ROPES & GRAY
225 FRANKLIN STREET
BOSTON 02110

CABLE ADDRESS ROPGRALOR
TELEX NUMBER 940519

AREA CODE 617 423-6100

May 29, 1979

(1)

DOCKET NUMBER
PROPOSED RULE PR-140(44FR20709)


Secretary of the Commission
United States Nuclear Regulatory
Commission
Washington, D. C. 20555

Attention: Docketing and Service Branch

Re: Proposed Modifications to Financial Protection Requirements and Indemnity Agreements

Dear Sir:

In response to the Commission's Notice of Proposed Modifications to its Financial Protection Requirements, 44 FR 20709, April 6, 1979, we are submitting the following comments on behalf of Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation, Maine Yankee Atomic Power Company and the several joint owners of the Seabrook Project.

As indicated by the supplementary information in the above Notice, the proposed modifications are intended by the Commission to implement certain provisions of Pub.L. 94-197, which modified and extended the Price-Anderson Act, by codifying the standard master policy form and related certificate of insurance which the Commission accepts as adequate proof of maintenance of the secondary financial protection requir ' by that legislation. We respectfully suggest that certain edit ial changes in the proposed modifications would be advisable not only to clarify the effect of the operative provisions of the regulations in situations where there are multiple licensees of a single reactor (i.e., jointly-owned units) or where the financial protection of the licensee is dependent upon its parent organization (i.e., single unit generating subsidiaries) but also to conform more precisely the language of the standard master policy to that of the statute.

While subsection 170b of the Atomic Energy Act of 1954, as amended, directs the Commission to include in the required financial protection private liability insurance under an industry retrospective rating plan, it specifically limits the amount chargeable under the standard deferred premium following any

Acknowledged by card 6/7 cf

(6)

337 305

7907180 264

nuclear incident to not "more than $5,000,000 for each facility" and provides further that "the amount which may be charged to a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims . . . ." The statute thus recognizes a clear distinction between the concept of the aggregate assessment against "each facility" and the pro rata charge against each "licensee". This distinction has not been clearly reflected in the drafting of the master policy.

We respectfully suggest that the proposed language of the master policy and certificate of insurance is ambiguous when analyzed in light of the statutory limit on the licensee's pro rata assessment. The presently proposed language implies the possibility of joint and several liability on the part of the "named insured", an interpretation which we understand the Commission Staff does not intend. Nevertheless, the master policy identifies the named insured as "Each Person or organization designated in Item 1 of a certificate" (emphasis added) and defines "insured" as "any person or organization" (emphasis added) so identified. The first paragraph of Condition 2 of the master policy then provides that "[t]he named insureds . . . shall pay to the companies retrospective premium" and defines the maximum amount thereof in terms of the maximum assessment to a facility, and the fourth paragraph of Condition 2 speaks of the "retrospective premium that shall be due from and payable by the named insureds . . . ." Further support for an interpretation of "joint" obligation is found in the last paragraph of Condition 4 which relieves the companies of their contingent liability for payment of losses in the event of a failure of "any named insured" (emphasis added) to pay retrospective premiums after "a named insured" (emphasis added) becomes insolvent. This appears to give the companies more protection than they would be justified in receiving if the several named insureds were severally liable for their pro rata shares of the premium. Finally, the implication of joint and several liability is reinforced by the language in the "Bond for Payment" contained in the Certificate of Insurance which states that "[t]he named insureds do hereby covenant . . . to pay to the companies all retrospective premiums and allowances for premium taxes which shall become due and payable . . ." (emphasis added).

In contrast to the foregoing provisions which imply a joint or joint and several interpretation, there are other provisions which recognize the several nature of multiple named insureds. For example, the sixth paragraph of Condition 2 and the second paragraph of Condition 16 provide that actual notice to the first named insured shall be deemed notice to all other named insureds, and the last paragraph of Condition 7 appears to recognize the possibility of default by some but not all of the named insureds in the crediting of excess interest, although this distinction is obviously clouded by the first sentence of that Condition 7

which imposes the obligation to pay interest upon "such named insureds" when premiums are not paid when due by "the named insureds" (emphasis added).

We believe the foregoing examples are sufficient to demonstrate the ambiguity of the proposed master policy as to the specific liability of each named insured in contrast to the clear statutory language which allocates liability "pro rata" among all licensees. It is essential that this issue be clarified because the master policy language may well create obligations between licensees which are not contemplated by their joint ownership contractual arrangements and which could have repercussions in other areas. For instance, any licensee which is a utility subject to the Public Utility Holding Company Act of 1935 is restricted in its ability to "extend its credit to or indemnify" another public utility company or "guaranty" the obligation of another and requires approval from the Securities and Exchange Commission (SEC) before doing so. Obtaining such approval requires application to the SEC, public notice and the potential for public hearings (see, e.g., SEC File No. 70-6045). Similarly, state regulatory statutes also frequently restrict a utility's ability to take such actions, and obtaining requisite approvals would involve proceedings at the state level. Furthermore, a utility's mortgage or debenture indentures may have provisions which require such "guarantees" to be treated as debt obligations for purposes of computing certain coverage requirements, with the result that any "joint and several" obligation under the master policy could severely penalize a joint owner. Finally, accounting principles could require that such contingent liabilities be disclosed in financial statements.

We would suggest that the clarifications can be easily accomplished by a few modifications to the proposed master policy:

(i) In the definition of "insured" in Section II, "any person or organization" should be changed to "each of the persons or organizations".

(ii) In Condition 2, at the end of the first sentence of the first paragraph, the following clause should be added: ", each named insured to be liable for its pro rata share of such excess losses as set forth in Item 1 of the certificate.".

(iii) In Condition 2, the word "aggregate" should be inserted in the following locations:

(a) At the beginning of the second sentence of the first paragraph, so it would read "The aggregate amount of retrospective . . .".

(b) At the beginning of the third paragraph, so it would read "The aggregate maximum retrospective . . .".

(c) In the first sentence of the third paragraph, so it would read "In the event of two or more nuclear incidents, the aggregate maximum amount . . .".

(d) In the fourth line of the sixth paragraph, so that it would read "certificate written notice of the aggregate retrospective".

(iv) In Condition 2, the third sentence of the sixth paragraph should be revised to read "Each named insured shall pay directly to the Nuclear Energy Liability Insurance Association its pro rata share of the aggregate retrospective premium . . . [etc.]".

(v) In Condition 2, at the end of the seventh paragraph the following clause should be added: "for distribution pro rata among the named insureds."

(vi) Item 1 of the Certificate of Insurance should be expanded to show the "Pro Rata Share" for each named insured.

(vii) The first two sentences of the Bond for Payment should be modified to read: "Know all men by these presents, that each of the undersigned do hereby acknowledge that it is a named insured . . . . Each named insured does hereby covenant . . . to pay to the companies its pro rata share of all retrospective premium and allowances for premium taxes, as set forth in Item 1 hereof, which shall become due [etc.] . . . ."

A few other clarifying corrections are also suggested:

(viii) In the fifth line of the last paragraph of Condition 4 which reads "failure of any named insured" it should be "failure of such named insured".

(ix) In the title of Condition 7, the word "Insured" should be plural, and in the second line of the first paragraph of that Condition, which reads "premium taxes is not paid when due by the", it should be "premium taxes is not paid when due by any one or more of the".

(x) In the fourteenth line of Condition 8, which reads "against the insured, and insured shall", it should read "against an insured, such insured shall".

(xi) In the fourth line of the fifth paragraph of Condition 2, "retrospective premiums are" should be singular to conform usage throughout the master policy.

337 309

We would appreciate your consideration of these comments and request that appropriate modifications of the proposed master policy be made. We will be available to discuss the points in more detail with your Staff.

Very truly yours,

John A. Ritsher

John A. Ritsher

JAR:vml