

May 7, 2003

MEMORANDUM TO: William D. Travers
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - SECY-02-0175 - 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 has approved the staff's recommendation to deny the Nuclear Energy Institute's petition for rulemaking dated July 18, 2001; however, the proposed *Federal Register* notice (FRN) should be revised as discussed in the comments below. The appropriate Congressional committees and the petitioner should be informed of the Commission's decision.

The Commission has approved continued staff efforts to develop the technical bases for rulemaking to specifically define the requirements for consideration of alternative sites. The rulemaking effort should consider some of the premises underlying the current petition and include arguments and reasoning in recent Commission decisions. 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). The regulations should not be changed to eliminate review of "need for power" and alternative energy sources.

The FRN should be changed to reflect the December 18, 2002 modification of the NEI petition for rulemaking. The substantive discussion of alternative sites should be removed from the FRN, consistent with NEI's withdrawal of this part of the petition. However, in the general discussion of "Alternatives Addressed in EIS" or other appropriate location, the FRN should note that the petitioner has cited decisions of relevance to limitations on the scope of review of alternative sites, such as the Commission's own decision in *Hydro Resources*, CLI-01-4, 53 NRC 31 (2001).

The 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 Services (LES)* 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.

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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 FRN 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 and should be clear that need to substitute for existing generating capacity is also a valid benefit. Specifically, the FRN 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.” Referring to the same cases, a footnote states that “[a] showing of need to substitute for existing generating capacity may also be acceptable.” The footnote, without explanation, appears inconsistent with the text.

The FRN should also be edited to clearly state that the discussion of “benefits” need only apply 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).

The analysis of alternative energy sources seems to be related to the evaluation of need for power. Therefore, the FRN should clarify that an Early Site Permit applicant in its environmental report also need not include an assessment of alternative energy sources.

cc: Chairman Diaz
Commissioner Dicus
Commissioner McGaffigan
Commissioner Merrifield
OGC
CFO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR