Subject: Outcomes of November 5, 2008 public meeting to discuss the Nuclear Energy Institute (NEI) comments on Decommissioning Planning rule.

- Summary Notes of the subject meeting have been entered into ADAMS (ML083181094) and have been posted to the public NRC decommissioning website at http://www.nrc.gov/about-nrc/regulatory/decommissioning/public-involve.html. The purpose of the meeting was to provide NEI an opportunity to elaborate on their comments submitted during the proposed rule's public comment period. The staff has carefully considered each of the issues raised by NEI and believes that two issues should be noted by the Commission.

1.

Staff is recommending that proposed 10 CFR part 30, Appendix A.(III)(E) -- which would impose a joint and several liability requirement on the guarantor of a Parent Guarantee – not be part of any final published rule. If the Commission approves this recommendation, the staff would prepare a supplemental proposed rule limited to the removal of the joint and several language for public comment. The proposed provision E (on page 192 of the final rule draft *Federal Register Notice*) is a single sentence, stating: "The guarantor must agree that it is jointly and severally liable with the licensee for the full cost of decommissioning, and that if the costs of decommissioning and termination of the license exceed the amount guaranteed, the guarantor will pay such additional costs that are not paid by the licensee."

The NEI asserted that promulgation of provision E would be a policy change, in that it would require the guarantor of a Parent Guarantee to agree to joint and several liability with its subsidiary company for the full cost of decommissioning. After careful evaluation, the staff agrees that imposing such liability by rule would be a change in NRC policy. The basis for this finding, in part, is that after the November 5, 2008 public meeting, the staff reviewed Amendment 1 to the Parent Guarantee executed on May 7, 2007, on behalf of Duane Arnold LLC. In that guarantee, the Guarantor (FPL Group Capital Inc) "guarantees to the NRC that if the Licensee fails to perform the required decommissioning activities, the Parent Company shall (a) carry out the required activities, or (b) set up a trust fund for the benefit of the NRC in the amount of $93 million (in year 2007 dollars)(the "Guaranteed Obligations")." Contrary to what the staff had previously assumed was the case, this guarantee does not cover the full cost of decommissioning.

Following the November 5, 2008 meeting, the staff also performed an additional review of how the NRC has evaluated the joint and several liability issue in the past. During the 1990's, the NRC took steps to address deregulation of electric utilities. As part of this effort, a "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" was published on August 19, 1997 (62 FR 44071). In responding to comments on joint ownership issues raised in the draft policy statement, the NRC stated in the policy preamble as follows:

> The NRC recognizes that co-owners and co-licensees generally divide costs and output from their facilities by 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. The NRC is addressing the issue of non-owner operators separately.

In line with the above, a proposed rule ("Financial Assurance Requirements for Decommissioning Nuclear Power Reactors") was published on September 10, 1997 (62 FR 47588 et seq) wherein the NRC stated in the preamble as follows:

> The regulations do not explicitly impose joint liability on co-owners and co-licensees. … [The NRC] sees no need to impose an additional regulatory obligation of joint liability on co-owners or co-licensees.

62 FR at 47594 col. 2. In response to requested input on how to address the issue of future funding shortfalls caused by underestimates of decommissioning costs, the NRC noted in this preamble its authority to require power reactor licensees to submit their current financial assurance mechanisms for review, and stated in this regard as follows:

> The Commission reserves the right to take the following steps in order to assure a licensee's adequate accumulation of decommissioning funds: review, as needed, the rate of accumulation of decommissioning funds; and either independently or in cooperation with either the FERC and the State PUC's, take additional actions as appropriate on a case-by-case-basis, including modification of a licensee's schedule for accumulation of decommissioning funds.

62 FR at 47597 col. 2. In the final published rule ("Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (63 FR at 50465 et seq., September 22, 1998), the above-quoted language from the preamble was codified as 10 CFR 50.75(e)(2), and this provision remains in place today.

In this 1998 final rulemaking, rather than revising the Part 50 definition of "electric utility" as initially proposed, the NRC instead amended 10 CFR 50.75 by replacing its references to electric utilities with references to power reactor licensees. This action had the effect of separating issues of whether applicants for reactor licenses are financially qualified under 10 CFR 50.33(f) (where the definition of "electric utility" is still relevant) from 10 CFR 50.75 financial assurance for decommissioning issues. See 63 FR at 50466.

