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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Financial Assurance Requirements ) Docket No. RIN 3150-AB41  
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Power Reactors )

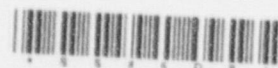
COMMENTS OF THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NEW YORK

OFFICE OF THE  
RULEMAKING  
ADJUDICATIONS STAFF

The Public Service Commission of the State of New York (PSCNY) appreciates this opportunity to comment on the Notice of Proposed Rulemaking (NOPR) issued by the Nuclear Regulatory Commission (NRC or Commission) on financial assurance for nuclear decommissioning costs in a competitive electric industry. PSCNY requests that the NRC consider the comments contained in Appendix A, which address the specific questions raised in the NOPR. On April 8, 1996, the NRC published its Advanced Notice of Proposed Rulemaking (ANOPR) soliciting comments by June 24, 1996. On September 10, 1997, the NRC issued its Notice of Proposed Rulemaking (NOPR) and solicited comments due November 24, 1996. The PSCNY responded to the ANOPR, and we now offer these comments in response to the NOPR.

PSCNY has traditionally taken pains to assure adequate funding of decommissioning costs, and New York State also shares the concerns expressed by NRC that adequate funding mechanisms be assured for the responsible decommissioning of nuclear generating stations. The NRC, therefore, should not attempt to either lock states into a particular ratemaking method or dictate levels of cost recovery. As discussed in POINT I infra, such incursions into state regulation would be not only needless but unlawful. The

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proposed rule's definition of "electric utility," however, would infringe on state ratemaking. By limiting the definition to companies that recover "the cost of this electricity," including operations and maintenance costs, through cost-based rates or a non-bypassable charge,<sup>11</sup> the NRC's proposed rule infringes on state ratemaking. Though we do not think it was the NRC's intention to preempt state rate regulation, this definition implies otherwise. Certainly, we appreciate the NRC's legitimate concerns with safe and efficient decommissioning but, again, states have allowed recovery of decommissioning costs in the past. For the purposes of this regulation, the definition of "electric utility" simply should be "any entity that generates, transmits, or distributes electricity."

Similarly, the definition of "non-bypassable charges" is also problematic in that reference is made to "operation" and "maintenance" costs. This definition is simply not necessary. Additionally, the proposed regulation under 10 CFR section 50.75(e)(3) again makes reference to recovery of operation and maintenance expenses. Lastly, PSCNY does not oppose the proposed funding mechanisms to cover non-"electric utility" licensees' decommissioning costs.

New York's stake in the future of nuclear generation is substantial. Six investor-owned utilities and the New York Power Authority own and operate six nuclear generating plants in New York State. These plants produce about 18 percent of the state's

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<sup>11</sup> 10 CFR §§ 50.2 & 50.75(e)(3).



electric energy. In addition, Consolidated Edison Company of New York, Inc. owns a retired nuclear facility, Indian Point No. 1. The cost of removing and disposing of the radioactive components and wastes from these seven facilities, as they are decommissioned, will be substantial.

#### Competition in New York

In May 1996, the PSCNY set forth its vision for the implementation of electric competition in New York State<sup>1/</sup> to reduce high rates and provide choice and better service quality to consumers. PSCNY is now reviewing settlements with each utility and recently approved the Consolidated Edison settlement. There is no basis to assume that any of the settlements will leave a utility (or possible successors in interest) unable to fund nuclear decommissioning costs.

Additionally, the PSCNY recently issued a Notice Soliciting Comments on Nuclear Generation.<sup>2/</sup> The Staff Report accompanying the Notice includes a recommendation that prudently incurred decommissioning costs (and spent fuel storage costs) continue to be paid by transmission and distribution customers after the transition to competition.<sup>3/</sup> Following the comment period, the PSCNY will consider the need for further analysis of

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<sup>1/</sup> N.Y.P.S.C. Case No. 94-E-0952, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion 96-12 (May 20, 1996).

<sup>2/</sup> N.Y.P.S.C. Case No. 94-E-0952, Notice Soliciting Comments on Nuclear Generation (August 27, 1997).

