

February 26, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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| In the Matter of |) | |
| |) | |
| POWER AUTHORITY OF THE STATE |) | |
| OF NEW YORK, ENTERGY NUCLEAR |) | |
| FITZPATRICK, LLC, ENTERGY NUCLEAR |) | Docket Nos. 50-333-LT |
| INDIAN POINT 3, LLC, AND ENTERGY |) | and 50-286-LT |
| NUCLEAR OPERATIONS, INC. |) | |
| |) | |
| (James A. FitzPatrick Nuclear Power |) | |
| Plant and Indian Point Nuclear Generating |) | |
| Unit No. 3) |) | |

NRC STAFF'S BRIEF REGARDING NRC AUTHORITY
OVER DECOMMISSIONING EXPENDITURES BY
THE POWER AUTHORITY OF THE STATE OF NEW YORK

Pursuant to the Memorandum and Order (NRC Staff Participation) (Feb. 8, 2001) of the Presiding Officer (February 8 Order), the NRC Staff hereby submits this brief regarding the authority of the U.S. Nuclear Regulatory Commission (NRC or Commission) over decommissioning expenditures by the Power Authority of the State of New York (PASNY) for the James A. FitzPatrick Nuclear Power Plant (JAF) and the Indian Point Nuclear Generating Unit No. 3 (IP3), following the transfer of the respective operating licenses from PASNY to Entergy Nuclear FitzPatrick, LLC (ENF), Entergy Nuclear Indian Point 3, LLC (ENIP3), and Entergy Nuclear Operations, Inc. (ENO).

BACKGROUND

By orders dated November 9, 2000, the NRC Staff approved the transfer of the Facility Operating License No. DPR-59 for JAF from PASNY to ENF and ENO, and the

transfer of the Facility Operating License No. DPR-64 for IP3 from PASNY to ENIP3 and ENO. The transfers were effected on November 21, 2000. On that same date the licenses were amended to reflect the new licensees and remove PASNY from the licenses. Currently, ENF and ENIP3 are the owners of JAF and IP3, respectively, and ENO is the licensed operator for both facilities.

As proposed in the applications¹ for approval of the transfers, and approved by the Staff under certain conditions discussed more fully below, PASNY continues to hold all of the decommissioning trust funds for both JAF and IP3, and may continue to do so through the life of the licenses. In this regard, one of the issues that has been accepted for litigation in this proceeding is:

Whether the transfer applicants' plan for handling decommissioning funds for the [JAF] and [IP3] nuclear plants -- whereby control of the decommissioning funds will remain with PASNY but responsibility for decommissioning the plants will reside with the Entergy companies -- provides reasonable assurance of adequate decommissioning funding, within the meaning of 10 C.F.R. §§ 50.75(b) and 50.75(e)(1)(vi).

Power Authority of the State of New York, et al. (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), CLI-00-22, 52 NRC ____, slip op. at 50 (Nov. 27, 2000). With respect to this issue, the Presiding Officer, in his February 8 Order, opined that the Staff's views might be useful in resolving "specifically, the NRC's authority to control decommissioning expenditures of [PASNY] subsequent to the divestiture" of JAF and IP3 to ENF and ENIP3. The Presiding Officer requested that the Staff "present a

¹The initial applications were submitted in May of 2000, and were supplemented by several submittals through November 3, 2000.

witness and/or file a brief on this subject.”² The Staff has concluded that in light of the legal nature of the issue, the most appropriate method of providing its views would be by the filing of this brief, rather than through the testimony of a witness.³

DISCUSSION

The Staff asserts that the NRC has and will continue to have the authority or ability to control decommissioning expenditures of PASNY for the decommissioning of JAF and IP3, even though PASNY is no longer named as a licensee for those facilities, for so long as PASNY continues to hold the decommissioning funds or until such time as the facilities are fully decommissioned. The Staff’s conclusion has several bases.

I. The Atomic Energy Act Provides the NRC Authority to Issue Relevant Orders to PASNY

Under section 161 of the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2201, the Commission has been granted broad authority to prescribe regulations or issue orders “as it may deem necessary . . . to govern any activity authorized pursuant to this Act . . . in order to protect the public health and safety and minimize danger to life or property.” AEA, section 161(i), 42 U.S.C. § 2201(i). The Staff submits that this authority includes the

²The Staff has not elected to be a party in this proceeding. However, under 10 C.F.R. § 2.1316(b), the Staff will offer into evidence the Staff’s safety evaluation reports relevant to the JAF and IP3 transfer approvals and provide sponsoring witnesses.

