

May 7, 2003

COMMISSION VOTING RECORD

DECISION ITEM:       SECY-02-0175

TITLE:                       DENIAL OF PETITION FOR RULEMAKING TO  
ELIMINATE REVIEW OF ALTERNATIVE SITES,  
ALTERNATIVE ENERGY SOURCES AND NEED  
FOR POWER IN NUCLEAR POWER REACTOR  
SITING AND LICENSING REVIEWS (PRM-52-2)

The Commission (with Chairman Diaz and Commissioners McGaffigan and Merrifield agreeing) approved in part and disapproved in part the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 7, 2003. Commissioner Dicus approved the paper.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

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Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc:     Chairman Diaz  
          Commissioner Dicus  
          Commissioner McGaffigan  
          Commissioner Merrifield  
          OGC  
          EDO  
          PDR

SECY NOTE:               THIS VOTING RECORD WILL BE RELEASED TO THE PUBLIC 5  
WORKING DAYS AFTER THE LETTER IS SENT TO THE PETITIONER.

## VOTING SUMMARY - SECY-02-0175

### RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X	X			X	3/6/03
COMR. DICUS	X				X	11/15/02
COMR. McGAFFIGAN	X	X			X	4/22/03
COMR. MERRIFIELD	X	X			X	3/20/03

### COMMENT RESOLUTION

In their vote sheets, Chairman Diaz and Commissioners McGaffigan and Merrifield approved in part and disapproved in part the subject paper. Commissioner Dicus approved the paper. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 7, 2003.

## Commissioner Comments on SECY-02-0175

### Chairman Diaz

I approve the staff's recommendation that the Commission deny NEI's petition for rulemaking dated July 18, 2001. However, I strongly support the staff's plans to consider some of the premises underlying the current petition as the staff develops regulations and guidance. Specifically, the staff refers to the need to consider changes in the electricity market such as the complexities presented by unregulated merchant generators. I believe the NRC should endeavor to reduce any unnecessary burden associated with the NEPA review process.

I disapprove the Federal Register notice as drafted. The petitioner modified a portion of its request in supplemental comments dated December 18, 2002, withdrawing its proposal for elimination of any alternative site review but elaborating on issues and cases that would support limitations on the scope of the review of alternative sites in consideration of the purposes and needs of the proposed private activity. NEI cites pertinent aspects of the Commission's own decision in Hydro Resources Inc., CLI-01-4 (2001), and Federal appellate court cases. The staff's proposed Federal Register notice (at p. 22-23) appears to discuss the implications of such cases concerning an applicant's goals, without acknowledging the potential applicability for some limitation on the scope of review of alternatives under NEPA. Thus, I recommend that this section of the Federal Register notice be modified to reflect the fact that the licensee has cited decisions of relevance to limitations on the scope of review of alternative sites. The staff should also apply these precedential decisions, as appropriate, as it pursues further rulemaking and guidance.

### Commissioner Dicus

I wholeheartedly approve the staff's recommendations to: (1) deny a petition for rulemaking to eliminate reviews of alternative sites, alternative energy sources, and need for power in nuclear power reactor siting and licensing reviews; and (2) continue with current staff efforts to develop the technical bases for rulemaking to specifically define the requirements for consideration of alternative sites.

The petitioner makes the argument that the National Environmental Policy Act (NEPA) only requires assessment of the proposed action and the no-action alternative, and does not explicitly require assessments of need for power, alternate energy sources and alternate sites. While NEPA does not explicitly require these assessments, it does require assessment of reasonable alternatives including, at a minimum, the proposed action and the no-action alternative. NEPA was promulgated to ensure that environmental factors were assessed by decision makers mainly because previous reliance on assessment of financial factors was resulting in environmentally unsound decisions. The NEPA process is intended to help public officials (in this case, the Commission) make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

As the primary benefit from a nuclear power plant is electricity, the NRC has taken the view that reasonable alternatives include where and how that electricity could be generated. This view clearly embodies the spirit of NEPA and has served us well in our interactions with the public and the courts. The petitioner has not shown any change in judicial consideration of the NEPA obligations of Federal agencies which would support wholesale elimination of NRC reviews in

these areas. To the contrary, the de-regulation of the electric power industry may result in the environmental reviews conducted by the NRC being more important as the lack of these reviews could lead us back to the circumstances that led to the promulgation of NEPA, i.e., sole reliance on assessment of financial factors resulting in environmentally unsound decisions.

However, the petitioner raises a valid concern that the de-regulation of the electric power industry does change the landscape upon which we perform our environmental reviews. To address this concern, the staff has proposed a strategy of adaptation (versus elimination) of our alternative site reviews in the form of rulemaking to specifically define the requirements for consideration of alternative sites.

I believe the staff has proposed an appropriate course of action; one which will continue to ensure that the NRC, as directed by the Atomic Energy Act, as amended, advances the goals of protecting and enhancing environmental quality as well as assuring public health and safety. I also believe that the staff's proposed strategy strongly supports the NRC's performance goal of increasing public confidence in that it adapts to a changing environment while still providing for a transparent, robust process which includes meaningful public participation. I commend the staff for its efforts in this area.

#### Commissioner McGaffigan

I approve in part and disapprove in part the staff's recommended actions. I approve the staff's recommendation to deny NEI's petition for rulemaking. However, I join with Chairman Diaz and Commissioner Merrifield in disapproving the draft Federal Register (FRN) notice as written. The FRN should be rewritten to reflect the December 18, 2002 modification of the NEI petition for rulemaking, and to analyze and cite Commission precedent as suggested by Chairman Diaz and Commissioner Merrifield. With regard to the alternative site discussion, I agree with Commissioner Merrifield that the substantive discussion of this topic may be removed from the FRN, consistent with NEI's withdrawal of this part of the petition. However, as both the Chairman and Commissioner Merrifield point out, the petitioner's arguments and reasoning citing recent Commission decisions should be considered in the upcoming rulemaking on alternative sites.

On the topics of consideration of the need for power and alternative sites, I would note that it is possible that legislative direction could resolve these matters. In the 107<sup>th</sup> Congress, Senator Voinovich introduced, S. 1591, Nuclear Safety and Promotion Act of 2001, which explicitly removed from NRC consideration under NEPA "the need for, or any alternative to, the facility to be licensed." The Commission supported this legislation and has recently stated its continuing support to Senator Voinovich, who is considering reintroducing similar legislation.

#### Commissioner Merrifield

The staff recommends the Commission deny a petition for rulemaking to eliminate review of alternative sites, alternative energy sources, and need for power in nuclear power reactor siting and licensing reviews. For the following reasons, I approve in part, and disapprove in part the staff's bases for denying the petition. While the Commission was considering the staff's

recommendations, the petitioner supplemented its request.<sup>1</sup> Significantly, the petitioner withdrew the request for rulemaking to eliminate review of alternative sites, but urged acceptance of its petition on all other grounds. I recommend substantial edits to the Federal Register notice denying the petition to reflect the supplement and partial withdrawal of the initial petition, and to include reference to more recent trends in judicial and agency case-law interpreting a licensing agency's role in environmental reviews.

The basis for the staff's analysis is well founded. Its aim is to ensure that the agency's environmental review of new plant licensing is thorough and meaningful. An essential aspect of any National Environmental Policy Act (NEPA) review is the discussion of alternatives to the proposed action. I share staff's concern that an environmental review that overly narrows the alternatives will be meaningless, because it will skew the costs and benefits of the proposed action and fail to disclose preferred environmental alternatives. As staff recognizes, however, this concern must be balanced with judicial instructions to avoid inquiries into unreasonable alternatives or matters too speculative to allow meaningful consideration.

### Alternative Sites

I recommend that the staff modify the Federal Register notice to reflect that the petitioner withdrew its request to amend Part 52, Subpart A for alternative site review. Consequently, that issue is no longer before the agency. The substantive discussion should be deleted.

Although I am recommending the staff delete its discussion of alternative sites, I urge the staff in its upcoming rulemaking on alternative sites to work with the petitioner and other stakeholders to consider the petitioner's recommendations in both its original petition and supplement concerning review of alternative sites. Specifically, the staff should consider agency decisions that rely on more recent trends in NEPA case-law to "... accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." Hydro Resources, Inc. CLI-01-4, 53 NRC 31,55, (2001)(citations and internal quotations omitted).

