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NUCLEAR REGULATORY COMMISSION
10 CFR Part 50
Final Policy Statement on the
Restructuring and Economic Deregulation of
the Electric Utility Industry

AGENCY: Nuclear Regulatory Commission.

ACTION: Final Policy Statement.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) is issuing this final statement of policy regarding its expectations for, and intended approach to, its power reactor licensees as the electric utility industry moves from an environment of rate regulation toward greater competition. The NRC has concerns about the possible effects that rate deregulation and disaggregation resulting from various restructuring actions involving power reactor licensees could have on the protection of public health and safety.

EFFECTIVE DATE: This policy statement becomes effective on October 20, 1997 ~~[insert a date 60 days after publication]~~.

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SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 1996, the NRC issued a draft policy statement for public comment (61 FR 49711). The purpose of the draft policy statement was to provide a discussion of the NRC's concerns regarding the potential safety impacts on NRC power reactor licensees which could result from the economic deregulation and restructuring of the electric utility industry and the means by which NRC intends to address those concerns. Because of the interest expressed by several commenters, the NRC extended the public comment period to February 9, 1997.

II. Summary of and Response to Comments

The NRC received 32 public comments on the draft policy statement: 14 from electric utility licensees or their representatives, 8 from State public utility commissions (PUCs) or other State agencies, 5 from public interest groups, 4 from private consultants and individuals, and 1 from a labor union. The following list provides the names and comment numbers referenced in this notice:

1. Nuclear Information and Resource Service -- comment extension request only
2. Public Service Commission of Wisconsin
3. Engineering Applied Sciences, Inc.
4. TU Electric
5. Public Service Electric & Gas Company
6. Minnesota Department of Public Service
7. Spiegel & McDiarmid on behalf of 5 publicly-owned systems
8. IPALCO Enterprises, Inc., Citizens Action Coalition of Indiana, Inc., and Public Citizen, Inc.
9. Wisconsin Emergency Management, Bureau of Technological Hazards
10. Illinois Department of Nuclear Safety
11. International Brotherhood of Electrical Workers
12. Consolidated Edison Company of New York, Inc.
13. Centerior Energy
14. GPU Nuclear
15. Commonwealth Edison Company
16. Vermont Department of Public Service
17. Marilyn Elie
18. GE Stockholders' Alliance for a Sustainable Nuclear-Free Future
19. Women Speak Out for Peace and Justice
20. New England Power Company

21. Nuclear Information and Resource Service

22. New Jersey Division of the Ratepayer Advocate

23. Southern California Edison Company

24. Entergy Operations, Inc.

25. Nuclear Energy Institute

26. Arizona Public Service Company

27. Massachusetts Office of the Attorney General

28. Winston and Strawn on behalf of the Utility Decommissioning Group

29. Dave Crawford and Diane Peterson

30. National Rural Electric Cooperative Association

31. Schlissel Technical Consulting, Inc.

32. National Association of Regulatory Utility Commissioners

General Comments:

Most commenters viewed the issuance of the draft policy statement as timely and appeared to understand the reasons for the NRC's concerns. Some directly supported the NRC's overall approach, particularly the five actions listed in Section III. Commenter 14, for example, stated that these five actions should provide sufficient focus for NRC actions. Commenter 5 believes that the NRC's current authority is sufficient to cope with any safety issues raised by rate deregulation. Commenter 31 shares the NRC's concerns but

indicated that the draft policy statement did not address the key issue, namely, whether economic deregulation of nuclear power is compatible with the protection of public health and safety.

Other comments, particularly from electric utility licensees and their representatives, suggested that some NRC concerns are overstated. For example, Commenter 4 recommended elimination of language in the policy statement that implies that deregulation is inevitable. Other commenters suggested that the policy statement should recognize that change will occur at different rates and, therefore, the NRC should individually evaluate restructuring as it affects each nuclear plant. In any case, restructuring will not occur so rapidly or secretly that the NRC will not know about it. Others stated that many services will remain regulated and that the PUCs will act responsibly. Further, there is no basis for the NRC to conclude that licensees will be unable to provide adequate financial assurance for safe operations and decommissioning. The National Association of Regulatory Utility Commissioners (NARUC) stated that in view of the experimental nature of many State actions, the NRC should approach deregulation cautiously. Finally, several commenters asked the NRC to avoid actions that would serve as impediments to deregulation.

Commenters representing public interest groups generally thought that

the draft policy statement did not go far enough in addressing safety concerns related to deregulation. These commenters stated that the NRC should take immediate action with respect to on-line maintenance practices, extended refueling cycles and downtime during refueling, and up-front funding of decommissioning, among other issues. Some suggested that the policy statement specifically include discussion of possible negative safety risks from economic deregulation, such as cutting corners and deferring capital investments. These commenters also urged the NRC to expand its inspection and compliance resources to counter the adverse safety impacts that these commenters believe will result from deregulation.

