



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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March 4, 1994

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Mr. Donald P. Cleary
Office of Nuclear Regulatory Research
U.S. Nuclear Regulatory Commission
5650 Nicholson Lane
Rockville, MD 20852

DOCKET NUMBER
PROPOSED RULE **PR 51**
(59 FR 2542)

Re: Proposed Rule 10 C.F.R. Part 51
Environmental Review for Renewal of Operating
Licenses; Generic Environmental Impact Statement
Docket No. RIH 3150-AD94, NUREG-1437

Dear Mr. Cleary:

Enclosed please find the original and three (3) copies of the Response of the Pennsylvania Public Utility Commission to the Staff Discussion Paper, Analysis, and Options at this docket.

As we had discussed, inclement weather did result in the closure of Commonwealth offices on March 2-3, 1994. Consequently, these comments are somewhat delayed in transmission, but we ask that they be accepted and considered by your Commission as if timely filed.

All correspondence and communications concerning this matter should be directed to:

Dennis J. Buckley
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Thank you for your courtesy and consideration.

Yours truly,

D. J. Buckley
Dennis J. Buckley
Assistant Counsel

DJB/mas

Enclosures

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BEFORE THE
NUCLEAR REGULATORY COMMISSION

Proposed Rule 10 C.F.R. Part 51 :
Environmental Review for Renewal :
of Operating Licenses Generic : Docket No. RIH 3150-AD94
Environmental Impact Statement :
NUREG-1437 :

RESPONSE OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION
TO THE STAFF DISCUSSION PAPER, ANALYSIS AND OPTIONS

The Pennsylvania Public Utility Commission ("PaPUC") is the state agency responsible for regulating rates and service for all distribution companies and utilities providing electric service within the Commonwealth of Pennsylvania. Many of those companies and utilities generate electric power from nuclear plants located within the Commonwealth. Those plants are also included in the rate base of those utilities. The PaPUC hereby submits its comments before the Nuclear Regulatory Commission ("Commission") on the Notice of Public Meeting dated January 11, 1994, at Docket No. RIH 3150-AD94. All correspondence and communications concerning this matter should be directed to:

Dennis J. Buckley
Veronica A. Smith
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-4945

Copies of these comments may be obtained by contacting Assistant Counsel Buckley at the foregoing address.

Executive Summary of PaPUC's Position

The Nuclear Regulatory Commission ("NRC") has proposed rule changes at 10 C.F.R. Part 51 which would allow the use of a Generic Environmental Impact Statement ("GEIS")¹ in license renewal decisions for nuclear power plants. That draft has provoked considerable controversy and adverse comment because of its presumption of continued need for all nuclear generating capacity and its restricted view of the role of alternative energy sources.²

The GEIS arguably, though perhaps inadvertently, intrudes upon the states' authority to regulate utilities with respect to issues of need by pre-empting a state review of the need for nuclear generation and alternatives to electric generation. Issues of reliability, cost, and other environmental, non-safety aspects of nuclear power generation are similarly pre-empted by the GEIS. The GEIS and the subsequent staff Discussion Paper oversimplifies these complex issues.

It is the opinion of the PaPUC that the GEIS and the four options to address state concerns proposed by Commission staff in their Discussion Paper do not go far enough to resolve the issues

¹ The GEIS was published as NUREG-1437, September 17, 1991; 56 FR 47016. The comment period closed March 17, 1992.

² These issues are referred to in the GEIS and by NRC staff in its Discussion Paper as "Category 1" issues, the conclusions of which bind all plants. "Category 1" issues are not subject to further review in individual plant license renewals; "Category 1" determinations substantially eliminate "public" participation, including participation by state and local governments. Several states requested that issues of need and alternatives be considered as "Category 3" issues, which would permit case-by-case analysis during individual plant licensing renewals.

attendant to federal pre-emption of state authority. The PaPUC recommends, alternatively, that the proposed rule and GEIS be withdrawn, or that the Commission adopt a fifth option amending its proposed rule. That fifth option is detailed below, but would require an amendment of the proposed regulation by the Commission, preserving the states' jurisdiction and decision making authority with respect to need and alternatives.

