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(62FR47588)

Secretary of the Commission
Nuclear Regulatory Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on Proposed Rule "Financial Assurance Requirements for Decommissioning Nuclear Power Reactors"

Dear Sir:

As provided by Federal Register notice of September 10, 1997 (62 Fed. Reg. 47,588), we are submitting written comments on the Nuclear Regulatory Commission's ("NRC") proposed rule concerning "Financial Assurance Requirements for Decommissioning Nuclear Power Reactors." These comments are being submitted on behalf of Boston Edison Company, Cleveland Electric Company, The Toledo Edison Company, Centerior Service Company, Consolidated Edison Company of New York, Duquesne Light Company, MidAmerican Energy Company, Northern States Power Company, Rochester Gas & Electric Company, Wisconsin Electric Power Company, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Co., and Kansas City Power & Light Co., (referred to hereinafter as "Utilities").

The proposed rule would, among other things, revise the Commission's regulatory definition of "electric utility" found in 10 C.F.R. § 50.2. Those entities which remain electric utilities under the new definition would continue to provide decommissioning funding assurance under 10 C.F.R. § 50.75(e)(3). Those entities which are no longer considered electric utilities under the revised definition would be required to provide decommissioning funding assurance in accordance with 10 C.F.R. § 50.75(e)(2). For non-electric utilities, this could require up-front funding of decommissioning costs. The proposed rule would also require licensees to report periodically on the status of their decommissioning funds. Finally, the NRC's proposal would allow licensees to take a two percent (2%) credit for their earnings on decommissioning trust funds.

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As discussed more specifically below, the Utilities appreciate the Commission's concern for adequate decommissioning funding in the face of electricity restructuring and deregulation of the power generating industry. The Utilities maintain, however, that the Commission can achieve its desired results without some of the changes it has proposed and should endeavor to provide as much flexibility as possible to accommodate the differing approaches to deregulation that may emerge in different states. Moreover, since electricity restructuring is still in the process of being implemented, the Utilities maintain that the Commission should not overreact by imposing requirements that are so restrictive that they impose unreasonable economic burdens on entities no longer qualifying as electric utilities. It makes no sense subjecting deregulated licensees to economic requirements they cannot meet. Such an approach merely increases the risk of premature shutdowns and exacerbates the possibility of unfunded decommissioning liability. It its therefore imperative that the NRC allow deregulated licensees to chose reasonable funding options (options that provide reasonable, not absolute assurance, of funding[1]).

I. The Commission Should Consider Additional Approaches

The NRC's proposed rule does not consider other alternatives to address the potential impact of deregulation on decommissioning funding. In particular, rather than establishing very burdensome and prescriptive financial requirements that may be imposed suddenly on a licensee as a result of state deregulation (and that may produce other unintended results), the Commission should consider exercising its broad authority under the Atomic Energy Act (section 161 of the Atomic Energy Act of 1954) to require the continuing recovery of decommissioning costs through rates. The NRC already recognizes that it has the authority to take actions as warranted to protect the public health and safety. 61 Fed. Reg. 185 (September 23, 1996). Indeed, the Commission said it intends to work with state and federal agencies as electric utilities face deregulation to minimize the possibility of actions that would have an adverse safety impact. Id. at 49,713.

The public health and safety is much better served by assuring continued ratepayer funding than by establishing financial requirements that cannot be met. We, therefore, strongly suggest that the NRC consider a proactive rather than reactive approach to the decommissioning issue. The NRC's decommissioning funding regulations relied for nearly a decade on ratepayer funding, which the NRC has recognized as providing the requisite level of financial assurance for this liability. If, as it appears, this established funding mechanism is the best method of

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[1] As the Commission recently explained, the NRC's decommissioning funding regulations are intended only to require reasonable assurance of funding, not an absolute guarantee. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235, 262 (1996).

providing decommissioning funding assurance, the Commission should take actions to require its continuation even in a deregulated market.

For these reasons, the Utilities urge the Commission to consider exercising its authority to maintain ratepayer funding as a means of protecting the public health and safety. We also suggest that this and other reasonable alternatives be comprehensively considered in the NRC's regulatory analysis to ensure that any new decommissioning requirements are reasonable, appropriate, and cost effective.

II. The NRC Should Clarify the Scope of the Proposed Rule

The Commission has described its proposed rule as an amendment of the regulations on financial assurance for decommissioning (see 62 Fed. Reg. 47,588). This characterization is unfortunate, because the proposed changes are not limited to decommissioning funding requirements but also affect the financial qualifications requirements for operations. By changing the definition of electric utility, the NRC will affect the scope of financial qualifications review under 10 C.F.R. § 50.33(f) and thus establish a new test applicable to initial licensing, to transfers of control under 10 C.F.R. § 50.80, and to operating reactors. By failing to have made this impact clear, the NRC's description of the change has the potential of misleading some interested parties and does not adequately explain or analyze the implications of the rule. For this reason the NRC may wish to consider renoticing the proposed rule (with a more accurate description and analysis of the changes) before proceeding further.