³The Staff has previously designated two witnesses from its financial review group for the purpose of sponsoring the safety evaluation reports. See NRC Staff’s Notice of Sponsoring Witnesses (Jan. 16, 2001). One of these witnesses will be available to respond to a second issue on which the Presiding Officer is seeking the Staff’s views, namely “an interpretation of NRC’s rules concerning filing requirements for cost and revenue estimates with respect to newly formed entities -- and, indeed, when an organization should be deemed to be a newly formed entity” See February 8 Order at 1; *Power Authority of the State of New York, et al.* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), LBP-01-04, 52 NRC ____, slip op. at 12 n.10 (Feb. 5, 2001).

authority to issue appropriate orders against PASNY to control decommissioning expenditures. The fact that PASNY is not now a named licensee would not prevent the NRC from exercising jurisdiction over it, as the following analysis demonstrates.

The Supreme Court has long held that great deference is due the interpretation of a statute by the officers or agency charged with its administration. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). The Commission, of course, is responsible for all of the licensing and related regulatory functions set forth in the AEA. See generally section 201, Energy Reorganization Act of 1974, 42 U.S.C. § 5841. Its interpretation of the AEA, therefore, is entitled to considerable weight.

The Commission has previously articulated in detail the scope of its jurisdiction under the AEA over unlicensed persons. Albeit in a different context, the Commission's discussion of its jurisdiction over unlicensed persons, contained in the Statement of Considerations regarding the promulgation of the original Deliberate Misconduct Rule, is of general applicability and is instructive here. See Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664 (1991).⁴ The Commission stated that its statutory authority to issue orders, found in section 161 of the AEA, "is not limited solely to licensees." *Id.* Rather, its authority "is extremely broad, extending to any person (defined in section 11s to include, for example, any individual, corporation, federal, state and local agency) who engages in conduct within the Commission's subject matter jurisdiction." *Id.* This did not mark the boundary of the

⁴The Commission amended the rule in 1998 to extend the rule's reach to additional specified categories of persons. Deliberate Conduct by Unlicensed Persons, 63 Fed. Reg. 1,890 (1998).

Commission's *in personam*⁵ jurisdiction, however, for the Commission stated further that "persons" to which it had authority to issue orders include those "who engage[] in conduct *affecting* activities within the Commission's subject-matter jurisdiction." *Id.* at 40,666 (emphasis added).⁶

The expenditure of the funds accumulated and held for the specific purpose of decommissioning JAF and IP3 is clearly within the scope of the Commission's subject matter jurisdiction. *See, e.g.,* 10 C.F.R. § 50.82. If PASNY continues to hold the decommissioning funds for JAF and IP3 and is responsible for their disbursement, PASNY will not only affect activities within the Commission's subject matter jurisdiction, but will directly engage in conduct within such jurisdiction. Accordingly, the Commission has jurisdiction over PASNY and thus has the authority to issue orders against it if necessary to control expenditures from the JAF and IP3 decommissioning trusts.⁷

⁵There are no specific personal jurisdiction provisions or limitations contained in the AEA. The Commission has explained that in light of the foregoing, "the NRC is authorized to assert its personal jurisdiction over persons based on the maximum limits of its subject matter jurisdiction." 56 Fed. Reg. at 40,667. Personal jurisdiction "is established" (but not necessarily limited to) when one "acts within the agency's subject matter jurisdiction." *Id.*

⁶As indicated above, the issue being briefed here is not predicated on a violation of the Deliberate Misconduct Rule. Further, a legal action by the NRC to control decommissioning expenditures of PASNY would involve an injunctive-type remedial action, rather than any type of penalty action, such as the imposition of civil monetary penalties. In our view, the *dictum* in *Thermal Science, Inc. v. NRC*, 184 F.3d 803, 806 (8th Cir. 1999), suggesting that the NRC's discussion of its authority to assess civil monetary penalties against unlicensed persons under the Deliberate Misconduct Rule was inadequate, is simply inapposite here. In *Thermal Science*, an action was brought by a manufacturer of fire barrier material, used by NRC licensees, to prevent the NRC from bringing a civil monetary penalty action against the manufacturer based on alleged false statements.