Under these principles, the appropriateness of generally applicable staff guidance calling for review of an absolute number of alternative sites would be questionable, because the number of alternatives may depend on the particular circumstances of the project. For example, to suggest that an applicant, who proposes to build a nuclear reactor on the only site that it owns with reactors, must identify other alternative sites begs the question of what other sites could possibly satisfy its goal. As the Commission stated in the Hydro Resources decision, "[w]hen the purpose is to achieve one thing, it makes no sense to consider alternative ways by which another thing might be achieved." Id. (citations omitted).

### Need for Power

I do not recommend that the regulations be changed to eliminate a "need for power" review. The "need for power" review is shorthand for the "benefits" side of any proposed project. NEPA requires a benefits discussion of some sort to avoid a skewed picture of the costs. Consequently, at the Combined Operating License stage, environmental documents would be incomplete without some discussion of the power market in which the applicant proposes to

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<sup>1</sup> Nuclear Energy Institute's Petition for Rulemaking PRM-52-2 Supplemental Comments (Dec. 18, 2002).

serve. At the very least, there should be an understanding whether the project will meet excess demand or provide replacement power. Otherwise, the proposed benefits of the project would be unclear.

However, the staff's discussion of "need" in the Federal Register notice should start out with more recent cases addressing "benefits" and "need" including the Commission's comprehensive treatment of this issue in the Louisiana Energy proceeding. CLI-98-3, 47 NRC 77, 88, 89-96 (1998). Although not a reactor licensing proceeding, the Commission's analysis is generally applicable as it was focused on the very question at issue here: interpreting "need" in 10 C.F.R. Part 51, Appendix A. In LES all parties agreed that the product to be produced by LES, enriched uranium, was already in excess supply. The Commission went on to consider the possible benefits of enhanced competition from another market participant and the project furthering national policy goals.

The Federal Register notice should also note that the Commission in LES put into perspective the Commission's expectations for discussions of need that depend on economic predictions. Specifically, the Federal Register notice should be clear that the agency while requiring some discussion of need for power, is not looking for burdensome attempts to precisely identify future market conditions. Economic predictions "reflect not ineluctable truth, but rather a plausible scenario." LES at 94. "The appearance of precision ... tends to divert scrutiny from the difficult judgmental decisions involved in performing an accurate cost-benefit analysis and, specifically, in determining whether a genuine need for the facility exists." Id. at 94 (citations and internal quotes omitted).

In addition to supplementing the Federal Register notice's discussion of need for power, the staff should also rewrite the present text. As written it is confusing and needs to be clarified. It refers to Atomic Safety and Licensing Board decisions from 1974-1976 that state "absent some 'need for power,' justification for building a facility is problematical." Draft Fed. Reg. At 14 (citations omitted). Then in a footnote there is a discussion which states that a "need for power" is not the only possible benefit. Referring to the same cases, the footnote states that "[a] showing of need to substitute for existing generating capacity may also be acceptable." Id. at 2, n. 2. The footnote includes no citations to page numbers and without explanation appears inconsistent with the text.

The Federal Register notice should also be edited to clearly state that the discussion of "benefits" only applies at the Combined Operating License stage. An Early Site Permit applicant in its environmental report "need not include an assessment of the benefits (for example, need for power) of the proposed action." 10 C.F.R. § 52.17(a)(2).

### Alternative Energy Sources

For similar reasons, I do not recommend eliminating altogether, any look at alternative energy sources. Although the petitioner suggests that alternative sources of energy would not further the goal of a nuclear power plant applicant, that is too restrictive a reading of Hydro Resources. In contrast to alternative sites not owned by the applicant, one can easily conceive of other sources of power that could achieve roughly the same economic goals of nuclear power plant applicants. For example, utilities have multi-use sites with more than one source of power. Because it is feasible that another source of energy could reasonably satisfy the applicant's goals, I agree with the staff that eliminating all future consideration of alternative energy sources would be inappropriate. At the very least, a brief discussion would be necessary to inform the

need for power or “benefits” review and a “no-action” alternative review for operation.

However, it is not clear that an alternative energy source review is necessary at the Early Site Permit stage. The analysis of alternative energy sources seems to go hand and hand with the evaluation of need for power. Because the regulations specifically call for the need for power analysis at the COL stage, I recommend that the review of alternative energy sources also be done at that time. The Federal Register notice should state that the alternative energy sources review will be conducted at the COL stage.