NRC's Response to General Comments:

Regarding the issue of whether the policy statement should address the compatibility between economic deregulation and the protection of public health and safety, the NRC believes that economic deregulation does not preclude adequate protection of public health and safety. However, due to the increased uncertainty engendered by state-by-state deregulation of the electric power industry, the NRC is concerned about the possible impact on the protection of public health and safety. Thus, in the draft policy statement, the NRC expressed its general concerns about the possible effects of deregulation, realizing that such concerns can be either vitiated or

exacerbated depending on specific deregulation approaches that are implemented. In this respect, the NRC recognizes that deregulation will occur at different times, in different degrees, and in some jurisdictions, perhaps not at all, and the final policy statement more explicitly recognizes these facts. With respect to the concerns expressed by public interest groups about the impact of certain potential safety practices, such as on-line maintenance and outage duration, the NRC has addressed, and will continue to address, these issues as safety issues. This policy statement is not meant to be a substitute for regulatory remedies to specific safety problems.

Sufficiency of Current Regulatory Framework and Incentives for Safe Operation:

Although most commenters indicated that the NRC's current regulatory framework is adequate to protect public health and safety, others disagreed. Commenter 21, for example, cited the experience with the Millstone facility and indicated that it is "of increasing concern that NRC cannot accurately determine the extent and scope that economics plays in the reductions of reactor safety margins and the deferral of safety significant issues." This commenter concluded that the policy statement has not adequately addressed safety hazards brought about by managerial malpractice in response to economic pressures. Other commenters stated that the NRC must continue to ensure that its own inspection and oversight programs identify when a licensee is failing

to devote sufficient resources to ensuring safe operations, specifically as a result of deficiencies resulting from economic pressure. When necessary, the NRC should seek additional inspection and compliance resources from Congress. Commenter 9 stated that the emphasis and focus on emergency planning may lessen. Commenter 10 suggested that the NRC's shift to performance-based and risk-informed regulations may potentially threaten established safety margins. This commenter urged the NRC to establish current, vigorous probabilistic risk assessments (PRAs) to identify the risks, which would be used in all appropriate areas of plant operation as a cornerstone to maintaining cost-effective safety margins in a changing environment.

Many commenters did not view deregulation as necessarily a disincentive to safe operation. They cited the incentive to operate safely and use preventive maintenance due to the premium placed on unit availability. Another commenter expressed the belief that near-term economic incentives exist for expenditures to maintain reliable operation. However, this incentive decreases as a plant ages and thus is of greater concern later in a plant's life. Commenter 23 suggested that the policy statement be modified to support a licensee's use of the 10 CFR 50.59 review process to determine that establishment of an Independent System Operator (ISO) does not involve an unreviewed safety question.

Other commenters indicated that disincentives to safe operation should be dealt with by limiting reactor operating cycles to 18 months and requiring at least 250 hours for refueling outages. These commenters also opposed on-line maintenance.

Another commenter expressed concern that deregulation would be a disincentive to continuing cooperation among nuclear generators, such as early reporting of safety and operationally significant events and continuation of the Institute of Nuclear Power Operations (INPO). Additionally, the pressure on the NRC to reduce costs to licensees will increase, as will pressure to reduce use of the "watch list." This commenter cited the analogy of the resultant events at the Federal Aviation Administration (FAA) when the airlines were deregulated and urged the NRC to avoid the FAA's mistakes. This commenter also suggested that incentive regulation of nuclear plants may become an alternative to full deregulation and that the NRC should study incentive programs used at Diablo Canyon and Pilgrim.

NRC's Response to Comments on Sufficiency of Current Regulatory Framework and Incentives for Safe Operation:

The NRC shares many of the concerns expressed by commenters about the potential impact of economic deregulation on specific safety programs and

practices. As discussed in the NRC's response to general comments, the NRC will continue to evaluate specific safety concerns or 10 CFR 50.59 review processes as part of its safety oversight programs. For example, on-line maintenance and increased fuel burnup are being considered through the NRC's safety review and inspection oversight programs. Reductions in manpower and training costs, and other reductions in operation and maintenance (O&M) and capital additions budgets are of continuing concern to the NRC. The NRC is considering changes to the Senior Management Meeting process that would include consideration of economic trends. However, because the safety concerns that commenters expressed exist, in many cases, independently of economic deregulation, the NRC believes that these issues have been and are more appropriately considered in other NRC programs. Also independently of economic deregulation, the NRC is striving to make its regulatory program as efficient and effective as possible -- through use of risk analysis and other techniques -- so that the resources of the agency and of licensees are devoted to the most safety-significant matters.

The NRC has extensively reviewed State performance incentive programs and does not believe significant additional review is warranted at this time. (See footnote 2 in the Policy Statement below.)

