

November 28, 1997

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: RESPONSE TO REQUEST FOR RECONSIDERATION OR DELAY OF IMPLEMENTATION OF THE PORTION OF THE FINAL POLICY STATEMENT ON RESTRUCTURING AND ECONOMIC DEREGULATION OF THE ELECTRIC UTILITY INDUSTRY ADDRESSING JOINT AND SEVERAL LIABILITY OF OWNERS

PURPOSE:

To advise the Commission of the staff's recommendation that the Commission deny the request for reconsideration or delay of implementation of the Commission's Final Policy Statement.

DISCUSSION:

By letter dated October 14, 1997, a group of eight municipal and cooperatively owned electric utility systems⁽¹⁾ ("Publicly Owned Systems") filed the "Publicly Owned Systems' Request for Reconsideration or, in the Alternative, Motion to Delay Effectiveness of a Portion of the Final Policy Statement in Order to Receive Additional Public Comment." The request seeks reconsideration of the portion of the Final Policy Statement which addresses joint and several liability of co-owners and co-licensees of nuclear power plants.

The Final Policy Statement acknowledged the NRC's implicit acceptance of the *pro rata* division of costs and output between co-owners and co-licensees, which is the standard practice of the industry. The Final Policy Statement went on to note that the NRC believes that *pro rata* division should remain the operative practice, but reserved 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 Publicly Owned Systems' request for reconsideration of that portion of the Policy Statement is based on four objections:

- First, the imposition of joint and several liability would upset the reasonable expectations of co-owners and investors because it is contrary to the contractual basis of many joint ownership arrangements, which are based on a *pro rata* allocation of liability for costs.
- Second, the possible imposition of joint and several liability generates confusion regarding the scope of an individual owner's liability, in that it creates the possibility that an owner of a small percentage of a plant could be liable for a much larger share of operating and decommissioning costs. The Policy Statement does not define *de minimis* or enunciate a standard for application of joint and several liability. Such uncertainty, it is asserted, could adversely affect an owner's ability to raise capital. In addition, the Policy Statement appears to be inconsistent with the Commission's "Proposed Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants," 62 Fed. Reg. 47588 [1997], in which the Commission noted the difficulties in attempting to impose joint and several liability for decommissioning.
- Third, the Publicly Owned Systems argue that the imposition of joint and several liability raises substantial legal issues: whether it is a violation of the constitutional prohibitions against impairment of contracts, abrogation of due process, or constitutes an unlawful "taking"; whether it is within the scope of the Commission's statutory authority under the Atomic Energy Act ; and whether it is arbitrary, capricious, and an abuse of discretion.
- Fourth, it is asserted that the creation of the uncertainty regarding liability appears to be unnecessary and unsettling in the present climate of restructuring and may complicate the transfer of nuclear generation assets, and the Commission should defer implementation until it receives comments regarding the "real-world" implications of the policy.

The Publicly Owned Systems also request, in the alternative, an additional 90-day period for public comment on the issue of imposition of joint and several liability.

Issues raised by the Publicly Owned Systems were considered by the staff in drafting the Final Policy Statement. The same or similar issues were raised by commenters responding to the Draft Policy Statement. As indicated in the supplementary information accompanying the Final Policy Statement, virtually all who commented on the issue of joint and several liability were opposed to its imposition on co-owners of licensed facilities and raised the issues of the effect on business arrangements and impairment of contracts. Nonetheless, the Commission determined to leave open the possibility that joint and several liability might be imposed, should unusual circumstances deleteriously affecting public health and safety be presented.

The Final Policy Statement did not create a binding rule or regulation and did not alter any private contractual arrangements. A statement of policy creates no binding regulation or rule for licensees. See *Limerick Ecology Action vs. NRC*, 869 F. 2d 719, 736 (1989). It is only binding on the agency. Moreover, the Policy Statement expressed no change in prior NRC practice. See *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI-88-10, 28 NRC 573 (1988), [Due to bankruptcy of the largest joint owner of the facility, the Commission required two other co-owners/licensees to be jointly and severally liable during the pendency of the license for low power testing for any deficiency in the amount of

decommissioning funding assurance].

In addition, the Final Policy Statement did not state that the NRC will abrogate contractual relations creating *pro-rata* responsibilities or interfere with a *pro-rata* division of responsibility. In fact, the Final Policy Statement acknowledged that *pro-rata* division of responsibility is the norm, and should remain the operative standard.

The Final Policy Statement is fully consistent with the "Proposed Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants," (62 Fed. Reg. 47588 [September 10, 1997]), wherein the NRC noted that the imposition of joint and several liability for decommissioning costs may not be necessary because the Commission considers the level of financial assurance for decommissioning to be adequate. Thus, the NRC saw "no need to impose an additional regulatory obligation of joint liability on co-owners or co-licensees," (62 Fed. Reg. 47588 at 47594).⁽²⁾ Similarly, the Final Policy Statement does not impose any regulatory obligation on licensees.

The comment period for the draft policy statement, which was open from September 23, 1996 until February 9, 1997, provided ample time for comment on all issues raised. It is unlikely that an additional comment period would provide any information or insight on this issue not previously brought to the attention of the Commission.

COORDINATION:

This paper and the attached response to the submittal of the Publicly Owned Systems were jointly developed by the Office of Nuclear Reactor Regulation and the Office of the General Counsel.

RECOMMENDATION:

That the Commission respond to the Publicly Owned Systems' request by denying it *in toto*, as presented in the attached letter to Gary J. Newell.

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Attachment: Letter to Gary J. Newell

1. The group is composed of the American Public Power Association, the Connecticut Municipal Electric Energy Cooperative, the North Carolina Municipal Power Agency No. 1, the New Hampshire Electric Cooperative, Inc., the Holyoke (MA) Gas & Electric Department, the City of Riverside (CA) Electric Department, the City of Anaheim (CA) Public Utilities Department, and the City of Azusa (CA) Electric Department.

2. If the Publicly Owned Systems, nevertheless, believe there is some inconsistency between the proposed rule and the Final Policy Statement, they may offer such comment with respect to the proposed rule.