



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 11, 2000

OFFICE OF THE
SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-00-0126

TITLE: DENIAL OF PETITION ON JOINT AND SEVERAL
 LIABILITY (PRM-50-64)

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of July 11, 2000.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
 Commissioner Dicus
 Commissioner Diaz
 Commissioner McGaffigan
 Commissioner Merrifield
 OGC
 EDO
 PDR

SECY NOTE: THIS PAPER AND SRM TO BE MADE PUBLICLY AVAILABLE 5
 WORKING DAYS AFTER ISSUANCE OF THE LETTER.

VOTING SUMMARY - SECY-00-0126

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	6/22/00
COMR. DICUS	X					6/18/00
COMR. DIAZ	X				X	6/30/00
COMR. McGAFFIGAN	X					6/20/00
COMR. MERRIFIELD	X				X	6/29/00

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on July 11, 2000.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook
Secretary of the Commission

FROM: CHAIRMAN MESERVE

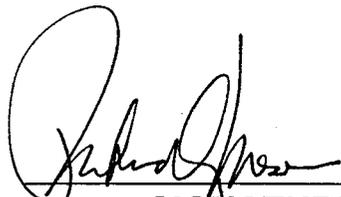
SUBJECT: SECY-00-0126 - DENIAL OF PETITION ON JOINT AND
SEVERAL LIABILITY (PRM-50-64)

Approved X with edits Disapproved _____ Abstain _____

Not Participating _____ Request Discussion _____

COMMENTS:

See attached edits and comments.



SIGNATURE

June 22, 2000

DATE

Entered on "AS" Yes ✓ No _____

COMMENTS OF CHAIRMAN MESERVE ON SECY-00-0126

I approve the denial of the petition for rulemaking and the publication of a notice announcing the denial, subject to the attached edits of the notice. The reason for most of the editorial suggestions is self-evident, but perhaps three need to be explained:

- The text at the bottom of page 10 notes that petitioners' proposed rule makes no reference to de minimis ownership, thereby implying that their argument is flawed. This seems unfair because the petitioners' proposal removed the need to define de minimis ownership. Moreover, I think it is appropriate to explain why the Commission chooses not to define the de minimis threshold -- namely, that the Commission needs the flexibility to respond to particular circumstances.
- I would delete the citation on page 12 to Safety Light Corporation (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350 (1990), because the Appeal Board did not address joint and several liability.
- A fuller explanation of the process leading to the policy statement, including in particular the fact that allocation of responsibility was a matter on which the Commission sought and responded to comment, would bolster the response to Comment 15 at page 15.

The petitioners are concerned that the NRC's "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" (Policy Statement) published on August 19, 1997 (62 FR 44071), has resulted in confusion among joint owners of nuclear power plants regarding the potential liability of the owner of a relatively small share of a nuclear power plant. In the Policy Statement, the Commission indicated that it "reserves the right, in highly unusual situations where adequate protection of the public health and safety would be compromised, if such action were not taken, to consider imposing joint and several liability on co-owners of more than *de minimis* shares when one or more co-owners have defaulted." (This is as opposed to dividing costs by using a *pro rata* share approach.) The petitioners believe that a joint owner could incur the burden of all, or an excessive portion, of a plant's costs if other joint owners or the operators defaulted or became financially incapable of bearing their share of the burden. The petitioners believe that the NRC has changed its policy so that it would now ignore existing *pro rata* cost sharing arrangements that it had previously sanctioned. The petitioners stated that the NRC has published no information regarding what would constitute a *de minimis* share and that the particular circumstances under which the NRC might find the imposition of joint and several liability necessary to protect the public health and safety are not defined. ✓

The petitioners have concluded that these factors have caused much confusion and uncertainty about the potential liability of a joint owner, and can adversely affect the ability to raise capital in an uncertain market that is undergoing consolidation and restructuring.

