

SHAW, PITTMAN, POTTS & TROWBRIDGE  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N STREET, N.W.  
WASHINGTON, D.C. 20037-1126  
(202) 663-8000  
FACSIMILE  
(202) 663-8007

GERALD CHARNOFF, P.C.  
(202) 663-8032

NRC Operating License No. N-26  
Docket No. 50-443  
NYN-96031

August 11, 1997

Samuel J. Collins, Director  
Office of Nuclear Reactor Regulation  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852

Dear Mr. Collins:

This letter is in response to the exemption order issued on July 23, 1997 by the Nuclear Regulatory Commission's ("NRC") Office of Nuclear Reactor Regulation (hereinafter referred to as "Staff") in which the Staff extended the January 22, 1997 temporary exemption previously granted Great Bay Power Corporation ("Great Bay") from certain requirements of 10 C.F.R. § 50.75(e)(2). Great Bay believes that the Staff has correctly found that Great Bay meets the requirements for an exemption under 10 C.F.R. § 50.12, but that the Staff has not correctly resolved Great Bay's request for reconsideration on whether it is an "electric utility" under the Commission's current regulations.

The NRC's Exemption Action Conforms To Its Regulations.

As the Staff observed, the supplemental financial information submitted by Great Bay on June 4, 1997 shows that Great Bay "will be able to generate cash flow in excess of that needed to fund its proportionate share of operating costs and decommissioning funding obligations" (page 5). Further, as the Staff noted, Great Bay has made good faith efforts - and Great Bay will continue to exert such efforts - to secure a surety bond at reasonable costs. However, as reported by Great Bay on July 7, 1997, it appears that, in the absence of a number of utilities who might require a financial assurance mechanism such as a surety bond, the only insurance mechanism for a single facility would require the utility to pre-fund the entire obligation. As the Staff observes, for Great Bay to fund or collateralize the insurer

9708190293 970811  
PDR ADOCK 05000443  
P PDR



ADDI

Samuel J. Collins, Director

August 11, 1997

Page 2

for its entire decommissioning obligation "would make it difficult, if not impossible, for Great Bay to meet its day-to-day obligations," and therefore "the underlying purpose" of 10 C.F.R. § 50.75(e)(2) "would not be served by attempting to apply the rule under these circumstances" (page 8).

Thus, as the Staff found, Great Bay meets the criteria for an exemption under 10 C.F.R. § 50.12. Indeed, Great Bay believes that under the circumstances a longer extension than that granted by the Staff would have been appropriate, both because Great Bay has shown sufficient cash flow to meet its operating costs and decommissioning funding obligations and because a longer exemption period would allow changes to occur in the industry that might lead to a market being developed for a surety bond mechanism, such as that which Great Bay has so far unsuccessfully sought to obtain. Nevertheless, the extension of the exemption provided by the July 23, 1997 order does provide Great Bay with necessary, immediate relief and Great Bay will certainly comply with the conditions attached to the exemption by the Staff.

Under NRC's Current Regulations Great Bay Is An "Electric Utility".

Great Bay does not believe that the Staff's latest exemption order correctly resolves its February 21, 1997 petition for partial reconsideration of the the earlier January 22, 1997 exemption order. In that petition, Great Bay had requested the Staff to reconsider its preliminary finding in the January 22, 1997 exemption order that Great Bay is not an "electric utility" as defined by the NRC in 10 C.F.R. § 50.2. The conclusion in the January 22, 1997 exemption order was based on a supposed distinction between long-term and short-term rates. As pointed out in Great Bay's February 21, 1997 petition, all of Great Bay's rates -- including those for long-term sales and spot market sales -- are "established by . . . a separate regulatory authority" -- the Federal Energy Regulatory Commission ("FERC"). Both are equally subject to FERC jurisdiction and regulation and no distinction can be drawn between them. Further, as shown in the June 4, 1997 supplement to its petition, Great Bay recovers the cost of the electricity it generates through the long term and short term rates authorized by FERC. Therefore, Great Bay meets the NRC's current definition of "electric utility" under 10 C.F.R. § 50.2, and properly should not be subject to the decommissioning funding requirements of 10 C.F.R. § 50.75(e)(2). In both its February 21, 1997 petition and its June 4, 1997 supplement, Great Bay requested an opportunity to orally argue this matter before the

Samuel J. Collins, Director  
August 11, 1997  
Page 3

Commission in the event the Staff declined to make a finding that Great Bay is an electric utility.

In its recent July 23, 1997 exemption order, the Staff acknowledges, as Great Bay had argued in its petition, that "[t]here is no distinction between long-term and short-term sales in connection with the [NRC's] definition of electric utility" (page 4). Although agreeing with Great Bay that the rationale of the January 22, 1997 exemption order was incorrect, the Staff still incorrectly concludes that Great Bay is not an electric utility under the NRC's current definition in 10 C.F.R. § 50.2. Rather, the Staff concludes that Great Bay is not an electric utility because its FERC authorized long term and short term rates are not established through a "traditional cost-of-service ratemaking process" (pages 4 and 5; emphasis added). However, these words appear nowhere in the current definition of an electric utility in 10 C.F.R. § 50.2.<sup>14</sup> Rather, they appear only in the new proposed draft regulations set forth in the attachments to SECY-97-102, "Proposed Rule On Financial Assurance Requirements For Decommissioning Nuclear Power Reactors," May 16, 1997, which have yet to be published for public comment.<sup>24</sup>

<sup>14</sup>In pertinent part, 10 C.F.R. § 50.2 currently provides (emphasis in original):

*Electric utility* means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates . . . established by a separate regulatory authority. Investor-owned utilities . . . are included within the meaning of "electric utility."

