Attorney General
Lee Fisher

(9)

March 3, 1994

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

Re: **Ohio Comments in "Part 51" Rulemaking**

Dear Mr. Cleary:

Enclosed please find an original and 10 copies of Ohio's comments pursuant to NRC Staff's January 1994 Discussion Paper and subsequent public meetings. Please timestamp one of the copies as being "received" or "filed" and return it to me in the enclosed postage-paid envelope. Also, pursuant to our conversation the other week, please notify me if you decide to circulate the NRC Staff's proposal for comments prior to formally submitting it to the NRC.

Thank you for your attention to this matter.

Respectfully submitted,

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BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of the Proposed Amendments to 10 CFR Part 51	:	56 Fed. Reg. 47016 (September 17, 1991)

COMMENTS ON PROPOSED RULEMAKING AND EXISTING OPTIONS FOR ADDRESSING STATE CONCERNS SUBMITTED BY THE PUBLIC UTILITIES COMMISSION OF OHIO, THE OHIO POWER SITING BOARD AND THE UTILITY RADIOLOGICAL SAFETY BOARD OF OHIO

I. INTRODUCTION AND GENERAL STATEMENT OF INTEREST

In construing the Atomic Energy Act of 1954, the United States Supreme Court has repeatedly and unequivocally acknowledged the Congressional intent of preserving traditional state regulation over the non-safety aspects of nuclear power regulation, particularly with respect to economic regulation. More importantly, the Supreme Court has recognized that the federal government's ability to preempt state regulation of nuclear power plants is subject to constitutional limitations. Accordingly, there is no doubt that economic regulation of nuclear power production by the states will continue in the face of any NRC determinations of "need and alternatives" made under the National Environmental Policy Act of 1969 (NEPA), in particular 42 U.S.C. § 4332(2)(C). Consequently, the primary issues to be addressed in the context of this rulemaking are to minimize unnecessary duplication of effort, avoid subsequent confusion and unnecessary conflict between the respective juris-

dictions of the federal and state actors, and to narrowly-tailor a method of achieving compliance with NRC's duty under NEPA.[1]

A. Basic Jurisdictional Issues

After an exhaustive review of the history of the Atomic Energy Act, the United States Supreme Court concluded as follows:

> This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; *the States [will continue to] exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking and the like.*

Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission , 461 U.S. 190, 211-212 (1983) (emphasis added). The *PG&E* Court also described the States' power as prevailing over NRC authority "in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." *PG&E* , 461 U.S. at 205. [2]

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1 The legal issues raised and discussed below are submitted for purposes of general reference to matters that the NRC and its legal counsel are, or should be, well aware of and vitally concerned with; by no means do they fully reveal the legal strategy or arguments that would be taken in a litigation context should the NRC actions conflict with matters properly within state jurisdiction. Likewise, the submission of comments in this rulemaking by Ohio, pursuant to the invitation and express limitations offered by the NRC Staff, should not be construed as an acceptance of the legal premises and assumption implicit in the options presented by NRC Staff in its position paper issued in January 1994. Therefore, to the extent that the comments and suggestions made are constructive in nature, the NRC should bear in mind that Ohio is greatly disturbed by the general approach and apparent intention taken by NRC Staff that the NRC needs to delve into the realm of economic analysis regarding the need for power and least-cost alternatives.

2 These observations are well-established and directly supported in the provisions of the Atomic Energy Act itself. *See, e.g.*, 42 U.S.C. ∫ 2018. In fact, as further observed by the *PG&E* Court, the 1959 amendments to the Atomic Energy Act "reinforce this fundamental division of authority . . . [and actually] heighten the States' role." *PG&E* , 461 U.S. at 208-209. Also, the NRC does not purport to exercise its authority based upon economic considerations, 10 C.F.R. § 8.4 (1982), and has repealed its regulations concerning the financial qualifications and capabilities of a utility proposing to construct and operate a nuclear power plant. 47 Fed. Reg. 13751.

Similarly, the need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States. Justice Brandies once observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." *Frost v. Corporation Comm'n*, 278 U.S. 515, 534 (1929) (dissenting opinion). The U.S. Supreme Court has noted elsewhere that "the nature of government regulation of private utilities is such that a utility may frequently be required *by the state regulatory scheme* to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (emphasis added). Hence, regardless of what the NRC does or analyzes in its relicensing process, the utilities and the States regulating them realize that the NRC is incapable of giving any comprehensive "blessing," from a non-safety related standpoint, for continuing to operate a nuclear power plant.

In this regard, the NRC Staff has indicated that it intends to propose a "preemption disclaimer" in the rules that would have the effect of saying that, whatever analysis of need and alternatives is done in the relicensing process, the NRC does not intend to preempt the states' determinations or authority in this area. In discussing the effect of an NRC licensing of nuclear plants, the Supreme Court has already recognized that the "NRC's imprimatur, however, indicates *only* that it is safe to proceed with such plants, *not that it is economically wise to do so* . . . the NRC order does not and could not compel a utility to develop a plant." *PG&E* , 461 U.S. 218-219 (emphasis added).[3] *Cf. Vermont Yankee Nuclear Power Corp. v.*

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[3] In the *PG&E* case, the Supreme Court determined that a California statute which imposed a moratorium on the construction of nuclear plants in California was not preempted under the traditional "obstacle" and "dual compliance" tests for preemption. The Court concluded that the "legality remains that Congress has left sufficient authority for the States to allow the development of nuclear power to be slowed or even stopped for economic reasons. *PG&E* , 461 U.S. at 223. Thus, with respect to more fundamental economic authority asserted by the States in this rulemaking, there can be no doubt that State economic regulation of nuclear power pro-

NRDC, 435 U.S. 519, 550 (1978) (there is little doubt that under the Atomic Energy Act, state regulatory commissions are empowered to make the initial decision regarding the need for power). Therefore, it is clear that such a preemption disclaimer would merely reflect the existing state of the law and does not represent a significant effort to accommodate State concerns. Of course, that type of language would do more good than harm, but it simply is not very helpful or comforting in and of itself; in order to be meaningful, it must be accompanied by other more substantial (*i.e.*, less procedural) efforts to avoid conflicting with State authority.

B. **Ohio's Ongoing Regulatory Responsibilities**

The Public Utilities Commission of Ohio (PUCO), the Utility Radiological Safety Board of Ohio (URSB) and the Ohio Power Siting Board (OPSB) collectively[4] possess important duties under Ohio law relative to state ratemaking, including prudency and necessity of construction or modification of energy-generating facilities, determination of whether particular supply options are least cost, regulation of significant financial decisions of utility companies, monitoring of radiological safety issues, approval of power siting proposals (including major refurbishment proposals) and consideration of environmental impacts of power siting proposals.

As recognized by the United States Supreme Court and other lower courts, Ohio has the statutory and constitutional power to continue regulating these areas of important interest to its citizens. Without going into detail concerning Ohio statutes and laws, it is sufficient to say that the State of Ohio has been, and continues to be, vitally interested in facing these tasks and discharging these important duties.

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duction would be upheld by the U.S. Supreme Court if the NRC takes actions that attempt to preempt or otherwise interfere with States' powers.

[4] Hereinafter, these three agencies may be referred to collectively as "Ohio" for purposes of this rulemaking.

Consequently, Ohio has every intention of exercising and defending its jurisdiction over these matters.

C. National Environmental Policy Act of 1969

The portion of NEPA that is pertinent to this rulemaking is the requirement that federal agencies, to the fullest extent possible, include in the context of taking a major federal action an Environmental Impact Statement (EIS) containing discussions of five required subjects including a discussion of the alternatives to the proposed action. 42 U.S.C. § 4332(2)(C). When examining § 4332(2)(C), the obvious question relative to this rulemaking is whether the NRC needs to examine the *need* for electrical power at all when discharging its duty under NEPA. Clearly, the determination of need is the most controversial part of the rulemaking from the States' perspective, because it most directly infringes upon the States' jurisdiction and traditional authority. The NRC should give serious consideration to the approach of abandoning any consideration of need for power in performing a relicensing EIS. There is nothing that prevents the NRC from taking the applicant's need for operating the plant as a given and treating it as a collateral factor to relicensing.