<sup>3/</sup> Case 94-E-0952, Staff Report on Nuclear Generation (August 1997) at 5.

nuclear issues related to ratemaking, including decommissioning costs, and work with stakeholders, including the NRC, to develop reasonable solutions. Accordingly, there certainly is no reason for the NRC to attempt to preempt New York from exercising rate authority regarding decommissioning funds. Rather, NRC should work with New York and the affected owners to address decommissioning needs. For example, the NRC and states should consider proposing legislation that would make decommissioning liabilities first priority in the event of bankruptcy of a private nuclear facility owner.

#### POINT I

AS STATED IN OUR ANOPR REPLY, THE NRC SHOULD  
NOT SEEK TO PREEMPT STATE EFFORTS TO ASSURE  
ADEQUATE FUNDING FOR DECOMMISSIONING  
DURING THE TRANSITION TO ELECTRIC COMPETITION.

Since its enactment, the Atomic Energy Act ("Act") has provided a dual system of regulation in the nuclear power industry.<sup>1/</sup> This dual scheme of regulation extends to nuclear decommissioning costs, with NRC having authority to assure the safety of nuclear decommissioning and the states having power to address decommissioning costs in rates.

The Act vests the NRC with authority to assure the public health and safety with respect to nuclear generation through

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<sup>1/</sup> 42 U.S.C. Section 2011, et seq., Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 211-212 (1983).



ownership, licensing and operation requirements.<sup>1/</sup> Concomitantly, the economics of nuclear generation, including the need and rates to be set for nuclear capacity, have always been the domain of the states. The Atomic Energy Act itself provides that:

Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities licensed by the Commission.<sup>2/</sup>

The Supreme Court of the United States has upheld state authority over the economics of nuclear generation costs. In Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission, the Court upheld, against preemption challenges, a California Statute that required a demonstration of adequate waste storage capacity and federally approved waste disposal techniques before nuclear power plants could be built in the state.<sup>3/</sup> The Court held that the statute

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<sup>1/</sup> 42 U.S.C. Sections 2012(d), 2013(d), 2133, 2201, 2232 and 2233.

<sup>2/</sup> 42 U.S.C. Section 2018. The Act also states that each NRC licensee that holds a license for generation of commercial electricity "shall be subject to the provisions of the Federal Power Act." Id., Section 2019. Section 201(a) of the Federal Power Act provides that federal regulation extends to wholesale sales of power and transmission in interstate commerce, and specifically reserves to the states authority over retail electric rates and local distribution of electricity. 16 U.S.C. Section 824(a); Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205, 211 (1964), Reh'g denied, 377 U.S. 913 (1964).

<sup>3/</sup> 461 U.S. 198, 222-223 (1983).

legitimately addressed state concerns regarding the economics of nuclear power, and did not interfere with the NRC's authority to regulate the nuclear industry.<sup>1/</sup>

Thus, the NRC does not have statutory authority to preempt the states' rate treatment of nuclear decommissioning costs. Moreover, inasmuch as the treatment of particular costs are simply intermediate steps to the development of actual retail rates, which plainly remain the domain of the state commissions, such preemption would serve no useful purpose.

#### POINT II

THE NRC SHOULD WORK COLLABORATIVELY WITH  
THE STATES TO ASSURE NUCLEAR DECOMMISSIONING  
FUNDING DURING AND AFTER THE TRANSITION TO  
COMPETITION IN THE ELECTRIC INDUSTRY.

In the ANOPR and NOPR, NRC proposes to require non-"electric utility" licensees to meet equivalent financial assurance requirements for nuclear decommissioning costs as "electric utility" licensees. PSCNY agrees that funding assurance is needed where, because of competition, "licensees are no longer subject to rate regulation by PUCs or FERC."<sup>2/</sup>

However, NRC's concern that states will not have authority to assure nuclear decommissioning funding during or after the transition to electric competition is unfounded. The New York Commission has authority to address potential threats to health and

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<sup>1/</sup> Id. at 216.