⁷*See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-92-4, 35 NRC 69, 80 n.7 (1992). In *Shoreham*, the Commission imposed a condition in connection with a license transfer approval that required the former licensee to take back
(continued...)

Along these same lines, the Staff's orders approving the transfers of the JAF and IP3 licenses contained the following condition fourteen in both orders:

(14) The Authority shall waive any right to deny, contest or challenge the NRC's jurisdiction over the Authority with respect to IP3 [and JAF] to the extent that there may arise in the future any matter warranting action by the NRC to ensure compliance with the NRC's decommissioning requirements regarding the disposition and use of the amounts accumulated in the decommissioning trust fund[s] and retained by the Authority, and remain subject to the Commission's jurisdiction under Section 161 of the Atomic Energy Act to issue orders to protect health and to minimize danger to life or property regarding any and all matters concerning compliance with the Commission's decommissioning requirements regarding the disposition and use of the amounts accumulated in the decommissioning trust fund[s] and retained by the Authority, until such time as the Authority transfers the decommissioning trust fund[s] to [ENIP3 or ENF] or the decommissioning of [IP3 or JAF] has been completed in accordance with NRC regulations and guidance, whichever occurs first.

Power Authority of the State of New York (Indian Point Nuclear Generating Unit No. 3), Order Approving Transfer of License and Conforming Amendment (IP3 Order), 65 Fed. Reg. 70,843, 70,844-45 (2000); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant), Order Approving Transfer of License and Conforming Amendment (JAF Order), 65 Fed. Reg. 70,845, 70,847 (2000).⁸ The Staff submits that in

⁷(...continued)

the license if the approved transferee was dissolved by a state court. Thus, inherent in the imposition of the condition was the Commission's assumption that it would have or retain jurisdiction or authority over the former licensee at least for this specific purpose of possibly requiring that the former licensee revert to becoming the licensee once again.

⁸Prior to the issuance of the orders, PASNY filed a supplement, dated September 21, 2000, to the original application for approval of the license transfers that contained PASNY's agreement to essentially the same terms of the condition fourteen in both orders.

light of all of the foregoing, it is clear that the NRC has the legal authority under the AEA to control decommissioning expenditures of PASNY for JAF and IP3.

II. The Governing Trust Agreement Expressly Provides the NRC the Ability to Control Decommissioning Expenditures

The Staff's Orders approving the JAF and IP3 license transfers contained several conditions that required that the relevant decommissioning trust agreements between PASNY and the trustee (The Bank of New York) contain certain provisions at the time of the closing of the transfers. Included among these conditions are the following:

(7) The decommissioning trust agreement shall provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of the payment. In addition, the trust agreement shall state that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation.

(9) The decommissioning trust agreement shall provide that the provisions or purpose of the trust agreement may be enforced by the NRC against the Authority and the trustee with respect to the disbursement of the trust funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements. The NRC shall not be a beneficiary of the trust or of any of the trust funds, unless required by law to be so for the sole purpose of enforcing the provisions or purpose of the trust agreement as set forth above.

(10) [The decommissioning trust agreement shall require that] PASNY may not terminate any fund established under the Master Trust for [JAF and IP3] except after requesting and obtaining written consent from the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as appropriate.

JAF Order, 65 Fed. Reg. at 70,844; IP3 Order, 65 Fed. Reg. at 70,846-47. The purpose of the above conditions⁹ was to provide additional measures by which the NRC could control decommissioning expenditures notwithstanding that the funds would be held by PASNY. In general, the conditions provide mechanisms for the NRC to bar disbursements, to require disbursements to satisfy NRC decommissioning requirements, and to prevent PASNY from terminating the trust fund without the NRC's consent. The Staff asserts that these mechanisms now provide the NRC adequate control over the expenditure of decommissioning funds by PASNY.¹⁰

The Staff recognizes that an argument could be made that, strictly speaking, the conditions imposed in the JAF Order and IP3 Order only require that the relevant trust agreements contain certain provisions, and that once the provisions are incorporated, PASNY or the trustee could, in theory, then choose to disregard them.¹¹ In such a case, were PASNY to disregard the substance of the conditions once embodied in the trust agreement, PASNY would effectively be failing or would have failed to comply with the conditions of the transfer approvals, in the Staff's view. Accordingly, the approvals would

⁹Condition eight of the JAF Order and IP3 Order also required that the decommissioning trust agreement shall provide that the trust agreement shall not be modified in any material respect without the prior written consent of the Director, Office of Nuclear Reactor Regulation. Thus, once the required conditions were implemented in the trust agreements, they would remain in effect absent express NRC authorization to the contrary.