Financial Qualifications:

Commenters expressed varied opinions. Although some viewed the NRC's current financial qualifications regulatory framework as sufficient, others believed that additional measures may be necessary. Commenter 20 indicated that the critical question for the NRC is whether, in the absence of independent financial assurances to the NRC from its licensees, rate regulators have committed to provide licensees with sufficient financial resources. Commenter 2 stated that if recovery of stranded costs is not allowed or is severely restricted, a large number of premature shutdowns may occur, further straining licensees' financial qualifications and diminishing their ability to decommission safely. In this vein, Commenter 15 urged that the NRC aggressively affirm that stranded capital costs must be recovered by utilities. Commenter 16 indicated that those nuclear plant licensees that are no longer rate regulated should have sufficient buffering funds to proceed safely from operations to decommissioning. Commenter 8 stated that the NRC should shut down the plants of licensees with questionable financial ability to sustain safe operations in a competitive environment and should require them to decommission their facilities. Operating costs that cannot be recovered competitively should be borne by the licensee, not the ratepayer or the taxpayer. Commenter 22 believes that the NRC should institute ongoing financial qualifications reviews every 2 to 5 years for all power reactor licensees, including those that still meet the NRC's definition of "electric utility." Commenter 31 recommends that the NRC examine whether mergers and

joint operating agreements would dilute or weaken units and utilities that are performing well by spreading or diverting existing management attention, personnel, and other resources over a larger number of units.

Other commenters appeared quite optimistic that additional financial qualifications reviews would be unnecessary. Commenter 15 suggested that the NRC should avoid conflicts with other agencies having jurisdiction over financial qualifications and should not condition license transfers. Commenter 25 and others indicated that holding companies should not be subject to 10 CFR 50.80 license transfer reviews. At most, the NRC should use a "negative consent" approach to formation of holding companies. This commenter also recommended that the NRC provide more explicit guidance on the "no significant hazards" criteria that are used with license amendments.

Commenter 23 asked that the NRC adopt clear criteria for approval of license transfer requests and use clear, unambiguous standards for license transfers to non-utility licensees such as those offered in the Draft Standard Review Plan (SRP) on Financial Qualifications and Decommissioning Funding Assurance (61 FR 68309; December 27, 1996). The regulations in 10 CFR 50.33(f) for non-utility licensees should be modified and should include standards for extended, unplanned outages, such as minimum amounts for retained earnings, insurance, and contractual arrangements.

Commenter 22 suggested that "securitization" may be an advantageous method of reducing stranded cost charges to customers. Consequently, the NRC should endorse securitization as permissible from a regulatory, legal, and public policy perspective.

Finally, two commenters urged the NRC to factor in Price-Anderson obligations in its deliberations on financial qualifications.

NRC's Response to Comments on Financial Qualifications:

The NRC remains concerned about the impacts of deregulation on its power reactor licensees' financial qualifications. The NRC's existing regulatory framework under 10 CFR 50.33(f) requires financial qualifications reviews for those licensees that no longer meet the definition of "electric utility" at the operating license (OL) stage. Paragraph 4 of 10 CFR 50.33(f) also provides that the NRC may seek additional or more detailed information respecting an applicant's or a licensee's financial arrangements and status of funds if the Commission considers this information appropriate. The NRC will evaluate additional rulemaking, separate from the proposed rulemaking on financial assurance requirements for decommissioning, to determine whether enhancements to its financial qualifications requirements are necessary in anticipation that some power reactor licensees will no longer be "electric

utilities." However, the NRC continues to believe that its primary tool for evaluating and ensuring safe operations at its licensed facilities is through its inspection and enforcement programs. In its previous experience, the NRC has found that there is only an indirect relationship between financial qualifications and operational safety, but it is continuing to study this issue. Although enhanced financial qualifications reviews may provide the NRC with valuable additional insights on a licensee's general qualifications to operate its facilities safely, it is not clear that enhanced financial qualifications programs by themselves would prove to be a sufficient indicator of general ability to operate a facility safely.

With respect to the issue of decommissioning and stranded costs, many states are considering securitization as a non-bypassable charge mechanism to fund the recovery of decommissioning, and other stranded costs. The NRC believes that securitization has the potential to provide an acceptable method of decommissioning funding assurance, although other mechanisms that involve non-bypassable charges may provide comparable levels of assurance and should not be excluded from consideration by State authorities.

With respect to transfers of a license under 10 CFR 50.80, the NRC must review and approve in writing all such transfers, if such transfers meet the appropriate NRC standards. The NRC does not believe that Section 184 of the

Atomic Energy Act of 1954, as amended, allows the NRC to approve transfers by "negative consent."

The NRC will continue to use its current method of evaluating a licensee's cash flow under 10 CFR 140.21 to determine a licensee's ability to pay deferred premiums under the Price-Anderson Act.

Decommissioning Funding Assurance:

The consensus appeared to be that the NRC should work closely with State regulators to provide for assurance of decommissioning funding. Commenter 13 recommended that the policy statement include a call for the continued recovery of decommissioning costs through regulated rates and tariffs in all jurisdictions. Similarly Commenter 16 suggested that the NRC maintain awareness of State decommissioning proceedings, monitor funding adequacy based on the estimates produced in State proceedings, and work with the host State to ensure that adequate amounts are provided in decommissioning trust funds. Another commenter stated that additional decommissioning funding assurance should be required on an ad hoc basis and that the NRC should not require accelerated decommissioning funding.

Many State and licensee commenters asked the NRC to accept non-

bypassable charges or other mechanisms, such as dedicated revenue streams, as proof of decommissioning funding assurance. Similarly, those licensees whose States require such mechanisms should be considered "electric utilities" under the NRC's regulations. Many commenters also suggested that the NRC take a more proactive role with the Congress, the Executive Branch, and others in order to increase assurance of decommissioning funds.

Most public interest group commenters advocated that the NRC end "fund-as-you-go" decommissioning by requiring full, up-front decommissioning for unfunded balances. These commenters also asked that any stranded cost recovery be applied to external decommissioning trusts and that investors bear the greater share in funding any decommissioning shortfall. Other comments sought the elimination of internal decommissioning funding and asked that decommissioning be funded at a level that would permit a third party to complete decommissioning.

Other specific comments in the decommissioning area included (1) a recommendation that the NRC add an explicit statement to the policy statement that would inform licensees of the NRC's right to assess the timing and liquidity of decommissioning funds (Commenter 3); (2) a recommendation for an increase in decommissioning reporting requirements and assurance that funds are not diverted to non-decommissioning uses; (3) recognition that [illegible] charges

are placed on current electricity customers while competition increases, consumers will avoid nuclear power and will, therefore, avoid contributing to decommissioning funding; and (4) recognition that decommissioning is not a stranded cost, because stranded costs are known and measurable costs that have already been incurred, whereas decommissioning costs are not fully known and have yet to be incurred.

NRC's Response to Comments on Decommissioning Funding Assurance:

Many of these comments parallel comments received on the Advance Notice of Proposed Rulemaking (ANPR) (61 FR 15427; April 8, 1996) that sought comment on restructuring issues as they may relate to decommissioning funding assurance. The NRC is developing a proposed rule that considers most of these comments. With respect to the specific comment that the policy statement should indicate that NRC retains the right to assess the timing and liquidity of decommissioning funds, the NRC agrees and will add such a statement. Because of the long history of effective rate regulatory oversight and recovery of safety-related expenses through rates, in the 1988 decommissioning rule (53 FR 24018; June 27, 1988), the NRC deferred to the PUCs and the Federal Energy Regulatory Commission (FERC) on the timing and liquidity of decommissioning trust fund deposits. However, the NRC has the authority to assess the timing and liquidity of such deposits by its licensees, and intends

to exercise this authority with those licensees who lose rate regulatory oversight. Similarly, 10 CFR 50.82 specifies a schedule for decommissioning trust fund withdrawals and the NRC will thus continue to assess the timing of such withdrawals.

Regulatory Interface:

Most commenters support NRC's working closely with State and Federal rate regulators, although some public interest groups stated that such an effort would offer scant protection to the public (Commenter 17). Many thought that the focus of this cooperation should be on the assurance of recovery of decommissioning costs. Some commenters believe that the NRC should take a more proactive role and that the NRC can play a special role in educating rate regulators. Commenter 22 proposed that the NRC maintain a dialogue with all classes of ratepayers, perhaps through the National Association of State Utility Consumer Advocates. Other suggested venues for NRC-State regulatory interface included the National Governors Association, the National Conference of State Legislatures, the American Legislative Exchange, and similar groups (Commenter 25). Commenter 15 suggested that the NRC and NARUC convene a joint conference on stranded capital cost recovery. As previously mentioned, several commenters indicated that the NRC should act to educate Congress and seek legislation in areas relevant to plant safety and

restructuring, for example, a national excise tax to fund decommissioning. Finally, Commenter 22 suggested that the NRC review the States' plans for cost recovery to ensure that, once recovered through rates, these revenues are employed for the purpose for which they were collected.

NRC's Response to Comments on Regulatory Interface:

The NRC believes that the policy statement adequately covered the NRC's intent to work closely with rate regulators and others as deregulation proceeds. The NRC will consider expanding contacts to include the other groups identified. Although the NRC will testify before Congress when asked to speak on its views on deregulation as related to protecting public health and safety, the NRC is evaluating whether it should make specific recommendations on mechanisms to handle decommissioning costs and operational costs. The NRC recognizes that Federal legislation might be of benefit in resolving these issues. However, the NRC also recognizes the vital role that States have played and will continue to play in resolving these issues and is fully prepared to work with the States through either State or federally sponsored initiatives.

Joint Ownership:

Virtually all who commented in this area believe that the NRC should not impose joint and several liability on co-owners of nuclear plants. Rather, each co-owner should be limited to its pro rata share of operating and decommissioning expenses. The NRC should not look to one owner to "bail out" another owner. Commenter 28 suggested that any effort to alter the current legal and financial relationship among co-owners would retroactively alter, and likely jeopardize, the business arrangements that underpin co-ownership. Several of those who commented on this issue also pointed to the bankruptcy laws as one way of ensuring that co-owners pay their pro rata share, although Commenter 22 suggested that recent NRC experience with bankrupt licensees may not hold true in the future. No one directly commented on the issue of non-owner operators, although 3 comments addressed this issue peripherally.

