 170 granted applicants for Part 50 construction permits or operating licenses.") It has now been over one year since your Company was first billed and the fee has not been paid. As described in the enclosed NRC procedures, the NRC assesses and collects fees under a statutory mandate, duly implemented. It is of singular importance that any fee assessed becomes a debt immediately due and payable to the United States when billed. The statute entitled "Interest and penalty on claims," 31 U.S.C. 3717, does permit non collection of interest fees for the first 30 days, which period may be extended by the NRC. As indicated above, the original 30-day period was not extended by the NRC in this case. Accordingly, when your Company did not pay the debt by June 8, 1984, interest began accruing, retroactive to the original billing date. With the failure to pay the bill within 90 days after June 8, 1984, a statutorily mandated penalty charge for the delinquent bill accrued, calculated from the date that the debt became delinquent. In sum, the United States is owed the balance of the applicable fee in the amount of $884,275, interest charges of $108,148.04, and penalty charges in the amount of $67,737.89, for a total of $1,060,160.93, through September 15, 1985. The interest and penalty charges continue to accrue at the rate of $363.40 per day until payment is received. Enclosed is a revised bill. Full payment should be made within 15 days from the date of this letter. You should consider this letter the final agency action with respect to review of the debt owed the United States. However, if you still wish to meet with the staff, please contact William O. Miller, LFMB. Any such meeting should not delay payment of the debt owed the United States.

Sincerely,

Original Signed by
Patricia Norry

Patricia G. Norry, Director
Office of Administration

Enclosures:
As stated

*See previous concurrences attached.

OFFICE ▶	LFMB:ADM*	OELD*	RM*	ADM	NRR*	ADM	
RNAME ▶	WOMiller:jp	RSmith	GJohnson	MSpringer	HDenton	PGNorry	
DATE ▶	9/ /85	9/ /85	9/ /85	9/ /85	9/ /85	9/ /85	

NRC FORM 318 (10 80) NRCM 0240

OFFICIAL RECORD COPY

Enclosure 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of the Application of	)	
PUBLIC SERVICE COMPANY OF OKLAHOMA,	)	
ASSOCIATED ELECTRIC COOPERATIVE, INC.,	)	Docket Nos.
AND	)	STN 50-556
WESTERN FARMERS ELECTRIC COOPERATIVE	)	STN 50-557
(Black Fox Station, Units 1 and 2)	)	

PETITION FOR RECONSIDERATION AND
REQUEST FOR AUDIT INSPECTION

PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC., and WESTERN FARMERS ELECTRIC COOPERATIVE (the "BFS Co-Owners") respectfully ask for reconsideration, by the full Commission, of the staff's September 18, 1985 decision denying the BFS Co-Owners' Application For Waiver Of Withdrawal Fees Under 10 C.F.R. §170.12(b). Upon reconsideration at the Commission level, the BFS Co-Owners ask that the full Commission waive so much of the $1,060,161 withdrawal fee as the BFS Co-Owners' unique circumstances warrant.

As grounds for reconsideration, the BFS Co-Owners respectfully suggest that the September 18, 1985 staff denial of their fee-waiver Application misapprehended or overlooked the factual element of unique circumstances and several controlling legal respects which support fee waiver.

In addition to reconsideration, the BFS Co-Owners ask for an audit inspection of all pertinent records of the Nuclear Regulatory Commission (the "NRC") bearing upon how the NRC has

formulated the $1,060,161 withdrawal fee for the canceled Black Fox Station ("BFS") nuclear power project.

As further support for their reconsideration petition and audit inspection request, the BFS Co-Owners state:

I. RECONSIDERATION BY THE FULL COMMISSION

Although issued by letter dated September 18, 1985 from Patricia G. Norry, the decision denying the BFS Co-Owners' fee-waiver Application did not reach the BFS Co-Owners until September 26, 1985. It came without further contact, staff or otherwise, since the Application and supporting Brief were filed on June 17, 1985.

The denial decision thus issued without any evidentiary hearing to negate the BFS Co-Owners' factual showing, set forth in the Application and supporting Brief, of unique circumstances warranting full or partial fee waiver. Instead, the fee-waiver Application was decided by NRC staff as a rote question of rule and regulation.

The denial decision states that only a "meeting" is available, at NRC "option," to "receive further evidence or arguments supporting the debtor's contentions." These quoted phrases come from a two-page writing entitled "NRC Procedures for Extending Payment Dates of License Fee Billings." But the BFS Co-Owners' fee-waiver Application does not constitute a mere request for extending the payment date of a million-dollar fee. Instead, the very merits of the BFS withdrawal fee is being challenged because of the unique circumstances which have surrounded the BFS Co-Owners and their nuclear power project.

