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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 5, 1984

MEMORANDUM FOR: William J. Dircks
Executive Director for Operations

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: LEGAL GUIDANCE ON NRC ACTIONS IN THE EVENT UTILITIES
SEEK TO WITHDRAW THEIR APPLICATIONS TO CONSTRUCT AND
TO OPERATE THE ZIMMER AND MARBLE HILL NUCLEAR PLANTS

This responds to your request for guidance on this subject in the following areas: Atomic Energy Act of 1954; NEPA; and presence of NRC inspectors at the plant sites.

The guidance is presented in the outline which is attached. A summary of its essential points follows:

Atomic Energy Act

1. Unless it can be demonstrated that a nuclear plant is not a utilization facility as defined in the Atomic Energy Act, the utility will need a facility license to possess the facility. Issuance of a license to possess the reactor is the approach typically taken in the past when completed reactors were decommissioned but not dismantled. If the utility decides to "disable" the plant so that, to NRC's satisfaction, it no longer falls within the definition of utilization facility, no facility license is needed, after such disabling. There are no existing criteria and no known past experience on the degree of disabling deemed necessary to remove a nuclear reactor from the definition of utilization facility. That determination is essentially technical. In making that determination, however, it should be understood that the utilities' intentions regarding the reactors and a prohibition on loading fuel in them are not controlling under the definition of utilization facility. The definition focuses instead on the capability of the facility to make use of special nuclear material.
2. CG&E also has a SNM to possess fuel at the Zimmer site and fuel is stored there now. This material will have to be transferred from the site in a manner which satisfies NRC's requirements.

(There is no similar SNM license for Marble Hill.)
3. CG&E also has an outstanding indemnity agreement for the Zimmer plant. If all radioactive material is removed from the site, that agreement should be terminated. If radioactive material remains on the

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site, the indemnity agreement can be terminated only by Commission order or regulation.

(No indemnity agreement has been issued for Marble Hill.)

NEPA

No substantial NEPA issue is now foreseen. There is no major Federal action which caused the utilities to seek withdrawal of their applications. A negative declaration or environmental assessment should, under circumstances now known, provide the appropriate NEPA evaluation. Consistency with actions in recent application termination requests suggests that the Licensing Boards assigned to the Zimmer and Marble Hill operating license proceedings would probably seek staff's view on the adequacy of environmental measures before terminating the licensing proceedings.

Inspectors

There is no applicable law which directs the continued presence of NRC inspectors on a site under circumstances which exist at the Zimmer and Marble Hill plants. Accordingly, decisions on the continued presence of inspectors would be within the discretion of the NRC. In exercising that discretion, consideration should be given to the need of the continued presence of inspectors for any ongoing investigations which would continue despite any change in the licensing status of these plants.

Original signed by
Guy H. Cunningham, III

Guy H. Cunningham, III
Executive Legal Director

Attachment: Outline

cc w/attachment:

- H. Denton
- R. DeYoung
- J. Keppler

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OUTLINE OF RELEVANT LEGAL
CONSIDERATIONS CONCERNING A
REQUEST BY UTILITIES TO WITHDRAW
THEIR APPLICATIONS TO CONSTRUCT AND OPERATE
THE ZIMMER AND MARBLE HILL PLANTS

Background: This responds to Mr. Dircks' request that the ELD provide guidance on the legal considerations applicable in three areas in the event the NRC receives a request from the utilities to withdraw their applications for licenses and to terminate the outstanding construction permits for the Zimmer and Marble Hill plants. The three areas on which legal guidance is requested concern: (1) The Atomic Energy Act of 1954; (2) NEPA; and (3) NRC inspectors. After summarizing the present procedural and licensing status of the Zimmer and Marble Hill proceedings, guidance is given in each of these areas.

Present Status - Zimmer:

Construction Permit No. CPPR-88, issued for the Zimmer Plant on October 27, 1972, remains in effect. Special nuclear material license SNM-1823, issued on June 26, 1979, authorizes the licensee to possess and store SNM at the Zimmer site. That license, which remains in effect, covers SNM now stored at the Zimmer site.

. Price-Anderson Act Indemnity Agreement No. B-85 was issued along with the SNM license. The indemnity agreement also remains in effect.

. Procedurally, the application for an operating license is pending before a Licensing Board.

Present Status - Marble Hill

Construction Permits No. CPPR-170 and 171, which were issued for the Marble Hill plants on April 4, 1978, remain in effect. No SNM license has been issued for storage and possession of SNM at the Marble Hill site. No Price-Anderson indemnity agreement has been issued for the Marble Hill plants.

Three petitions have been received to intervene in the Marble Hill operating license proceeding. The applicant earlier requested the presiding Licensing Board to defer any further action in the proceeding pending a decision on cancellation of the plants.

Guidance in each of three areas is as follows:

A. The Atomic Energy Act

Any privately-owned reactor which is within the AEA's definition of a "utilization facility" must be licensed under the AEA. The license may be for possession only.

