UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SUPPLEMENTAL SUBMISSION BY THE STATE OF NEW YORK CONCERNING DECOMMISSIONING ISSUES

State of New York
Office of the Attorney General
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Submitted: December 4, 2011

The State of New York respectfully submits these comments in response to NEI's November 4, 2011 letter (ML11313A049) concerning SECY 11-0133, the three options presented to the Commissioners in that SECY paper, and the record developed in the stakeholder process and discussed in the SECY enclosures.

Reduced to it essentials, NEI's proposal asks that corporations that own or operate reactors be permitted to *discount* a parent corporation's *promise* to pay money at a later date to cover the owner's decommissioning deficits or debts. Such promises are *not* actual funds placed in a trust account.

The five NRC Commissioners should reject NEI's continued efforts to convince the Commission to ignore the plain text of the decommissioning regulations. NEI's proposal is inconsistent with federal statues and regulations. It is inconsistent with the factual record developed in the stakeholder process. And, it is inconsistent with the well-founded concerns of States and localities.

NEI's recent letter contains unfounded arguments and omissions.

1. NEI advocates that the Commissioners select "Option 2" from the three options presented in Staff's SECY document and insists that corporate subsidiaries that operate and own reactors be permitted to discount a parent corporation's promise to pay money at a later date. Tellingly, NEI never identifies what regulation expressly and specifically authorizes reactor owners to use a discounted parent company promise to pay. That omission is fatal to NEI's effort, and it was not an oversight. NEI's letter did not identify such a regulatory provision because it could not. Simply put, no regulation authorizes that what NEI seeks. This is not surprising because the non-cash nature of such mere promises to pay makes it unsuitable for discounting, since the promises do not produce earnings. SECY 11-0133 at 5.

2. Although NRC Staff's recent SECY report to the Commissioners explained in detail how certain license transfer cases do not support NEI's position, NEI continues to place great reliance on those three proceedings. As the State has also noted in previous submissions, NEI misconstrues those proceedings and their precedential value to this discussion. The safety reviews in the license transfer cases did not join issue on the use of the parent company guarantee. Those safety reviews do not reflect or contain any substantive analysis of whether or not such discounted parent guarantees were authorized under NRC regulations. Because the license transfer order safety reviews never specifically analyzed this issue, the license transformers cannot stand as any type of meaningful precedent on this issue.

3. NEI misconstrues the legal and regulatory significance of the Commissioners' 2010 SRM-SECY communication that requested Staff review the discounted parent guarantee issue and prepare a report for the Commissioners. It is black letter law that NRC Commissioners may not use a communication to staff to

change an existing regulation or to promulgate a new regulation. NEI's contrary premise runs afoul of the federal Administrative Procedure Act notice and comment provisions for promulgating a regulation. NEI's position on this score reflects two mistakes: (1) it assumes that the SRM communication specifically authorized the use of discounted parent guarantees, and (2) that SRM communication unilaterally amended existing NRC regulations. NEI's suggestion that the Commissioners "promulgate" a regulation via a SRM communication is inconsistent with the Administrative Procedure Act and would result in *ultra vires* conduct. Contrary to NEI's understanding, SRM-SECY-10-84 asked NRC Staff to review decommissioning issues, engage stakeholders and solicit their views, and then provide the Commissioners with an option paper and analysis based on the results of the stakeholder process.

4. NEI overlooked that the record developed during the stakeholder process revealed that that minimal, if any, costs are incurred to provide a parent company promise (or PCG) to a licensee subsidiary. A licensee for a large number of reactors stated at the March 2011 workshop that it incurred no direct or indirect costs as a result of issuing parent company guarantee in 2010. SECY-11-0133, Executive Summary, Enclosure 2 at 5 ML11243A173.

5. NEI's letter assumes that investments will always appreciate. While there have undoubtedly been periods of economic expansion over the last century, given recent financial events and the record assembled, a prudent regulator should not assume that the investment vehicles selected by licensees will forever generate a positive or real rate of return that exceeds the appreciation of decommissioning, decontamination, and disposal costs. For example, a few days after NEI's recent letter, energy company Dynegy Holdings filed for bankruptcy.[1] In late October, futures broker MF Global, which previously had been designated by federal financial regulators as a "primary dealer," declared bankruptcy. Indeed, NEI does not come to grips with the negative rate of return included in certain economic projections provided during the stakeholder process. Also unacknowledged is the recent Constellation situation. In an October 2009 ruling, the Maryland Public Service Commission noted that Constellation nearly went bankrupt in 2008 characterizing the situation as a "near-death experience" that "demonstrated all too vividly how vulnerable [Baltimore Gas and Electric] is if, and when, things go badly for [Constellation]." *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Co,* Maryland Public Service Commission, Case No. 9173, Phase II, Order 82986, at 3 (issue date October 30, 2009).

6. NEI overlooks the significance and details of the Zion Solutions, LLC arrangement. In that situation, Exelon, who remains the landlord and owner of the

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1 *In re Dynegy Holdings, LLC, Debtor*, Case No. 11-38111-cgm (Bktcy. S.D.N.Y) (petition filed November 7, 2011).

property, included several levels of protection for itself against a host of downside economic risks. Chief among those strategies is Exelon's ability to prevent Zion Solutions from declaring bankruptcy, to compel Zion Solutions' parent to fund decommissioning (without cap, limit, or discount), and to obtain 7.5 million cubic feet of free disposal space. That a company with an understanding of potential costs and risks negotiated the inclusion of these and other protections confirms the validity of the concerns expressed by States, localities, and tribes in the decommissioning context. SECY 11-0133, Additional Information, Enclosure 3, at 18-19 ML111950025.

7. NEI further ignores the fact that reactor decommissionings to date have been in the context of publicly regulated utilities which have the ability to access rate payer funds. Significantly, to the State's knowledge, no *merchant plant* has yet ceased operation, completed decommissioning of the entire site, and complied with State decontamination or green field site restoration requirements. NEI points to a Texas regulation, but the reference is inapposite. That regulation applies only to activities within Texas; it is not a national standard, nor can NEI impose that state-specific standard upon all other States. As NRC Staff noted, "A discounted PCG used by a merchant plant licensee, without access to rate-payer funds, increases the risk that unfunded decommissioning obligations may occur, due to delay or cessation of contributions to the NDT." SECY 11-0133 at 4.

8. Moreover, NEI ignores the substantial number of incidents where power reactors have allowed unpermitted and hence unauthorized releases of strontium, cesium, cobalt, nickel, and tritium into ground water or surface water resources. While there may be voluntary industry programs to monitor such releases, such releases – and delayed or deferred remediation – will invariably increase the costs to decommission, decontaminate, and restore reactor sites.

9. NEI distorts the recent NRC Inspector General report concerning commitments and turns the report on its head. Far from endorsing NEI's view that licensee commitments effectively resolve issues of concern, the OIG report, *Audit of NRC's Management of License Commitments*,[2] found substantial concerns about whether commitments are implemented, tracked, or enforced. OIG-11-A-17, at iii.

Staff's SECY paper and enclosures presented three options for review by the Commissioners. The State requests that the Commissioners select Option 1.

<u>Option 2</u>. NEI's preference, Option 2, has no regulatory basis. 10 C.F.R. § 50.75(e)(1)(iii)(B) and 10 C.F.R. Part 30 Appendix A do not authorize parent company promises to be discounted. At the end of the day, rather than use the various options provided by the existing regulations, NEI asks the Commissioners to bestow an

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[2] OIG-11-A-17, *Audit of NRC's Management of License Commitment* (Sept. 19. 2011), available at ML112620529.

informal sanction of a device that is not authorized by those regulations or the Administrative Procedure Act. Therefore, there is no basis to select Option 2.

Ensuring that operators have sufficient money that is actually on hand and actually available to decommission and restore reactor sites is an issue of vital concern the State of New York, and NEI's proposal (at 3) that NRC Commissioners "expeditiously" resolve the issue to NEI's satisfaction is misplaced. This is especially so given that NEI seeks to encourage the Commissioners to embark on conduct that is *ultra vires* and contrary to sound financial regulation and public policy. The Commissioners should reject NEI's Option 2 proposal as such.