The petitioners requested that the issue of potential liability among joint owners be resolved by amending the regulations concerning enforcement in 10 CFR Part 50. The petitioners proposed that the NRC's regulations be amended to provide that if the NRC imposes additional requirements to protect public health and safety, the NRC would look first to the entity licensed to operate a nuclear power plant to assume whatever costs are incurred in meeting those requirements. The petitioners also requested that the regulations be amended to provide

Comment 4. NRC imposition of joint and several liability on co-licensees in a manner inconsistent with co-licensees' contractual agreements would constitute unlawful retroactive rulemaking (4) and is an unconstitutional impairment of contracts and a "taking" of property without compensation. The Atomic Energy Act of 1954, as amended, does not contain explicit authorization for the Commission to impose retroactive rules on the subject of joint and several liability, and therefore, the Commission does not possess authority to retroactively impose joint and several liability, *citing Bowen v. Georgetown University Hospital*, 488 US 205 (1988). (1)

Response: Commission action ensuring that operating or decommissioning funds are available from co-applicants/co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs does not constitute a retroactive action. Contrary to the commenter's ^{ASSUMPTION} implicit argument, the Commission never "approved" the private contractual arrangements for the sharing of costs among co-owners/co-licensees. The Commission's consideration of co-applicants'/co-licensees' cost-sharing arrangements initially was solely for the purpose of determining, under 10 CFR 50.33, if the co-applicants/co-licensees had the financial qualifications necessary to construct and operate the nuclear power plant. After the Commission had assured itself that the co-applicants'/co-licensees' cost-sharing scheme, regardless of its character and provisions, provided for reasonable assurance that co-applicants/co-licensees together would be able to pay for all necessary costs of construction and operation, the Commission's inquiry was satisfied and the appropriate finding could be made.² The Commission has reviewed co-owners' ^{CO-LICENSEES'} provisions for decommissioning financial assurance, pursuant to 10 CFR 50.75 in a similar manner.

²However, since 1984, the NRC has not required Operating License Stage review of the financial qualifications of "electric utilities," as defined in the Commission's regulations (10 CFR 50.2).

Staff guidance on financial qualifications discloses no intent to approve the specific cost-sharing arrangements made between licensees, as opposed to reviewing the arrangements to ensure that the licensees together possess the necessary financial qualifications. Thus, the staff, when applicable, recited the ownership percentages of decommissioning funding obligations of co-licensees in licensing actions it has taken. However, such wording merely constituted a recitation of the facts and did not reflect approval of the particular cost-sharing arrangements as a prerequisite of the staff's approval. *Therefore, the co-owners had no reasonable expectation that their regulatory obligations were limited by those arrangements.* In the absence of any regulatory "approval" by the NRC of the private contractual arrangement by co-licensees with respect to *pro rata* cost sharing, there is no legal basis for a claim of retroactivity.

Furthermore, Commission action recognizing joint and several regulatory responsibility on co-licensees³, e.g., to ensure that operating or decommissioning funds are available from co-applicants/co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not alter and therefore leaves undisturbed the *contractual rights* of a co-owner to recover costs from another co-owner under their contractual agreements in a private cause of action or in a bankruptcy proceeding. Because Commission action to impose joint and several responsibility has no legal effect upon the private contractual arrangements for cost sharing among co-licensees, it *per se* follows that this Commission action does not constitute an unconstitutional impairment of the contractual cost sharing agreements among co-licensees, nor does it constitute an unlawful "taking."

In sum, the Commission never approved the private contractual arrangements among co-licensees/co-owners for sharing of costs. Therefore, Commission imposition of joint and

²As discussed later in this notice, the NRC believes that the term, "joint and several regulatory responsibility" more accurately reflects the intent of the NRC's policy statement. Thus, the NRC will use the term "joint and several regulatory responsibility" in lieu of "joint and several liability."

these comments. The Commission notes that the term, "joint and several liability," may have connotations for contract law that the Commission did not intend to convey and that the term "joint and several regulatory responsibility" more accurately reflects the intent of the Commission's policy statement. Commission guidance on financial obligations is also provided in the "Standard Review Plan on Power Reactor Financial Qualifications and Decommissioning Funding Assurance" NUREG-1577, Rev. 1 (March 1999).

Comment 7. The NRC should define or clarify "*de minimis* share" and "joint and several liability" in "highly unusual circumstances." (5)

Response: As referenced in the Policy Statement, "*de minimis* share" means a level of plant ownership below which, even in highly unusual circumstances where recourse to all other potential remedies (e.g., rate regulators, bankruptcy proceedings) has failed, the Commission would not attempt to impose joint and several regulatory responsibility on minority co-owners of a plant. The Commission did not specify a numerical value in the Policy Statement for "*de minimis* share." The Commission recognizes that a licensee with a relatively small percentage of plant ownership is unlikely in most circumstances to have sufficient resources available to assume responsibility for significantly more than its *pro rata* share if a co-owner defaults.