In this latter area, the NRC endorsed the need for flexibility given the ongoing restructuring of the electric power industry. For example, situations could arise in which the plant operator has greater financial resources than the plant owner, and the NRC therefore declined to exempt operator licensees from financial assurance for decommissioning requirements. See 63 FR at 50468. Among the 1998 amendments, 10 CFR 50.75(e)(1)(vi) was added, and the rule was otherwise structured to provide a variety of financial assurance mechanisms, including methods not specifically identified in the regulations. See 63 FR at 50469 col. 2.

The NRC similarly endorsed using combinations of financial assurance methods, and in the 1998 rulemaking removed the regulatory prohibition which did not allow use of either the self-guarantee or parent company guarantee "in combination with other mechanisms." 63 FR at 50473 col. 2. (But the NRC did state its general belief that licensees should not be allowed to use the self-guarantee and parent company guarantee "in combination with each other," in order to avoid double counting the same assets. 63 FR at 50473 col. 3.). The combination of a self-guarantee or parent company guarantee and an external sinking fund "appears to provide a relatively low-cost means" to provide financial assurance while the reactor licensee

continues to “gradually fund decommissioning costs over time.” 63 FR at 50473 col. 3. The Commission summarized its discussion on this topic by stating that “the NRC has eliminated the prohibition on combining parent company or self-guarantees with external sinking funds.” 63 FR at 50473 col. 3. As discussed below, NEI quotes this last statement in its May 2008 written comments opposing the proposed joint and several liability provision.

The proposed Decommissioning Planning rule was published for comment on January 22, 2008 (73 FR at 3812 et seq), and included the following new provision E to be added to the Parent Company Guarantee requirements under Section III of Appendix A to Part 30:

> E. The guarantor must agree that it is jointly and severally liable with the licensee for the full cost of decommissioning, and that if the costs of decommissioning and termination of the license exceed the amount guaranteed, the guarantor will pay such additional costs that are not paid by the licensee.

In its May 2008 comments, NEI described this provision as a reversal – rather than a clarification – of policy. Citing 73 FR at 3818, NEI argued that provision E was likely an “unintended consequence” with respect to power reactors, based on the January 2008 preamble’s statement that no changes to 10 CFR 50.75(e) were being proposed. At the November 5 meeting with NRC staff, Morgan Lewis' John Matthews argued on NEI’s behalf that previous to the 1998 rulemaking discussed above, NRC required a 100% cost guarantee, but that the 1998 rule changed this to permit less than a 100% guarantee. The present rulemaking, in going back to requiring 100% if the parent company guarantee is used, represents a significant policy change. NEI further argued that while the 1997 policy statement discussed above endorsed the concept of joint/several liability, such liability applied only with respect to a co-owner of a plant, i.e. a licensee. But a parent corporation of a reactor licensee is not itself an NRC licensee, and the 1997 policy statement did not address actions against non-licensees. Matthews concluded his remarks on this issue by stating that until now, the NRC has always respected the corporate form, except in the limited cases where piercing the corporate veil is justified.

The January 2008 preamble’s statement (73 FR at 3818) that no changes to 10 CFR 50.75(e) were being proposed was accurate. But the Staff failed to acknowledge there the connection between 10 CFR 50.75(e)(1) and 10 CFR Part 30, Appendix A. The existing parent company guarantee provisions of 10 CFR 50.75(e)(1)(iii) reference 10 CFR Part 30, Appendix A. Thus, adding provision E to the Parent Company Guarantee requirements under Section III of Appendix A to Part 30 in the proposed rule affected how 10 CFR 50.75(e)(1) would be applied in the future, and represented a change in policy.

As it would be a change in policy, imposing joint and several liability in this rulemaking would first require performance of a backfit analysis.

In any re-noticing of this rule, the existing rulemaking package would be revised by removing provision E. This will involve a global renumbering of current sections in part 30 Appendix A. (III)(F), (G) and (H) to be sections (E), (F) and (G).

Additionally, the following revisions to the rule package will need to be made to remove references to joint and several liability language:

- Revision of the SECY paper on page 6.

- Revision of the draft Federal Register Notice (FRN) on pages 120 through 125 to change the Responses to Comments H.10.1 through H.10.4 on the topic of joint and several liability; on page 120 in the section by section analysis; and on page 192 in the final rule text for the Parent Guarantee.
- Revision of the Regulatory Analysis on pages 26 and 58, and estimated impacts of the rule in Tables 5-1, 5-2 and 5-3.
- Revision of the OMB supporting statement for the final rule on page 6.
- Changes to the revised financial assurance guidance document.

2.

The NEI asserted that NRC did not comply with backfit regulations in development of the rule. Other than with respect to the joint and several liability issue discussed above, the staff disagrees with the NEI on this issue. A 4-page description of the NEI backfit assertions and the NRC response to each is in a non-publicly available file, ML083220035.