RULEMAKING ISSUE
NOTATION VOTE

SECY-00-0126

June 8, 2000

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: DENIAL OF PETITION ON JOINT AND SEVERAL LIABILITY (PRM-50-64)

PURPOSE:

To obtain the Commission's approval to deny the petition for rulemaking to amend the regulations relating to the issue of potential liability among joint owners.

DISCUSSION:

On November 3, 1998, Atlantic City Electric Company, Austin Energy, Central Maine Power Company, Delmarva Power & Light Company, South Mississippi Electric Power Association, and Washington Electric Cooperative, Inc., submitted a petition (Attachment 1) relating to the subject of joint and several liability of non-operating co-owners of nuclear power plants. This issue was addressed in the "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry," published on August 19, 1997 (62 FR 44071). In the final policy statement, the Commission indicated that it "reserves the right, in highly unusual situations where adequate protection of the 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." (62 FR 44074) (This is as opposed to dividing costs by using a *pro rata* share approach.) The petition objected to the imposition of joint and several liability and requested that the issue of potential liability among joint owners be resolved by amending the regulations pertaining to enforcement in 10 CFR Part 50.

The NRC published a notice of receipt of the petition and requested public comment on it on January 5, 1999 (64 FR 432). Seventy-six comments were received on the petition, covering 20 topic areas from 16 commenters, all of whom were licensees of nuclear power plants or groups representing these licensees. None of the commenters were in favor of the NRC reserving the option of recourse to joint and several liability; however, there seemed to be a difference of opinion on the petition between those utilities that are organized as smaller minority owners and those that are not. The smaller minority owners favored the petition and the other group generally opposed it.

Our concern with this issue is explained in the following taken from the "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" published in the Federal Register on August 19, 1997 (62 FR 44071):

> 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.[1] 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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> [1]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.

The staff believes this petition should be denied for several reasons.

- The Commission has already publicly articulated its policy not to impose operating or decommissioning costs on co-owners in a manner inconsistent with their agreed-upon *pro rata* shares, except when highly unusual circumstances relating to the protection of the public health and safety require this action.

The petition would require the licensed operator of a plant to be the first imposed upon by the Commission should additional funding requirements be needed.

- The petitioners' attempt to establish an artificial distinction between the operator, operating owner, and non-operating owner would be counter to Commission legal precedent.

- The petitioners' position contradicts itself by claiming that the Commission should not impose operating or decommissioning costs on co-owners greater than their contractual obligations. However, the petitioners also stated that the financial burden should be shifted, if necessary, to the operator or operating owner (with no reference to the contractual obligations).

- Contrary to petitioners' argument on retroactivity, the Commission never "approved" the private contractual agreements for the sharing of costs among co-applicants/co-licensees. The Commission's consideration of co-applicants' or co-licensees' cost-sharing arrangements was solely for the purpose of determining, pursuant to 10 CFR 50.33, whether the co-applicants/co-licensees, as a group, had the financial qualifications necessary to construct and operate the nuclear power plant. After the Commission had assured itself that the co-applicants'/co-licensees' cost-sharing scheme, regardless of its character and provisions, provided for reasonable assurance that co-applicants or co-licensees together would be able to pay for all necessary costs of construction and operation, the Commission's inquiry was satisfied and the appropriate finding could be made. Initially, these regulations were implemented to provide financial qualification reviews at both the Construction Permit (CP) and Operating License (OL) stages. However, since 1984, the NRC has not required OL financial qualification reviews of "electric utilities." The Commission has reviewed co-owners' provisions of decommissioning funding assurance under section 50.75 in a similar manner. Staff guidance on financial qualifications discloses no intent to approve the specific cost-sharing arrangements made between licensees, as opposed to reviewing the arrangements to ensure that the licensees together possess the necessary financial qualifications. Thus, the staff, when applicable, recited the ownership percentages or decommissioning funding obligations of co-licensees in licensing actions it has taken. However, such wording merely constituted a recitation of the facts and did not reflect approval of the particular cost-sharing arrangement as a prerequisite of the staff's approval.

- Any Commission action to recognize joint and several regulatory responsibilities of co-licensees in a manner inconsistent with co-licensees' contractual agreements should not alter or render null and void those contractual agreements. Therefore, the *contractual rights* of a co-owner to recover costs from another co-owner under their contractual agreements in a private cause of action or in a bankruptcy proceeding would remain undisturbed regardless of any Commission action to ensure that operating or decommissioning funds are available from co-owners.

- Lastly, the petition does not show how the proposed rule would improve the NRC's regulatory process and maintain the same level of protection of public health and safety provided under current Commission regulations, legal precedent, and policies.

COORDINATION:

The Office of the General Counsel has no legal objection to the denial of this petition.

RECOMMENDATION:

That the Commission

1. Approve our denial of the petition for rulemaking and publication of the Federal Register notice (Attachment 2) announcing the denial.

2. Inform Congress about the denial.

3. Note that a letter is attached for the Secretary's signature (Attachment 3) informing the petitioners of the Commission's decision to deny their petition.

/RA by Frank J. Miraglia Acting For/

William D. Travers
Executive Director for Operations

CONTACT: Brian Richter NRR/DRIP/RGEB
(301) 415-1978

Attachments: As stated