For example, ^{may be owned by} ~~Particularly, co-owners that are smaller~~ rural electric cooperatives or ^{small} municipal electric systems ⁽⁵⁾ tend to own relatively small portions of nuclear units. In addition, ownership arrangements and percentages vary substantially from plant to plant. Given this variation, the Commission

believes that it is appropriate to evaluate the imposition of joint and several responsibility on a case-by-case basis, when this consideration becomes necessary in highly unusual circumstances after all other remedies have failed. A unit-by-unit listing of plant ownership percentages is contained in NUREG/CR-6500, Rev. 1, "Owners of Nuclear Power Plants" (March 2000).

The Commission does not intend to impose inordinate financial stress on its licensees by seeking their payment of additional safety-related costs above their normal *pro rata* share as a result of default by a co-owner. The Commission recognizes that, particularly for smaller municipal and cooperative entities, requiring them to pay for more than their *pro rata* share (an already substantial sum, particularly for a smaller entity) could be counterproductive by potentially causing additional defaults by those entities. In practice, it is unlikely that the Commission would be able to obtain additional funds from a seriously financially stressed smaller licensee to cover a defaulting licensee's safety expenses. As indicated, the

Commission would only consider imposing a joint and several regulatory responsibility in highly unusual and, presumably, quite rare circumstances after all other feasible remedies have been exhausted.

^{also} Further, the Commission notes that the petitioners have petitioned for a particular rule that makes no reference to *de minimis* ownership. ^{(In any event,} In order to deny the petition, it is not necessary for the Commission to establish what would constitute a *de minimis* share of plant ownership applicable to all circumstances. If the Commission were to establish a numerical *de*

de minimis threshold of general applicability, it would likely do so by a process that provides an opportunity for public comment on the proposed numerical threshold. However, the Commission does not believe that establishing a numerical *de minimis* threshold is ^{appropriate;} ~~warranted~~ ^{advisable or} warranted in order that it ^{the Commission needs to retain flexibility to respond to particular circumstances;}

~~warranted~~ ^{appropriate;} ~~advisable or~~ ^{advisable or} warranted in order that it ^{the Commission needs to retain flexibility to respond to particular circumstances;}

~~This page is being reviewed and the issue addressed~~

As noted above, the Commission intends to use the term "joint and several regulatory responsibility" in place of "joint and several liability." With regard to Commission regulations regarding NPPs, the obligations for which the co-owners/co-licensees could be jointly and severally responsible are those in the Commission's regulations or identified in the license. (See also the response to Comment 1.) By "highly unusual circumstances" we mean circumstances when the public health and safety may be at risk because of lack of appropriate action by licensees. The Commission would consider requiring other co-owners/co-licensees to assume additional health and safety expenditures in excess of their *pro rata* share only after all other remedies have been exhausted (e.g., rate regulators, bankruptcy courts).⁴

 Comment 8. NRC's rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants (September 22, 1998; 63 FR 50465), identified problems that could result from trying to impose joint and several liability. The Policy Statement does not explain why it takes a position different from the rule. (3)

Response: The Commission does not believe that the Policy Statement takes a position different from the final rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants, but supplements it. The Commission addressed "joint liability" in some detail in the proposed rule, published in the Federal Register on September 10, 1997 (62 FR 47588). Both the rule and the Policy Statement stated that under virtually all circumstances, *pro rata* division of decommissioning is acceptable, although the rule did not explicitly address financial assurance in "highly unusual circumstances."

⁴The Commission recognizes that if there are inadequate funds to safely operate the facility, the appropriate action would be for the Commission to order the plant to cease operation. Thus, it would be highly unusual for the Commission to require operation under these circumstances. However, should a co-licensee or co-owner default on its decommissioning funding obligation, and, in turn, create a health and safety problem and no other recourse were available, the Commission would be more likely to seek to impose a joint and several regulatory responsibility for decommissioning funding on the remaining owners/licensees.

Comment 9. The Commission should focus its authority on the defaulting co-owner and its customers, not the other co-owners and their customers. (1)

Response: The Commission intends to focus on those licensees that are not fulfilling their obligations under the license to protect public health and safety. This would include a focus on the defaulting licensee and, as necessary to protect public health and safety in highly unusual circumstances, on the other non-*de minimis* licensees.