Under that approach, the NRC would evaluate the environmental impacts of licensing as compared to the other alternatives considered and render its decision for relicensure based upon a comparison of those impacts. The EPA or the CEQ may not be entirely pleased with that course of action. However, the NRC, not the EPA or CEQ, is responsible for implementing NEPA when relicensing nuclear plants. *Citizens Against Burlington, Inc. v. Busey* , 938 F.2d 190, 201 (D.C. Cir. 1991); *Alaska v. Andrus* , 580 F.2d 465, 474 (D.C.Cir. 1978). Likewise, a lead agency does not have to follow the EPA's comments slavishly --it just has to take them seriously. *Citizens Against Burlington,* 938 F.2d at 201. In any event, as discussed below, any discus-

sion of need should be limited to a simple parameter or assumption that relates to the evaluation of alternatives.

Because the statute directs agencies only to examine the environmental effects of their decisions, and not to take one type of action or another, federal judges correspondingly enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results. *See Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97-98 (1983). Thus, a plain reading of NEPA's EIS requirements, as applied to the NRC's relicensing responsibilities, does not necessarily involve a determination of need for power relative to a particular nuclear plant. Because delving into that area will create considerable conflict and confusion, the NRC should refrain from doing so.

The Courts interpreting NEPA have recognized the necessity of taking into account the needs and goals of the parties involved in the application. *See, e.g., Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *Roosevelt Campobello Int'l Park Common v. EPA* , 684 F.2d 1041, 1046-47 (1st Cir. 1982). However, the federal agency "cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process." *Citizens Against Burlington*, 938 F.2d at 199 (emphasis original). NEPA does not require "agencies to determine for the applicant what the goals of the applicant's proposal should be." *Id.*

In *Citizens Against Burlington*, the Court approved the FAA's environmental consideration of two alternatives: to approve the application or not approve the application. In doing so, the Court rejected arguments advanced that suggested the FAA should have developed additional alternatives that might have accomplished the general goals of the proposed airport expansion. Thus, the FAA effectively assumed the need for the proposal and considered the environmental impacts of

the alternatives of either approving or not approving the proposal. Although the petitioners rigorously challenged that approach, the D.C. Circuit Court of Appeals affirmed this "thumbs-up or thumbs-down" NEPA evaluation. *Citizens Against Burlington* , 938 F.2d at 197. As a related matter, the lead agency doing a NEPA evaluation need not consider alternatives that are beyond the scope of its authority. *See, e.g., New York v. Dept. of Transportation* , 715 F.2d 732, 743-745 (2nd Cir. 1983) (need not consider alternative of transporting nuclear fuel by barge when performing function of regulating transportation by interstate highway). Likewise, the NRC should limit its NEPA inquiry to the radiological safety and environmental consequences of issuing a license versus denying the license.

All of these principles support a narrow reading of the NRC's NEPA requirement as it relates to the determination of economic need for power and least cost alternatives. When coupled with the obvious Congressional intent to leave these issues to the States, including a direct reference in the Atomic Energy Act mandating such deference [42 U.S.C. § 2018][5] , it is clear that, if the NRC chooses to get into this area, it will be because it chooses to do so, not because it is legally required to do so. That approach would be inadvisable for the reasons advanced by the States.

II. RESPONSES TO FOCUS QUESTIONS

1. Ohio agrees that the list of state concerns is accurate, but stresses that no concurrent jurisdiction on matters of need and analysis of energy

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5 Aside from the directive to NRC found within the Atomic Energy Act, Congress has given other indications that issues relating to ratemaking, economic need for power and least-cost alternatives should be left to the States. For example, the National Energy Conservation Policy Act of 1992 makes it very clear that states are to implement integrated resource planning without preemption by the federal government. 16 U.S.C. § 2621. Moreover, Congress has made funds available to assist states in undertaking these responsibilities. *See also* Johnson Act, 28 U.S.C. § 1342 (federal courts not to interfere with state ratemaking authority).

alternatives exists. The OPSB would add that many matters addressed as safety and health issues, such as fuel cycle issues, are also properly reviewed by the states as economic and environmental issues.

2. Ohio agrees that the changes to the Generic Environmental Impact Statement (GEIS) remove many of the limitations and obstacles to the introduction of new information in the environmental review process, but stresses that environmental issues may also be properly addressed by the states in need determinations, energy alternatives analyses, and siting proceedings.

