



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20565-0001

September 18, 1997

Mr. Gerald Charnoff  
Counsel for Great Bay Power Corporation  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, DC 20037-1128

50-443

Dear Mr. Charnoff:

This letter responds to your letter dated August 11, 1997, in which you renewed your earlier request for reconsideration of our determination of whether Great Bay Power Corporation (Great Bay) is an "electric utility" under the NRC's current definition in 10 CFR 50.2. You indicated 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."

In support of your request, you stated:

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 24, 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 .... (Your letter dated August 11, 1997, p. 2, supplied the emphasis.)

You further stated that "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...' However, these words appear nowhere in the current definition of an electric utility in 10 CFR § 50.2. 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." (Your letter dated August 11, 1997, p. 3, supplied emphasis.)

97-443

We continue to believe that Great Bay does not meet the current definition of electric utility contained in 10 CFR 50.2. We believe that the statement of considerations to the 1984 financial qualifications rule that instituted the current definition of electric utility supports our interpretation of the definition. (49 Fed. Reg. 35,747 (1984)) The statements of consideration in that rulemaking stated:

9709240240 970918  
PDR ADOCK 05000443  
P PDR

NRC FILE CENTER COPY



10/1

It is well established that public utility commissions (PUCs) are legally bound to set a utility's rates such that all reasonable costs of serving the public are recovered, assuming prudent management of the utility. (49 Fed. Reg. 35,748)

Another part of the statements of consideration indicated:

It is not uncommon for a rate commission to deny certain requested cost items or portions thereof. These disallowances, however, deny a utility only a portion of its total revenues. The amount of the disallowance may be reflected in a smaller profit margin, but the costs denied by the ratemaking bodies are not so great that the amount of these disallowances would exceed operating costs. NRC conversations with ratemaking bodies...confirm that it is standard practice among ratemaking bodies to factor in the amount of disallowances to ensure that utilities receive enough rate relief when a plant goes into operation to recover all reasonable costs of safe operation. (49 Fed. Reg. 35,749)

Finally, the statements of consideration included the following conclusion:

The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. (49 Fed. Reg. 35,750)

As these statements from the 1984 rulemaking indicate, the current definition of electric utility is based on an entity being subject to a traditional cost-of-service ratemaking process. Great Bay, on the other hand, has market-based tariffs. As pointed out in the exemption dated July 23, 1997, "Although...FERC may 'accept' market-based tariffs consistent with FERC's statutory responsibilities to ensure that rates are just and reasonable, the FERC's fulfillment of its responsibilities does not necessarily mean that the particular electricity seller involved thereby meets the NRC's definition of electric utility." "Accepting" market-based rates is not the same as FERC "establishing" rates sufficient to recover the cost of the electricity through a cost-of-service ratemaking process.

As you pointed out in your letter, "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." (Your letter dated August 11, 1997, p. 5, footnote 4.) It was the traditional cost-of-service rate regulation that all rate regulators, including FERC, used until about 5 years ago that formed the basis of NRC's 1984 financial qualifications rulemaking that promulgated the current definition of electric utility.

Additionally, as the July 23, 1997 exemption stated:

Great Bay states that it recovers the cost of the electricity it sells. Although the staff agrees that Great Bay has provided evidence that it can generate sufficient cash to pay for its share of Seabrook-related expenses, Great Bay has not indicated that it will recover full costs, including non-cash costs. The NRC's definition of electric utility, again, is based on cost recovery as a result of the action of an independent rate-setting authority, such as FERC, rather than merely a positive cash flow resulting from then favorable market conditions. (exemption, p. 5)

In supplemental information that Great Bay filed through an affidavit by Frank W. Getman, Jr., dated June 3, 1997, the actual and projected income statements for the years 1996 through 2001 for Baycorp Holdings, Ltd., the parent company of Great Bay, indicated that net income over the entire 6-year period will be negative.<sup>1</sup> The intent of the current definition in § 50.2 presupposes that rate regulation will be sufficient to allow an electric utility licensee to recover the cost of the electricity from the plant for which it is licensed. As indicated in the statements of consideration from the 1984 financial qualifications rule provided above, recovery should be sufficient "to ensure that utilities receive enough rate relief when a plant goes into operation to recover all reasonable costs of safe operation." The Commission did not exclude non-cash costs when referring to "all costs." The statements of consideration make clear that traditional rate regulation would ensure that electric utility licensees would be able to consistently earn sufficient revenues to cover all costs. Great Bay's submittals indicate that it will not meet this test.

