IN THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Greta J. Dicus
Edward McGaffigan, Jr.
Jeffrey Merrifield

In the Matter of: **Docket No.** PRM-50-64

Petition for Rulemaking Regarding
Joint and Several Liability of Non-Operating
Co-Owners of Nuclear Power Plants.

PETITION FOR RULEMAKING

I. INTRODUCTION

1. This petition for rulemaking is filed by Atlantic City Electric Company, Austin Energy, Central Maine Power Company, Delmarva Power & Light Company, South Mississippi Electric Power Association, and Washington Electric Cooperative, Inc. ("Petitioners"). Petitioners are all non-operating co-owners of nuclear power plants. The petition is filed pursuant to 5 U.S.C. §§ 553(e) and 10 CFR Part 2, Subpart H.

2. On August 13, 1997, the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") issued a "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" ("Policy Statement") (62 Fed. Reg. 44071).

The Policy Statement was issued by NRC after consideration of public comments on a draft policy statement published in the *Federal Register* on September 23, 1996 (61 Fed. Reg. 49711). The purpose of the Policy Statement was to discuss NRC's concerns regarding the potential safety impacts on NRC power reactor licensees which could result from economic deregulation and restructuring of the electric utility industry and the means by which NRC intends to address those concerns.

3. In the Policy Statement, the Commission correctly recognized that many licensed nuclear power plants are jointly-owned facilities. The Commission also recognized that "co-owners and co-licensees generally divide costs and output from their facilities by using a contractually-defined, *pro rata* share standard." The Commission further stated that it believed this *pro rata* sharing of plant costs "should continue to be the operative practice." However, the Commission then went on to state that such *pro rata* cost-sharing arrangements might be ignored by the Commission in certain circumstances.

> [The Commission] reserves the right, in highly unusual situations where adequate protection of public health and safety would be compromised if such action were not taken, to consider imposing joint and several liability on co-owners of more than *de minimus* shares when one or more co-owners have defaulted.[1]

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[1] The Commission also indicated that it viewed all co-owners as "co-licensees who are responsible for complying with the terms of their licenses." It is of course true that licensees must comply with their licenses.

4. A group of publicly-owned joint owners sought Commission reconsideration of the above-quoted portion of the Commission's Policy Statement and, when reconsideration was not forthcoming, petitioned for judicial review in the U.S. Court of Appeals for the D. C. Circuit, *American Public Power Association, et al. v. Nuclear Regulatory Commission, et al.* (Case No. 98-1219). Petitioner later agreed to dismissal of the case after discussing the matter with NRC counsel and receiving NRC authorization to make the following representation to the court:

> Counsel for petitioners is authorized to state that it is the NRC counsel's position that, should petitioners seek to raise and litigate *ab initio* the legal issue of whether the NRC has the authority to impose joint and several liability on minority licensee/owners, such a challenge would not be precluded by petitioners' not pursuing the present litigation. NRC counsel states that it can foresee no circumstances in which it would argue otherwise.

II. THE CURRENT STATE OF CONFUSION

5. Thus, notwithstanding dismissal of the petition, it is clear that no one is precluded from raising and litigating in any future case in which NRC seeks to impose joint and several liability on a licensed co-owner, any legal challenge to the imposition of joint and several liability, including the right to raise and litigate the issue whether NRC has the legal authority to impose such liability. However, this still leaves the above-quoted portion of the NRC's Policy Statement in effect—whatever "in effect" may mean for such a Policy Statement in these circumstances. As a result, there remains substantial

confusion about individual joint owners' potential liabilities. The quoted portion of the Policy Statement appears to create the possibility that the owner of a relatively small ownership share of a nuclear power plant could incur the burden of all, or an excessive portion of a plant's costs if other co-owners or the operators were to default or become financially incapable of bearing their share of the burden. Further, there is no information provided as to what would constitute a "*de minimus*" share, and the particular circumstances under which the Commission might find the imposition of joint and several liability necessary to protect the public health and safety are undefined. These factors considered collectively create a vast cloud of uncertainty as to the potential liability of a joint owner. This can adversely effect the ability of the joint owners to raise capital in the financial markets (or the costs of raising capital) even for activities that are unrelated to nuclear power plant operations. This is especially unsettling to an industry undergoing consolidation and restructuring. There is an emerging market for the sale of nuclear power plants and interests in those plants, and the Commission's Policy Statement might stifle the emergence and vitality of this market. Finally, the unsettled nature of this issue could serve as a "poison pill" to co-owning utilities seeking to be acquired by other utilities, since actual or projected decommissioning costs are an unknown contingent liability.

III. THE PROPOSED RULE

6. The Commission has acknowledged on numerous prior occasions the need for a predictable and stable regulatory process. The situation described above is the antithesis of this. Petitioners submit that the following rule change is necessary in order to eliminate confusion and establish a stable and predictable regulatory process, at least in this particular area. Thus, Petitioners propose the following language to be included among the "Enforcement" provisions of 10 CFR Part 50:

> Whenever the Commission finds it necessary or desirable to impose additional requirements by rule, order or amendment on a person subject to this part to promote or protect the public health and safety, the additional requirements will be directed first to the person licensed to possess and operate the facility. If it becomes necessary to impose additional requirements on persons who only own the facility, and were never licensed to operate, then the Commission will not impose greater than the agreed allocation of responsibility among all the owners and operators reflected in applicable joint ownership or similar agreements pertaining to the plant.