Option 3. The Commissioners should also reject Option 3. As SECY 11-0133 and its enclosures make clear, it is unlikely that Option 3 could ever result in a conclusion that discounting a promise to pay is the equivalent of the decommissioning funding mechanisms specified in 10 C.F.R. § 50.75(e)(1)(i), (ii), (iii), (iv) or (v). Given that a non-discounted corporate-promise-to-pay does not provide financial assurance equivalent to money in a nuclear decommission trust, it logically follows that a *discounted* corporate-promise-to-pay would not achieve equivalency either. The Staff also identified several risks associated with a promise to pay (or parent company guarantee) – risks that would be exacerbated through the discounting of such promises.

> The [parent company guarantee] and self-guarantee are subject to a number of vulnerabilities when used as financial assurance mechanisms. First, there is no requirement to set aside funds, or to provide security for the guaranteed amount. The parent company is not required to hold funds to pay the guarantee in a segregated account outside the parent company's control. Consequently, the assets that would be called upon to pay the guarantee, if needed, are subject to attachment by creditors, can be pledged as collateral for other purposes, may be lost in unprofitable business ventures, and are vulnerable in bankruptcy. Unlike a bank, insurance company, or surety, the parent company is not an independent third party, and it can be affected by financial stress of its subsidiary-licensee, while the subsidiary-licensee can be affected by the financial stress of its parent. As a result, the parent and licensee may be subject to a common mode financial risk. The self-guarantee has similar risks, but is directly affected by the licensee's financial stress.
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> In addition to the financial risks involved, the PCG raises certain adverse incentives, as discussed in the regulatory history section of this paper. Briefly, the PCG provides incentives to delay or cease deposits into the [nuclear decommissioning trusts], and to shift costs. . . . A discounted PCG provides a lower level of assurance than a non-discounted PCG by the fact that it covers a lower amount of the decommissioning costs,

> which may result in a shortfall in [decommissioning funding assurance]. It provides a greater opportunity to take advantage of the adverse incentives provided by the non-discounted PCG by virtue of its lower effective ratio of assets and net worth to the decommissioning cost. The Commission stated that the guarantee method, which represents a promise to pay at some time in the future, provides less assurance than funds already deposited and protected in a decommissioning trust.

SECY 11-0133, Additional Information, Enclosure 3, at 17-18 ML111950025. At the same time, Option 3 is likely to consume substantial Staff, Commissioner, licensee, and State resources with no corresponding benefit to even the licensees. Given that the Commissioners previously recognized that "[m]aking riskier financial assurance mechanisms available to riskier licensees compounds risk to the public that adequate funds will not be available when needed,"[3] it is hard to see how discounting a promise to pay could ever be the equivalent of a non-discounted promise or actual cash deposited into a bankruptcy-proof trust. In light of those concerns and those identified by Staff in the SECY enclosures, the Commissioners should decline Option 3.

Option 1. The Commissioners should instead select Option 1 and continue to apply the existing regulations, which do not allow a discounted promise to pay. This option is straightforward and consistent with existing NRC regulations. 10 C.F.R. § 50.75(e)(1)(iii) (B) and 10 C.F.R. Part 30 Appendix A do not allow discounted corporate promises to pay. As discussed above and in the SECY's enclosures, accepting discounted promises as the equivalent of non-discounted promises or other mechanisms compounds risk to the public that adequate funds will not be available when needed. Because no sound basis exists for further dilution of the decommissioning funding requirements, the Commissioners should reject Option 3 and select Option 1.

Respectfully submitted,

s/

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[3] 63 Federal Register 50465, 50468 (Sept. 22, 1998) (NRC Statement of Considerations, 1998 Decommissioning Rule).

Excerpt from Transcript of
June 8, 2011 Public Meeting, p. 32 ML111650033
Statement of Susan Uttal, NRC Office of General Counsel

MS. UTTAL: This is Susan Uttal, and I worked on that, so -- and I disagree with what both of you guys said regarding the present value. Present value was added only for the cash in hand. That is, specifically stated in the SOC, discussed in the SOC, as to the prepayment method and the sinking fund method. There was no discussion of the present value discount for the parent company guarantee or any other surety requirement, and it wasn't considered during that rulemaking.

. . . .

And the fact that we specifically named it in two sections of the regulation, and specifically didn't name it in the other sections, means that it is applicable to the two methods in which it is discussed and not applicable to the other methods.