In your August 11, 1997, letter, you also requested that you be given the opportunity to argue Great Bay's status as an electric utility before the Commission. The Commission's regulations at 10 CFR 50.12 do not provide such an opportunity in connection with the granting of an exemption, and there is no pending proceeding before the Commission in which oral argument may be granted by the Commission under its rules.

---

<sup>1</sup> Great Bay did not provide actual and projected income statements of its own for the 6-year period. However, the staff notes that actual and projected revenues over the entire period for Great Bay as provided in its cash statements are equal for all 6 years to those of Baycorp Holdings, Ltd. Thus, the staff believes that income statements for Baycorp Holdings, Ltd. can be used to project the costs related to Great Bay's share of the Seabrook plant, both cash and non-cash, expected to be recovered by Great Bay. Because Great Bay has indicated that projections for it and its parent company are proprietary, we have not included actual dollar amounts from these statements.

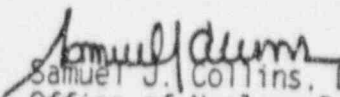
G. Charnoff

-4-

September 18, 1997

For the foregoing reasons, I conclude that there is an adequate basis for the staff's conclusion that Great Bay does not meet the NRC's definition of electric utility in § 50.2.

Sincerely,

  
Samuel J. Collins, Director  
Office of Nuclear Reactor Regulation

For the foregoing reasons, I conclude that there is an adequate basis for the staff's conclusion that Great Bay does not meet the NRC's definition of electric utility in § 50.2.

Sincerely,

*Original signed by*  
**Samuel J. Collins**

Samuel J. Collins, Director  
Office of Nuclear Reactor Regulation

DISTRIBUTION:

See attached page

DOCUMENT NAME: G:\CWS\GBLETTER.997

To receive a copy of this document, indicate in the box: "C" = Copy without attachment/enclosure "E" = Copy with attachment/enclosure  
"N" = No copy \*See Previous Concurrences

|        |          |             |              |            |  |
|--------|----------|-------------|--------------|------------|--|
| OFFICE | TEditor* | PGE*        | (A) SC: PGE* | (A)C: PGE* |  |
| NAME   | RSanders | Rwood: sw   | MCase        | TEssig     |  |
| DATE   | 09/08/97 | 09/09/97    | 09/09/97     | 09/10/97   |  |
| OFFICE | OGC*     | (A)D: DRPM* | NRR          |            |  |
| NAME   | Chandler | JRoe        | Collins      |            |  |
| DATE   | 09/16/97 | 09/11/97    | 09/18/97     |            |  |

OFFICIAL RECORD COPY

#2  
9/14

DISTRIBUTION:

Docket File (Docket No. 50-443)(w/original incoming) (YT970125)  
PUBLIC (w/incoming) (YT970125)  
PGE (w/incoming) (YT970125)  
NRR Mailroom (w/incoming) (YT970125)  
Chairman Jackson  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
JCallan  
HThompson  
SCollins  
FMiraglia  
RZimmerman  
JRoe  
DMatthews  
BBoger  
BSheron  
WTravers  
Sweiss  
AdeAgazio  
DMcDonald  
Rwood  
MCase  
MThadani  
HMiller, RI  
MBoyle, (EMail) (MLB4)  
MClark (YT970125)  
SHom, OGC

# SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N STREET, N.W.  
WASHINGTON, D.C. 20037-1128  
(202) 663-8000  
FACSIMILE  
(202) 663-8007

GERALD CHARNOFF, PC  
(202) 663-8032

NRC Operating License No. NPF-86  
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 GRR

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>12</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>13</sup>

<sup>12</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>13</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>3/</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>3/</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

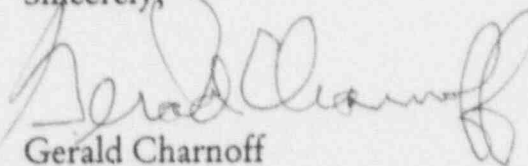
Samuel J. Collins, Director  
August 11, 1997  
Page 5

natural consequence of Order No. 888, and is already occurring in a variety of states like California and Massachusetts.<sup>4/</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>4/</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 NPC Project Manager

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

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



UNITED STATES  
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

September 18, 1997

Mr. Gerald Charnoff  
Counsel for Great Bay Power Corporation  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, DC 20037-1128

Dear Mr. Charnoff:

This letter responds to your letter dated August 11, 1997, in which you renewed your earlier request for reconsideration of our determination of whether Great Bay Power Corporation (Great Bay) is an "electric utility" under the NRC's current definition in 10 CFR 50.2. You indicated 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."

In support of your request, you stated:

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 24, 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 .... (Your letter dated August 11, 1997, p. 2, supplied the emphasis.)