IV. REASONS FOR THE RULE

7. The prospect of joint and several liability, even in limited circumstances, is directly contrary to the contractual basis on which numerous joint ownership arrangements for nuclear plants have been structured. In most, if not all, such arrangements, ownership commitments were made and substantial sums of capital raised based on a contractual *pro rata* allocation of liability for plant costs. The reasonable expectations of co-owners and investors (*e.g.*, bondholders), as well as rate commissions,

would be completely overturned by the imposition of joint and several liability, especially given the Commission's prior acceptance of *pro rata* allocations. Assessments of assets and liabilities for purposes of a potential sale of ownership interests is made more difficult by speculation about the meaning of the Commission's Policy Statement and the circumstances in which the Commission might carry out its threat to impose joint and several liability.

8. Moreover, nothing in the Atomic Energy Act of 1954, as amended ("AEA"), or NRC's regulations authorizes the Commission to impose any "liability," much less "joint and several liability," as those terms are ordinarily understood. At most, the Commission may, in the exercise of its regulatory powers under the AEA, impose certain substantive safety obligations on licensees. The Commission has no authority under the AEA, comparable to the U.S. Environmental Protection Agency's authority under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), to institute safety improvements at taxpayers' expense and then sue the licensee for reimbursement. Thus, the Commission's statement about joint and several liability is all the more confusing.

9. At most, the quoted Commission statement regarding joint and several liability might be understood as a Commission statement that it could hold co-licensees jointly and severally responsible for meeting specific substantive safety obligations under the AEA. However, even as so understood, the Commission statement is directly

contrary to the contractual basis on which numerous joint ownership arrangements for nuclear power plants have been structured. In most, if not all, such arrangements, ownership commitments were made and substantial sums of capital raised based on a contractual *pro rata* allocation of responsibility for plant costs. NRC has long acquiesced to such arrangements. The reasonable expectations of co-owners, investors, bondholders and rate commissions would be completely overturned by imposition now of joint and several liability. This is all the more evident given that NRC acknowledged in the Policy Statement that it implicitly accepted the practice of *pro rata* allocation in the past.

10. Moreover, there is no need for such a draconian Commission imposition of liability. Nuclear power reactor licensees, even licensees in bankruptcy, have always been able to comply with Commission-mandated safety requirements, and the Commission has never confronted the situation where a nuclear power reactor licensee was financially unable to meet its safety obligations.[2] Even in the very extreme case, with the operating licensee in bankruptcy, the Commission's safety authority is preserved. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 506-507 (1986) ("The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety.") *See also, Ohio v Kovacs*, 469 U.S. 274 (1985); *Penn Terra, Ltd. v.*

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[2] The unique situation at TMI Unit 2, following the accident, is ameliorated by the accident cleanup insurance requirements in 10 CFR § 50.54(w).

Department of Environmental Resources, 733 F. 2d 267 (3rd Cir. 1984) (automatic stay under bankruptcy laws does not stay injunction to require compliance with environmental laws); *In re METCOA, Inc., fdba the Pesses Company*, Adversary Case No. B-85-0092 (Bankr., N.D. Ohio, Nov. 18, 1996).

11. The quoted Commission statement on joint and several liability is also inconsistent with the Commission's September 4, 1997, "Proposed Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants" (62 Fed. Reg. 47588). In that proposed rule, the Commission noted the difficulties that could arise from attempting to impose joint liability on co-owners and co-licensees for decommissioning costs. The Commission noted that these difficulties include problems with respect to potential disagreement on decommissioning methods, the inhibition of flexibility, the weakening of competitive position, and difficulty in implementation (62 Fed. Reg. 47594). These same factors should be considered decisive here as well.[3]

12. NRC's quoted statement regarding joint and several liability raises serious legal questions. No provision of the AEA authorizes the Commission to impose "joint and several liability," as the term is ordinarily understood. Moreover, the imposition of joint and several liability, if understood as the imposition of a joint and several safety regulatory obligation on a group of co-owner licensees, is contrary to the overall intent

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[3] The final rule is consistent with the proposed rule in this respect. 63 Fed. Reg. 50465 (Sept. 22, 1998)

of the AEA that there be a proportionality or symmetry between the safety obligations imposed by the Commission and the scope of licensed activity. Given that ownership by itself poses no safety hazard, it would be unreasonable for the Commission to impose an onerous safety obligation on non-operating co-owners simply because the person with the real safety obligation—the operator—is facing financial difficulty. This is especially the case given that the Commission has ample authority to assure the financial qualifications of operating licensees. Atomic Energy Act § 182a. The Policy Statement raises further questions of impermissible retroactivity, as applied to those currently owning nuclear power reactors. A Memorandum of Law is attached hereto in further support of this petition.

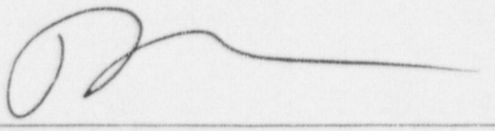
13. Finally, the Commission has plenary authority to prevent an unsafe plant from operating, and a plant which cannot operate is a liability rather than an asset. In the real world, it is in the interest of all of the licensees, co-owners and operators, to agree as to the funding of necessary safety measures so that the plant may operate. *See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and* 2), CLI-88-10, 28 NRC 573 (1988). The Commission's Policy Statement interferes with the right of licensees to reach their own decisions as to allocation of safety expenses. Everyone has the same objective—safe plant operation—and Commission interference in allocation decisions among co-owners is not necessary for safety, and it creates

potentially huge and unnecessary problems for co-owning utilities as they seek to consolidate, restructure, or spin off assets.

V. CONCLUSION

14. For the above reasons, petitioners respectfully request that this petition be granted, and that the regulations in 10 CFR Part 50 be amended as suggested.

Respectfully submitted,



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Attachment