NRC's Response to Comments on Joint Ownership:

The NRC recognizes that co-owners and co-licensees generally divide costs and output from their facilities by using a contractually-defined, pro rata share standard. The NRC has implicitly accepted this practice in the past and believes that it should continue to be the operative practice, but 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*

minimis shares when one or more co-owners have defaulted. The NRC is addressing the issue of non-owner operators separately.

Antitrust:

Most commenters viewed NRC antitrust reviews as redundant to those performed by other agencies, especially in view of FERC Order 888, and recommended that the NRC act to eliminate this redundancy. Commenter 22 suggested that the NRC develop a memorandum of understanding with FERC and the Securities and Exchange Commission (SEC) that would allow the NRC to rely on the judgments of these agencies about market power that do not raise issues unique to the NRC's mandate. Another commenter recommended working with the Department of Justice to develop a list of guidelines and criteria to evaluate requests for ownership changes.

NRC's Response to Comments on Antitrust:

The NRC is statutorily required under the Atomic Energy Act of 1954, as amended (AEA), in connection with an application for a license to construct or operate a facility under section 103, to evaluate an applicant's or a licensee's activities under the NRC license to determine that these activities do not create or maintain a situation inconsistent with the antitrust laws of

the United States. However, the NRC has begun to work with FERC, SEC, and the Department of Justice to develop methods by which the NRC can minimize duplication of effort on antitrust issues, while carrying out its statutory responsibilities. The NRC will also consider seeking legislation to eliminate its review to the extent that its review duplicates the efforts of other federal agencies.

Other Issues:

Several commenters made observations not directly addressed in the draft policy statement. Commenter 5 stated that nuclear plant operators in the Northeast United States are subsidizing dirtier coal generation from Western U.S. generators. Accordingly, the NRC should articulate its views on the need for nuclear power and its value for fuel diversity and environmental protection. Commenter 16 recommended that the NRC urge the Department of Energy to proceed with interim spent fuel storage to reduce uncertainty and costs facing nuclear plant operators.

NRC's Response to Comments on Other Issues:

The NRC does not have a role in advocating the positions stated in these comments.

POLICY STATEMENT

I. Basis

This policy statement recognizes the changes that are occurring in the electric utility industry and the importance these changes may have for the NRC and its licensees. The NRC's principal mission is to regulate the nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment. As part of carrying out this mission, the NRC must monitor licensee activities and any changes in licensee activities, as well as external factors that may affect the ability of individual licensees to safely operate and decommission licensed power production facilities.

II. Background

The electric utility industry is entering a period of economic deregulation and restructuring that is intended to lead to increased competition in the industry. Increasing competition may force integrated power systems to separate (or "disaggregate") their systems into functional areas. Thus, some licensees may divest electrical generation assets from

transmission and distribution assets by forming separate subsidiaries or even separate companies for generation. Disaggregation may involve utility restructuring, mergers, and corporate spinoffs that lead to changes in owners or operators of licensed power reactors and may cause some licensees, including owners, to cease being an "electric utility" as defined in 10 CFR 50.2.[1] Such changes may affect the licensing basis under which the NRC originally found a licensee to be financially qualified, either as an "electric utility" or otherwise, to construct, operate, or own its power plant, as well as to accumulate adequate funds to ensure decommissioning at the end of reactor life. (See discussion below.)

Rate regulators have typically allowed an electric utility to recover prudently incurred costs of generating, transmitting, and distributing electric services. Consequently, in 1984, the NRC eliminated financial qualifications reviews at the OL stage for those licensees that met the definition of "electric utility" in 10 CFR 50.2 (49 FR 35747; September 12, 1984). The NRC based this decision on the assumption that "the rate process

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[1] Section 50.2 defines "electric utility" as "any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation and distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of 'electric utility.'"

assures that funds needed for safe operation will be made available to regulated electric utilities" (49 FR 35747, at 35750). However, the NRC recognized that financial qualifications reviews for OL applicants might be appropriate in particular cases in which, for example, "the local public utility commission will not allow the total cost of operating the facility to be recovered through rates" (49 FR 35747, at 35751). The Commission also has expressed concern about various State proposals to implement economic performance incentive programs.[2]

In its 1988 decommissioning rule, the NRC again distinguished between electric utilities and other licensees by allowing "electric utilities" to accumulate funds for decommissioning over the remaining terms of their operating licenses. NRC regulations require its other licensees (with the added exception of State and Federal government licensees of certain facilities) to provide funding assurance for the full estimated cost of decommissioning, either through full up-front funding or by some allowable guarantee or surety mechanism.