DISCUSSION

In September, 1991, the Commission proposed rule changes which would allow the use of a Generic Environmental Impact Statement ("GEIS") in license renewal decisions for nuclear power plants. That rule might speed the relicensing process, but at a cost unacceptable to those most affected: the energy consuming public living in proximity to those plants, and the state regulatory agencies charged with oversight of the utilities operating those plants. The proposed rule has provoked considerable controversy and adverse comment from other states with respect to the Commission's presumption of need for nuclear generating capacity and an extremely narrow assessment of energy alternatives, including alternative generation.

"Need," is defined in the draft GEIS not as a function of demand, but as an amount of generating capacity equivalent to the generating capacity of the subject nuclear power plants; thus, "need" for that capacity is presumed to exist. Further, that "need" is presumed to encompass all 118 operational nuclear power

plants which may request license renewal. Whether the Commission is justified in making these presumptions is debatable, though continuation of demand, or an increase in demand, for electric power is not unreasonable. A generic assumption of, "need," without reference to the jurisdiction and the substantive and procedural concerns of state agencies is a clear intrusion upon state regulatory authority, however. Further, the proposed rule and GEIS conflict with the mandatory requirements of several federal laws as will be detailed, below.

If the proposed rule is promulgated in its present form, federal and state regulatory commissions will be confronted by utilities asserting that the "need" for nuclear generating capacity has already been addressed and answered in the affirmative in a collateral, federal proceeding, and that our commissions must accept that determination. That is unacceptable and constitutes a further intrusion upon PaPUC's regulatory authority and responsibility.³

National Environmental Policy Act Conflicts and Considerations

In promulgating a generic environmental impact statement, the Commission must recollect the requirement that it cooperate with state agencies to the fullest extent possible to satisfy its

³ "Alternatives," are defined in the draft GEIS as alternative energy sources that could supply generating capacity equivalent to the nuclear plant or actions to reduce need through conservation.

National Environmental Policy Act ("NEPA")⁴ mandate. See, 40 C.F.R. §1506.2 Environmental impact statements shall discuss any inconsistency of a proposed plan with any approved State or local plan and laws (whether or not federally sanctioned). See, 40 C.F.R. §1506.2(d) It would be virtually impossible for the Commission to comply with the requirements of 40 C.F.R. §1506.2 if a generic environmental statement is promulgated which precludes meaningful participation by the states, and which is binding on all nuclear facilities into the next 20 years. State integrated resource planning takes place periodically, not with projections in increments of 20 years.

Even assuming that a non site-specific environmental impact statement such as the Commission has proposed would be legal and in accord with NEPA, generic findings with respect to need and the proper "mix" of alternate energy sources presupposes specific forecasting and utility expertise that is beyond the experience and jurisdiction of the Commission, and which is violative of least cost and integrated resource planning principles.

The Four Staff Options Intended to Address State Concerns

Commission staff asserts that the original rulemaking was initiated by the Commission to improve the efficiency of the environmental review process for the renewal of nuclear power plant operating licenses. In streamlining that somewhat time-consuming process, the Commission has intruded, perhaps inadvertently, upon

⁴ 42 U.S.C. 4321, et seq.

state authority as outlined above, and has limited public participation in license renewal reviews.⁵

The states' authority to regulate utilities with respect to issues of need, reliability, cost, alternate energy resource options, and other non-safety aspects of nuclear power generation could be effectively pre-empted by the GEIS. This pre-emption is not relieved by disclaimers contemplated to date nor by the four options set forth in the staff Discussion Paper.

The four "options" set forth in the staff Discussion Paper are cast as, "Additional proposed changes to address state concerns." The options are in addition to continuing the approach taken in the draft rule and GEIS. The four options and a brief assessment of each follow:

Option 1. Need and alternatives are factors in the NRC license renewal decision; however, the cost-benefit method used in making the decision would be replaced with a decision method that considers utility costs only under specific conditions.

Option 1 does not relieve the states' pre-emption concern at all. In fact, this option formalizes that pre-emption by expressly attempting to replicate state-level adjudications and analyses. Option 1 is not acceptable to PaPUC.

⁵ Under the GEIS an environmental review would be performed only to confirm the continued validity of information and analyses relevant to the operation.

Option 2. Need and alternatives are factors in an NRC license renewal decision; however, the NRC would adopt a State's analyses and determinations of need and alternatives after confirming that the analyses meet NRC guidelines.

Option 2 encroaches upon state jurisdiction by re-asserting that need and alternatives are factors in a Commission license renewal decision, and by implying that a state's analysis and determination of need and alternatives must meet Commission guidelines. Obviously, the Commission is not the review authority for state action, nor could any state commission, or review court for that matter, acquiesce in such a proposition which, at best, renders state regulation an adjunct to an ultimate federal decision making process. Option 2 is not acceptable to PaPUC, nor does it relieve our concerns.

Option 3. "Need for Power" not required to be reviewed at the license renewal stage by the NRC to satisfy NEPA.

This option is really not an option at all. It merely confirms the Commission's approach to "need" as a presumption that all nuclear generating capacity is needed. This "generic" conclusion is not acceptable as need is determined at the state level, and the Commission should defer to and be guided by state decisions in that regard to the maximum extent possible under NEPA. Option 3 is not acceptable to the PaPUC.

Option 4. Neither need for generating capacity nor alternative energy sources will be a factor in the NRC decision whether to grant a renewed operating license.

As explained in the Discussion Paper, what the Commission is contemplating in this option is that need for power and alternative energy sources will be considered for "disclosure purposes" only, and will not be cited as a factor in the Commission's decision whether to renew a license. Need, however, will still be addressed in the GEIS to demonstrate that, ". . . the policy on which this [the GEIS] is based is reasonable." Discussion Paper, at p. 11

This option, while superficially attractive, does not go far enough to confirm that the Commission is not pre-empting the states' in their regulatory responsibilities. A much stronger, more unequivocal statement such as is proposed, below, as "Option 5," is needed.

Energy Alternatives, the Clean Air Act, the Energy Policy Act, the Atomic Energy Act and the Public Utility Regulatory Policy Act Considerations

The Discussion Paper and options presuppose that an economic justification for relicensing nuclear facilities could be sustained, generically, if it can be shown that the alternatives to relicensing would involve the construction of new capacity so that capital costs of constructing the alternative would outweigh the refurbishment costs associated with relicensing.

Staff presumes that any "new capacity" would be a new, coal-fired plant. Staff seems to have an implied bias against "dirty" coal-fired energy, but that bias does not consider the impact upon

coal-fired plants of key, related legislation such as the Clean Air Act⁶ in making a cost/benefit analysis. Staff does not consider the possibility that "new capacity" may also be fueled by relatively clean natural gas or that new capacity may be based on renewable energy technology. Similarly, staff appears not to have considered state integrated resource planning requirements ("IRP") nor the IRP mandates of the Energy Policy Act of 1992⁷ or the Public Utility Regulatory Policies Act of 1978⁸ in its presumptions.

Section 111(a)(7) of the Energy Policy Act of 1992⁹ requires that:

Each electric utility shall employ integrated resource planning. All plans or filings before a State regulatory authority to meet the requirements of this paragraph must be updated on a regular basis, must provide the opportunity for public participation and comment, and contain a requirement that the plan be implemented.

Thus, each state regulatory authority must also consider integrated resource planning as a process for each electric utility.

The Pennsylvania Public Utility Code requires all electric utilities subject to the jurisdiction of PaPUC to file an annual conservation report which shows the plans and progress achieved on

⁶ 42 U.S.C. §7401, et seq.

⁷ 16 U.S.C. §824, et seq.

⁸ 16 U.S.C. §2101

⁹ 16 U.S.C. §2601 et seq.

programs of energy conservation.¹⁰ Consistent with that law, the PaPUC has issued a policy statement on energy supply alternatives consistent with IRP principles:

The Commission [PaPUC] believes that energy supply alternatives such as conservation, load management, and alternate energy supply products are viable supply options which must be considered by the jurisdictional electric utilities as alternatives to capacity expansion and to reduce operating costs.¹¹

Integrated Resource Planning is a dynamic process that takes place in annual, not twenty year increments. In considering alternate energy sources, integrated resource planning is simply not based on coal-fired plants as the only, or even as the most likely, source of new generation capacity.

Integrated resource planning must be updated on a regular basis with an opportunity for public participation and comment. Section 111(d)(19) of the Energy Policy Act requires an evaluation of a full range of alternatives in IRP, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications and renewable energy resources, in order to provide adequate and reliable service to customers at the lowest system cost.

