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Washington, D.C. 20037

SUBJECT: PETITION FOR RULEMAKING REGARDING JOINT AND SEVERAL LIABILITY OF NON-OPERATING CO-OWNERS OF NUCLEAR POWER PLANTS

Dear Mr. Malsch:

I am responding to the November 3, 1998, petition for rulemaking you filed on behalf of Atlantic City Electric Company; Austin Energy; Central Maine Power Company; Delmarva Power & Light Company; South Mississippi Electric Power Association; and Washington Electric Cooperative, Inc. The petitioners requested that the issue of potential liability among joint owners be resolved by amending the regulations concerning enforcement in 10 CFR Part 50. The petitioners propose that the Nuclear Regulatory Commission's (NRC's) regulations be amended to provide that if the NRC imposes additional requirements to protect public health and safety, it will look first to the entity licensed to operate a nuclear power plant to assume whatever costs are incurred in meeting those requirements. The petitioners also requested that Part 50 be amended to provide that if the NRC imposes these additional requirements on co-owners (licensees) who are not licensed to operate the plant, the NRC will not impose upon any of those licensees a proportional responsibility greater than that reflected in contracts establishing the allocation of responsibility among the co-owners.

The NRC published a notice of receipt of the petition and request for comment in the January 5, 1999 (64 FR 432), issue of the *Federal Register*. Subsequently, the NRC received comments from 16 commenters. NRC has analyzed the petition and public comments and has decided to deny the petition. A summary of the Commission's reasoning is provided below.

In its analysis of the petition and comments, the Commission notes that it 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 public health and safety require this action. Further, the Commission has publicly articulated its policy that it would not seek more than *pro rata* shares from co-owners with *de minimis* ownership of a nuclear power plant.

The Commission also notes that the petition also sought to have the licensed operator of a plant be the first imposed upon by the NRC should additional requirements be needed. This would unnecessarily limit the Commission's flexibility when highly unusual circumstances affecting the protection of public health and safety would require this action.

Also, the petitioners' attempt to establish an artificial distinction between the operator, operating owner, and non-operating owner would be counter to Commission legal precedent, within the context of Commission consideration of the imposition of joint and several liability or responsibility.

Commission action ensuring that operating or decommissioning funds are available from co-applicants/co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not constitute retroactive regulatory action. Contrary to the petitioners' assertion, the Commission never "approved" the private contractual arrangements for the sharing of costs among co-owners. The Commission's consideration of co-applicants' or co-licensees' cost-sharing arrangements initially was solely for the purpose of determining, under 10 CFR 50.33, if the co-applicants/co-licensees, as a group, had the financial qualifications necessary to construct and operate the nuclear power plant. Subsequently, the Commission also considered cost-sharing arrangements with respect to decommissioning financial assurance, but did not "approve" the contractual arrangements in that context either. Accordingly, Commission action to recognize joint and several regulatory responsibility on co-licensees does not constitute retroactive regulatory action.

Commission action ensuring that operating or decommissioning funds are available from co-licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not alter, and therefore leaves undisturbed the *contractual rights* of a co-owner to recover costs from another co-owner in accordance with their contractual agreements in a private cause of action or in a bankruptcy proceeding.

Further, 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 to the operator or operating owner (with no reference to the contractual obligations).

Lastly, the petitioners do not show how their requested rule change 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. Accordingly, the Commission has denied the petition. A detailed discussion of the Commission's reasoning in this matter is contained in the enclosed notice of Denial of Petition for Rulemaking, that will be published in the *Federal Register.*

Sincerely,

Annette Vietti-Cook
Secretary of the Commission

Enclosure: Notice of Denial of
Petition for Rulemaking

Also, the petitioners' attempt to establish an artificial distinction between the operator, operating owner, and non-operating owner would be counter to Commission legal precedent, within the context of Commission consideration of the imposition of joint and several liability or responsibility.

Commission action ensuring that operating or decommissioning funds are available from co-applicants/licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not constitute an unlawful exercise of retroactivity. Contrary to the petitioners' assertion, the Commission never "approved" the private contractual arrangements for the sharing of costs among co-owners. The Commission's consideration of co-applicants' cost-sharing arrangements was solely for the purpose of determining, pursuant to 10 CFR 50.33, whether the co-applicants had the financial qualifications necessary to construct and operate the nuclear power plant. Since the Commission never approved the private cost-sharing arrangements, co-licensees had no reasonable expectation that the Commission might exercise its regulatory authority in appropriate instances in a manner inconsistent with those private contractual arrangements. Accordingly, Commission action to recognize joint and several regulatory responsibility on co-licensees does not constitute retroactive regulatory action.

Commission action ensuring that operating or decommissioning funds are available from co-applicants/licensees regardless of the contractual arrangements among co-owners for *pro rata* sharing of costs, does not alter, and therefore leaves undisturbed the *contractual rights* of a co-owner to recover costs from another co-owner in accordance with their contractual agreements in a private cause of action or in a bankruptcy proceeding.

Further, 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, but the petitioners also stated that the financial burden should be shifted to the operator or operating owner (with no reference to the contractual obligations).

Lastly, the petition does not show how its requested rule change 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. Accordingly, the petition has been denied. A detailed discussion of the Commission's reasoning in this matter is contained in the enclosed notice of Denial of Petition for Rulemaking, which will be published in the *Federal Register.*

Sincerely,

Annette Vietti-Cook
Secretary of the Commission

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