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Subject: NUREG-1577, Rev. 1

Attached, please find the comments of the New York Public Service Commission regarding the matter referenced above. Thank You.

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STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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November 10, 2004

Chief, Rules and Directives Branch
Mail Stop TG-D59
Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(via first class mail and e-mail)

Re: NUREG-1577, Rev. 1

To whom it may concern:

Attached, for your consideration, are the Comments of the New York State Public Service Commission regarding the above-referenced matter. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

/s/

David G. Drexler
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Issuance of Draft Supplement) NUREG-1577, Rev. 1
Standard Review Plan)

COMMENTS OF THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

The New York State Public Service Commission (NYPSC) submits these comments pursuant to the Nuclear Regulatory Commission's (NRC or Commission) Notice published in the Federal Register on July 19, 2004 (Notice). Although the Notice solicited comments by August 18, 2004, it indicated that comments received after this date would be considered if practicable to do so. We respectfully request that the NRC consider our comments given that all six nuclear facilities in New York would potentially be impacted by the outcome of this proceeding. Taking the unique circumstances of the sales of these facilities by New York's Investor Owned Utilities (IOUs) and Power Authority into account will contribute to a complete record and assist the NRC's decision-making process.

Copies of all correspondence and pleadings should be addressed to:

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BACKGROUND AND SUMMARY

Pursuant to the Notice, the NRC requests comments on proposed criteria for evaluating the use of an insurance policy to provide reasonable assurance of decommissioning funding for nuclear facilities. These criteria would be used in reviewing the use of insurance, as authorized under the NRC's regulations,¹ to ensure adequate protection of public health and safety.

Given our common responsibility in ensuring adequate decommissioning funds, we request that the Commission expand its proposed criteria to include State public utility commission (PUC) approval, or non-objection, in states such as New York, where nuclear facility licensees do not have access to non-bypassable charges. By expanding the criteria to encompass such State approval, the dual jurisdictions of the PUCs and the NRC over decommissioning funding will be maintained.

¹ 10 C.F.R. §50.75.

DISCUSSION

The NRC Should Provide For State PUC Approval, Even Where Licensees Do Not Have Access To Non-Bypassable Charges

The Commission's Notice proposes to require State PUC approval, or non-objection, to the use of insurance policies only where electric utility licensees have access to non-bypassable charges.² This restriction could substantially limit state authority over economic issues associated with decommissioning funding in states where nuclear facility licensees still subject to state regulation do not have access to non-bypassable charges.

The NYPSC has afforded the purchasers of the IOUs' and New York Power Authority's (NYPA) nuclear facilities lightened regulatory status, but has retained its authority with respect to matters such as the reliability of the decommissioning funds.³ Moreover, the Atomic Energy Act (AEA) has been held to

² See, Notice at ¶19.

³ See, Case 01-E-0113, et al., Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001) (providing that Entergy will "remain subject to the Public Service Law with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and other requirements of PSL Articles 1 and 4"); Case 01-E-0349, Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued October 26, 2001 (approving lightened regulation for Constellation Energy Group, Inc.'s (Constellation) Nine Mile Point nuclear facilities); Case 04-E-0030, Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued May 20, 2004) (approving lightened regulation for Constellation's Ginna nuclear facility).

provide for state jurisdiction over rates and economic aspects of nuclear facilities.⁴ Precluding the NYPSC's approval of the use of insurance would interfere with our authority to ensure that the fully funded decommissioning trusts that were transferred to the new owners are not substituted with other assurances that sacrifice the reliability or adequacy of the decommissioning funds. Furthermore, a distinction between states where licensees have access to non-bypassable charges and states where licensees do not have access to such charges, but have retained their authority, such as in New York, is arbitrary, capricious, and inconsistent with law for the reasons below.⁵

⁴ See, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission (interpreting the AEA such that Congress "intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electric utilities for determining questions of need (for additional capacity), reliability, cost, and other related state concerns," such as land use and ratemaking); see also, 42 U.S.C. §2021(k) (providing states with authority to "regulate activities for purposes other than protection against radiation hazards").

⁵ Allentown Mack Sales and Service, Inc. v. National Labor Relations Board, 522 U.S. 359, 377 (1998) (noting that "[s]ubstantive review of an agency's interpretation of its regulations is governed only by that general provision of the Administrative Procedure Act which requires courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (citing 5 U.S.C. §706(2)(A)).

The NYPSC's decisions to approve the transfers of New York's nuclear generating facilities from the IOUs to the current owners were based, in part, on the commitment of the new owners to fully decommission the facilities and restore the underlying sites to "greenfield" condition.⁶ The NYPSC ensured that the decommissioning funds transferred to the new owners, which were fully funded by the IOUs' ratepayers, were sufficient to return the sites to "greenfield" conditions. Accordingly, the NYPSC determined that the public would not be adversely impacted by the sales since there was adequate assurance that the new owners, who lack guaranteed sources of revenues from ratepayers (e.g., a non-bypassable charge), would be able to meet their financial burdens associated with decommissioning.

⁶ Case 01-E-0011, Order Authorizing Asset Transfers, (issued October 26, 2001) (authorizing the transfer of Nine Mile Point Nuclear Generating Station to Constellation Nuclear, LLC and Nine Mile Point Nuclear Station, LLC); Case 01-E-0040, Order Authorizing Asset Transfer, (issued August 31, 2001) (allowing the transfer of the Indian Point nuclear generating station to Entergy Nuclear Indian Point 2, LLC); Case 03-E-1231, Order Approving Transfer, Subject To A Modification, (approving the transfer of the Robert E. Ginna Nuclear Power Plant to Constellation Energy Group, Inc., et al.). Although the NYPSC did not approve the transfers of NYPA's facilities, the new owners of those facilities are subject to the NYPSC's jurisdiction to the same extent as the other owners. See, Case 01-E-0113, et al., Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001) (providing for lightened regulation of the facilities Entergy Nuclear Fitzpatrick LLC and Entergy Indian Point 3 LLC purchased from NYPA).

Moreover, where appropriate, the NYPSC required that the asset sales agreements contain mechanisms for the sharing of any excess decommissioning funds with ratepayers in the event the new owners placed their facilities in Safstor or decommissioned them by entombment.⁷ The purpose of these provisions was to permit New York ratepayers to realize a portion of any profits derived from the new owners not allowing New York and its residents to reuse the sites for decades, or perhaps forever.

In sum, allowing nuclear facility licensees in New York to switch their fully-funded trusts to insurance policies absent State approval violates the AEA and is arbitrary, capricious, and inconsistent with law given the circumstances under which the plants were transferred. Consequently, the NRC should expand the criteria contained in paragraph 19 to provide for State PUC approval, even where the licensees do not have access to non-bypassable charges.

⁷ Case 01-E-0011, Order Authorizing Asset Transfers, (issued October 26, 2001) (authorizing the transfer of Nine Mile Point Nuclear Generating Station to Constellation Nuclear, LLC and Nine Mile Point Nuclear Station, LLC); Case 01-E-0040, Order Authorizing Asset Transfer, (issued August 31, 2001) (allowing the transfer of the Indian Point nuclear generating station to Entergy Nuclear Indian Point 2, LLC).

CONCLUSION

For all the reasons above, the Commission should adopt the proposal contained herein.

Respectfully submitted,

/s/

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Dated: November 10, 2004
Albany, New York