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**Draft Statement of Policy on Conduct of
New Reactor Licensing Proceedings
(72FR32139)**

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

August 10, 2007

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

Re: Comments on "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," 72 Fed. Reg. 32,139 (June 11, 2007)

On behalf of Duke Energy, Entergy Nuclear, Exelon Generation, Luminant (formerly TXU Power), South Carolina Electric & Gas Company, Southern Nuclear Operating Company, and South Texas Project Nuclear Operating Company, Morgan, Lewis & Bockius LLP respectfully submits the following comments regarding the NRC's "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," which was published in the *Federal Register* (72 Fed. Reg. 32,139) on June 11, 2007.

We commend the Commission for developing the Draft Policy Statement and issuing it for public comment. We generally agree with much of the Draft Policy Statement, and believe that it could provide substantial improvements to the hearing process, particularly with respect to resolution of generic issues. We strongly urge the Commission to finalize the Policy Statement and to use it in new reactor licensing proceedings.

Nonetheless, we believe that the Draft Policy Statement could be enhanced to provide more efficient and effective docketing and hearing processes for the upcoming new reactor licensing proceedings. Therefore, we respectfully submit the comments outlined below and request the corresponding changes to the Draft Policy Statement.

All of our comments and requested changes are consistent with the Atomic Energy Act of 1954, as amended, the Administrative Procedure Act, and the applicable NRC regulations. Therefore, the Commission is free to make our requested changes. As stated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 534-44 (1978), "Absent constitutional constraints of extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Furthermore, our requested changes would promote the

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Commission's objectives in Section I of the Draft Policy Statement, which states that "the Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing process, and to enable the development of an informed adjudicatory record that supports agency decision making."

Comment No. 1 - - If Requested by the Applicant, the NRC Should Issue a Notice of Hearing for Each Part of a Two-Part Application

Although the NRC regulations at 10 CFR § 2.101(a)(5) allow submission of a Combined License ("COL") application in two parts (*i.e.*, the safety information and the environmental information), Section II.A.2 of the Draft Policy Statement directs issuance of a Notice of Hearing only after the entire application is docketed. The Commission should modify the Draft Policy Statement such that, at the request of the applicant, Notices of Hearing would be provided after docketing each part of the application.

The length of the NRC's review of an application is directly affected by the timing of the staff review of an application and the length of the hearing. Under the Draft Policy Statement, the hearing process cannot begin until the staff has completed docketing of both parts of the application related to environmental issues and safety issues. Therefore, the hearing process will be delayed until both the environmental and safety acceptance reviews are completed. In that case, the completion date of the hearing will be determined by the most time-consuming part of the application. If an applicant could submit that part of the application that will take longer to review and litigate earlier than the other part, then the entire proceeding could be completed sooner. Furthermore, if the hearing process is started earlier, it will lead to earlier resolution of contentions and greater certainty in the licensing process.

Additionally, our requested change is consistent with the NRC regulations at 10 CFR § 2.104(a), which state that a Notice of Hearing "must be issued as soon as practicable after the NRC has docketed the application." Under 10 CFR § 2.101(a)(5), the NRC "accept[s] for docketing" each part of the two-part application. Docketing one part of the application and then waiting up to 18 months, as permitted by Section 2.101(a)(5), to issue the Notice of Hearing cannot be considered "as soon as practicable." Furthermore, the issuance of multiple Notices of Hearing as requested above is consistent with the final rulemaking on Limited Work Authorizations (SECY 07-0030), which provides for multiple Notices of Hearing.

Finally, our proposed change is fully compatible with a fair hearing process, because all public participants would continue to have the opportunity to challenge every section of an application. As the Draft Policy Statement acknowledges in Section II.B.1 in a different context, "Such a procedure [involving two Notices of Hearing] would not affect any prospective intervenor's substantive rights; *i.e.*, members of the public will still have a right to petition for intervention on every issue material to the Commission's decision on each individual application." Thus, the Commission itself has already recognized that issuing multiple Notices of Hearing will not detrimentally affect the public's right to participate in the hearing process.

Comment No. 2 - - The Draft Policy Statement Should Provide Guidance for Proceedings in Which a COL Application References an Early Site Permit (“ESP”) Application or an Application for an ESP Amendment, Comparable to Guidance Set Forth for COL Applications Which Reference a Design Certification Application

Section B.2 of the Draft Policy Statement, “COL Applications Referencing Design Certification Applications,” provides a substantial amount of guidance regarding COL applications referencing a Design Certification application. Similar guidance should be provided for COL applications that either (1) reference an ESP application or (2) reference an application for an ESP amendment. In particular, just as Section B.2 of the Draft Policy Statement instructs Licensing Boards not to accept contentions that are the subject of a Design Certification application, the Draft Policy Statement should instruct Licensing Boards not to accept contentions that are subject to an ESP application or an application for an ESP amendment.