Only through a focused evidentiary hearing can such circumstances be properly shown to be non-unique.

The BFS Co-Owners urge to the full Commission that the unique circumstances of the BFS project make a million-dollar withdrawal fee truly unfair. Neither the fairness, nor the public-policy, nor the value-to-applicant principles of the Independent Offices Appropriation Act of 1952 support imposing liability upon the BFS Co-Owners for such a fee.[1/]

Apart from the NRC staff's having misapprehended or overlooked the BFS Co-Owners' unique circumstances, the staff's denial decision reflects misapprehension in four controlling respects:

First, the denial decision states that despite the missing hydrogen control safety requirements from the NRC's August 1981 "policy," the BFS Co-Owners should have been able to make the continue-versus-withdrawal decision without unfair prejudice. Had the new withdrawal fees of November 6, 1981 not made time a critical factor, perhaps a general feasibility decision could have been made. But in the short span between August and November 1981, the BFS Co-Owners were being forced to make a withdrawal decision blindly without key safety requirements.

The BFS Co-Owners have never urged entitlement to concrete-cast finality on safety requirements. They have merely urged that it is unfair to charge them a million-dollar withdrawal fee

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1/ That the BFS project differs from all other withdrawn projects appears more particularly from pages 29-32 of the BFS Co-Owners' supporting Brief.

when the timing of two NRC-controlled activities, safety requirements and withdrawal fees, intersected to deprive the BFS Co-Owners of any time at all for making a million-dollar decision. The unfairness of this appears with certainty, no matter what might otherwise be said of regulatory uncertainties after Three-Mile Island.

Second, the NRC's denial decision states that the BFS Co-Owners could not possibly have been prejudiced by any retroactive application of the new withdrawal fee regulation because it was not until July of 1982 that the First Circuit Court of Appeals directed that the new withdrawal fees could be applied only from November 6, 1981 forward. See New England Power v. NRC, 683 F.2d 12 (1st Cir. 1982). Since this directive was not rendered until July 19, 1982, so the denial decision concludes, no opportunity could have been apparent to the BFS Co-Owners that they could have avoided all fees by withdrawing before November 6, 1981.

But like any other opinion of a federal appellate court, New England Power merely declared what the law had been all along. Like the nuclear project owner in that case, the BFS Co-Owners knew that no matter what efforts the NRC took to "clarify" or to "interpret" older regulations as permitting imposition of the new withdrawal fees, such new withdrawal fees would not be legal until properly promulgated as a part of formal rulemaking. As New England Power holds, that did not occur until November 6, 1981. The NRC itself must have recognized this to be so since despite all of its efforts to

"clarify" and to "interpret" existing regulations, the NRC did in fact undertake formal rulemaking for the new withdrawal fees.

The BFS Co-Owners thus did not depend upon the July 1982 New England Power opinion to tell them that withdrawal before November 6, 1981 would avoid all fees for canceling their nuclear project. The NRC deprived the BFS Co-Owners of this very opportunity by encouraging them and others in the industry to be patient until the NRC could finalize safety regulations. Such finality came in January of 1982, roughly two months after the effective date of the new withdrawal fee regulations.

Third, the staff's denial decision states that the new withdrawal fee regulations which took effect November 6, 1981 gave no lead time to withdraw without a fee. This is simply incorrect. The new withdrawal fee regulations had a promulgation date of October 7, 1981. They took effect 30 days later, on November 6, 1981. Thus, every owner of a nuclear project who had a meaningful opportunity to make the continue-versus-withdrawal decision on October 7, 1981 had a full 30 days of lead time to withdraw without a fee.

For the BFS Co-Owners, the meaningful opportunity to make such a decision did not ripen until January 15, 1982, over two months after the November 6, 1981 effective date of the new withdrawal fee regulations. The BFS Co-Owners communicated to the NRC their decision to withdraw their construction permit applications within 30 days after January 15, 1982. If the BFS Co-Owners had the same 30 days of lead time as all others did, they could have avoided the million-dollar withdrawal fee.

Depriving them of even this 30-day period makes the million-dollar withdrawal fee doubly unfair.