III. The Proposed Definition of Electric Utility Should Be Revised

In its proposed rule, the Commission is proposing to amend the definition of electric utility in 10 C.F.R. § 50.2 as follows:

> Electric utility means any entity that generates, *transmits*, or distributes electricity and which recovers the cost of this electricity~~, either directly or indirectly,~~ through rates established ~~by the entity itself or~~ by a ~~separate~~ regulatory authority, *such that the rates are sufficient for the licensee to operate, maintain, and decommission its nuclear plant safely. Rates must be established by a regulatory authority either directly through traditional cost of service regulation or indirectly through another non-bypassable charge mechanism. An entity whose rates are established by a regulatory authority by mechanisms that cover only a*

> *portion of its costs will be considered to be an "electric utility" only for that portion of the costs that are collected in this manner.* ~~Investor-owned utilities, including generation and distribution subsidiaries, p~~/Public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, *that establish their own rates* are included within the meaning of "electric utility."

See 62 Fed. Reg. at 47605. In addition, the Commission is adding the following definitions of "cost of service regulation" and "non-bypassable charges" to 10 C.F.R. § 50.2.

> Cost of service regulation means the traditional system of rate regulation in which a rate regulatory authority allows an electric utility to charge its customers all reasonable and prudent costs of providing electricity services, including a return on the investment required to provide such services.
>
> Non-bypassable charges means those charges imposed by a governmental authority which affected persons or entities are required to pay to cover costs associated with operation, maintenance, and decommissioning of a nuclear plant. Affected individuals and entities would be required to pay those charges over an established time period.

Id.

The Utilities have a number of concerns with the NRC's proposed changes to the definition of electric utility in 10 C.F.R. § 50.2. First, the phrase "directly or indirectly" should not be deleted from the first sentence of the definition because the deletion could be interpreted as eliminating the exemption from financial qualification requirements applicable to non-owner operators who cover their costs under contracts with the owners. The NRC has traditionally held that such non-owner operators are "electric utilities" exempt from further financial qualification reviews because they recover their costs indirectly from the regulated rates of the owners who are contractually committed to pay the operators' expenses.

Not only should the NRC leave the phrase "directly or indirectly" in the first sentence of the definition, the NRC should further revise its regulations to make it clear that the financial qualifications and decommissioning funding requirements are the obligations of licensed owners. This is important both to clarify where the real financial responsibility lies and also to facilitate

the formation of operating service companies, which may be particularly important in a deregulated market. Where an operator has no ownership interest and is merely operating a nuclear plant under contract with the owners, that entity should not be liable for decommissioning funding and should not be subject to these regulations.[2]

Returning to the proposed definition of electric utility, the phrase "such that the rates are sufficient to operate, maintain, and decommission its nuclear plant safely" should be deleted from the first sentence because it unnecessarily invites challenges to the underlying sufficiency of the rates established by the regulatory authority. For example, in a proceeding involving a license transfer or reorganization, an intervenor might contend that the licensees are not electric utilities because the rates established by a state are not sufficient to operate, maintain or decommission the plant safely. As a result, litigation might result before the NRC concerning the sufficiency of the rates established by a state public utility commission (PUC), and the NRC might find itself acting as an arbiter of the state ratemaking process. The Utilities do not believe that the NRC or the licensees which recover their costs via rate regulation (and hence qualify as electric utilities) should be subjected to the possibility of such litigation.

Similarly, a challenge to the sufficiency of the underlying rate regulation could result from the addition of the second sentence of the proposed definition for electric utility coupled with the new definition for cost of service regulation. Specifically, a requirement that rates be established through traditional cost of service regulation which requires that "all" reasonable and prudent costs be recovered invites a challenge to the sufficiency of the licensee's rate regulation. Also, it is inconsistent with the ongoing practice of ratemaking agencies which, while they generally allow the inclusion of reasonable and prudent costs in the rate base, only require that the end result for cost of service regulation be just and reasonable. The Utilities, therefore, maintain that the modifier "all" should be deleted from the definition for the cost of service regulation.

Finally, the Utilities question why the Commission is proposing to delete investor-owned utilities, including generation and distribution subsidiaries, from the list of entities that may qualify as electric utilities. The reason for this deletion is not explained, and the change could imply or be construed as an indication either that investor-owned utilities can no longer qualify as an electric utility, or that investor-owned utilities are subject to different "electric utility"

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[2] In particular, we recommend adding a new, third sentence to section 50.75(a) stating, "The funding of decommissioning is an obligation of the owner or owners of facilities subject to this Part, and applicants for or holders of an operating license for a production or utilization facility that provide operating services for such facility and have no ownership interest therein are not subject to any decommissioning funding responsibilities under these regulations."

criteria that are public utility districts, electric cooperatives, and other types of licensees. Clearly, either inference would be inappropriate.

