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November 22, 1978

Mr. Samuel J. Chilk
Secretary of the Commission
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: "Appendix E - Emergency Plans For Production And Utilization Facilities"

Dear Sir:

In response to the notice of proposed rule making relating to 10 CFR Part 50, Appendix E (43 Fed. Reg. 37473, August 16, 1978; 43 Fed. Reg. 47978, October 18, 1978), comments are hereby submitted on behalf of Boston Edison Company, Florida Power & Light Company, Houston Lighting & Power Company, Iowa Electric Light and Power Company, and Northern Indiana Public Service Company. Each is operating or constructing one or more nuclear power reactors, and, for the reasons set forth below, each objects strongly to the proposed amendment to Section I of Appendix E of 10 CFR Part 50.

At the outset it should be emphasized that the notice is plainly incorrect in suggesting that the amendment would merely clarify existing requirements.[1] On the contrary

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1/The notice states that "continued implementation of its [the Commission's] practice to review the possible need for emergency plans beyond the LPZ as necessitated by circumstances in the vicinity of the site is required." 43 Fed. Reg. at 37475.

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the proposed amendment constitutes a significant change in the Commission's licensing requirements for nuclear power reactors. This is clearly illustrated by the history.

1. The prior rules

In 1962 the Atomic Energy Commission adopted the site suitability criteria contained in 10 CFR Part 100, including the concepts of an exclusion area, low population zone (LPZ) and population center distance. 27 Fed. Reg. 3509 (April 12, 1962). From the definition of the LPZ contained in 10 CFR § 100.3(b) it was clear that the Commission intended a relationship between the size of the zone and the need for emergency planning, since the regulations defined the LPZ in terms of what an applicant must be able to accomplish for people residing within it:

> "'Low population zone' means the area immediately surrounding the exclusion area which contains residents the total number and density of which are such that there is a reasonable probability that appropriate protective measures could be taken in the event of a serious accident." (emphasis added)

The subsequent fifteen-year history of consistent interpretation of the regulations as limiting the need for emergency planning to the area within the perimeter of the LPZ is spelled out in detail in New England Power Company (NEP Units 1 and 2); Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-390, 5 NRC 733 (April 7, 1977). As that unanimous decision makes clear, each organ of the Commission which dealt with the question, including the licensing and appeal boards in numerous decisions issued during the period, and--until ALAB-390 was argued--the staff, have consistently taken that position. 5 NRC at 737-41. In view of the direct reference to "protective measures" in the definition of an LPZ and the fact that 10 CFR § 50.34 states that "[s]pecial attention should be directed to the site evaluation factors identified in Part 100 . . .", it is entirely logical that this interpretation was adopted.

ALAB-390 also emphasized that the Commission has refrained from reviewing the numerous decisions of the Appeal Board in circumstances which indicated the Commission's agreement (5 NRC at 743); and in 1975 the Commission represented to the Supreme Court that protective measures need only "be taken to protect people within the low population zone." 5 NRC at 749 (Mr. Salzman, concurring). Consequently, the Appeal Board adhered

> " . . . to our uniform prior holdings that, under the Commission's regulations in their present form, consideration is not to be given in a licensing proceeding to the feasibility of devising an emergency plan for the protection (in the event of an accident) of persons located outside of the low population zone."

5 NRC at 747.

The Commission let stand this persuasive reaffirmation of the scope of the regulations. On June 17, 1977, it issued a memorandum and order which said only that

> "The Commission has decided not to review the decisions in ALAB-390. The questions raised there, as the Appeal Board has recognized, are more appropriately addressed through rulemaking, given their complexity, their broad application, and the consistent past interpretation of our present rules. Our staff has underway studies intended to produce proposals for rulemaking dealing with these questions, among other things, which will be presented to the Commission shortly. We direct this study to be carried forward as a priority matter, and intend to initiate a rulemaking at an early date."

New England Power Company (NEP Units 1 and 2); Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-77-44, 5 NRC 1323.

2. The change in the regulations

Thus, even the Commission has recognized the "consistent past interpretation of our present rules", and there can be no question but that the proposed amendment would change that "consistent past interpretation". It would do so by requiring that in some circumstances "emergency planning . . .

should extend to areas beyond the LPZ"[2/] and that such planning "may include planning for evacuation measures."

In view of this past history and its recognition of the "complexity" of the questions involved, the Commission was well advised in directing that any change in the regulation be preceded by two steps: first, a staff study to be undertaken "as a priority matter"; and second, a rule making proceeding to be initiated "at an early date."

3. Failure to identify a need for change

However, it is perfectly clear that the staff study directed by the Commission has not been completed. Indeed, the notice so indicates. It merely states that a "general examination of emergency planning in the licensing of nuclear plants is underway." 43 Fed. Reg. 37475. Such vague statements do not establish the need for a change in the rules, and, in fact, the notice fails to demonstrate any such need.

Under the existing regulations, the size of the LPZ is determined by calculating the amount of radiation that will be released in the event of a serious accident given the varying effectiveness of safety design features built into a reactor. The exposure limitations contained in 10 CFR § 100.11 for an individual in the exclusion area and on the boundary of the low population zone have come to represent, to license applicants, reference guides for the degree of protection that is required to ensure that individuals in the area surrounding a plant are adequately protected in the event that a severe accident should occur.

2/The proposed rule would amend 10 CFR Part 50, Appendix E to include the following new paragraph:

> "For nuclear power reactors, provisions for emergency protective measures to reduce exposures from an accidental release of radioactive material shall be considered, at a minimum, within the low population zone (LPZ) as specified in 10 CFR Part 100. The extent to which emergency planning, which may include planning for evacuation measures, should extend to areas beyond the LPZ shall be based on the design features of the facility and the physical characteristics of the environs in the vicinity of the site, taking into account the emergency protective action criteria developed by appropriate Federal authorities, and by appropriate State and local governmental authorities in cooperation with the Commission."

We recognize, however, that limiting the amount of exposure of single individuals is only a part of the Commission's health and safety consideration; limiting the cumulative exposure dose--the population dose--of large numbers of people in the event of a severe accident is also an objective.[3/] For this reason, the Commission's reactor site criteria include a "population center distance" which must be at least one and one third times the distance to the outer boundary of the LPZ. Thus, there is a safety margin beyond the boundary of the LPZ which operates to limit the amount of exposure received by large numbers of people in the general area of a nuclear power plant, and an applicant must locate and design a reactor so as to ensure that no densely populated center will be denied the protection afforded by this safety margin.

It may be that underlying the desire to amend the emergency planning requirements is a suspicion--not stated in the notice--that either the existing individual radiation exposure levels or the limits on population doses imposed by the population center distance requirement are not adequate to ensure the safety of individuals in the vicinity of a plant. See, ALAB-390, 5 NRC at 748-50. (Mr. Salzman, concurring). However, the notice presents no data supporting any such suspicion.

To be sure, the notice does state that

> "The NRC staff has found that there may be circumstances for which the available strategies for taking protective actions outside the facility site boundaries are limited. As a example, this [sic] occur when large numbers of persons may be engaged in outdoor recreational activities in the vicinity of a plant, and it is clear that existing structures are insufficient to provide needed temporary shelter . . . . These considerations may lead to planning for protective actions beyond the LPZ."

43 Fed. Reg. at 37474 (emphasis added).

3/"Calculation of Distance Factors for Power and Test Reactor Sites, Technical Information Document" (TID-14844), March 23, 1962, Division of Licensing and Regulation, AEC, p. 7; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-420, 6 NRC 33, 49, (July 12, 1977), affirmed, New England Coalition v. United States Nuclear Regulatory Commission, 582 F.2d 87, 90-92 (1st Cir., 1978).

However, these examples, so tentatively expressed, can hardly serve as evidence of a need to change the existing rules.

4. The amendment is unclear

Perhaps it is because the need has not been demonstrated and the basic objectives of the change are so obscure that the requirements of the amendment are also unusually imprecise.

The proposed amendment fails to specify the physical or demographic characteristics of the surrounding area or the dose considerations which would require planning beyond the LPZ. The amendment merely lists two general factors that will be considered: "the design features of the facility and the physical characteristics of the environs in the vicinity of the site, taking into account the emergency protective action criteria developed by appropriate . . . authorities." So vague a rule would constitute a standing invitation to any opponent of a nuclear power plant to contend that "the design features of the facility and the physical characteristics of the environs"--whatever either may be--require emergency planning beyond the LPZ. The amendment provides no guidance as to how such a contention is either to be established or disproved. It will therefore be a nearly certain source of litigation.

The notice does state that the amendment "clarifies the intent that consideration of emergency planning beyond the LPZ is a factor in the licensing review [i.e., the review conducted pursuant to 10 CFR Part 50] and is not a factor in the site suitability review under 10 CFR Part 100." 43 Fed. Reg. at 37474. This statement, however, does nothing to clarify the standards which would be applicable to determine the need for planning beyond the LPZ. As so frequently explained by the Appeal Boards, under the existing system, the definitions and guides contained in Part 100 operate as limits on the emergency planning requirements of Part 50, Appendix E. The amendment would remove those guides without substituting any others.

This problem of ambiguity is accentuated by the failure of the amendment to specify who carries the burden of proving that emergency planning beyond the LPZ will be required. Ordinarily an applicant has the burden of demonstrating compliance with the Commission's regulations. In this case, however, presumably emergency planning beyond the LPZ will only be required in some situations. In the absence of a

clear standard, the question arises whether there will be a presumption that such planning is not necessary or whether an applicant must somehow establish that it is not.

It is submitted that, absent any showing that current requirements are generally unsatisfactory, the presumption should be, in every case, that planning is only required for areas within the boundary of the low population zone. If emergency planning beyond the LPZ is to be required, the burden should be placed on those proposing it to demonstrate the existence of special circumstances requiring it; and, as stated above, those circumstances requiring extended planning should be articulated in the rule.

5. Immediate effectiveness

The notice states that "pending the receipt of comments and the promulgation of a final rule, the proposed amendment will be used as interim guidance," and that that "guidance" will govern in uncompleted construction permit proceedings and in future operating license proceedings. 43 Fed. Reg. 37475. For the reasons already stated, we submit that the decision so to use the amendment as "interim guidance" is at best, ill-advised. We strongly oppose it and request that it be reconsidered.

Moreover, we submit that it would be illegal so to apply the amendment. There can be no doubt that its application would represent a radical change from what the Commission itself has characterized as "the consistent past interpretations of our present rules." Adoption of such a change before completion of the study directed by the Commission and without the presentation of evidence justifying the change, does not comply with standards imposed by the courts on federal agencies modifying or overruling established administrative precedents. The federal courts have held that before an agency may depart from precedent it must state the reasons for the change. Columbia Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018, 1026 (D.C. Cir. 1971); States Marine International, Inc., v. Peterson 518 F.2d 1070, 1081 (D.C. Cir. 1975), cert. denied, 424 U.S. 912 (1976). The Courts have been careful to ensure that before an agency changes a position which affects a regulated party, it is not indifferent to the "rule of law" requiring reasoned decision-making. As one court has stated:

> "Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." Greater Boston Televison Corporation v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (footnotes omitted)

Such views were echoed in ALAB-390, when the Appeal Board stated:

> "Finally, there is the important matter of fundamental fairness . . . . Over the past six years we have on four separate occasions explicitly told applicants in general that under existing Commission regulations the suitability (and therefore approval) of any proposed reactor site does not hinge upon the feasibility of taking protective measures with respect to persons located outside the LPZ. The Commission chose on each occasion to allow this reading of its regulations to stand. In these circumstances, applicants must be thought to have every right to proceed accordingly unless and until the regulations are changed upon due notice. Otherwise, no applicant would ever be able to make a reasonable appraisal of whether its proposal satisfies regulatory requirements--for what was yesterday authoritively determined to be the effect of the terms of a given regulation might be just as easily discarded tomorrow. In our view, no regulatory process can properly be taken to work in that fashion."

5 NRC at 744 (footnote omitted). Board Member Farrar, concurring, put it more succinctly:

> "But my colleagues quite rightly point out that our decisions are on the books, that if followed they call unequivocally for rejection of the staff's position, and that, at least with respect to the meaning of regulations whose terms have remained unchanged for 15 years, there must be some degree of certainty even in the law of nuclear reactor regulation."

5 NRC at 751 (footnote omitted).

Yet, the staff's position has now been put into effect as "interim guidance" despite its rejection by the Appeal Board and the Commission itself, and without the required "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."

The licensees referred to above are devoted to the preservation of the public safety. They are prepared to contribute what they can to an inquiry into the need for a change. However they must object to the arbitrary and ill-considered amendment now proposed and being put into effect.

Sincerely,

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