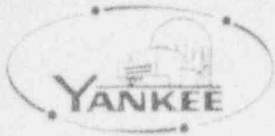


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Mr. Donald P. Cleary
Office of Nuclear Regulatory Research
U.S. Nuclear Regulatory Commission
Washington, DC 20555

DOCKET NUMBER
PROPOSED RULE PR 51
(59 FR 2542)

Subject: Yankee Atomic Electric Company Comments - 10 CFR Part 51,
Environmental Review for Renewal of Operating License: Public Meeting
and Request for Comments (59FR2542, January 18, 1994)

Dear Mr. Cleary:

Yankee Atomic Electric Company (YAEC) appreciates the opportunity to provide comments on the subject comment opportunity. Yankee owns the nuclear power plant in Rowe, Massachusetts. Yankee nuclear Services Division (YNSD) also provides engineering and licensing services for other nuclear power plants in the northeast, including Vermont Yankee, Maine Yankee and Seabrook.

Yankee has been deeply involved in all facets of development of the rules for plant operating license renewal including those for the environmental review. We provided representatives for several panels during the November 1991 public workshop on the 10 CFR Part 51 proposed rule and provided written comments in response to the Proposed Rule Notice, "10 CFR Part 51, Environmental Review for the Renewal of Operating Licenses, Request for Comments" (56 Fed. Reg. 47016) published 9/16/91 and extended 11/26/91 (56 Fed. Reg. 59898). Concurrently, the NRC published NUREG-1437, a draft Generic Environmental Impact Statement (GEIS) that contained the analyses which the NRC proposed to codify in Part 51. Yankee filed comments (FYC 92-004, March 13, 1992) and supported the development of the NUMARC comments filed during the public comment period on the proposed rule, the GEIS, and other related documents.

After review of the staff paper, "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 Staff Discussion Paper," and attending the Regional Meeting on February 17, 1994 in Chicopee, Massachusetts, we offer the following comments in response to the subject comment opportunity:

As part of the NRC's proposed Part 51 amendments to address NEPA requirements associated with utilities seeking to renew operating licenses for nuclear power plants, the NRC proposed to address the issue of generating capacity need and alternative energy

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resource evaluations during the renewal period as part of its review. Certain States have commented that those provisions of the proposed rule are, "in conflict with the traditional authority of the States to regulate electrical utilities with respect to generation of need, reliability, cost, resource options, and other non-safety aspects of nuclear power generation" (59 FR 2542).

Yankee does not believe that the staff's proposed amendments to 10 CFR 51 associated with nuclear power plant license renewals preempt state regulatory and energy planning agencies in the economic regulation of utilities and in establishing energy-mix policies for their state. The NRC has indicated that when the final rule is published it will include an explanation in the Federal Register Notice that the rule in no way preempts state jurisdiction over determinations of the continued need for nuclear power plant capacity. In the proposed amendments to Part 51, the NRC has included for generic consideration, economic and other non safety issues (such as need for power and alternative energy sources) which neither supplant nor bind the states on these issues. To clarify the NRC's position that regulation of these issues remains within a state's energy planning jurisdiction, NRC has offered several alternatives for their treatment. We believe that Option Number Four (4) (i.e., not considering either in the license renewal decision) would best represent this position of the options presented. However that explicit option may not be entirely sufficient for some states.

Yankee's concern is that by inclusion of those issues in this NRC review, even merely for disclosure purposes, licensees could be in the position, as has been the case in the past, of having to address these same issues in multiple regulatory venues. The multiple review occurs irrespective of whether their rate setting and/or generation planning regulator is a state public utility commission or FERC. To be forced to visit these same issues more than once is, in our view, redundant regulation and an unwarranted expense for both utilities and the consuming public.

Although representatives of the NRC's Office of General Counsel have expressed skepticism that the NRC can avoid explicit assessment of these issues and still meet their NEPA obligations, we believe that the NRC can fulfill its obligations under NEPA even if it does not consider the issues of need for power and alternative sources of energy presented in the GEIS. We believe that the apparent divergence is really a result of mischaracterization of what the major federal action really is in this case. In actuality, the facility is in place and is being used to produce needed electricity. If it were not, the applicant would not be seeking to renew the license. However, the renewal by NRC merely enables the licensee to preserve the option for continued use of the facility for consideration by the state regulatory and energy planning agencies. They, in turn, will consider the continued use of the facility in the context of their ongoing demand projections and the availability of alternatives to fulfill projected needs.