The Utilities support the Commission's proposed definition of electric utility in two particular aspects. First, the third sentence of the definition allowing a licensee to qualify as an electric utility with respect to those portions of its costs recoverable through rates, which we understand to be a provision allowing the NRC to decouple its review of decommissioning funding from other financial qualifications reviews, is very beneficial in concept. However, the provision also could be misconstrued as requiring review of the sufficiency of rate treatment. For example, suppose a public utility commission only allowed a ten percent contingency in the decommissioning amount included in rates, as opposed to 25% often used by the industry and NRC. Moreover, the third sentence could be misconstrued as requiring further financial assurance (e.g. prepayment, surety, or guarantee) for this unfunded contingency. Such an approach could rapidly escalate into complex proceedings and second-guessing of state ratemaking decisions. To avoid this misinterpretation, the NRC should revise the third sentence so that it avoids referring to "portions" of costs and instead states, "An entity whose rates are established by a regulatory authority by mechanisms that cover only decommissioning costs will be considered to be an 'electric utility' with respect to its decommissioning funding responsibilities."

The Utilities also support as a prudent concept the provision in the proposed definition allowing qualification as an electric utility based on non-bypassable charges. The Utilities do believe, however, that the definition of non-bypassable charges should be expanded to cover those instances in which state public service commissions or other agencies establish mechanisms for recovery of such costs in lieu of assessing them as "charges." For example, a decommissioning liability might be covered by so-called state "securitization" legislation, assumed by the state, or recovered through a tax.

For the foregoing reasons, the Utilities submit that the proposed definitions of electric utility, cost of service regulation and non-bypassable charges in 10 C.F.R. § 50.2 should be revised as set forth below :

Electric utility means any entity that generates, transmits, or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by a regulatory authority. Rates must be established by a regulatory authority either directly through traditional cost of service regulation or indirectly through another non-bypassable charge

mechanism. An entity whose rates are established by a regulatory authority by mechanisms that cover only decommissioning costs will be considered to be an "electric utility" with respect to its decommissioning funding responsibilities. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including organizations of any of the foregoing, that establish their own rates, are included within the meaning of "electric utility."

Cost of service regulation means the traditional system of rate regulation in which a rate regulatory authority allows an electric utility to charge its customers those reasonable and prudent costs of providing electricity services, including a return on the investment required to provide such services.

Non-bypassable charges means those charges imposed by a governmental authority which affected persons or entities are required to pay to cover costs associated with operation, maintenance, and decommissioning of a nuclear plant. Affected individuals and entities would be required to pay those charges over an established time period. Charges shall also include any other funding mechanisms imposed or established by a governmental authority to provide for payment of such costs.

IV. The Proposed Changes to Section 50.75(e)(3) are Redundant and Confusing

The proposed rule inserts several new sentences in section 50.75(e)(3) (the provision establishing funding methods for electric utilities) repeating language from the proposed definition of electric utility. The first two sentences of this proposed provision should be deleted for several reasons. First, they are redundant and add nothing to the section; the term "electric utility" has already been defined and there is no need to repeat the definition. Second, they are particularly confusing in this context. They suggest that to qualify as an electric utility for purposes of decommissioning funding, a licensee's rates must be sufficient for the licensee "to operate, maintain, and decommission its plant safely." See 62 Fed. Reg. at 47,606. There is no reason why financial assurance for operations and maintenance should be mentioned in this section when the definition of electric utility allows the decommissioning inquiry to be decoupled from other aspects of financial qualifications. Moreover, like the troublesome

language in the definition (as discussed earlier in these comments), these sentences suggest that qualifying as an electric utility requires a factual "sufficiency" review of a state's ratemaking decisions -- a result that would inject unnecessary complexity and controversy into these rules.

V. The Financial Assurance Requirements for Non-Electric Utilities Are Not Sufficiently Flexible to Accommodate Deregulation

In promulgating a new definition for electric utility, the Commission stated in the proposed rulemaking that it is concerned that the financial assurance mechanisms available in 10 C.F.R. § 50.75(e)(2) may not be available to some licensees who do not qualify as electric utilities. This regulation limits non-electric utilities to providing decommissioning funding assurance through (i) prepayment, (ii) an external sinking fund coupled with a surety or similar third-party guarantee for the outstanding balance, or (iii) a parent or self guarantee. The Commission asked for additional comments on alternative methods of financial assurance, including accelerating funding, which might provide the desired financial assurance (62 Fed. Reg. at 47,596).

The Utilities strongly support the idea of amending 10 C.F.R. § 50.75(e)(2) to allow non-electric utilities more flexibility in establishing alternative financial mechanisms to fund decommissioning of a nuclear facility. As stated at the beginning of our comments, it makes no sense to impose economic requirements on deregulated entities if those requirements cannot be met. Unreasonable or unrealistic economic requirements will simply increase the stress on deregulated entities, increase the possibility of premature shutdowns, and exacerbate the possibility of unfunded decommissioning liabilities. In sum, rather than promoting the public health and safety, unreasonable requirements may in fact diminish such protection. For these reasons, unless the NRC takes steps to require the continuation of ratepayer funding, it is imperative for deregulated entities to have available to them reasonable, flexible funding options.

For instance, 10 C.F.R. § 50.75(e)(2) should be amended to provide greater flexibility in the parent company guarantee or self guarantee provisions of Appendix A and Appendix C of 10 C.F.R. Part 30 respectively. Among other tests, Appendix A requires for a parent company guarantee that the parent have a net worth of at least six times the estimated cost of decommissioning. Appendix C requires, among other tests, that the licensee have a net worth of at least ten times the estimated decommissioning cost. Both of these amounts were originally developed for materials licensees and the Utilities submit that they are excessive for decommissioning funding by reactor licensees. Lowering the required amounts to one or two times the estimated decommissioning costs would be more than adequate.

Further, 10 C.F.R. § 50.75(e)(2) should be amended to allow a licensee to utilize parent or self guarantees in conjunction with other authorized financial assurance mechanisms under 10 C.F.R. § 50.75(e)(2). The regulation currently precludes the use of a parent or a self-guarantee in combination with any of the other financial assurance mechanisms provided for by the regulation. It is, however, unreasonable, particularly in the era of the competitive marketplace, to prohibit a licensee from combining the different authorized financial assurance mechanisms into the most economical package in order to provide the reasonable assurance of decommissioning funding required by the NRC regulations. Nor does it make sense to allow a licensee to provide a guarantee for the entire decommissioning liability but not for a lesser amount when a portion has already been accumulated in trust.

A modest acceleration of decommissioning fund payments into an external sinking fund is also an approach that could be reasonable, provided the period of time is not too short. However, too great an acceleration (and in particular, prepayment) could adversely impact the non-electric utilities' competitiveness in the marketplace and force early closure of the affected nuclear facilities. The Utilities also suggest that the timeframe for the accelerated payments should not be based solely on an arbitrary number of years but should consider the remaining operating license life of the plant. For example, the accelerated funding might require accumulation of necessary funds either within ten years or within two-thirds of the remaining license term, which ever is greater. This approach would avoid prejudicing those non-electric utilities which have many years remaining on their operating licenses.

In addition to the above-suggested amendments to 10 C.F.R. § 50.75(e)(2), Utilities believe that the regulations should also be amended to allow other mechanisms to be developed by a governmental authority (e.g., states) or the licensees themselves and approved by the Commission once reasonable assurance of decommissioning funding has been established.

VI. Rate of Return on External Sinking Funds

The Commission has proposed that a two percent (2%) annual real rate of return be allowed to licensees on external sinking funds from the time of the funds' collection through the decommissioning period. The Utilities respectfully submit that this rate of return is inadequate and inconsistent with prior promulgations by the agency. In the Regulatory Analysis Guidelines of the Nuclear Regulatory Commission, NUREG/BR-0058, Revision 2 (December 20, 1995), the Commission adopted a real discount rate of 7% as recommended in the latest version of the Office of Management and Budget Circular A-94 (October 29, 1992). Moreover, in a prior version of its own regulatory analysis guidelines (SECY93-167, June 14, 1993), the Commission stated that a 7% discount rate should be used unless there are unique circumstances where the

regulatory analysis considers consequences in excess of 100 years (and even where the analysis extends beyond 100 years, 3%, not 2%, should be used for present worth analysis). These promulgations provide evidence not only that a 2% real rate of return on the extended sinking funds is inadequate but also that a 7% annual real rate return is both reasonable and justifiable.

VII. Conclusion

Utilities appreciate the opportunity to provide these comments on the proposed rule on financial assurance requirements for decommissioning funding. Utilities recognize the legitimate concerns arising as a result of electricity restructuring that the Commission seeks to address in this proposed rule. Utilities, however, caution the Commission to not promulgate a rule which is more stringent than necessary, especially when implementation of electricity restructuring is far from complete. Otherwise, the adverse effects could not only be detrimental to companies already in the industry but could also result in early nuclear plant closings. It would be unfortunate if the NRC's regulations had the effect of increasing unfunded decommissioning liability, but this could indeed be the result if unreasonable or unrealistic requirements force premature plant closures. Utilities respectfully submit that the suggested amendments provided herein would greatly assist the industry and still provide the Commission with the assurance that adequate funds will be available to decommission nuclear facilities.

Sincerely yours,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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