Assessments of need and energy alternatives are most accurately made at the time of relicensure application and in reliance upon state commission expertise and procedure. In passing

¹⁰ 66 Pa. C.S. §308(c)

¹¹ 52 Pa. Code §69.31

the Atomic Energy Act¹², and in subsequent amendments, Congress intended that the states retain their traditional responsibility in regulating electric utilities for determining questions of need, reliability, cost and other related state concerns. Assessment of need is a traditional state regulatory function. See, Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission et al., 461 U.S. 190, 206 (1983) The United States Congress formalized this regulatory authority in enacting the Energy Policy Act of 1992 when it encouraged the states to implement integrated resource planning. The generic treatment of relicensing, in any respect, is contrary to case law and congressional intent as embodied in the EPA.

The Discussion Paper makes an extremely generalized and purely economic cost-benefit analysis that is based on unsupported presumptions and which is weighted heavily in favor of relicensing nuclear facilities. This result-driven analysis does not comport with the site-specific review contemplated under the Commission's current regulations. Further, this analysis continues to intrude upon state jurisdiction over utilities in need and alternate energy assessment.

One of the critical aspects of the Commission's relicensing proposal and staff's analysis is that a nuclear facility may apply for relicensing up to 20 years before its current license expires. This time frame greatly exceeds reliable environmental,

¹² 42 U.S.C. §2011 et seq.

demographic, and IRP forecasting.¹³ The need for capacity cannot be dealt with generically. Further, even such limited participation as is available to state commissions under the rule becomes problematic given this long-range relicensure.

Withdrawal of the Regulation or Consideration of a Fifth Option

Several states have made the foregoing arguments in detail and have pointedly criticized the GEIS both conceptually and in terms of content. Further, the concept of a "generic" environmental impact statement in an area as complex and controversial as nuclear energy warrants the numerous requests already received that the proposed rule be withdrawn, entirely.

Given the very considerable potential for intrusion on the part of the Commission into the jurisdictional realm of state regulatory commissions, withdrawal of the proposed rule is requested. This request is made on the basis that the proposed rule impermissibly intrudes upon and pre-empts the jurisdiction of PaPUC, and other state and federal regulatory agencies and commissions.

If the Commission is determined to promulgate this rule the objections and arguments of so many commenters notwithstanding, PaPUC offers a "fifth option," for consideration by the NRC. PaPUC endorses an approach suggested by the New York Public Service

¹³ Population distribution is a critical factor to be considered in developing environmental impact statements for initial siting decisions for nuclear plants. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 510 (1978)

Commission, and we reiterate that fifth option:

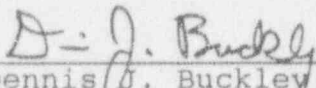
Option 5

1. The text of the actual rule should be modified to include, and each individual relicensing decision should include, statements that the NRC's findings with respect to need for generating capacity and alternative energy sources are only intended to assist the NRC in meeting its NEPA obligations and do not preclude the states from making their own determinations with respect to these issues;
2. Determinations regarding issues of need for generating capacity and alternative energy sources should be designated as site-specific rather than as generic conclusions; and
3. All NRC project specific Environmental Impact Statements and relicensing decisions should make reference to state determinations on issues of need for generating capacity and alternative energy sources, and should defer to and be guided by those state determinations to the maximum extent possible pursuant to the NEPA.

CONCLUSION

It is the opinion of the Pennsylvania Public Utility Commission that the proposed rule and GEIS submitted by the NRC at this docket impermissibly intrude upon state regulatory authority. The four options proposed by NRC staff in their Discussion Paper do not go far enough to resolve the threat of federal pre-emption of state authority in relicensing nuclear power plants. PaPUC hereby requests that the proposed rule and GEIS be withdrawn, or that the NRC adopt a fifth option, outlined above, in amending its proposed rule.

Respectfully submitted,


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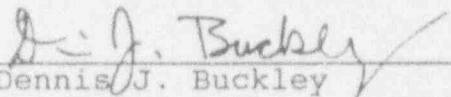
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Dated: March 4, 1994

CERTIFICATE OF SERVICE

I hereby certify that I will serve the foregoing document upon each person designated on any official service list compiled by the Secretary of the Nuclear Regulatory Commission in this proceeding upon receipt of the same.

Dated at Harrisburg, Pennsylvania, this 4th day of March, 1994.



Dennis J. Buckley
Counsel for the Pennsylvania
Public Utility Commission