<sup>2/</sup> 61 Fed. Reg. 15427, 15428 (April 8, 1996).



safety posed by electric generation.<sup>1/</sup> Recently, PSCNY determined that the best way to assure just and reasonable rates in the future is by implementation of a competitive industry model that will enable generators to compete for end use customers at the wholesale and retail levels.<sup>2/</sup> PSCNY also determined, however, that it will continue to exercise its authority to ensure that the competitive market meets the needs of New York's ratepayers. Moreover, in its opinion and order, PSCNY decided that stranded costs it determines to be recoverable will be assured recovery through rate mechanisms, such as a non-bypassable wires charge on the local d'stribution system.<sup>3/</sup> In fact, the Final Generic Environmental Impact Statement issued by PSCNY in the state competition proceeding recognized inadequate funding for nuclear decommissioning as a potential adverse impact of competition.<sup>4/</sup> The New York Commission determined that decommissioning funds could be assured through a wires charge.<sup>5/</sup>

NRC and the states should work collaboratively to assure that adequate funding for nuclear decommissioning is available. PSCNY is committed to the efficient and safe decommissioning of

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<sup>1/</sup> N.Y. Pub. Serv. Law, Sections 65-66.

<sup>2/</sup> N.Y.P.S.C. Case No. 94-E-0952, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion No. 96-12 (May 20, 1996).

<sup>3/</sup> Id. at 52.

<sup>4/</sup> N.Y.P.S.C. Case No. 94-E-0952, Final Generic Environmental Impact Statement, Vol. I, at 5-88.

<sup>5/</sup> Id. at 6-45.

nuclear power plants. The states have substantial experience designing the most cost-effective means to ensure the availability of sufficient funds for utility decommissioning.

### POINT III

NRC SHOULD CONSIDER ADDITIONAL STEPS THAT  
WOULD ASSURE FUNDING FOR NUCLEAR DECOMMISSIONING  
COSTS THROUGH CHANGES IN BANKRUPTCY CODE PROVISIONS.

NRC is taking important steps to promote the responsible decommissioning of nuclear generators during and following the transition to competition. As separation of generation from monopoly transmission and distribution functions proceeds under competition, some nuclear plants could become independently-owned. In the event of bankruptcy of a privately-owned nuclear generator, assuring adequate decommissioning funds will be imperative.

The Supreme Court has held that a Bankruptcy Court cannot authorize abandonment of a hazardous waste site "without formulating conditions that will adequately protect the public's health and safety."<sup>1/</sup> Given that public health and safety imperatives for decommissioning nuclear reactors are equally great, NRC or state commissions would seek funds for decommissioning costs in a bankruptcy proceeding. Nevertheless, the current Bankruptcy Code does not explicitly create a priority for nuclear decommissioning costs.<sup>2/</sup> To assure adequate decommissioning funds in bankruptcy, NRC and the states should consider proposing

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<sup>1/</sup> Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 507 (1986).

<sup>2/</sup> 11 U.S.C. Section 101, et seq.



legislation that would amend the bankruptcy law to expressly require payment of nuclear decommissioning liabilities over other creditors.

In sum, the NRC should not upset the federal balance of nuclear regulation, but seek collaboration with states. Additionally, PSCNY suggests examination of certain bankruptcy provisions that may aid in the assurance of adequate decommissioning funding. Finally, Appendix A provides specific commentary on the issues raised in the NOPR.

#### CONCLUSION

For the reasons stated above, the Nuclear Regulatory Commission should consider the views of the Public Service Commission of the State of New York in determining how best to assure adequate decommissioning funds for nuclear power plants.

Respectfully submitted,

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Albany, New York

## APPENDIX A

### UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

Financial Assurance Requirements )  
For Decommissioning ) Docket No. RIN 3150-AF41  
Nuclear Power Reactors )

In light of the aforementioned legal authority and responsibility regarding the economics of nuclear regulation, the PSCNY offers the following comments concerning the NOPR discussion of the proposed rules and the actual language contained in the proposed regulation.

#### A. Timing and Extent of Electric Utility Industry Deregulation

PSCNY agrees that the NRC "must act now to be in a position to respond to the upcoming changes in the electric utility environment that could affect protection of public health and safety."<sup>1</sup> It now appears reasonable to assume that increased competition will result in economic pressures which will, in turn, affect how all generators of electricity (hydro, nuclear and fossil) address all aspects of the generation business, including operation and maintenance. Because cost-of-service regulation has resulted in marked differences in the cost of electricity on a regional basis, competition is considered, by rate regulators in high cost regions, to be worth pursuing to bring energy costs in line with national averages. The role of state and federal rate regulators is to establish a level financial "playing field" by introducing competition into the business of generating electricity.