Comment 10. The Commission does not have the legal authority to impose joint and several liability. (10) Joint and several liability is neither necessary nor proper, and should be promptly removed by an appropriate rule. (1)

Response: The imposition of a regulatory obligation of joint and several responsibility for the costs of operation and decommissioning among co-licensees of a NPP is neither expressly authorized nor prohibited under the Atomic Energy Act of 1954, as amended (AEA) or related case law. However, the Commission has broad statutory authority under the AEA to take necessary actions to protect public health and safety. See AEA section 161 b & i, 42 USC 2201 b & i. In fact-specific circumstances, ~~the Commission has imposed~~ joint and several regulatory responsibility. ^{has been imposed} See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988); Order against Safety Light Corporation, its predecessor corporation, and several wholly-owned subsidiaries of the predecessor (54 FR 12035-38, 1989); ~~Safety Light Corporation, et al. (Bloomsburg Site Decontamination), ALAB 931, 31 NRC 350~~ (1990). ^{has only been imposed} Although the Commission ~~has only sought to impose~~ joint and several regulatory responsibility in compelling circumstances where such action was necessary to protect public health and safety, the Commission believes it has this authority. Further, it would be inconsistent with the Commission's overriding mission to protect public health and safety for the

any, ownership of the facility in many cases. The Commission also believes that it should retain flexibility in those highly unusual circumstances when *pro rata* responsibility would endanger public health and safety. With respect to the commenters' position on contractual arrangements, the NRC has addressed that point in its responses to Comments 1 and 4.

Comment 15. The Commission's assertion that the policy statement "expressed no change in prior NRC practice or policy" is "inexplicable and insupportable." Also, the commenter says that the Commission should provide for a full hearing if it considers a change in these policies in the future. (1)

As to issue of the allocation (1992) of responsibility among Co-owners (61 FR 49711, 49713)

in publishing the final policy statement (62 FR 41071 (1997) 41074 (1997))

Response: The NRC policy statement in question was published in the *Federal Register* as a proposed policy statement with a request for public comment. ^{The Commission} All preambles in final policy statements include in a discussion of any public comments received. In addition, as discussed above (Comments 1 and 7), under virtually all circumstances short of the highly unusual, the Commission will continue to defer to co-owners' contractually determined divisions of responsibility. ^{Because} all co-owners are co-licensees under NRC legal precedent, See Public

Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179,198-201 (1978), the Commission does not believe that the policy statement represents a change in previous policy. Also, see the response to Comment 10.

Comment 16. If the rulemaking continues, it is important that the PRM be more closely aligned and consistent with the existing financial assurance requirements. (1)

Response: The Commission does not intend to initiate a rulemaking in response to the PRM. Hence, the point raised by the commenter is moot.

on point and covered liability

NOTATION VOTE

RESPONSE SHEET

2000 JUN -9 PM 3: 36

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER DICUS
SUBJECT: **SECY-00-0126 - DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY (PRM-50-64)**

Approved Disapproved Abstain

Not Participating

COMMENTS:

None

Aneta Jay Dicus
SIGNATURE

June 18, 2000
DATE

Entered on "STARS" Yes No

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-00-0126 - DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY (PRM-50-64)**

w/comment

Approved XX *(initials)* Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

(Handwritten Signature)

 SIGNATURE

6.30.00

 DATE

Entered on "STARS" Yes No _____

**COMMISSIONER DIAZ'S COMMENTS ON SECY-00-0126 --
DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY**

On the basis of discussion between my staff and OGC, I recommend the following edits:

1. On page 6 of the Federal Register Notice, revise the fourth sentence of the Response as follows:

"After the Commission assured itself that the co-applicants'/co-licensees' financial qualifications provided for reasonable assurance,"

2. On page 7 of the Federal Register Notice, replace the second and third sentences of the first paragraph of the Response with the following:

"Although power reactor licenses frequently recite the ownership percentages of the co-licensees, those percentages do not invariably reflect the allocation of decommissioning funding obligations. By reciting ownership percentages, the staff did not intend to make any finding about proportional allocation of decommissioning funding obligations."



NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-00-0126 - DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY (PRM-50-64)**

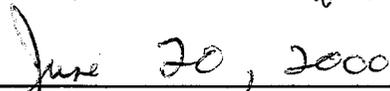
Approved Disapproved Abstain

Not Participating

COMMENTS:



SIGNATURE



DATE

Entered on "STARS" Yes No

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-00-0126 - DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY (PRM-50-64)**

Approved Disapproved Abstain

Not Participating

COMMENTS:

Approved subject, to the attached edits and inserts.