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[2] *See* Possible Safety Impacts of Economic Performance Incentives: Final Policy Statement, (56 FR 33945; July 24, 1991), for the NRC's concerns relating to State economic performance incentive standards and programs. The NRC understands that States instituted many of these programs as a means of encouraging electric utilities to lower electric rates to consumers. As States deregulate electric utilities under their jurisdictions, these economic performance incentive programs ultimately may be replaced by full market competition.

A discussion of the NRC review process is contained in two draft Standard Review Plans (SRPs) that the NRC issued for comment: NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance" (January 1997); and NUREG-1574, "Standard Review Plan on Antitrust" (January 1997). In addition, the NRC issued an Administrative Letter on June 21, 1996, that informed power reactor licensees of their ongoing responsibility to inform and obtain advance approval from the NRC for any changes that would constitute a transfer of the license, directly or indirectly, through transfer of control of the NRC license to any person pursuant to 10 CFR 50.80. This administrative letter also reminded addressees of their responsibility to ensure that information regarding a licensee's financial qualifications and decommissioning funding assurance that may have a significant implication for public health and safety is promptly reported to the NRC.

III. Specific Policies

The NRC is concerned about the potential impact of utility restructuring on public health and safety. The NRC has not found a consistent relationship between a licensee's financial health and general indicators of safety such as the NRC's Systematic Assessment of Licensee Performance. The NRC has traditionally relied on its inspection process to indicate when safety

performance has begun to show adverse trends. On the basis of inspection program results, the NRC can take appropriate action, including, ultimately, plant shutdown, to protect public health and safety. However, if a plant is permanently shut down, that plant's licensee(s) may no longer have access to adequate revenues or other sources of funds for decommissioning the facility. If rate deregulation and organizational divestiture occur concurrently with the shutdown of a nuclear plant either by NRC action or by a licensee's economic decision, that licensee may not be able to provide adequate assurance of decommissioning funds. Thus, the NRC believes that its concerns about deregulation and restructuring lie in the areas of adequacy of decommissioning funds and the potential effect that economic deregulation may have on operational safety.

As the electric utility industry moves from an environment of substantial economic regulation to one of increased competition, the NRC is concerned about the pace of restructuring and rate deregulation. Approval of organizational and rate deregulation changes may occur rapidly. The pace and degree of such changes could affect the factual underpinnings of the NRC's previous conclusions that power reactor licensees have access to adequate funds for operations and can reliably accumulate adequate funds for decommissioning over the operating lives of their facilities. For example, rate deregulation could create situations in which a licensee that previously

met the NRC's definition of an "electric utility" under 10 CFR 50.2 may, at some point, no longer qualify for such status. At that point, the NRC will require licensees to submit proof pursuant to 10 CFR 50.33(f)(4) that they remain financially qualified and will require them to meet the more stringent decommissioning funding assurance requirements of 10 CFR 50.75 that are applicable to non-electric utilities.

Although new and unique restructuring proposals will necessarily involve case-by-case reviews by the NRC, the NRC staff will advise the Commission of such proposals so that the Commission will have the option of exercising direct oversight of such reviews to maintain consistent NRC policy toward new entities. As patterns of restructuring begin to emerge, the NRC will consider standardizing its framework further to streamline, where possible, its case-by-case review process. The NRC has considered and will continue to consider mergers and the outright sales of facilities, or portions of facilities, to require NRC notification and prior approval in accordance with 10 CFR 50.80 in order to ensure that the transferee or licensee is appropriately qualified. For example, in certain merger situations, the NRC determines whether the surviving organization will remain an "electric utility" as defined in 10 CFR 50.2. If a license applicant or a licensee fails to meet this definition, the NRC will seek additional assurance of financial qualifications to operate and decommission the facility pursuant to 10 CFR 50.33(f) and 50.75 and as

discussed in more detail in its SRP on these subjects. The NRC has also advised licensees that the formation of holding companies requires notification and approval pursuant to 10 CFR 50.80.

In consideration of these concerns, the NRC will evaluate deregulation and restructuring activities as they evolve. Recognizing that the electric utility industry is likely to undergo great change, as restructuring progresses, the NRC will continue to evaluate the need for regulatory or policy changes to meet the effects of deregulation. The NRC will take all appropriate actions to carry out its mission to protect the health and safety of the public and, to the extent of its statutory mandate, to ensure consistency with Federal antitrust laws.

The NRC intends to implement policies and take action as described in this policy statement to ensure that its power reactor licensees remain financially qualified to ensure continued safe operations and decommissioning. In summary, the NRC will--

- Continue to conduct its financial qualifications, decommissioning funding and antitrust reviews as described in the SRPs developed in concert with this policy statement;
- Identify all owners, indirect as well as direct, of nuclear power

plants:

- Establish and maintain working relationships with State and Federal rate regulators; and
- Reevaluate its regulations for their adequacy to address changes resulting from rate deregulation.