It now seems likely that the electric generation industry will change from cost-of-service rate regulation to a system that allows market pressures to pervade all generation business decisions. It remains to be seen whether nuclear power will survive in a competitive environment. Should the nuclear option prove to be uncompetitive, then it will not be helpful for any state or federal agency to continue to advocate its financial support. Responsible government should ensure that uneconomic options are retired safely and efficiently. Accordingly, the NRC should expect its licensees to develop innovative methods for making the nuclear option profitable in a competitive environment, without reducing safety margins.

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<sup>1</sup>62 Fed. Reg. 47590.



The NRC should ensure that regardless of the economic pressures that are now being put in place during the transition to competition, managers of nuclear plants will continue to be faithful stewards of nuclear power by ensuring that plants are safely operated or retired. In the end, NRC regulations should enable the nuclear option to compete without sacrificing safety, and allow uncompetitive plants to retire on a least-cost basis.

## B. Stranded Costs

The NRC is not responsible for determining the economics of continued operation of nuclear plants, nor is it empowered to resolve issues related to stranded, sunk, running, or decommissioning costs where the solution involves electric rates.<sup>1/</sup> Therefore, even if the NRC "see[s] a need to interfere in the financial regulation of nuclear power plants with respect to the question of stranded costs"<sup>2/</sup> PSCNY maintains that the NRC has no authority to take action in an area traditionally regulated by state commissions. While we expect that it is not the intention of the NRC to interfere in financial regulation of traditional electric utilities, rate-regulators are understandably sensitive to language, such as the quotation above, which can be interpreted to mean otherwise.

### C.1 Funding Assurance if Plants Shut Down Prematurely

Funding nuclear plants which elect to shut down prematurely, where decommissioning funds would not have been fully collected, is an important issue. In the event that such funding is needed, however, PSCNY believes that rate regulators<sup>3/</sup> are in the best position to evaluate the reasonableness and best method of collecting such funds.

### C.2 When Does an Operator Cease To Be a Utility

According to the NRC's proposed regulations, an operator apparently ceases to be a "electric utility" when it does not recover the cost of electricity that it delivers through rates established by a regulatory authority either through traditional cost of service regulation or through a non-bypassable charge mechanism.<sup>4/</sup> PSCNY has already articulated its objection to the

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<sup>1/</sup> See POINT I above.

<sup>2/</sup> 62 Fed. Reg. 47591 (emphasis added).

<sup>3/</sup> e.g. state commissions.

<sup>4/</sup> 62 Fed. Reg. 47605.

proposed definition of "electric utility."<sup>1</sup> PSCNY offers further comment on the effect of that definition were it to be adopted. First, PSCNY agrees that responsibility for ensuring that non-"electric utility" licensees are able to fully fund nuclear plant decommissioning costs rests with the NRC where a license is transferred to a non-rate regulated entity. Alternatively however, PSCNY feels that state regulatory commissions remain the best evaluators of the reasonableness of operation and maintenance costs for "electric utilities."<sup>2</sup>

Second, after positing that a licensee may find itself recovering only a portion of its cost of operations under the jurisdiction of a rate-regulating authority, the NRC's proposed rule implies that decommissioning fund costs can be separated from all other nuclear costs. The NRC proposes that licensees will be considered an "electric utility" only for the fractional part of its annual decommissioning costs received under the jurisdiction of the rate-regulating authority. The result is that licensees no longer provided an opportunity to recover decommissioning costs either through cost-of-service regulation or a non-bypassable charge will have to provide for decommissioning costs under one of the methods specified in 10 CFR 50.75(e)(2). The four methods include: (1) prepayment of fees; (2) an external sinking fund combined with a surety method; (3) a surety method; or (4) for federal, state, or local government licensees only, a statement of intent indicating that the funds will be obtained when needed.

### C.3 Assurance Options

PSCNY does not oppose the NRC's proposed position that "new owners and operators should assume the obligation to safely operate the facility and assure adequate funding for decommissioning, as they have the incentives to properly manage and operate the units."<sup>3</sup> We assume that the NRC means that ratepayers would be

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<sup>1</sup> Supra, pp. 1-2.

