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March 4, 1994

Mr. Donald P. Cleary
Office of Nuclear Regulatory Research
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: State Concerns Regarding the Treatment of the Need for Generating Capacity and Alternative Energy Sources in the Context of Nuclear Power Plant Relicensing

Dear Mr. Cleary:

Thank you for the opportunity to offer our concerns as to the treatment of need for generating capacity and alternative energy sources in the context of environmental reviews to be considered by the Nuclear Regulatory Commission (NRC) for nuclear power plant relicensing. I, along with the Attorneys General of Minnesota, Connecticut, New York, and Vermont, provided our initial comments to the NRC on March 13, 1992. At the outset, I would like to state that my office continues to adhere to the views set forth in those comments, and incorporate them here by reference. We still strongly believe that the proposed rule and the generic analysis that it encompasses should not be adopted by the NRC. If the NRC nevertheless proceeds to adopt the rule, we recommend that it make significant changes in the manner that the issues of need for generating capacity and alternative energy sources are treated under the rule and the Generic Environmental Impact Statement (GEIS).

The proposed GEIS treats the issues of energy needs and energy alternatives as generic Category One issues rather than as Category Three issues requiring an environmental analysis on an individual plant basis at the time of relicensure. The questions of whether there is a need for the generating capacity of nuclear power plants seeking relicensure and whether there are alternative energy sources that are environmentally preferable to meet that need cannot possibly be properly addressed on a generic basis. The issues call for plant-specific analyses that can appropriately address the energy needs of and available alternative energy sources in the region at the time an application for relicensure is submitted.

Forecasting energy needs has historically been very problematic over even short periods of time. To attempt to forecast the energy needs of all regions of the country for the

next fifty-plus years on a generic basis appears to us to be nothing short of impossible. Similarly, consideration of alternative energy sources should be left until the time of relicensure and undertaken on a plant-specific basis. That will allow for consideration of inevitable technological advances in alternative energy sources, as well as of the particular features of the region that may make alternative energy sources environmentally preferable. Therefore, both the issues of energy needs and of alternatives should be designated as Category Three issues to be considered on a plant-specific basis at the time an application for relicensure is submitted.

Wisconsin also continues to be seriously concerned about the potential for federal preemption of state determinations of energy need and energy determinations. The case law developed under the Atomic Energy Act makes clear that despite the broad preemptive authority given to the NRC, states are clearly authorized to make decisions regarding the need for power. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550 (1978). While the NRC has authority to regulate safety in nuclear power production, the states retain their historical authority concerning matters such as rate making and the type of generating facility, if any, that should be put on line. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm., 461 U.S. 190, 212 (1983). The states are entitled to set their own energy policy and to make their own determination as to whether there is a need for a particular power source and to determine an appropriate energy mix given state policy objectives.

My office is also aware as a result of attending the regional meeting in Chicago on February 15, 1994, that the position of EPA is that the NRC must both "take a hard look" at the need and alternative questions and must reflect the results of that "hard look" in its substantive decision. Therefore, my office joins with the Public Service Commission of Wisconsin in proposing a modification of the "Option 2" approach which we believe will avoid the danger of improper preemption of state decisions on need and alternatives, while also meeting the National Environmental Policy Act (NEPA) requirements of NRC as perceived by the EPA.

The three elements of our proposed modified Option 2 approach are:

A. The analysis of need and alternatives performed by a state which has developed comprehensive integrated resource planning (IRP) is the best source of information on the subject that is likely to exist anywhere, and federal agencies should rely on that analysis. Therefore, we propose that the NRC adopt criteria which

delineate the attributes of adequate state IRP for the purpose of meeting NRC's NEPA requirements. Suitable criteria which have already been endorsed by Congress can be found in the Energy Policy Act of 1992, § 111(a)(7). Many states are planning and analyzing their electric systems consistently with these criteria. Some, like Wisconsin, meet and exceed these criteria in the depth of their analysis.

B. The appropriate agency in an affected state would provide the NRC with its analysis of need and alternatives, along with a reviewable "audit trail" of the procedure the state agency followed to arrive at its conclusions. The NRC would satisfy its "hard look" requirement by reviewing the process the state agency used for the analysis and determining whether that process meets the specified criteria adopted under paragraph A above.

C. If the NRC finds that the state agency's analysis meets the established criteria, NRC will incorporate the analysis into its EIS. Any substantive decision made on these points by the NRC will be based on the state's analysis in the EIS. Any preemption problem will be avoided, because the state and federal determinations will never be inconsistent.

If a state does not have an agency which performs IRP or other analysis which the NRC requires (i.e., the state cannot meet the criteria), then the NRC would have to fall back on taking its own hard look in some other way that would satisfy its NEPA responsibilities.

In conclusion, I strongly urge the NRC **not** to adopt its proposed rule and generic environmental impact analysis encompassed by that rule. However, if the NRC nevertheless does adopt such a rule, the issues of energy need and alternative energy should definitely be Category Three rather than Category One issues, and the modified Option 2 approach described above should be considered. Again, we appreciate the opportunity to comment.

Sincerely,

James E. Doyle
Attorney General of Wisconsin

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