Such changes are necessary to prevent the possibility of redundant reviews and hearings, with the possibility of inconsistent results. An issue that is being addressed and resolved in an ESP proceeding should not be addressed in a contemporaneous COL proceeding. Since members of the public have a right to petition to intervene in the ESP proceeding, their hearing rights will be fully preserved. Interested parties should not have a right to litigate the same issue twice - - once in the ESP hearing and once in the COL hearing. Such an outcome would be the very antithesis of an effective and efficient licensing process. Therefore, the Draft Policy Statement should be augmented to prohibit such a possibility.

Comment No. 3 - - The Draft Policy Statement Should Treat COL Applications that Reference Applications for Design Certification Amendments in a Manner Comparable to COL Applications that Reference Design Certifications

Currently, two of the reactor vendors that sponsored existing Design Certifications (AP1000 and ABWR) have applied or are planning to apply for amendments to the Design Certifications. It is anticipated that some COL applications may reference an application for amendment of a Design Certification. Therefore, the statements in the Draft Policy Statement regarding a COL application that references a Design Certification application should be expanded to encompass applications for Design Certification amendments.

In this respect, a COL application that references an application for a Design Certification amendment should be treated the same as a COL application that references a Design Certification application. This would be consistent with the well understood proposition that generic issues, such as Design Certification amendments, should be addressed through rulemaking rather than in individual licensing proceedings. *See e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 101 (1983). Additionally, the reasoning behind the statements in the Draft Policy Statement with respect to Design Certification applications applies equally to applications for Design Certification amendments.

Comment No. 4 - - NRC Should Clarify Its Positions on Consolidation

We request that the Commission clarify two provisions in Section II.B.1 of the Draft Policy Statement related to consolidation of issues common to multiple applications.

First, the Draft Policy Statement states that licensing boards should consider consolidation of such issues on their own initiative. We recommend that the Commission clarify this statement to indicate that consolidation should not occur if opposed by an applicant. Since the applicant has the burden of proof in licensing proceedings and has substantial financial investment in the application, it would be inappropriate for a licensing board to consolidate issues over the objection of an applicant.

Second, the Draft Policy Statement states “we presume that Subpart D procedures . . . will be applied to applications employing a design-centered review approach” (DCRA). To our knowledge, none of the applicants engaged in the DCRA will be seeking to use the Subpart D procedures. While use of Subpart D is permissible, it is not required and should not be presumed. Even absent a request to use Subpart D, there will still be value in utilizing the DCRA for the reviews performed by the NRC staff, as discussed in NRC Regulatory Issue Summary 2006-06. For example, the staff review of the reference COL (R-COL) application and the licensing documents generated from the review, including the Safety Evaluation Report and ACRS review, could be utilized in the proceeding of a subsequent COL (S-COL) application, notwithstanding that the hearing was not consolidated with that of other COLA applications referencing the same standard design. Moreover, the Licensing Boards would continue to have the authority to order consolidation of the hearing on specific issues such as where intervenors in separate proceedings raise identical contentions relative to a common portion of the COL applications. Therefore, we recommend the Draft Policy Statement be reworded to indicate that applications who take advantage of the DCRA may, but are not required to, utilize the provisions in Subpart D.

In addition, the Draft Policy Statement should clarify the meaning of “close in time” relative to the submission of applications in the event the provisions of Subpart D are employed in connection with the Design Centered Approach. For example, a S-COL application that is submitted between the docketing of a R-COL application and the deadline for requesting a hearing or filing a petition to intervene on the R-COL application should be considered to be filed in sufficient time to employ the procedures of Subpart D as described in the Draft Policy Statement.

Comment No. 5 - - The Provisions in the Draft Policy Statement Regarding the Finality of COL Proceedings Should Be Revised to Be Consistent with a Recent Decision by the U.S. Court of Appeals

The Draft Policy Statement contains a statement regarding the finality of COL proceedings that should be corrected to conform to the Seventh Circuit’s decision in *Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006). In that case, the Seventh Circuit accepted

jurisdiction to review a decision by an NRC Licensing Board, which granted summary disposition of the only remaining contention and dismissed the Intervenor from the proceeding. The Seventh Circuit affirmed the NRC's decision, and in doing so, held that if all of an Intervenor's contentions are resolved by the Licensing Board, that decision is the final agency action with respect to that Intervenor.

