30

North Atlantic

North Atlantic Energy Service Corporation
P.O. Box 300
Seabrook, NH 03874
(603) 474-9521

The Northeast Utilities System

November 24, 1997

Docket No. 55-443
NYN-97116

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

Attention: Rulemakings and Adjudications Staff

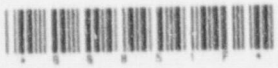
Seabrook Station
Comments on the *Proposed Rule for Financial Assurance Requirements for Decommissioning Nuclear Power Reactors*
(62 FR 47588 – September 10, 1997)

These comments are submitted by North Atlantic Energy Service Corporation (North Atlantic) in response to the subject *Federal Register* notice. North Atlantic is the managing agent and operator of Seabrook Station. Enclosure 1 provides detailed comments and recommendations on the proposed rule.

Seabrook Station is jointly owned by 11 investor-owned, municipal-owned and cooperatively-owned utilities whose sales are regulated by four states and the Federal Energy Regulatory Commission. Although some are further along than others, each of the states is in the process of restructuring its electric industry to establish competition among electricity suppliers.

Even at this early stage of deregulation we believe that the revisions proposed by the NRC do not fully address how future nuclear plant owners will be structured and how they will recover their decommissioning costs. As a first step, we believe that the financial assurance and decommissioning funding tests must be separated. In particular, we believe that the term electric utility should only be applied when the determination of financial qualification is made. For decommissioning, we believe that financial assurance tests specific to decommissioning should be used.

It is important to note that many of the arrangements for the recovery of decommissioning costs have yet to be worked out between the affected utilities and their regulators. These arrangements will all have the same fundamental goal of providing reasonable assurance that decommissioning



D510

will be fully funded. It is very likely, however, that some funding assurance arrangements will take forms that are not even being discussed yet. The NRC should ensure that its regulations provide licensees the flexibility to employ these creative solutions while at the same time achieving the underlying goal of full decommissioning funding assurance. The specific comments made in the enclosure are not meant to limit the NRC's consideration of even more flexible arrangements but simply address mechanisms and issues that we are aware of today.

North Atlantic has had the opportunity to input substantively into the comments being provided by the Nuclear Energy Institute and supports those comments. North Atlantic considers the concept in those comments of a "qualified nuclear entity" as determined by certain tests to be sound. We endorse this approach. Further, we believe that flexibility in the NRC's regulations is essential and the NEI proposal provides such flexibility. Our comments represent a somewhat less comprehensive approach than NEI's towards achieving the separation of the financial qualification and decommissioning funding assurance regulations. The detailed comments provided in the enclosure to this letter are meant to support NEI's comments.

Should you have questions regarding these comments, please feel free to contact Mr. Terry Harpster, Director of Licensing Services at (603) 773-7765.

Very truly yours,

NORTH ATLANTIC ENERGY SERVICE CORP.

Ted C. Feigenbaum
Executive Vice President and
Chief Nuclear Officer

cc: Adrian Heymer, NEI
Nuclear Energy Institute
1776 I Street, NW
Suite 400
Washington, DC 20006-3708

Craig W. Smith, NRC Project Manager, Seabrook Station
R. K. Lorson, Senior NRC Resident Inspector, Seabrook Station

United States Nuclear Regulatory Commission
Document Control Desk
Washington, DC 20555-00021

ENCLOSURE 1 TO NYN-97116

Enclosure 1

Detailed Comments on Proposed Rule Changes Regarding Funding Assurance for Decommissioning

I. Definition of Electric Utility

The Proposed Rule Needs to be Revised to Reflect Industry Restructuring

The NRC's proposed rule revises the definition of an electric utility to reflect the anticipated form of NRC licensees under the restructuring of the electric utility industry. However, applying the revised definition creates several difficulties for both licensees and the NRC in achieving the underlying objective of the decommissioning rule, namely the guarantee of the availability of decommissioning funds. As explained in the following, the rule as proposed unnecessarily limits a licensee's ability to demonstrate financial assurance and unnecessarily complicates the NRC's review of a licensee's assurance of decommissioning funding.

The Definition of an Electric Utility was Intended as a Financial Qualification Test Not a Decommissioning Funding Assurance Test

The definition of an electric utility that exists today was added to the NRC's regulations in support of a revision to the NRC's rules that eliminated NRC financial qualification reviews for electric utilities (49CFR35747). The inclusion of the definition of an electric utility was intended solely to address the test that a prospective licensee have assurance of the funds necessary to safely operate a nuclear plant. This was made clear in the statement of considerations that accompanied the rule where the NRC stated its concerns. Examples of the NRC's intent can be seen in the following statements:

> "Even though the rate process does no more than assure that regulated utilities will have the financial resources needed to operate safely, this limited assurance is all that the financial qualifications rule was intended to achieve." (49CFR35749) (Emphasis added), and,
>
> "Its (the NRC's) concern is that reasonable and prudent costs of safely maintaining and operating nuclear plants will be allowed to be recovered through rates." (49CFR35749) (Emphasis added)

The NRC continued this philosophy of applying the electric utility test when it issued the 1985 proposed revisions to its rules that added decommissioning criteria for nuclear facilities (50CFR5600). There, the NRC proposed adding requirements for what constituted acceptable decommissioning funding assurance mechanisms. The reason why the definition of electric

utility was applied to decommissioning appears to have occurred because the decommissioning funding assurance rules were originally proposed as an addition to § 50.33, Contents of Applications. Since the NRC's regulations already considered a licensee's status as an electric utility as the seminal criteria for whether a potential licensee was financially qualified, it followed that the NRC would use this as a test of the certainty of a licensee's recovery of decommissioning costs on an ongoing basis. The NRC based its distinction between the financial assurances required for electric utilities and non-electric utilities on the "guarantee" that recovery of operating costs allowed by state utility commissions presented.

In the 1988 final rule that established the requirements for the decommissioning of nuclear facilities (53FR24018), the NRC moved its criteria out of § 50.33 into a new section, § 50.75, Reporting and Recordkeeping for Decommissioning Planning. The criteria that established which decommissioning funding assurance requirements applied to a licensee still, however, contained the financial qualification test of whether the entity was an electric utility.

The NRC fully understood that FERC and the state utility commissions had the established responsibility for setting rates to allow the recovery of decommissioning costs. Illustrative of how the NRC saw the utilities commissions' roles is a statement in the section addressing unfunded decommissioning costs. There the NRC stated, "because public utility commissions are to set a utility's rates such that all reasonable costs of serving the public may be recovered and because NRC requirements concerning termination of a license are part of the reasonable cost of having operated a reactor, it is reasonable to assume that added costs beyond those in the prescribed amount could be obtained if the latter were too low as suggested by the commenters."

The linkage between the electric utility test and the objective of assuring full decommissioning funding merely recognized the then-existing regulatory "guarantee" established by the FERC and state utility commissions' allowance of the recovery of decommissioning costs.

The Proposed Rule Should Decouple the Financial Qualification and Decommissioning Funding Assurance Tests

The NRC, in its proposed rules has modified its definition of an electric utility to include recognition of the recovery of costs through either traditional cost of service rate recovery or through the establishment of a non-bypassable cost recovery mechanism (e.g. wires charge). This approach does not recognize that cost recovery under restructuring will not be as well defined as the NRC's proposed rules anticipate.

The restructuring of the electric utility industry is still in its early stages, however, several examples exist which point out the unnecessary results that will arise from the rule as proposed. In Massachusetts, utilities are restructuring in accordance with the model rules issued in Massachusetts Department of Public Utilities (MDPU) Docket 96-100. Those model rules encourage the filing of offers of settlement as a way to expedite the restructuring process. Individual utility restructurings, therefore, are being carried out in accordance with specific

settlement agreements involving the Massachusetts Attorney General, other parties and the utility.

Typically, these Massachusetts settlement agreements, which are currently pending before the Massachusetts Department of Public Utilities for approval, distinguish between recovery of decommissioning costs for nuclear plants and the going forward operating and capital additions costs for nuclear plants. The settlement agreements provide for full recovery of post-shutdown, decommissioning and site restoration costs of nuclear plants through a contract termination charge (CTC). This CTC is a non-bypassable "wires charge".

However, under these settlements, the going forward costs of operation of nuclear plants are typically divided with a portion of those costs recovered through the same non-bypassable CTC and the remainder subject to market based sales which result in either the over- or under-recovery of the going forward costs. Thus, despite the fact that these settlement agreements assure a Massachusetts licensee of recovery of 100% of its decommissioning costs through the CTC, it is not clear whether the NRC proposed revision of §50.75 would impose a prefunding requirement upon such a licensee because the new definition of electric utility combines all costs "to operate, maintain and decommission its nuclear plant" and §50.75 appears to incorporate that combined concept rather than focusing on decommissioning costs alone. Since the Massachusetts settlements assure 100% recovery of decommissioning, no prefunding is necessary to achieve the purposes of §50.75.

In New Hampshire, the utility restructuring order issued by the New Hampshire Public Utilities Commission (NHPUC) contained an approach that anticipated less than full recovery of nuclear operating costs as stranded costs, but that nonetheless recommended full recovery of decommissioning costs via a stranded cost approach. The NHPUC's Plan on Restructuring the Electric Industry, issued February 28, 1997 contained the following:

> "In all instances, companies will not be allowed to add the going forward costs of nuclear operation as stranded costs, with the exception of decommissioning costs. We believe the public good is served by allowing distribution companies to recover decommissioning costs through stranded cost charges...."

While this order has been temporarily stayed pending litigation, this specific provision would create more "partial electric utilities" that nevertheless had full regulatory guarantee of decommissioning cost recovery.

The Solution is to Separate the Financial Qualification and Decommissioning Funding Assurance Tests

The tests that the NRC has established in its proposed definition of electric utility are useful ones and would give a clear indication of the assurance that a licensee (or potential licensee) needed to

provide. However, by referring solely to the definition of electric utility as a matter of convenience could create "partial electric utilities" and require unnecessary prefunding.

A solution is to adopt the definition of electric utility proposed by the NRC as the test applied solely for financial qualification. In addition, §50.75 should be modified to apply financial tests specific to decommissioning funding in determining whether "prefunding" should be required. The concepts used by the NRC in modifying its definition of electric utility should be included in §50.75. North Atlantic believes that the NEI concept of a "qualified nuclear entity" provides a suitable replacement to the use of the term "electric utility". Another acceptable alternative is to use the suggested language provided as Attachment 1.

North Atlantic also endorses the three-tiered approach being proposed by NEI which grants additional flexibility in the evaluation of a licensee's ability to reasonably assure decommissioning funds.

II. Unavailability of the Financial Assurance Mechanisms Envisioned Under 10CFR50.75(e)(2)

As the Commission is well aware, Great Bay Power Corporation (Great Bay), a 12.1324% owner in Seabrook Station has been found to not meet the definition of an electric utility contained in §50.2. As a result, Great Bay must satisfy the more stringent funding requirements of §50.75(e)(2).

As of July 1997, Great Bay had been unsuccessful in locating any of the funding mechanisms described in the decommissioning regulations and has sought and received a continued temporary exemption from those requirements. It is continuing to search diligently for a financial instrument that would satisfy the Commission's requirements but has been unsuccessful.

The only alternatives that Great Bay has been able to identify would have required them to fully fund or collateralize the insurance company or surety in the form of a pre-funding of the total obligation by Great Bay. More recent discussions with insurance companies have found that the shifting of decommissioning risk to them is a difficult hurdle. The insurance companies have been focusing on an annuity type of product that is based on cash security provided by Great Bay up front. This in essence becomes simply another form of prepayment.

Great Bay's experience is consistent with the Commission's own findings that the forms of guarantees called for in §50.75(e)(2) were not available. In the statement of considerations for the final rule on General Requirements for Decommissioning Nuclear Facilities the Commission found:

> "Use of insurance for non-accident related decommissioning was found in an earlier study performed for the NRC, NUREG/CR-2370 (Ref.16), to

have potentially serious problems of insurability and moral hazard and is not currently available." (53FR24034) and,

"Finally, earlier studies in NUREG-0584 found that surety bonds were not generally available in the amounts necessary for decommissioning power reactors." (53FR24034).

While it is impossible to predict with certainty the form that restructured nuclear plants ownership will take, the examples we have to date in Massachusetts and New Hampshire indicate that it is likely that the vast majority of generating companies that will exist after restructuring will have an assured recovery mechanism through a non-bypassable charge. The result will be that there will be no new market created for such financial instruments leaving those few utilities that must seek them saddled with an extremely large operating expense that their competitors will not have to incur.

III. Alternative Methods of Financial Assurance

In its proposed rulemaking, the Commission has asked for comment on alternative methods of financial assurance given that some entities may not be able to obtain the assurance required under §50.75(e)(2). We believe that additional consideration of such alternatives is warranted.

Assignment of Rights to Decommissioning Funds Collected

In the example cited above involving Massachusetts utilities, should a new entity purchase a portion of a nuclear plant owned by a Massachusetts utility the resulting licensee would not be part of the former corporate organization. In that case, under the terms of the settlement agreement the distribution companies of the former owner would continue to collect decommissioning costs under a non-bypassable charge. The monies collected under that charge would then need to be assigned to the new owner of the nuclear plant. The NRC needs to recognize that this type of arrangement is likely in those cases where interests in nuclear plants are sold and the distribution company is collecting the decommissioning cost.

The language as proposed in Attachment 1 addresses this event.

Accelerated Funding

Accelerated funding has been offered as one potential alternative to the funding assurance requirements of §50.75(e)(2). While this mechanism has some attraction, there are certain aspects that appear problematic.

The period of time over which the accelerated funding would occur is undefined by the NRC. Clearly, this would vary depending on how long a nuclear plant had been operating when this new requirement was imposed. For a newer unit with greater than 25 years remaining on its

license, it may be appropriate to accumulate funds over a 15 or 20 year period. The unfunded decommissioning obligation for a plant early in its life is very large and spreading that cost over a short time period of 5 or even 10 years would impose competitive inequities when compared to licensees recovering funds via a cost of service or non-bypassable charge mechanism or those accelerating the far smaller balances of older plants.

The tax implications of accelerated funding must also be considered and we would request the NRC to approach the Internal Revenue Service for a ruling on this matter.

ATTACHMENT 1 TO NYN-97116

Attachment 1

Proposed Revisions to the NRC's Financial Assurance Proposed Rulemaking

§ 10CFR50.2 *Non-bypassable charges*

1. Insert two new sentences at the end of the definition as follows. - Monies collected under a non-bypassable charge must be available to a licensee through assignment or some other mechanism. Other state-mandated provisions that impose guarantees of decommissioning funding (e.g. imposition of joint and several liability) on the owner(s) of a nuclear power plant are to be considered to provide guarantees equivalent to non-bypassable charges.

§ 10CFR50.75(e)(2)

1. Renumber section as (e)(3)
2. Delete - "For a licensee other than an electric utility, acceptable methods of providing financial assurance for decommissioning are -"
3. Insert - "For a licensee that does not recover any of its decommissioning costs through rates established by a regulatory authority either directly through traditional cost of service regulation or indirectly through another non-bypassable charge mechanism as defined in §50.2, acceptable means of providing financial assurance for decommissioning are described in (i) through (iv) of this section.

§ 10CFR50.75(e)(3)

1. Renumber section as (e)(2)
2. Delete - "For an electric utility, acceptable methods of providing financial assurance for decommissioning are -"
3. Insert - "For a licensee that recovers all or part of the costs to decommission its nuclear plant through rates established by a regulatory authority, either directly through traditional cost of service regulation or indirectly through another non-bypassable charge mechanism as defined in §50.2, acceptable means of providing financial assurance for decommissioning are described in (i) through (iv) of this section. An entity whose rates as so established cover only a portion of its decommissioning costs may use the methods described in (i) through (iv) of this section for only that portion of the decommissioning costs collected through such rates. The Commission reserves the right to take the following steps in order to assure a licensee's adequate accumulation of decommissioning funds: review, as needed, the rate of accumulation of decommissioning funds: and either independently or in cooperation with either the FERC or the State PUCs, take additional actions as appropriate on a case-by-case basis, including modification of a licensee's schedule for accumulation of decommissioning funds."