3. It is Ohio's recommendation that both the rule and the GEIS state that the need for generating capacity and the analysis of energy alternatives are matters for state determination.

4. Ohio disagrees with the assertion that need and alternatives are factors in the NRC license renewal decision. In the approach utilized in Option 1, a finding of "inadequate need for generating capacity," based on NRC's analysis of state forecasting and integrated resource planning data, would trigger the wider analysis of economic costs and benefits outlined. Of particular interest to both agencies is the phrase " . . . geographic area in which each nuclear plant is located . . . " since apparently neither state boundaries or utility service areas are recognized for need determinations. Ohio has adopted a position in response to the National Energy Policy Act that recognizes a need for regional regulation of electric transmission facilities based on active participation of impacted states. Both agencies are concerned that a need determination, by a federal agency in a federal proceeding, addressing energy needs on a multi-state basis, would not only be preemptive in matters traditionally under state jurisdiction but would set a dangerous prece-

dent that might spill over into other energy and utility areas of concern.

5. Ohio has every intention of performing what is clearly within its jurisdiction - the determination of need and the analysis of energy alternatives, for the purposes of ratemaking and facility siting. However, the state has no desire to do so under NRC guidelines and with the threat of NRC rejection.

6. With the "need" for the capacity assumed to exist in this option, based on previous NRC licensing proceedings, the focus on assessment of alternatives to support the NRC's NEPA review is perplexing and, in the view of Ohio, is unnecessary. Once again, the analysis of energy alternatives is a matter of state jurisdiction, and an acceptance of an individual state's findings by the NRC, and an inclusion of that acceptance in the NRC's NEPA review, should suffice.

7. As described in the NRC Staff document, Option 4 seems to best recognize the relationship between the regulatory authority of NRC and that of the states. However, comments made in the NRC presentation at the public meeting seem to indicate that Option 4 would involve NRC oversight and retention of control over the economic need analysis. Therefore, Ohio recommends an "Option 5" as described below, *if* the NRC feels compelled to do any economic need analysis at all.

8. Ohio recommends that the NRC clearly indicate that need determinations, analysis of energy alternatives, and analysis of environmental impact are matters under the jurisdiction of the states. Ohio recommends the following option:

   Option 5: The determinations of the various states, either separately or jointly, concerning need for generating capacity and alternative energy

sources shall be binding on the NRC in operating license renewal matters. To the extent that state economic analysis or determinations have not been completed at the time of relicensing, the NRC should make subsequent state economic approval a condition of the license.

9. Ohio believes that individual states have sole responsibility for the formulation of policy regarding the matters of need determination and the analysis of energy alternatives and view any attempt by the NRC to address these matters as an attempt to preempt state jurisdiction.

10. Ohio's preferred option is included in the response to Focus Question 8.

III. SUMMARY AND RECOMMENDATIONS

As demonstrated above, NEPA does not require the NRC to do an economic need analysis in relicensing nuclear power plants. Because such analysis creates the potential for conflict with state jurisdiction over the economic regulation of public utilities and because the United States Congress has clearly expressed its intention to leave these matters to the states, the NRC should refrain from delving into this area.

If the NRC concludes that it must consider economic need issues, Ohio recommends implementing the following steps for mitigating harm to the states: (1) include the "preemption disclaimer" language discussed above; (2) limit economic issues and determinations to the most narrowly-tailored analysis; (3) do not expect or count on the states to do analysis for the NRC or to get involved in these issues;[6] and (4) to the extent states have done economic analysis prior to the

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[6] Although some states have expressed interest in joint analysis with the NRC, Ohio does not view that process as being beneficial at this time. To the extent states get involved in NRC proceedings and take positions on these issues, there is a greater likelihood that they will be bound by the outcome or considered to have prejudged the issues.

relicensing proceeding, the NRC should accept and be bound by the state determination and, to the extent no state analysis has been done, the NRC should condition the license upon state economic approval.

Respectfully submitted,

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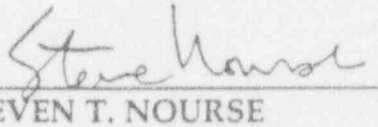

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On behalf of:

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