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Again, the major federal action by NRC in this instance is granting of the renewal license so that the licensee and the governing state may exercise the option of continuing to use the licensed facility, if there is a recognized need for the power and no better alternative source is available. The purpose of the GEIS remains to identify all relevant impacts and to categorize these in terms of significance, as it does quite well. The scope of the federal action in this instance should be recognized as a permissive step to facilitate the exercise of an option provided that no unacceptable adverse environmental impacts exist. In this context the disclosure and consideration of need and alternatives, as presented in the GEIS, are beyond the scope of the decision and need not be presented by the GEIS. A legal memorandum supporting these premises is attached to this letter.

This perspective mitigates a technical shortcoming of the GEIS as well. The GEIS assumes a renewal scenario of a major plant shutdown and retrofit period of nine (9) months prior to the resumption of operation under the renewed license. The exiting renewal rule (10 CFR 54), greatly accentuated by the February 3, 1994 Commission directive for its revision, are both focused at the continuation of operation in an uninterrupted manner. Indeed, the issuance of the Maintenance Rule (10 CFR 50.65) is cited as a fundamental basis for acknowledgment of the adequacy of the continued operation of the facility unchanged into the renewal period. By recharacterizing the nature of the NRC decision to one which enables the exercise of an option to continue, the flawed balancing analysis, which has included this grossly incorrect shutdown assumption can be avoided. Such a change materially improves the accuracy, and thus the credibility of the GEIS.

In summary, utilities seeking to renew their nuclear plant licenses will do so as part of a larger decision making process related to meeting the energy needs of their customers and ensuring reliable and efficient delivery of electricity. In order to meet future electricity demands, utilities must explore a range of options. For each option, consideration must be given to whether it is safe, environmentally sound, reliable, and economic. Even if NRC determines that there is reasonable assurance that a plant will operate safely for a period up to 20 years beyond the initial license, a utility must then demonstrate to their rate setting and/or generation planning regulator that continued operation is economically advantageous. The GEIS and NRC's utilization of it should recognize this context for the NRC's license renewal decision.

Sincerely,



Donald W. Edwards
Director, Industry Affairs

Attachment

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Memorandum of Law

March 18, 1994

1. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is seeking comments on one of its rulemaking proposals to create a reliable and predictable licensing process for renewing nuclear power plant operating licenses. This proposal would simplify the procedures and processes in 10 C.F.R. Part 51 for implementing the National Environmental Policy Act (NEPA). Environmental issues would be addressed, to the extent feasible, by generic evaluation of the impacts of extended operation for the present population of operating reactors in the United States. The agency has prepared NUREG-1437, Generic Impact Statement for License Renewal of Nuclear Plants (draft GEIS), to support and provide the technical bases for this endeavor.

The NRC issued the draft GEIS for public comment on September 17, 1991. Representatives of several states submitted comments opposing the discussion of need for power and alterna-

tive energy sources in the draft GEIS¹. A central theme of these objections was that the information and proposed conclusions in the draft GEIS on these topics infringed upon the traditional authority of the states to regulate public utilities and to determine the need for additional power generation and the most economical means for meeting that need.

The NRC Commissioners, in response to these state comments, directed its Staff to hold a series of workshops for the purpose of reconciling, if possible, their objections. The NRC Staff, to facilitate public involvement, prepared an options paper that provided four options for revising the need for power and alternative evaluations in the draft GEIS. These options, in the Staff's view, either removed or largely mitigated the states' perception that discussion of these matters in the final GEIS would infringe on traditional state regulatory prerogatives. These options were discussed at three workshops which were held in February 1994. Most participating states concluded that only Option 4 satisfied their objections and they supported that option. This Memorandum addresses the manner by which the agency may implement Option 4 to satisfy the objections of the states.

¹ Minnesota, Wisconsin, Illinois, Michigan, Ohio, Massachusetts, Vermont, New York and New Hampshire actively opposed the present formulations in Chapters 8 and 9 of the draft GEIS. It is not clear what the position of the other 41 states is on this issue.

2. The Discussion Of Need For Power And Alternatives In The Draft GEIS

The NRC, in Chapter 8 of the draft GEIS, stated that the Department of Energy's projection of the demand for electric power from 1991 to 2030 in each of the eleven energy regions of the United States indicates a need for the generating capacity represented by license renewal of the 118 nuclear plants in all eleven regions². The NRC also buttressed this finding by establishing a presumption of need, namely, that individual utilities would have to replace existing nuclear capacity after operating licenses expire. The NRC, therefore, concluded for purposes of the draft GEIS that a "need for power" existed with respect to the capacity that would be available from the license renewal and operation of the nation's 118 nuclear power plants.

The NRC also examined various power generation alternatives to license renewal in Chapter 9 of the draft GEIS. Newly-constructed nuclear and fossil plants were identified as meaningful power generation alternatives to meet the need for power identified in Chapter 8 of the draft GEIS. These alternatives, however, were determined to be environmentally inferior to renewing operating licenses of existing nuclear power plants. The environmental impacts of continued operation of already

² As of June 30, 1992, 113 nuclear power plants were licensed to operate in the United States. Five more plants were expected to be granted operating licenses in the future.

constructed nuclear plants were found to be substantially less than those expected from new plant construction. Moreover, the cost of continued operation was shown by the agency to be much less than that from new construction.

Based on the analyses in Chapters 8 and 9, the NRC proposed two conclusions, namely, that the electric generating capacity represented by the 118 nuclear power plants in the United States would be needed beyond the expiration dates of the operating licenses for these plants and renewing these licenses for an additional 20 years was environmentally preferable to all evaluated alternatives. The NRC also proposed that these generic findings be made conclusive for renewed licensing purposes, subject only to reconsideration if new information warranted such action.

3. The States' Choice - Option 4

Most states participating at the workshops supported Option 4 because it would limit the application of the need for power and alternative energy sources discussions required to satisfy NEPA's disclosure mandate. No conclusions on these issues would be made in the final GEIS. Thus, in the words of the NRC, "neither need for generating capacity nor alternative energy sources would be a factor in the NRC decision whether to grant a renewed operating license."

NEPA and the relevant case law generally require that federal agency environmental documents consider and evaluate alternatives to the proposed federal action and that agency decisionmakers take a "hard look" at the information developed before implementing the proposed action. Option 4's approach of merely addressing need and alternatives for disclosure purposes would seem to run counter to these legal requirements³. The NRC, however, is mindful of NEPA legal requirements, and it is unlikely that the agency would propose a per se unlawful option for consideration. As became more clear at the workshops, the agency proposes only to eliminate the need for power and alternative energy source discussions found objectionable by the state commenters.

The removal of the information found objectionable by the states can be justified by relying on the actual purpose of the proposed federal action, namely, to establish a stable license renewal process to preserve, for future consideration by licensees and state energy planners and regulators, the option of operating nuclear power plants beyond current license terms. This restatement of purpose leads to the logical conclusion that only the "no-action" alternative need be evaluated in the GEIS, and that the only "need" discussion necessary is an explanation

³ See, e.g., Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1100 (D.C. Cir. 1971).

of the reasons for preserving the license renewal option. These matters are explained below.

4. Nature Of The Proposed Federal Action

The NRC has stated that the purpose of the proposed federal action is:

S.2 Purpose

This GEIS was prepared to support a rulemaking to change NRC environmental protection rules, in 10 CFR Part 51, regarding requirements for the renewal of nuclear power plant operating licenses. The rulemaking was undertaken to address the environmental impacts that may result from activities associated with the renewal of an operating license and to codify the findings concerning these impacts so that they may be applied with limited further analysis in future environmental reviews for license renewals at individual plants.

draft GEIS, Executive Summary.

This statement of purpose misses the mark. It is true that one outcome of the final GEIS and the Part 51 rulemaking will be the establishment of simplified "NRC environmental protection rules" for license renewal; however, that objective is part of a greater purpose or goal. The agency, with the emphatic support of the industry, has staved repeatedly during the course of its license renewal rulemakings that the agency's overriding purpose is to establish a reliable and predictable licensing regime to preserve for licensees and state regulators the option

of operating nuclear power plants beyond current license terms, should economic considerations favor such action⁴. However, the overriding purpose of the final GEIS has not found its way into the draft GEIS⁵. That purpose should be recited explicitly in the final GEIS as the purpose of the proposed federal action.