¹⁰The conditions were implemented at the closing of both license transfers.

¹¹The Staff believes, however, that as discussed earlier, the NRC has continuing ordering authority under section 161 of the AEA over PASNY; the Staff is aware of nothing that would prevent the Staff from exercising this authority either to enforce the terms of the trust agreement, or to issue a specific order against PASNY with respect to the trust funds independent of the terms of the trust agreement.

become null and void, and PASNY would revert to being the licensee for JAF and IP3, subject to the NRC's usual authority over licensees.¹²

Further, even if PASNY was not deemed to have reverted to being a licensee for JAF and IP3, the NRC would have the ability to bring an action to enforce the provisions or purpose of the trust agreement under the terms of the trust agreement itself. Section 10.11 of the trust agreement, added to the agreement by the "First Amendment to Master Decommissioning Trust Agreement" dated November 21, 2000, provides as follows:

10.11 Enforcement by NRC. The provisions or purpose of this Agreement may be enforced by the NRC against the Authority and the Trustee with respect to the disbursement of the Funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements. * * *¹³

The Staff is aware of nothing in the law that would preclude the NRC from bringing an appropriate action in court under this provision of the trust agreement, which clearly evidences the intent of the parties to the agreement, and submits that it is reasonable to assume that the trust agreement is a valid contract under New York law. Accordingly, the

¹²Obviously there would be practical implications if PASNY were to revert to being the licensee. However, the Commission has recognized that former licensees following a transfer may later need to revert to being licensees in certain circumstances. *See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80 n.7 (1992).*

¹³The purpose of the trust, stated in section 2.01 as amended November 21, 2000, is "to accumulate and hold funds" for the decommissioning of JAF and IP3, "and to use such funds, in the first instance, for expenses related to" decommissioning the facilities. Section 5.01, as amended on November 21, 2000, contains provisions that require prior notice to the NRC of disbursements and that preclude disbursements if the NRC objects. Other sections of the trust agreement contain provisions that were required to be incorporated pursuant to the conditions of the approval of the license transfers. *See, e.g.,* sections 6.01, 9.01, and 10.05 of the Master Decommissioning Trust Agreement, as amended November 21, 2000.

trust agreement provides the NRC an alternative means by which it can control PASNY's expenditure of decommissioning funds.¹⁴

CONCLUSION

For all of the foregoing reasons, the Staff submits that the NRC has the authority and ability to control decommissioning expenditures of PASNY notwithstanding that PASNY is no longer named as a licensee for JAF and IP3.

Respectfully submitted,



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Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of February 2001

¹⁴Even where there is no express provision in a contract authorizing a non-party to bring an action to enforce the contract, under New York law, a non-party to the contract may be able to bring such an action, depending upon whether the facts establish that the non-party is an "intended third-party beneficiary." *Koch v. Consolidated Edison Co. of New York*, 62 N.Y.2d 548 (1984); see generally *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38 (1985). Here, however, as the discussion above indicates, there is an unmistakable, explicit provision in the trust agreement upon which the NRC may bring an action to enforce the trust agreement's provisions and purpose. Therefore, the Staff asserts that it would be unnecessary to establish that the NRC has the status of an intended third-party beneficiary, as that term is used in New York case law, in order to bring such an action. The Staff notes that in any event, the NRC would not seek to take any action as a "beneficiary" that would result in the funds having to be remitted to the U.S. Treasury under what is commonly referred to as the "miscellaneous receipts" statute, 31 U.S.C. § 3302(b), which addresses the disposition of any money that the NRC might receive which is not appropriated by Congress.

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(James A. FitzPatrick Nuclear Power Plant)
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Unit No. 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF REGARDING NRC AUTHORITY OVER DECOMMISSIONING EXPENDITURES BY THE POWER AUTHORITY OF THE STATE OF NEW YORK" in the above-captioned proceeding have been served on the following with E-mail addresses shown by E-mail, and on all of the following by deposit in the United States mail, first class, or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by an asterisk, this 26th day of February 2001.

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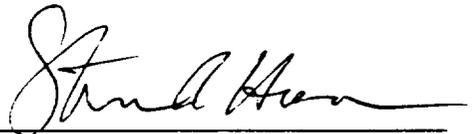
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