A. Adequacy of Current Regulatory Framework

The NRC believes that its regulatory framework is generally sufficient, at this time, to address the restructurings and reorganizations that will likely arise as a result of electric utility deregulation. Absent changes to the NRC's regulatory scheme, the NRC's review process will follow the current framework. The NRC believes that its financial qualifications requirements are sufficiently broad as to provide an adequate framework to adequately review new or unique situations that are not explicitly covered in 10 CFR 50.33(f) and Appendix C to Part 50, for financial qualifications, and in 10 CFR 50.75 for decommissioning funding assurance. However, in order to remove any ambiguities in its regulations and to address those situations that may not be adequately covered under current regulations, the NRC is considering rulemaking to revise its decommissioning funding assurance requirements, as described in Section III.E. The NRC is evaluating whether modification to its financial qualifications regulations are warranted.

B. NRC Responsibilities Vis-a-Vis State and Federal Economic Regulators

The NRC has recognized the primary role that State and Federal economic regulators have served, and in many cases will continue to serve, in setting rates that include appropriate levels of funding for safe operation and decommissioning. For example, the preamble to the 1988 decommissioning rule contained the following statement: "The rule, and the NRC's implementation of it, does not deal with financial ratemaking issues such as rate of fund collection, procedures for fund collection, cost to ratepayers, taxation effects, equitability between early and late ratepayers, accounting procedures, ratepayer versus stockholder considerations, responsiveness to change and other similar concerns....These matters are outside NRC's jurisdiction and are the responsibility of the State PUCs and [the Federal Energy Regulatory Commission] FERC" (53 FR 24016; June 27, 1988, at 24038).

Notwithstanding the primary role of economic regulators in rate matters, the NRC has authority under the AEA to take actions that may affect a licensee's financial situation when these actions are warranted to protect public health and safety. To date, the NRC has found no significant instances in which State or Federal rate regulation has led to disallowance of funds for safety-related operational and decommissioning expenses. Some rate regulators may have chosen to reduce allowable profit margins through rate disallowances.

or licensees have for other reasons encountered financial difficulty.

In order for the NRC to make its safety views known and to encourage rate regulators to continue their practice of allowing adequate expenditures for nuclear plant safety as electric utilities face deregulation, the NRC has taken a number of actions to increase cooperation with State and Federal rate and financial regulators to promote dialogue and minimize the possibility of rate deregulation or other actions that would have an adverse effect on safety. The NRC intends to continue to work and consult with the State PUCs, individually or through NARUC, and with FERC and other Federal agencies to coordinate activities and exchange information. However, the Commission also reserves the flexibility to take appropriate steps in order to assure a licensee's adequate accumulation of decommissioning funds.

C. Co-owner Division of Responsibility

Many of the NRC's power reactor licensees own their plants jointly with other, unrelated organizations. Although some co-owners may only be authorized to have an ownership interest in the nuclear facility and its nuclear material, and not to operate it, the NRC views all co-owners as co-licensees who are responsible for complying with the terms of their licenses. See *Public Service Company of Indiana, Inc.* [Marble Hill Nuclear Generating

Station, Units 1 and 2], ALAB-459, 7 NRC 179, 200-201 (1978). The NRC is concerned about the effects on the availability of operating and decommissioning funds, and about the division of responsibility for operating and decommissioning funds, when co-owners file for bankruptcy or otherwise encounter financial difficulty.[3] The NRC recognizes that co-owners and co-licensees generally divide costs and output from their facilities using a contractually defined, pro rata share standard. The NRC has implicitly accepted this practice in the past and believes that it should continue to be the operative practice, but 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 minimis* shares when one or more co-owners have defaulted.

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[3] The NRC has had experience with three licensees who have had much greater than *de minimis* shares of nuclear power plants and who filed under Chapter 11 of the U.S. Bankruptcy Code: Public Service Company of New Hampshire (PSNH), a co-owner and operator of the Seabrook plant; El Paso Electric Company (EPEC), a co-owner of the Palo Verde plant; and Cajun Electric Power Cooperative (Cajun), a co-owner of the River Bend plant. Both PSNH and EPEC continued their pro rata contributions for the operating and decommissioning expenses for their plants and successfully emerged from bankruptcy. Cajun remains in bankruptcy.

D. Financial Qualifications Reviews

The NRC believes that the existing regulatory framework contained in 10 CFR 50.33(f) and in the guidance in 10 CFR Part 50, Appendix C, is generally sufficient at this time to provide reasonable assurance of the financial qualifications of both electric utility and non-electric utility applicants and licensees under the various ownership arrangements of which the staff is currently aware. Licensees that remain "electric utilities" will not be subject to NRC financial qualifications review, other than to determine that such licensees, in fact, remain "electric utilities." However, the NRC is evaluating the need to develop additional requirements to ensure against potential dilution of the capability for safe operation and decommissioning that could arise from rate deregulation and restructuring.