In our view, the statement of purpose should be:

S.2 Purpose

The agency's Part 54 and Part 51 rulemakings and the preparation of this GEIS are components of the proposed federal action to establish a reliable and predictable license renewal process for the purpose of preserving for licensees and their state regulators the option of operating nuclear power plants beyond current license terms. This GEIS was prepared, as part of this goal, to simplify the NEPA process for license renewal. The findings of generic impacts, that are identified

⁴ See Request for Comments on Development of Policy for License Renewal, 51 FR 40334, November 6, 1986; Advanced Notice of Proposed Rulemaking, 53 FR 32919, August 29, 1988; Regulatory Analysis for License Renewal, NUREG-1362, pp. 1-1 through 1-8; Environmental Assessment for Final Rule on Nuclear Power Plant License Renewal, NUREG-1398, pp. 1-1 through 1-4; and Nuclear Power Plant License Renewal - Final Rule, 56 FR 64943, December 13, 1991.

⁵ Because of the agency's lack of clarity, some confusion may exist as to the purpose of the draft GEIS. The draft GEIS was not written to evaluate the environmental impacts of the Part 51 rulemaking itself. No impact statement is required for this purpose since the rulemaking is covered by the categorical exclusion provisions of 10 C.F.R. § 51.22. Rather, the draft GEIS was written to evaluate, categorize and codify in Part 51 the generic environmental impacts of continued operation during the renewal periods of 118 nuclear power plants. This action would avoid duplicative licensing work in individual license renewal applications, and thereby, contribute greatly to the overall goal of creating a reliable and predictable licensing process to preserve future options.

and completely evaluated in the GEIS, would be codified in 10 C.F.R. Part 51 so that they may be applied with limited further analysis in future environmental reviews for renewal at individual plants.

The NRC has inherent authority and discretion to restate the purpose of the proposed federal action. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) 190, 195-196, and cases cited therein⁶.

5. Alternatives

A "rule of reason" governs which alternatives the agency must discuss. Alaska v. Andrus, 908 F.2d 1024, 1031 (D.C. Cir. 1990). Agencies are only required to consider alternatives that either partially or completely meet the purpose or goal of a reasonably defined proposed federal action. City of New York v. DOT, 715 F.2d 732, 742-743 (3d Cir. 1983); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); and NRDC v. Callaway, 542 F.2d 73, 93 (2d Cir. 1975). The "purpose" formulation, however, must be reasonable and it may not narrow the proposed agency action artificially, and thereby circumvent NEPA's mandate that relevant alternatives be considered. See, e.g., City of New York, supra at 743.

⁶ This restatement should not result in a need to recirculate the GEIS for comment. It merely conforms to the agency's original purpose and no substantial change is involved. 10 C.F.R. § 51.72. Moreover, the issue is well within the ambit of issues presently subject to public comment.

Given the actual overriding purpose of the GEIS, the only alternative that logically must be discussed in the GEIS is the no-action alternative. This finding should be made in the final GEIS and codified in Part 51 as a Category 1 item. The "alternatives," discussed in the draft GEIS, need not be evaluated because they would not preserve the license renewal option. Simply stated, the employment of other generation sources and demand side management measures as alternatives will not preserve the nuclear plant license renewal option for future consideration by plant licensees and their state regulators and energy planners. Thus, these alternatives are irrelevant to the agency's actual purpose.

The fact that the "no action" alternative is the only relevant alternative is not objectionable. It is simply the logical application of the principles enunciated in the cases cited above. Indeed, proposed federal actions where substantive evaluation of alternatives were limited to the "no action" alternatives have been found by the courts to comply with NEPA. Busey, supra (only alternative substantively considered was not expanding a Toledo airport); City of Aurora, supra (only alternative substantively considered was not implementing certain procedures to relieve congestion at Stapleton airport).