<sup>2</sup> The NRC should be aware of Consolidated Edison Company of New York, Inc.'s ("Con Edison") October 16, 1997 reply to PSCNY's Notice Soliciting Comments on Nuclear Power. Con Edison's reply cites the proposed language for the NRC's definition of an electric utility and states the utility's opinion that the rates established by a regulatory authority must be sufficient to recover both operations and decommissioning costs, either through cost-of-service regulation or a non-bypassable charge mechanism. Such a position, if adopted, would likely frustrate efforts to subject nuclear generation to competition.

<sup>3</sup> 62 Fed. Reg. 47594.



responsible for no more than prudently incurred decommissioning costs, as opposed to "all ... decommissioning obligations."<sup>1</sup>

#### C.4 Financial Test Qualifications

To the extent that the PSCNY allows non-bypassable wires charges, plant owners will meet the definition of an "electric utility" for decommissioning purposes. To the extent that a licensee no longer qualifies as an "electric utility" under the new definition, the entity will need to provide the NRC with the appropriate financial assurance for both decommissioning using one of the four options provided under 10 CFR 50.75(e)(2), as discussed earlier.<sup>2</sup>

#### C.6 Impact of Accelerated Funding

Depending upon the methods of financial assurance imposed upon non-"electric utility" licensees, and the competitiveness of a particular plant, financial assurance mechanisms may precipitate early closure or impact the marketability of particular nuclear plants. PSCNY is considering recovery of nuclear decommissioning costs through non-bypassable charges, a process that would presumably satisfy the NRC's decommissioning funding concerns, and to attempt to optimize the market value of nuclear plants in an auction.

When a licensee continues to be a rate-regulated company with recovery of operations and maintenance expenses subject to the competitive market rather than cost-of-service regulation, that licensee would be considered a non "electric utility" for operations and maintenance expense (and all other "running costs") purposes and a "electric utility" for decommissioning purposes. The standard, sought here by the NRC, for decommissioning funding assurance should not be applied to other non "electric utility" licensees (i.e. commercial nuclear plants) for adequate funds for safe operation. The proposed definition of "electric utility" should be modified to allow electric utilities and non-electric utilities to recover operations and maintenance costs from the competitive market, without the support of a non-bypassable charge. If adequate revenues are not available from the competitive market to cover nuclear plant "running costs," the licensee has the option of closing the plant.

#### C.7 Potential Shortfalls From Underestimates of Costs

PSCNY has traditionally supported a process to allow a reasonable opportunity for the recovery of prudently incurred

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<sup>1</sup> 62 Fed. Reg. 47594.

<sup>2</sup>/ See Section C.2.

decommissioning costs. The NRC can apprise state rate regulators of underfunding, but the states are responsible for the collection and timing of decommissioning costs in rates.

C.9 If PUC or FERC oversight is either substantially limited or eliminated, are there other options for financial assurance of decommissioning that the NRC should consider?

Four mechanisms have already been proposed. The PSCNY does not oppose these four mechanisms.

#### E.1 Real Rate of Return

See comments under C.7.

#### E.2 Appropriate Time Period

See comment under C.7.

### F. Reporting on the Status of Decommissioning Funds

NRC should avoid duplication of state requirements. The PSCNY currently requires that its nuclear utilities report annually on the status of decommissioning funds for the plants they own. Specifically, New York utilities must report the yearly change in the qualified, non-qualified, and internal decommissioning funds to include activity related to deposits, earnings, expenses, and withdrawals for decommissioning. New York also requires specific information about decommissioning allowances granted in the utility's most recent rate proceeding, estimated decommissioning costs, and the progress of the fund in accumulating decommissioning dollars as compared to the time remaining until the scheduled date of decommissioning.

#### F.1 Contents

Rate regulators understand that the NRC has issued a draft regulation guide on the proposed requirement which would endorse FASB draft standard No. 158-B "Accounting for Certain Liabilities Related to Closure or removal of Long-Lived Assets." The PSCNY notes that in case the FASB standard is not adopted in a timely manner, other reporting requirements may need to be imposed in the interim.

#### F.2 Frequency

PSCNY feels that reports should be submitted annually for units nearing or in the process of decommissioning. This is consistent with FASB standards.

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