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October 17, 1986

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

Re: Proposed Changes in 10 C.F.R. Part 2

Dear Mr. Chilk:

On July 3, 1986, the Commission published for comment certain proposed amendments to its procedural regulations in 10 C.F.R. Part 2. 51 Fed. Reg. 24365. As attorneys representing a number of utilities involved in the Commission's licensing and regulatory process, we wish to comment on the proposed changes.

The Commission has proposed changes in five areas of its rules of practice. The proposals range from potentially significant to trivial to unnecessary. In our judgment, only two of the five are worthy of further consideration by the Commission. We shall comment first on the two proposals that we support, and then on the three that we believe are unnecessary or unwise. Thereafter, we shall offer some additional comments on the proposals advanced separately by Commissioner Asselstine.

The most significant proposed amendment, and the one that clearly deserves prompt Commission action, is the proposed amendment to § 2.714 concerning the admission of contentions. This proposal closely resembles Option B to amend § 2.714 originally published for comment by the Commission in 1981. 46 Fed. Reg. 30349. On June 29, 1981, we filed comments supporting the adoption of Option B by the Commission. A copy of our 1981 comments is enclosed and is incorporated by reference herein. It is unfortunate, to say the least, that the Commission has let five years pass without taking any final

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action on Option B. We hope that the current rulemaking signifies an intention on the Commission's part to adopt long-overdue reforms in § 2.714.

The current proposal to amend § 2.714 differs from, although it appears to follow the intent of, Option B. To the extent that there are differences, we are inclined to prefer Option B as originally proposed.

There is one area in which the current proposal significantly departs from Option B. We believe that the new departure detracts fron the intended reform, and we suggest that it be omitted. Specifically, proposed § 2.714(b)(2)(iii) would authorize amended contentions or new contentions based upon data or conclusions in the NRC draft or final Environmental Impact Statement that differ significantly from the data or conclusions in the applicant's document. We do not understand the desirability of this provision. The purpose of a licensing hearing is to evaluate the project proposed by the applicant. EAnvironmental contentions should be addressed to the desirability or sufficiency of the project, not to the sufficiency of the Staff's review. There is no reason why an intervenor can not evaluate the project and prepare legally sufficient contentions based upon the application, including the applicant's environmental report. Under any version of § 2.714, it is always possible to submit a late-filed contention and attempt to justify it. However, we see no reason specifically to invite or authorize late contentions based upon the Staff's environmental review documents. The burden should remain upon the intervenor to demonstrate why the contention could not have been formulated and filed at the outset.

The second proposed change that should be adopted by the Commission is the amendment of §§ 2.754 and 2.762 to limit the issues that may be raised by an intervenor in proposed findings or in appellate briefs. A similar proposal was advanced by the Commission in 1984, 49 Fed. Reg. 14698. In our comments filed on June 11, 1984, we supported the adoption of that proposal, and we continue to do so.

We believe that two changes should be made before the current proposal is adopted. First, both §§ 2.754 and 2.762 would permit an intervenor to argue issues that it "sought to place in controversy in the proceeding." We do not understand the basis for this provision. If a contention has been

rejected under § 2.714, there is no basis for permitting findings of fact or appellate argument on the matter. It is simply a waste of the resources of the other parties and the Commission to invite a intervenor to litigate an issue that has been rejected.

Second, § 2.762 should also be amended to provide that an intervenor who fails to file proposed findings with respect to an issue or contention may not thereafter appeal from that portion of an initial decision dealing with that issue or contention.

We turn now to the remaining three proposals that we believe the Commission should not adopt. Proposed § 2.720 would impose restrictions on the right to obtain answers to written interrogatories from the NRC Staff. The notice of proposed rulemaking indicates that the amendments would simply codify existing case law. If that is all that is intended, it is unnecessary. The Staff can respond to interrogatories that it objects to by simply citing the existing law. In any event, there is no reason why the case law should be codified solely with respect to the Staff. The indicated objections should be equally available to the applicant or any other party. Adoption of the amendment as proposed would suggest that the Staff is protected from burdensome discovery and other parties are not.

The proposed amendment § 2.743 would require the filing of a cross-examination plan as a prerequisite to conducting cross-examination. This is a silly proposal. It promises to waste more time than it is likely to save. Moreover, by requiring inclusion in the record on appeal of the cross-examination plans and orders relating thereto, the proposed amendment would simply create a new area for appellate litigation, one that does not exist today.

It has been our experience that cross-examination is not a major source of delay in licensing hearings. There will, of course, be instances where the right of cross-examination is abused. The remedy is for the presiding officer to control the hearing as necessary, not to create new paperwork requirements that apply to all counsel.

The final proposal that we regard as unnecessary would amend § 2.749 to permit the filing of a motion for summary disposition at any time. This would represent a departure from the Federal practice, upon which § 2.749 is modeled. The purpose of a motion for summary disposition is to eliminate a contention or issue from the hearing. Logically, all such

motions should be made and disposed of prior to the hearing. Motions for summary disposition made during the course of the hearing are likely to slow down, rather than speed up the process. We believe that the Commission should refrain from adopting this amendment.

We do not propose to comment in detail on the separate amendments proposed by Commissioner Asselstine. It is our understanding that Commissioner Asselstine's proposals are not being presented by the Commission. If that is so, we believe that their inclusion in the notice of proposed rulemaking has no real effect, and that none of the separate proposals could legally be adopted. We are therefore somewhat puzzled as to why they were published at all.

In any event, it is clear that Commissioner Asselstine's proposals would seriously detract from the beneficial effects of restricting the admissability of contentions as originally proposed in Option B in 1981. For that reason alone, they sould be rejected. Further, his approach would serve to divorce consideration of the standing of an intervenor from consideration of the intervenor's contentions. Recent decisions of the United States Supreme Court are to the contrary. The Supreme Court has emphasized that standing requires a demonstration that the injury complained of is both traceable to the challenged action and redressable by the proposed remedy. See, e.g., Allen v. Wright, 104 S. Ct. 3315, 3325-26 & n.19 (1984); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-43 (1976). Such prudential considerations are equally appropriate in administrative proceedings. The Commission should inquire whether an intervenor has standing to advance a particular contention. If the answer is no, the contention should not be admitted. Commissioner Asselstine's approach would serve to defeat this inquiry.

Commissioner Asselstine proposes various tests for the admission of contentions, including the existence of facts "which, if true, would entitle the intervenor to relief", and a showing that "an 'inquiry in depth' is appropriate." 51 Fed. Reg. 24370. These formulations, if adopted, would undermine the purpose of amending § 2.714 and would support holding hearings for the sake of having a hearing, rather than solely to determine matters concerning which there is a genuine dispute.

Finally, Commissioner Asselstine has requested comment on the so-called "plain English" version of 10 C.F.R. Part 2. The Commission has wisely rejected that version. It goes far beyond a restatement of existing practices and would alter the conduct of Commission proceedings in many significant respects. Detailed comment on the "plain English" rewrite would require dozens of pages. It has not found support from the other Commissioners, and it should receive no consideration in this rulemaking.

In conclusion, we reiterate that the revision of § 2.714 has been pending before the Commission since 1981. We hope that the Commission will now proceed to adopt significant reforms in its rules for the admission of contentions.

Sincerely,

LeBOEUF, LAMB, LEIBY
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By Harry H. Voigt
Partner