SIGNATURE

DATE 6/29/00

Entered on "STARS" Yes No

that if the NRC imposes these additional requirements on co-owners (licensees) who are not licensed to operate the plant, the NRC would not impose upon any of those licensees a proportional responsibility greater than that reflected in contracts establishing the allocation of responsibility among the co-owners.

Public Comments on the Petition

The NRC received 76 comments covering 20 topic areas from 16 commenters, all of whom were licensees or groups representing licensees. Of the 16 commenters, 11 were electric utilities (including five cooperatives) and five comments were from industry groups. Of the industry groups, two represented electric cooperatives and three represented investor-owned electric utilities. Almost all of the commenters agreed with the petitioners that NRC should not impose joint and several liability on its licensees. However, the cooperative utilities favored the petition, while the investor-owned utilities were against it. ^{also agreed with other issues and in general} ^{disagreed with other issues and consequently the petition}

The topic areas raised by the commenters follow (with the number of commenters making that statement appearing in parentheses). The NRC's responses are contained in the paragraphs after each comment.

Comment 1. The Policy Statement is at odds with the *pro rata* share contractual agreements (reviewed and approved by the NRC). The Commission should clarify that it will not impose operating or decommissioning costs on co-owners greater than their contractual obligations.

(10)

Response: The Commission has decided against taking the requested action because it could adversely affect public health and safety in those highly unusual circumstances when public health and safety are at risk and all other remedies have been exhausted. Because all co-owners are co-licensees, each licensee is ultimately responsible for complying with the Commission's regulations and the terms of the license. Although, in virtually all situations, the Commission expects that obligations under a license will be handled on a *pro rata* basis among co-owners, it cannot rule out highly unusual situations in which it would seek a co-owner to pay more than its *pro rata* share when essential to protecting public health and safety.

Insert
#1
(separate page)

Comment 2. Non-operating co-owners should not be liable for more than their contractually agreed upon share of additional, Commission-imposed requirements. (1)

Response: See response to Comment 1.

Comment 3. The Policy Statement has created uncertainty for minority owners because the Commission could impose operating or decommissioning costs on co-owners greater than their contractual obligations. This policy could affect the ability of co-owners to raise funds in financial markets. (6)

Response: The Commission believes that, given the limitations of this policy to highly unusual circumstances and its inapplicability to those co-licensees with *de minimis* shares, minority licensees will not experience significant uncertainty. The Commission notes that comments on the petition from investor-owned utilities or their representatives did not express concern about the impact of raising funds in capital markets, even though investor-owned utilities must go to essentially the same capital markets as the minority owners.

1. Insert page 5, first paragraph, after last sentence

, e.g., where one of the other co-owners is no longer capable of paying its *pro rata* share of costs. The rule change contemplated by the petition could prohibit the Commission from remedying such a situation. It would suggest that no matter how much a co-owners financial outlook changes from initial licensing for the worse, the Commission may not take all necessary action to ensure safe operation or decommissioning. Such a scheme would be inconsistent with the Commission's longstanding authority to take regulatory action in situations involving changed circumstances from initial licensing. See Atomic Energy Act §§ 186, 187, 42 USC 2236, 2237; 10 C.F.R. § 50.100; Cf., All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30 (1990) (Licensing Board sustained staff revocation of construction permits of a licensee that had failed to disclose its true financial condition during the original licensing proceeding).

2. On p. 6 in the response, redraft the fourth sentence, as follows:

"After the Commission assured itself that the co-applicants'/co-licensees' financial qualifications provided for reasonable assurance...."

3. On p. 7 in the response, first paragraph, replace the second and third sentences with the following:

"Although power reactor licenses frequently recite the ownership percentages of the co-licensees, those percentages do not invariably reflect the allocation of decommissioning funding obligations. Nor did the staff intend by reciting ownership percentages, to be making any finding about proportional allocation of decommissioning funding obligations."

4. Insert Page 7, 2nd paragraph, 6th line, after sentence ending "bankruptcy proceeding."

The enforcement of those arrangements appropriately lies with the parties to those *pro rata* - share contracts and the courts which have authority to enforce them, not the NRC, which is neither a party to them nor a tribunal with authority over such matters.