Section II.B of the Draft Policy Statement is inconsistent with that ruling. That section states the following: "a decision on common issues would become final agency action only in the context of final Commission action with respect to an individual application." This statement should be modified in conformance with *Environmental Law and Policy Center* to clarify that if all of a specific Intervenor's contentions are resolved by the Licensing Board, then that decision is final agency action with respect to that Intervenor.

Comment No. 6 - - The NRC Should Ensure Consistency in Its Rules by Conforming 10 CFR § 51.105 to 10 CFR § 2.104

In an April 11, 2007 Staff Requirements Memorandum ("SRM"), the Commissioners approved a revision to Part 52 and related regulations, but directed the staff to change the mandatory findings required by a presiding officer in an uncontested hearing under 10 CFR § 2.104, "Notice of Hearing." In Change No. 18 of the Attachment to this SRM, the Commissioners required the following modification:

The language of 2.104 should be altered to ensure that the Commission has maximum flexibility in the conduct of mandatory hearings. The mandatory content of the notice of hearing should be reduced to eliminate all references to findings made by the presiding officer. The only findings a presiding officer should make should be those regarding contested issues.

The NRC staff has modified the draft final rule such that Section 2.104 does not include any references to mandatory findings by the presiding officer of uncontested proceedings. Nonetheless, the draft final rule did not include corresponding changes to 10 CFR § 51.105, which requires similar mandatory findings in uncontested proceedings. For example, Section 51.105(a)(4) states that the presiding officer must "[d]etermine, in an uncontested proceeding, whether the NEPA review conducted by NRC staff has been adequate." This provision is essentially identical to Section 2.104(e)(3) of the draft final rule that was deleted in response to the Commissioners' direction.

Retaining requirements in Section 51.105 for the presiding officer to make certain mandatory findings in uncontested proceedings is inconsistent with the changes to Section 2.104 directed by the Commissioners. Therefore, we respectfully request that the Commission revise Section 51.105 to eliminate any mandatory findings by the presiding officer in an uncontested proceeding. To repeat the statement made by the Commissioners in the SRM, "[t]he only findings a presiding officer should make should be those regarding contested issues."

Comment No. 7 - - The NRC Should Allow for Early Submission of an Environmental Report Without All Information Specified in Sections 50.33(f)-(g) and 52.79(a)(1)

10 CFR § 2.101(a)(5) allows for a COL applicant to submit its application in two separate parts at different times: (1) an environmental report, and (2) a safety analysis report. Whichever part is submitted first must be accompanied by siting information needed for the safety analysis and the information specified in 10 CFR § 50.33 (including financial information as specified in Section 50.33(f) and offsite emergency planning information specified in Section 50.33(g)).

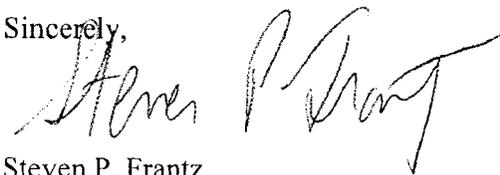
The current experience with preparation of COL applications indicates that development of seismic and other siting information is likely to be the most time consuming part of preparation of a COL application. However, Section 2.101(a)(5) apparently requires seismic and other siting information to be provided with the first part of a COL application, pursuant to Section 52.79(a)(1). Therefore, as a practical matter, Section 2.101(a)(5) has limited value.

To address this situation, we recommend that the Commission revise Section 2.101(a)(5) to permit the first part of the application to consist solely of the environmental report plus the general administrative information specified in 10 CFR § 50.33(a)-(e). It is not necessary for the NRC to have complete siting information, plus financial and emergency planning information, to review an environmental report. If an environmental report is prepared in accordance with NRC guidance found in the Environmental Standard Review Plan (NUREG-1555), then the NRC will not need any additional information to perform an adequate environmental review. Furthermore, by allowing a COL applicant to submit its environmental report first, the NRC can begin its environmental review early. Since environmental reviews are likely to be critical path for a COL application that references a Design Certification or a Design Certification application, the NRC should be able to complete its full review of the COL application sooner than it would otherwise be able to do so (thereby promoting administrative efficiency).

* * *

In conclusion, we respectfully request that the NRC modify the Draft Policy Statement and initiate rulemaking to address our comments.

Sincerely,



Steven P. Frantz
Stephen J. Burdick

From: <sfrantz@morganlewis.com>
To: <SECY@NRC.gov>
Date: Fri, Aug 10, 2007 10:31 AM
Subject: Comments on NRC Draft Policy Statement on Conduct of New Reactor Licensing Proceeding

(See attached file: MLB comments.pdf)

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