<sup>24</sup>In pertinent part, the draft proposed regulations would define electric utility as follows (italics emphasis in original; underlined emphasis added):

*Electric utility* means any entity that generates, transmits, or distributes electricity and that recovers the cost of this electricity, 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 . . . 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."



Samuel J. Collins, Director

August 11, 1997

Page 4

The proposed definition of "electric utility" in SECY-97-102 is also intriguing in this regard in that it would omit a relevant portion of the final sentence that appears in the present definition of "electric utility." The proposed omission is "Investor-owned utilities, including generation or distribution subsidiaries, . . . are included within the meaning of 'electric utility'." Great Bay has previously contended to the Staff that the plain meaning of this sentence would include Great Bay as an "electric utility." Is it only a coincidence that the Staff would now propose to omit these very words from the proposed new definition of "electric utility"?

It goes without saying that draft proposed regulations can have no legal effect whatsoever until properly promulgated under the Administrative Procedures Act. See, e.g., 10 C.F.R. Part 2, Subpart H; Connecticut Light & Power Co. v. NRC, 673 F.2d 523, 533-34 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982).

Wholly apart from the legal bar precluding reliance on the draft proposed regulations, there are strong policy reasons why the draft regulations should not be adopted by the NRC and therefore they certainly should not be applied prematurely to Great Bay. As applied to Great Bay in the July 23, 1997 exemption order, the new draft proposed regulations could thwart major efforts by FERC to restructure the electric utility industry. As an integral part of Order No. 888 (which requires electric utilities subject to FERC's jurisdiction to offer non-discriminatory open-access transmission services to all eligible users), FERC has required the functional unbundling or separation by utilities for rate purposes of their generation, transmission, distribution and power marketing functions.<sup>14</sup> Structural unbundling (i.e., the formal disaggregation of the various functions and related assets into separate companies), although not explicitly required, is the

<sup>14</sup>The Commission concluded that functional unbundling, along with other safeguards established in Order Nos. 888 and 889, would be a reasonable and workable means of assuring non-discriminatory open access transportation

Samuel J. Collins, Director

August 11, 1997

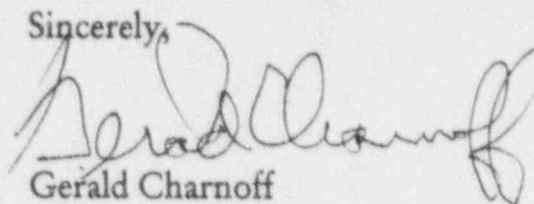
Page 5

natural consequence of Order No. 888, and is already occurring in a variety of states like California and Massachusetts.<sup>44</sup>

To the extent that owners of nuclear utilities structurally unbundle their generation facilities, including their nuclear plants, into separate generating companies, which would charge market-based rates deemed just and reasonable by FERC -- thus fulfilling goals established by FERC -- these new companies would be in a position similar to Great Bay. NRC's application of its definition of electric utility as set forth in the July 23, 1997 exemption order would result in these new entities facing the same predicament as Great Bay does today and therefore will necessarily cast grave uncertainty over the restructuring process of utilities owning nuclear power plants.

Because of the importance of this issue to Great Bay (and to the industry at large), Great Bay renews its request for reconsideration of whether it is an "electric utility" under the NRC's current regulatory definition as well as its request for an opportunity to orally argue this matter before the Commission. In the meantime, Great Bay will continue to pursue its efforts to obtain a surety bond at reasonable costs in accordance with 10 C.F. R. § 50.75(e)(2) and will comply with the other conditions set forth in the July 23, 1997 exemption order.

Sincerely,



Gerald Charnoff

Counsel for

Great Bay Power Corporation

<sup>44</sup> The electric utility industry today is vastly different than it was five and ten years ago. While historically, local electric utilities generated, transmitted and distributed power to their customers, today, after changes brought about by Congressional action (under PURPA and the Energy Policy Act of 1992) and by numerous state legislatures and PUCs, the nation is fast approaching a competitive market for the generation of electricity. In this regard, whereas five years ago virtually all utilities regulated by FERC were authorized to charge just and reasonable rates based on their cost-of-service, today, FERC has authorized many, including Great Bay, to charge market-based rates and has deemed those rates to be just and reasonable under the Federal Power Act.

Samuel J. Collins, Director  
August 11, 1997  
Page 6

cc: Dr. Shirley Ann Jackson, Chairman  
Office of the Chairman

Nils J. Diaz, Commissioner  
Office of the Commissioners

Greta J. Dicus, Commissioner  
Office of the Commissioners

Edward McGaffigan, Jr., Commissioner  
Office of the Commissioners

Hubert J. Miller  
Regional Administrator, Region I

John B. MacDonald  
Senior Resident Inspector, Seabrook

Mr. Albert W. DeAgazio  
Senior NRC Project Manager

Steven R. Hom, Esq.  
NRC Office of General Counsel

Mr. Robert S. Wood  
NRC Office of Nuclear Reactor Regulation