- . The AEA's definition of utilization facility focuses on whether:
 - . the facility is capable of making use of SNM;
 - . in such quantity as to be of significance to the common defense and security; or
 - . in such manner as to affect the health and safety of the public; or
 - . the facility is peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defence and security, or in such manner as to affect the health and safety of the public.

. The AEA's definition of utilization facility does not depend either on the absence of authority to load nuclear fuel or on the owner's declared intent not to do so. The definition is in terms of the capability of the facility itself to make use of special nuclear material.

. Considering the terms of the AEA's definition of a "utilization facility", it would, we believe, be difficult to conclude that a nuclear plant which is substantially completed is not a utilization facility. In any event, a conclusion that such a plant is not a utilization facility would have to find support on grounds other than the utility's announced intention that it will not proceed with the particular plant as a nuclear plant, and a prohibition on the loading of nuclear fuel in the plant.

. The consequences of a nuclear plant being a utilization facility under the AEA are:

. Although the construction permit for such a plant can legally be terminated if the applicant requests, the AEA requires that the plant be covered by a license to possess the reactor. (In prior years, owners of reactors covered by the AEA which have not been dismantled but which have been decommissioned have been issued a license to possess the reactor. Examples: N.S. Savannah; Vallecitos BWR; Westinghouse Test Reactor; Peach Bottom 1; Plumbrook; Fermi 1; and Saxton.) The requirement of a license to possess such a facility results from the capability of the facility itself to make use of special nuclear material and not because the facility has residual radioactivity from prior operation. If the facility does not have the capability to make use of special nuclear material

because it has been dismantled, any residual radioactivity in its remaining structure is covered by a byproduct material license. (Examples: Carolina Virginia Tube Reactor; Pathfinder; and SEFOR).

. If the licensee wants to eliminate the need for a license to possess the plant, then the licensee must disable the reactor sufficiently so that it would not fall within the definition of utilization facility. The type of disabling which would suffice for that purpose would require a technical judgment, especially if the licensee chose a minimal approach. On the other hand, removal or disassembly of the pressure vessel would quite clearly result in a plant which is no longer a utilization facility and therefore is not licensable under the AEA.

. NRC has not published criteria which apply to disabling. It does have jurisdiction over the facility, however, and has a regulation which covers applications for termination of licenses (§ 50.82). A construction permit is a license under the AEA (§ 185).

. Appropriate public notice should be given of any application to change the licensing status of the plants. Although a hearing request on such an application is unlikely, if there is one the appropriate action on it would be in the discretion of the Commission.

. Presumably the applicants would make an appropriate request with the Licensing Boards to terminate licensing proceedings pending before them.

2. The SNM license

For CG&E's SNM license to be terminated, the SNM which is possessed under it at the Zimmer site would first have to be transferred elsewhere consistent with NRC requirements. As noted earlier, there is no similar situation at the Marble Hill site.

3. Indemnity agreement B-85 with CG&E

. The indemnity agreement by its terms shall not terminate until all the radioactive material has been removed from the site and transportation from the site has ended as defined in the indemnity agreement.

. If the removal of all SNM from the Zimmer site results in no residual contamination, then the indemnity agreement can terminate by its own provisions.

. If, however, any residual radioactive material remains at the site after the SNM is transferred from the site, then the indemnity agreement can only be terminated by applicable Commission order or regulation.

(There is no indemnity agreement for the Marble Hill plants.)

B. NEPA

. There is no legal basis for requiring an environmental impact statement if the licensing status is changed from a construction permit holder to a possession only license. There is no major Federal action involved; the initiating events were the utilities' decision not to proceed with the nuclear plants. An appropriate "hard look" should nevertheless be taken at the situations and either a negative declaration or an environmental assessment should be prepared on the withdrawal requests.

. Recent actions involving plant cancellations, but at a much earlier stage than Zimmer and Marble Hill, suggest that the presiding Licensing Boards might seek to maintain jurisdiction until actions, satisfactory to the staff, have been taken to remedy environmental concerns. The extent to which NRC could force remedial action regarding non-radiological environmental concerns under such circumstances could present difficulties if the utilities refuse to cooperate.

C. Inspectors

Section 13 of the NRC Authorization Act for FY's 1982 and 1983 provides the following directions regarding resident inspectors:

"(a) The Nuclear Regulatory Commission is authorized and directed to implement and accelerate the resident inspector program so as to assure the assignment of at least one resident inspector by the end of fiscal year 1982 at each site at which a nuclear power plant is under construction and construction is more than 15 percent complete. At each such site at which construction is not more than 15 percent complete, the Commission shall provide that such inspection personnel as the Commission deems appropriate shall be physically present at the site at such times following issuance of the construction permit as may be necessary in the judgment of the Commission."

The foregoing statutory provision is the only statutory directive to the Commission which deals explicitly with the presence of NRC inspections at a facility site. Aside from the fact that we are now in FY 1984 and therefore the effectiveness life of section 13 has expired, its language by its own terms does not apply to the Zimmer and Marble Hill situations for the following reasons: