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June 13, 1980

John Ahearne, Chairman
Victor Gilinsky, Commissioner
Richard Kennedy, Commissioner
Joseph Hendrie, Commissioner
Peter Bradford, Commissioner
U.S. Nuclear Regulatory Commission
11th Floor
Washington, D.C. 20555

RE: Policy Statement for Operating License Requirements

Gentlemen:

My colleague Ellyn R. Weiss recently provided me with copies of the proposed Policy Statement for Operating License Requirements that you approved in principle on June 9, 1980, and of her letter to you of the same date. Ms. Weiss has eloquently expressed the sense of shock and outrage at this policy statement that is shared by my client, the New England Coalition on Nuclear Pollution. Until now, many of us had hoped that in the aftermath of Three Mile Island the Nuclear Regulatory Commission had decided to give more serious attention to safety concerns raised by members of the public. We even dared to think that NRC attitudes had changed, as recommended by the Kemeny Commission and so many others in recent months, and that there might now be a serious commitment to listen to public concerns. Your proposed policy statement apparently proves us wrong.

Ms. Weiss has fully explained the fundamental lack of fairness in your approach and has provided examples of issues in the post-TMI Action Plan that are open to serious debate and that would certainly be challenged by members of the public in a rulemaking proceeding or in an adjudicatory hearing, if either forum were available to them. We will not repeat the points that Ms. Weiss has made, except to focus on an issue that is of particular concern to NECNP - the NRC's apparent failure to understand the requirements of administrative due process.

As you know, NECNP was one of the plaintiffs in State of Minnesota v. NRC, 602 F. 2d 412 (D.C. Cir. 1979), which involved a challenge to the Commission's reliance on a "policy statement" as the basis for a factual conclusion that spent fuel would be

removed from the Vermont Yankee reactor site prior to the expiration of Vermont Yankee's operating license. We argued that the Commission could not rely on a policy statement, but could base its decision only on a properly adopted rule or regulation or on the results of an adjudicatory proceeding. The District of Columbia Circuit agreed and ordered you to address the issue in either an adjudicatory or rulemaking forum, according to your preference. The lesson of that case, which is hardly new law, is that you may not establish binding principles by fiat. You may do so only by presenting sufficient evidence and reasoning in support of your position in either a rulemaking or adjudicatory proceeding in which the public has a right to contest your conclusions.

Incredibly, just one year after that decision, you now propose to do exactly what the Court told you was illegal. Without any provision for public notice and comment, you have decided that requirements set out in the Action Plan are now binding virtually as if they were regulations:

> The Commission has decided that current operating license applications should be measured against the regulations, as augmented by these requirements.

Draft Policy Statement at 5.

There are only two ways that you may "augment" regulatory requirements. The first is to change the requirements through a new regulation. The second is to prove in an adjudicatory forum that the existing requirements are not adequate and to establish what the new requirements should be. In both instances the public would have a right to participate and to argue that the proposed new requirements are not strong enough. You have, as yet, done neither here.

Since you have not adopted the Action Plan through a rulemaking proceeding involving public notice and comment, the only legal way that you may impose it as a requirement is through individual adjudicatory proceedings. You appear to have gone half-way in that direction by allowing the industry to contest the need for the Action Plan requirements, but somehow you have decided that no one but you and the industry should have any say concerning the need for or adequacy of these requirements. Even members of the public who clearly demonstrate standing to participate in licensing proceedings will not be able to address these issues, despite the fact that the adequacy of the Action Plan requirements may be crucial to the furdamental issue of whether

the plants threaten public health and safety. If there has not been a rulemaking proceeding in which the public was allowed to comment, and the public has been precluded from addressing these questions in the relevant adjudicatory proceeding, the public has been completely shut out from the decisionmaking process.

The Policy Statement bases this denial of fundamental due process on the argument that a special showing is necessary to litigate matters going beyond NRC regulations, and you are treating the Action Plan requirements as regulations. However, the requirement for a special showing to go beyond NRC regulations depends upon the fact that the regulations were properly adopted pursuant to the public notice and comment requirements of the Administrative Procedure Act. Since the Action Plan was not properly adopted as a regulation, your argument on this point must fail.

You have two choices in establishing requirements such as the Action Plan. You may pursue APA rulemaking, in which both the industry or the public may provide comments, or you may raise the issue in individual adjudicatory proceedings, in which all parties may litigate all relevant issues. Specifically, the industry has the right to argue that requirements are not needed, and intervenors have the right to argue that the requirements are not adequate. There is no legal distinction between those two interests that would permit one to present its case, but prohibit the other from doing so.

In conclusion, perhaps our dominant reaction after the anger subsides is one of dismay. How often and how clearly must basic legal principles be established before they will be recognized by the Nuclear Regulatory Commission? Equally important, and even more distressing, what has happened to what appeared to be a new attitude toward participation in NRC decisions by those whom Ms. Weiss has referred to as "outside the nuclear establishment?"

I strongly urge you to reconsider your proposed policy statement. I also urge that you seriously consider the implications of this proposed policy statement and all of your other actions in terms of the credibility and public acceptability of your decisions. If you appear to be listening only to the industry, as you now propose as a formal policy, you cannot

Hope to be viewed as a responsible agency concerned with protecting the public health and safety.

Sincerely,

William S. Jordan, III
Counsel for the New England Coalition
on Nuclear Pollution

WSJ/lc

cc: Leonard Bickwit
General Counsel