Section 184 of the AEA and 10 CFR 50.80 provide that no license shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission consents in writing. The NRC will continue to review transfers to determine their potential impact on the licensee's ability both to maintain adequate technical qualifications and organizational control and authority over the facility and to provide adequate funds for safe operation and decommissioning. Such consent is clearly required when a corporate entity seeks to transfer a license it holds to a different corporate

entity. See *Long Island Lighting Co.* [Shoreham Nuclear Power Station, Unit 1] CLI-92-4, 35 NRC 69 (1992). The NRC staff has advised licensees that agency consent must be sought and obtained under 10 CFR 50.80 for the formation of a new holding company over an existing licensee. Other types of transactions, including where non-licensee organizations are proposed to have some degree of involvement in the management or operation of the plant, have been considered by the staff on a case-by-case basis to determine whether 10 CFR 50.80 consent is required. The NRC is evaluating what types of transfers or restructurings should be subject to 10 CFR 50.80 review. The NRC staff will inform the Commission of unique or unusual licensee restructuring actions.

E. Decommissioning Funding Assurance Reviews

The NRC believes that the existing decommissioning funding assurance provisions in 10 CFR 50.75 generally provide an adequate regulatory basis for existing and possible new licensees to provide reasonable assurance of decommissioning funds. However, to examine this and other issues related to decommissioning funding assurance in anticipation of rate deregulation, the NRC published an ANPR (61 FR 15427; April 8, 1996). The NRC is considering a proposed rulemaking developed in response to the comments received on the ANPR. In addition, the NRC wishes to emphasize that it retains the right to assess the timing of decommissioning trust fund deposits and withdrawals and

the liquidity of decommissioning funds for those licensees that no longer have rate regulatory oversight and insofar as such timing would potentially impact the protection of public health and safety.

F. Antitrust Reviews

The NRC is statutorily required under the AEA, in connection with an application for a license to construct or operate a facility under section 103, to evaluate an applicant's or a licensee's activities under the NRC license to determine whether these activities create or maintain a situation inconsistent with the antitrust laws of the United States. However, the NRC will explore with FERC, SEC, and the Department of Justice methods by which the NRC can minimize duplication of effort on antitrust issues, while maintaining its statutory responsibilities. The NRC will consider seeking legislation eliminating its review mandate to the extent that NRC reviews are duplicated by other agencies.

The NRC anticipates that competitive reviews over the next 5 to 10 years will arise primarily from changes in control of licensed facilities. The regulatory review addressing transfer of control of licenses under 10 CFR 50.80 will be used to determine whether new owners or operators will be subject to an NRC review with respect to antitrust matters.

SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

In accordance with the Small Business Regulatory Enforcement Act of 1996, the NRC has determined that this action is not a "major rule" and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

ELECTRONIC ACCESS

The NRC electronic Bulletin Board System (BBS) on FedWorld may be accessed by using a personal computer, a modem, and one of the commonly available communications software packages, or directly by way of Internet. Background documents on the final policy statement are also available, as practical, for downloading and viewing on the bulletin board.

If using a personal computer and modem, the NRC subsystem on FedWorld can be accessed directly by dialing the toll-free number (800) 303-9672. Communication software parameters should be set as follows: parity to none, data bits to 8, and stop bits to 1 (N,8,1). Using ANSI or VT-100 terminal emulation, the NRC subsystem can then be accessed by selecting the "Rules Menu" option from the "NRC Main Menu." Many NRC subsystems and databases also have a "Help/Information Center" option that is tailored to the particular subsystem.

The NRC subsystem on FedWorld can also be accessed by a direct-dial telephone number for the main FedWorld BBS, (703) 321-3339, or by using Telnet via Internet: fedworld.gov. If using (703) 321-3339 to contact FedWorld, the NRC subsystem will be accessed from the main FedWorld menu by selecting the "Regulatory, Government Administration and State Systems," then selecting "Regulatory Information Mail." At that point, a menu will be displayed that has an option "U.S. Nuclear Regulatory Commission," which will take you to the NRC on-line main menu. The NRC On-line area also can be accessed directly by typing "/go nrc" at a FedWorld command line. If you access NRC from FedWorld's main menu, you may return to FedWorld by selecting the "Return to FedWorld" option from the NRC on-line main menu. However, if you access NRC at FedWorld by using NRC's toll-free number, you will have full access to all NRC systems, but you will not have access to the main FedWorld system.

If you contact FedWorld using Telnet, you will see the NRC area and menus, including the Rules menu. Although you will be able to download documents and leave messages, you will not be able to write comments or upload files (comments). If you contact FedWorld using FTP, all files can be accessed and downloaded but uploads are not allowed; all you will see is a list of files without descriptions (normal Gopher look). An index file listing all files within a subdirectory, with descriptions, is available. There is a 15-minute time limit for FTP access.

Although FedWorld can also be accessed through the World Wide Web, like FTP, that mode only provides access for downloading files and does not display the NRC Rules menu.

For more information on NRC bulletin boards call Mr. Arthur Davis, Systems Integration and Development Branch NRC, Washington, DC 20555-0001, telephone (301) 415-5780; e-mail AXD3@nrc.gov.

Dated at Rockville, Maryland, this 13th day of August, 1997.

For the Nuclear Regulatory Commission.

John C. Hoyle,
Secretary of the Commission.