NEW YORK STATE ENERGY OFFICE

FRANCIS J. MURRAY, JR.
COMMISSIONER

March 3, 1994

Via Overnight Mail

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

Dear Mr. Cleary:

Attached are the supplemental comments of the State of New York on the Nuclear Regulatory Commission's proposed rule on the environmental review of applications for renewal of nuclear power plant operating licenses (10 CFR Part 51).

If you need further information on the points raised in the comments, please contact me.

Sincerely,

Eugene J. Gleason
State Liaison Officer

Attachment

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TWO ROCKEFELLER PLAZA · ALBANY, NEW YORK 12223
518-473-4375

Before the
NUCLEAR REGULATORY COMMISSION
Washington, D.C.

Environmental Review for Renewal of Operating Licenses	))	10 C.F.R. Part 51 RIH 3150-AD94

SUPPLEMENTAL COMMENTS OF THE STATE OF NEW YORK

These comments are intended to supplement the comments of the State of the New York, submitted to the U.S. Nuclear Regulatory Commission on March 12, 1992, regarding a proposal to establish new requirements for environmental review of applications to renew operating licenses for nuclear power plants (9/17/91; 56 FR 47016). They focus on the NRC staff discussion paper entitled, *"Addressing the Concerns of States and Others Regarding the Role of Need for Generating Capacity, Alternative Energy Sources, Utility Costs, and Cost-Benefit Analysis in NRC Environmental Reviews for Relicensing Nuclear Power Plants: An NRC Discussion Paper,"* as presented in 59 FR 2542 on January 18, 1994.

New York recognizes the significant effort expended by the NRC in the rulemaking to date. We appreciate staff attempts to address the many concerns raised, including those that allow for greater participation by states in the license renewal process. And we applaud what we believe represents a fundamental shift in the project staff position regarding the states' authority and responsibility to oversee the resource needs of electric utilities.

We do not believe, however, that the major concerns expressed by the States are adequately resolved by the modifications and options discussed in the Staff Discussion Paper.

In our initial comments, New York argued that the NRC's own responsibilities under the National Environmental Policy Act (NEPA) to examine alternatives to license renewal could not be satisfied by generic conclusions reached in preparing a Generic Environmental Impact Statement. We noted that it was folly to attempt to guess as much as 20 years in advance of license expiration about costs and alternatives that would be available in a State at that time.

We continue to oppose any efforts to make generic findings regarding these issues. In brief, we believe that the proposed rules conflict with the Energy Reorganization Act of 1974 which limits the role of the NRC to regulation and not promotion of nuclear power. Further, we believe the proposed rules conflict with the Energy Policy Act of 1992 which promotes integrated resource planning to be implemented by the States. Finally, we believe the NRC's need-for-capacity forecast that forms the foundation for the proposed rules fails to fully consider the advent of independent power producers and the rise of competitive power markets. Indeed, the rapid and significant changes occurring in the electric industry only serve to underscore the futility of attempting to examine these issues at this time.

We are also concerned that if the NRC makes generic findings with respect to need for generating capacity and alternative energy sources, it will create confusion and unreasonable expectations in the minds of utility planners, resulting in possible wasteful utility expenditures in reliance on those determinations, to the detriment of electricity consumers.

As we argued in our original comments, we believe that the issues of need for and alternatives to license renewal are inherently project specific. To the extent NEPA requires the NRC to examine these issues, they must be examined in a site-specific EIS prepared at the time a license renewal application is submitted. Accordingly, we recommend that for purposes of this rulemaking, these issues be designated as Category 3 rather than Category 1 as was originally proposed.

We also reiterate our strong concern that in carrying out its NEPA obligations, the NRC in no way encroach on the traditional jurisdiction of the States regarding the regulation of utilities for issues other than nuclear safety issues.

As we noted in our original comments, the fundamental and historic rights of the States to regulate the economic decisions of utilities, in particular, the determination of need for electricity and the manner in which that need is met, has long been recognized by both Congress, as well as the Supreme Court.[1] The division of responsibility between the States and the Federal government regarding decisions affecting nuclear power plants is clear: The States decide whether a facility is needed and represents the least cost option for the state's consumers, and where the State decides in favor of a nuclear facility, whether it be new construction or relicensing of the facility, the NRC will determine whether the facility can be constructed and operated in full accord with all applicable health and safety requirements.

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[1] 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed. 2nd 752 (1983) and 435 U.S. 519, 500 (1978).