You further stated that "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'." However, these words appear nowhere in the current definition of an electric utility in 10 CFR § 50.2. 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." (Your letter dated August 11, 1997, p. 3, supplied emphasis.)

We continue to believe that Great Bay does not meet the current definition of electric utility contained in 10 CFR 50.2. We believe that the statement of considerations to the 1984 financial qualifications rule that instituted the current definition of electric utility supports our interpretation of the definition. (49 Fed. Reg. 35,747 (1984)) The statements of consideration in that rulemaking stated:

9709240240 OPP

It is well established that public utility commissions (PUCs) are legally bound to set a utility's rates such that all reasonable costs of serving the public are recovered, assuming prudent management of the utility. (49 Fed. Reg. 35,748)

Another part of the statements of consideration indicated:

It is not uncommon for a rate commission to deny certain requested cost items or portions thereof. These disallowances, however, deny a utility only a portion of its total revenues. The amount of the disallowance may be reflected in a smaller profit margin, but the costs denied by the ratemaking bodies are not so great that the amount of these disallowances would exceed operating costs. NRC conversations with ratemaking bodies... confirm that it is standard practice among ratemaking bodies to factor in the amount of disallowances to ensure that utilities receive enough rate relief when a plant goes into operation to recover all reasonable costs of safe operation. (49 Fed. Reg. 35,749)

Finally, the statements of consideration included the following conclusion:

The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. (49 Fed. Reg. 35,750)

As these statements from the 1984 rulemaking indicate, the current definition of electric utility is based on an entity being subject to a traditional cost-of-service ratemaking process. Great Bay, on the other hand, has market-based tariffs. As pointed out in the exemption dated July 23, 1997, "Although... FERC may 'accept' market-based tariffs consistent with FERC's statutory responsibilities to ensure that rates are just and reasonable, the FERC's fulfillment of its responsibilities does not necessarily mean that the particular electricity seller involved thereby meets the NRC's definition of electric utility." "Accepting" market-based rates is not the same as FERC "establishing" rates sufficient to recover the cost of the electricity through a cost-of-service ratemaking process.

As you pointed out in your letter, "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." (Your letter dated August 11, 1997, p. 5, footnote 4.) It was the traditional cost-of-service rate regulation that all rate regulators, including FERC, used until about 5 years ago that formed the basis of NRC's 1984 financial qualifications rulemaking that promulgated the current definition of electric utility.

Additionally, as the July 23, 1997 exemption stated:

Great Bay states that it recovers the cost of the electricity it sells. Although the staff agrees that Great Bay has provided evidence that it can generate sufficient cash to pay for its share of Seabrook-related expenses, Great Bay has not indicated that it will recover full costs, including non-cash costs. The NRC's definition of electric utility, again, is based on cost recovery as a result of the action of an independent rate-setting authority, such as FERC, rather than merely a positive cash flow resulting from then favorable market conditions. (exemption, p. 5)

In supplemental information that Great Bay filed through an affidavit by Frank W. Getman, Jr., dated June 3, 1997, the actual and projected income statements for the years 1996 through 2001 for Baycorp Holdings, Ltd., the parent company of Great Bay, indicated that net income over the entire 6-year period will be negative.<sup>1</sup> The intent of the current definition in § 50.2 presupposes that rate regulation will be sufficient to allow an electric utility licensee to recover the cost of the electricity from the plant for which it is licensed. As indicated in the statements of consideration from the 1984 financial qualifications rule provided above, recovery should be sufficient "to ensure that utilities receive enough rate relief when a plant goes into operation to recover all reasonable costs of safe operation." The Commission did not exclude non-cash costs when referring to "all costs." The statements of consideration make clear that traditional rate regulation would ensure that electric utility licensees would be able to consistently earn sufficient revenues to cover all costs. Great Bay's submittals indicate that it will not meet this test.

In your August 11, 1997, letter, you also requested that you be given the opportunity to argue Great Bay's status as an electric utility before the Commission. The Commission's regulations at 10 CFR 50.12 do not provide such an opportunity in connection with the granting of an exemption, and there is no pending proceeding before the Commission in which oral argument may be granted by the Commission under its rules.

---

<sup>1</sup> Great Bay did not provide actual and projected income statements of its own for the 6-year period. However, the staff notes that actual and projected revenues over the entire period for Great Bay as provided in its cash statements are equal for all 6 years to those of Baycorp Holdings, Ltd. Thus, the staff believes that income statements for Baycorp Holdings, Ltd. can be used to project the costs related to Great Bay's share of the Seabrook plant, both cash and non-cash, expected to be recovered by Great Bay. Because Great Bay has indicated that projections for it and its parent company are proprietary, we have not included actual dollar amounts from these statements.