Fourth, the staff's denial decision assesses the BFS Co-Owners for $67,737.89 as penalty charges in addition to interest charges of $108,148.04. This penalty charge is levied under Title 4 of the C.F.R. Yet Title 10 of the C.F.R. pertaining to the Government's debt collection efforts, refers only to interest as a late payment charge (represented by the $108,148.04 sum). See 10 C.F.R. §15.37. Throughout all of their dealings with NRC representatives, the BFS Co-Owners were told that delayed payment would carry with it no consequences other than interest charges. Since first receipt of Invoice #C0203 dated May 3, 1984, and in all subsequent invoice notices, the BFS Co-Owners at no time received the two-page writing entitled "NRC Procedures for Extending Payment Dates of License Fee Billings," which references the penalty charges of Title 4 C.F.R. Neither did any invoice (except the invoice accompanying the September 18, 1985 denial decision) contain the legend referencing Title 4 C.F.R. Contrary to the apparent practice now followed by the NRC, then, such practice was not followed for the BFS project.

The penalty charges of Title 4 C.F.R. may be statutorily due. Counsel for the BFS Co-Owners did in fact consult the regulations to determine what late charges might accrue because of postponed payment. Coupled with the advice received from NRC representatives at all times, Section 15.37 of Title 10 C.F.R. gives strong indication that only interest charges would be due

without the kind of penalty charges now sought by the NRC in the sum of $67,737.89. Had NRC representatives not misled the BFS Co-Owners about such penalty charges, the BFS Co-Owners would have known that the total interest rate for postponed payment during the fee-waiver application process would have equaled 15%, not the 9% referenced in each invoice notice and reinforced not only by the oral affirmations of NRC representatives but the complete omission of any contrary reference to Title 4 C.F.R. At the very least, then, such penalty charges should be waived.

In sum, the September 18, 1985 administrative denial of the BFS Co-Owners' fee-waiver Application has misapprehended or overlooked the BFS Co-Owners' unique circumstances and several other controlling points affecting their Application. For these reasons, the BFS Co-Owners respectfully urge the full Commission to reconsider the fee-waiver Application and to grant such Application in whole or in part as the BFS Co-Owners' unique circumstances warrant.

II. REQUEST FOR AUDIT INSPECTION

Apart from liability for withdrawal fees, there lies the question of proper dollar amount. The NRC's records have yet to be adequately probed for reasonable satisfaction that if any fee be due, the proper amount would equal $884,275 plus $175,886 in interest and penalties. Addressing this question of "how much" has remained premature until now.

To verify that the amount of the withdrawal fee has been formulated in accordance with law, the BFS Co-Owners request permission to conduct an audit inspection of all NRC records

bearing upon how costs were assigned to the BFS project, from mid 1975 when the BFS Co-Owners first applied for a construction permit to the present.

On October 10, 1985, the BFS Co-Owners paid under protest the withdrawal fee levied against them thus far. Accordingly, should either the reconsideration process or the audit inspection exonerate the BFS Co-Owners from liability or confirm that the paid sum is excessive in law or fact, the BFS Co-Owners will be entitled to an appropriate refund.

The staff's denial decision states that it constitutes the final agency action of the NRC on the question of withdrawal fees. However, given the BFS Co-Owners' present petition for reconsideration and their request for an audit inspection, the BFS Co-Owners respectfully ask that the finality of agency action be vacated, with such finality to be reinstated after the present reconsideration petition has been decided and after any refund request has been resolved following conclusion of the audit inspection process.

WHEREFORE, the BFS Co-Owners respectfully ask for:

(A) reconsideration by the full Commission of the September 18, 1985 administrative decision denying the BFS Co-Owners' fee-waiver Application, and upon such reconsideration, for a partial or total waiver of withdrawal fees under 10 C.F.R. §170.12(b);

(B) an audit inspection of all pertinent records of the NRC which may bear upon how the NRC has formulated the withdrawal fee amount for the BFS project, from the first

construction permit application in mid 1975 to the present; and

(C) vacatur of the finality attaching to the administrative denial of the fee-waiver Application, with such finality to be reinstated after reconsideration has been determined and after any refund request has been resolved following such audit inspection.

Respectfully submitted,

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

By: _____
Albert J. Givray

Attorneys for Public Service Company of Oklahoma, Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative, as Co-Owners of the cancelled Black Fox Station nuclear project

CERTIFICATE OF FILING

I hereby certify that on the 29th day of October, 1985, I sent by Federal Express courier, fee prepaid, one original and three true and correct copies of the above and foregoing Petition for Reconsideration and Request for Audit Inspection, for hand-delivery on October 30, 1985, to the following addressees:

William O. Miller, Chief
License Fee Management Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert Fonner, Esq.
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Trip Rothschild, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Patricia G. Norry, Director
Office of Administration
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Accompanying such original and copies was a written request that the same be filed of record with the United States Nuclear Regulatory Commission.

Albert J. Givray