Indeed, as recently as 1991, the NRC itself noted that decisions regarding continued operation of a nuclear facility are private decisions that are not to be interfered with by the NRC. In the matter of the Long Island Lighting Company (Docket No. 50-322) the NRC's Memorandum and Order, CLI-91-08, states:

> *...the decision not to operate Shoreham is a private decision... LILCO -- or any licensee, for that matter -- is capable of deciding to decommission a nuclear facility at any time during the operating life of the facility.*

The cessation of power generation through the early decommissioning of a nuclear power plant or the continued operation of a plant through a life extension process are just opposite sides of the same coin. They reflect economic decisions to be made by utilities and the States, and as recognized with Shoreham, may not be revisited by the NRC against the wishes of these parties.

This division of responsibility was also endorsed once again by Congress in 1992, with the enactment of the Energy Policy Act of 1992 (P.L. 102-486). This comprehensive law includes an amendment to the Public Utility Regulatory Policies Act of 1978 (PURPA) that encourages State public utility commissions to engage in integrated resource planning. As defined in the Act, this is:

> *a planning and selection process for new energy resources that evaluates the full range of alternatives, 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 its electric customers at the lowest system cost.*[2]

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[2] See Section 111(d) of P.L. 102-486, adding new definitions to Section 3 of PURPA.

New York State has promoted integrated resource planning by utilities for several years. The process will be guided by the results of the State's comprehensive energy planning process. In 1992, a new Article 6 was added to the State Energy Law under which the State Energy Planning Board[3] was created and directed to adopt a State Energy Plan every four years, with the first such plan due in 1994. It will contain, among other things, 20 year forecasts of energy demands, supply requirements and assessments and energy prices, as well as estimates of additional electric capacity needed to satisfy supply requirements with recommendations concerning how those needs might be met. The Plan also will articulate energy policies and long-range energy planning objectives and strategies to achieve, among other things, a least cost integration of energy supply sources and demand-reducing measures for satisfying energy supply requirements, giving due regard to various public interest factors.

These state planning efforts provide appropriate mechanisms to examine the alternatives best suited to the State's and utility's needs and are fully consistent with the historic role exercised by the States, rather than the Federal government, to determine how best to meet the energy needs of its citizens. Nothing in the NRC's rules should be allowed to disturb this historic division of duties.

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[3] The Board consists of the Commissioners of the Energy Office and the Department of Environmental Conservation and the Chairman of the Public Service Commission. The Energy Commissioner serves as Chair.

We acknowledge that Section V of the Staff Discussion Paper indicates, *"When the final rule is published, the NRC will include an explanation in the Federal Register Notice that the rule in no way preempts State jurisdiction over determination of the continued need for nuclear power plant capacity, taking cost and alternatives into consideration."* While we welcome this statement, the NRC should incorporate such a statement in the text of the actual rule itself, rather than insert it into the Federal Register Notice as currently proposed.

Moreover, in addition to including a statement in the text of the rule, 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.

The Staff Discussion Paper sets out four possible options for harmonizing the NRC's NEPA responsibilities to examine need and alternatives with the States' historic responsibility to oversee the resource needs of its utilities. Significantly, Section V of the Discussion Paper acknowledges, *"Whatever the option selected, the NRC recognizes the primacy of State regulatory and energy planning agencies in the economic regulation of utilities in establishing energy-mix policies for their States."*

Notwithstanding the efforts of the NRC to address the States' concerns, none of the four options set out appropriately harmonizes the responsibilities of the NRC and the States. As stated above,

State regulators are responsible for overseeing the resource needs of electric utilities, not the NRC.

Against this background, we must reject Option 1 because it assumes generic findings by the NRC that cannot be justified. Options 2, 3, and 4 would seemingly violate NEPA by delegating or foregoing required NEPA determinations. Options 2 and 3 require States to adhere to NRC guidelines on need for capacity and/or alternative energy sources and cannot be implemented without encroaching on the traditional jurisdiction of the States regarding the regulation of utilities for issues other than nuclear safety.

In lieu of the four options presented by Staff, and for the reasons discussed in these comments, the State recommends a new 5th option be adopted by the NRC as follows:

i. 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;

ii. determinations regarding the issues of need for generating capacity and alternative energy sources should be designated "Category 3" conclusions requiring site-specific review, rather than "Category 1" generic conclusions; and

iii. all NRC project specific EIS and relicensing decisions should make reference to State determinations on the issues of need for generating capacity and alternative energy sources, and should defer to and be guided by those State determinations to the maximum degree possible pursuant to NEPA.

Conclusion

New York recognizes the NRC's mandate to comply with NEPA in making decisions regarding specific license renewal applications. This mandate cannot be satisfied through generic findings made years in advance on inherently project-specific issues such as need and alternatives.

Adoption of the new "Option 5" proposed by New York would allow the NRC to satisfy its NEPA obligations without intruding on the States' historic role as regulator of utility resource decisions for all issues other than nuclear safety. We urge the NRC to modify its proposed rules and adopt "Option 5" in its entirety.