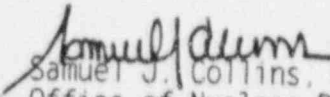
G. Charnoff

-4-

September 18, 1997

For the foregoing reasons, I conclude that there is an adequate basis for the staff's conclusion that Great Bay does not meet the NRC's definition of electric utility in § 50.2.

Sincerely,

  
Samuel J. Collins, Director  
Office of Nuclear Reactor Regulation



For the foregoing reasons, I conclude that there is an adequate basis for the staff's conclusion that Great Bay does not meet the NRC's definition of electric utility in § 50.2.

Sincerely,

*Original signed by*  
**Samuel J. Collins**

Samuel J. Collins, Director  
Office of Nuclear Reactor Regulation

DISTRIBUTION:

See attached page

DOCUMENT NAME: G:\CWS\GBLETTER.997

To receive a copy of this document, indicate in the box: \*C\* = Copy without attachment/enclosure \*E\* = Copy with attachment/enclosure  
\*N\* = No copy \*See Previous Concurrences

|        |          |             |              |             |
|--------|----------|-------------|--------------|-------------|
| OFFICE | Teditor* | PGEb*       | (A):SC:PGEb* | (A):C:PGEb* |
| NAME   | RSanders | RWood:sw    | MCase        | TEssig      |
| DATE   | 09/08/97 | 09/09/97    | 09/09/97     | 09/10/97    |
| OFFICE | OGC*     | (A):D:DRPM* | (A):NRR      |             |
| NAME   | Chandler | JRoe        | SCollins     |             |
| DATE   | 09/16/97 | 09/11/97    | 09/18/97     |             |

OFFICIAL RECORD COPY

#2  
9/14

DISTRIBUTION:

Docket File (Docket No. 50-443)(w/original incoming) (YT970125)

PUBLIC (w/incoming) (YT970125)

PGEB (w/incoming) (YT970125)

NRR Mailroom (w/incoming) (YT970125)

Chairman Jackson

Commissioner Dicus

Commissioner Diaz

Commissioner McGaffigan

JCallan

HThompson

SCollins

FMiraglia

RZimmerman

JRoe

DMatthews

BBoger

BSheron

WTravers

Sweiss

ADeAgazio

DMcDonald

RWood

MCase

MThadani

HMiller, RI

MBoyle, (EMail) (MLB4)

MClark (YT970125)

SHom, OGC

Rec'd DRPE 8/14

PGEB

FROM:

ORIGINAL DUE DT: 09/05/97

TICKET NO: 0970125

DOC DT: 08/11/97

NRR RCVD DATE: 08/14/97

19

G. CHARNOFF,

COUNSEL FOR GREAT

BAY

TO:

S. J. COLLINS

FOR SIGNATURE OF

\*\* YEL \*\*

S. J. COLLINS

Rec'd 8/20/97

DESC:

ROUTING:

CONSIDERATION OF GREAT BAY'S REQUEST FOR RECONSIDERATION ON WHETHER IT IS AN "ELECTRIC UTILITY" UNDER THE COMMISSION'S CURRENT REGULATIONS

COLLINS  
MIRAGLIA  
ZIMMERMAN  
MARTIN  
WEISS  
TRAVERS  
BOHRER

ASSIGNED TO:

DRM  
ERPE

CONTACT:

ROE  
BOGER

SPECIAL INSTRUCTIONS OR REMARKS:

|                              |
|------------------------------|
| ACTION                       |
| DUE TO NRR DIRECTOR'S OFFICE |
| BY <u>Sept 28 '97</u>        |

16

SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N STREET, N.W.  
WASHINGTON, D.C. 20037-1128  
(202) 663-8000  
FACSIMILE  
(202) 663-8007

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

NRC Operating License No. NPF-86  
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 GPP

Samuel J. Collins, Director  
August 11, 1997  
Page 2

f. 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's 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>42</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>43</sup>

<sup>42</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>43</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>24</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>24</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

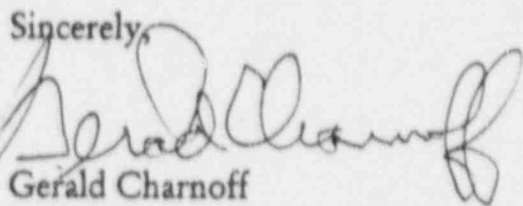
Page 5

natural consequence of Order No. 888, and is already occurring in a variety of states like California and Massachusetts.<sup>4/</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>4/</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