6. Need For The Proposed Action

The NRC must establish a need for the proposed federal action as revised. In doing so, Chapter 8 should be rewritten to delete (i) information and conclusions concerning the need for renewed plant operations to meet future energy needs of the country, and (ii) the assumption that existing capacity provided by nuclear plants will be needed after the licenses for such plants expire. Instead, NRC should discuss the reasons why it is prudent and necessary to preserve the option of providing future energy capacity from the license renewal of nuclear plants.

This evaluation would include energy need projections to about 2030, based on nationwide information developed by the Department of Energy and others expert in the field. The discussion would serve the limited purpose of showing that some level of energy production beyond capacity without the 118 nuclear plants is likely to be needed. Notice could be taken, based on the work done by the pilot plant owners, the owners groups, other utilities and NRC's NPAR program that plant refurbishment for renewed license purposes is likely to involve a modest increment of capital investment in the course of normal operation. This would suggest that a renewed plant may be a low cost source of future energy generation. Based on these premises, it is both reasonable and necessary to preserve the license renewal option

for future consideration. This conclusion should be designated in the final GEIS and codified in Part 51 as a Category 1 item.

The final GEIS could also disclose a general description of the present and changing state of the electric utility industry. This could include the recent aggressive actions of state regulators to meet future energy needs through competitive means and demand side management measures, the introduction of integrated resource planning nationally under the Energy Policy Act of 1992, and the trend of utilities to merge and reorganize to meet competition from independent power producers and others.

7. Consistency With Agency Practice and Regulations

Any perceived departure from agency practice and guidance and implicitly, from Part 51 itself, governing construction permit NEPA review requirements would not represent arbitrary and capricious agency action as long as a reasonable basis for change exists. Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835, 1848-49 (1989) (substantial deference was due to a regulation, which superseded previous regulation because there was a "well-considered basis for the change."). That basis exists for license renewal.

The NRC, in the draft GEIS, generally followed long-standing agency guidance⁷ and practice for determining need for power and alternative energy sources for the issuance of nuclear power plant construction permits⁸. In such cases, the need for the proposed action, i.e., the issuance of a permit to construct a nuclear power plant, is measured by examining the utility-applicant's service area and regional service area to determine whether or not the additional increment of power represented by the proposed plant is needed. These analyses provide a basis for determining at the time of the application whether the plant is needed. The consideration of alternatives similarly evaluates other means than nuclear generation for providing the perceived need for power.

The construction permit model for evaluating need for power and alternative energy sources will not work for license renewal. Nuclear power plant construction permit applicants intend to construct the plants consistent with state regulatory oversight at the time of application. Need and alternative evaluations of the type required for construction permits are, therefore, relevant to the specific proposed federal action,

⁷ NRC Regulatory Guide 4.2 and the Staff's Environmental Standard Review Plans (NUREG-0555).

⁸ Supplemental Environmental Impact Statements to support the issuance of nuclear plant operating license are not required to evaluate need for power and alternatives. Instead, the agency relies on the discussions and conclusions on those topics found in the construction permit environmental impact statements. 10 C.F.R. §§ 51.53 and 51.95.

i.e., whether or not to allow plant construction by issuing the construction permit.

License renewal is a quite different proposed action. Renewed operating licenses will be obtained generally 15 or more years before existing reactor operating authority expires. No commitments or intentions to operate beyond 40 years will have been made by that time by nuclear plant licensees. Neither will state regulators have decided whether or not to permit such continued operation. Indeed, none could be made. Licensees must first make the case for continued operation beyond 40 years to state regulators and energy planners, a process that will not occur for years after renewed licenses are issued.

Lest operating nuclear plants be lost from consideration as part of the nation's future energy mix, they must be licensed and ready to provide service when needed, otherwise licensees and their state regulators will discount them and other, perhaps less favorable, sources of energy will be employed. The NRC proposed federal action is intended to assure, by early licensing, that its renewed licensing requirements do not become critical path obstacles to the use of an otherwise economically-preferable asset as a future source of energy. Thus, it is entirely reasonable for the NRC to structure its NEPA process to coalesce with this goal.

8. Conclusion

Option 4 can be adopted provided the statement of purpose in the final GEIS is restated as discussed above. This necessarily would eliminate the states' objections, since the alternative energy source and need determinations in the draft GEIS can be omitted from the final document.

Joseph Gallo