Comment 4. NRC imposition of joint and several liability on co-licensees in a manner inconsistent with co-licensees' contractual agreements would constitute unlawful retroactive rulemaking (4) and is an unconstitutional impairment of contracts and a "taking" of property without compensation. The Atomic Energy Act of 1954, as amended, does not contain explicit authorization for the Commission to impose retroactive rules on the subject of joint and several liability, and therefore, the Commission does not possess authority to retroactively impose joint and several liability, *citing Bowen v. Georgetown University Hospital*, 488 US 205 (1988). (1)

Response: Commission action ensuring that operating or decommissioning funds are available from co-applicants/co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs does not constitute a retroactive action. Contrary to the commenter's implicit argument, the Commission never "approved" the private contractual arrangements for the sharing of costs among co-owners/co-licensees. The Commission's consideration of co-applicants'/co-licensees' cost-sharing arrangements initially was solely for the purpose of determining, under 10 CFR 50.33, if the co-applicants/co-licensees had the financial qualifications necessary to construct and operate the nuclear power plant. After the Commission had assured itself that the co-applicants'/co-licensees' cost-sharing scheme, regardless of its character and provisions, provided for reasonable assurance that co-applicants/co-licensees together would be able to pay for all necessary costs of construction and operation, the Commission's inquiry was satisfied and the appropriate finding could be made.² The Commission has reviewed co-owners' provisions for decommissioning financial assurance, pursuant to 10 CFR 50.75 in a similar manner.

Insert
#2
(separate
page)

²However, since 1984, the NRC has not required Operating License Stage review of the financial qualifications of "electric utilities," as defined in the Commission's regulations (10 CFR 50.2).

Staff guidance on financial qualifications discloses no intent to approve the specific cost-sharing arrangements made between licensees, as opposed to reviewing the arrangements to ensure that the licensees together possess the necessary financial qualifications. ^{Insert #3 (Separate Page)} Thus, the staff, when

applicable, recited the ownership percentages of decommissioning funding obligations of co-licensees in licensing actions it has taken. However, such wording merely constituted a recitation of the facts and did not reflect approval of the particular cost-sharing arrangements as a prerequisite of the staff's approval.

In the absence of any regulatory "approval" by the NRC of the private contractual arrangement by co-licensees with respect to *pro rata* cost sharing, there is no legal basis for a claim of retroactivity.

Furthermore, Commission action recognizing joint and several regulatory responsibility on co-licensees³, e.g., to ensure that operating or decommissioning funds are available from co-applicants/co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not alter and therefore leaves undisturbed the *contractual rights* of a co-owner to recover costs from another co-owner under their contractual agreements in a private cause of action or in a bankruptcy proceeding. ^{Insert #4 (Separate Page)} Because Commission action to impose joint and several responsibility has no legal effect upon the private contractual arrangements for cost sharing among co-licensees, it *per se* follows that this Commission action does not constitute an unconstitutional impairment of the contractual cost sharing agreements among co-licensees, nor does it constitute an unlawful "taking."

In sum, the Commission never approved the private contractual arrangements among co-licensees/co-owners for sharing of costs. Therefore, Commission imposition of joint and

²As discussed later in this notice, the NRC believes that the term, "joint and several regulatory responsibility" more accurately reflects the intent of the NRC's policy statement. Thus, the NRC will use the term "joint and several regulatory responsibility" in lieu of "joint and several liability."

several regulatory responsibility that may be inconsistent with these private contractual arrangements would not constitute retroactive rulemaking.

Comment 5. If the Commission imposed an additional financial burden on the remaining owners of a nuclear power plant (NPP), and if the rate authorities would not allow additional costs into the rate base, the result would drive the co-owners into financial distress, creating further risks. This action would not only affect minority owners of NPPs, but also investors and State regulatory authorities. (6)

Response: If a licensee experiences financial difficulties, the minority owners of NPPs as well as investors and State regulatory authorities would likely be affected whether or not the Commission imposed additional responsibilities on the minority owners above their *pro rata* share. Also, the Commission would consider imposing any additional burden only under highly unusual circumstances in which ^{no other regulatory action would protect} the public health and safety would be compromised if no action were taken by the Commission, and when the other courses of action have been exhausted, such as through bankruptcy courts or financial markets. (Financial markets would come into play, for example, if a financially troubled licensee were to seek refinancing of its ownership share or if it were to sell its share to another party.)

Comment 6. The NRC should clarify its intent with respect to potential financial obligations of nuclear power plant licensees. (3)

Response: The Commission believes that it has already clearly stated its intent with respect to potential financial obligations of nuclear power plant licensees in the Policy Statement. To the extent that the petitioners are seeking clarification, the Commission trusts that the petitioners will find that clarification in this denial notice, including the Commission's response to