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February 7, 1997

Secretary  
United States Nuclear Regulatory Commission  
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: **NRC DRAFT POLICY STATEMENT ON THE  
RESTRUCTURING AND ECONOMIC DEREGULATION  
OF THE ELECTRIC UTILITY INDUSTRY**

Dear Secretary:

These comments are submitted by the New Jersey Division of the Ratepayer Advocate ("NJDRA") in response to the U.S. Nuclear Regulatory Commission's ("NRC or Commission") Draft Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry. This Draft Policy Statement was published in the Federal Register on September 23, 1996.

The NJDRA is a statutory representative of residential, commercial, and industrial public utility customers in the State of New Jersey. See *Reorganization Plan No. 001-1994*, reprinted at *N.J.S.A. 13:1D-1*; see also *N.J.S.A. 52: 27E-50 et seq.* The NJDRA has a vital interest in the development of Commission policy on nuclear generation, safety, and decommissioning issues, particularly in any proceeding that may affect the charges or costs associated with the provision of electric energy or related services in the State of New Jersey.

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Three electric utilities in New Jersey -- Public Service Electric & Gas Company, Atlantic City Electric Company, and Jersey Central Power & Light Company -- are the co-owners of a total of seven operating nuclear units located in New Jersey and Pennsylvania.<sup>1</sup> These three utilities currently serve approximately 3.5 million residential, commercial, and industrial customers in the State of New Jersey. These ratepayers have a significant interest in the developing transition from a regulated market for electricity to a restructured and economically deregulated environment. The NJDRA is pleased that the NRC has issued the Draft Policy Statement. The issues addressed in the Draft Policy Statement are both timely and important.

On January 16, 1997, the New Jersey Board of Public Utilities (NJBPU) issued its proposal for restructuring the electric industry.<sup>2</sup> This NJBPU report calls for a phase-in of direct retail customer choice beginning in October 1998. Several recommendations in the Report, if ultimately adopted by the Board, may have a direct impact on the nuclear power industry. The NJBPU will require the functional separation of vertically-integrated utilities into generation, transmission, and distribution entities. The Report suggests that divestiture of utility generating assets may be desirable at some stage of the transition to retail competition. The Report also addresses the mechanism by which the future "distribution utility" that still

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<sup>1</sup> These seven nuclear units are Salem Units 1 and 2; Hope Creek Unit 1; Peach Bottom Units 2 and 3; Oyster Creek; and Three Mile Island Unit 1.

<sup>2</sup> *Restructuring the Electric Power Industry in New Jersey: Proposed Findings and Recommendations*, BPU Docket No. EX94120585Y (January 16, 1997). The Board has stated that it intends to issue its final decision in this matter by the end of March, 1997.

owns nuclear generating plants will recovery operation, maintenance, and decommissioning costs from customers. Finally, the Report calls from a mechanism for utilities to recover at least some portion of stranded costs, of which a large percentage are likely to be uneconomic nuclear generating plants.

The NJDRA has the following comments on specific issues that the NRC identified in the Draft Policy Statement as needing further evaluation:

A. ***NRC RESPONSIBILITIES VIS-A-VIS STATE AND FEDERAL ECONOMIC REGULATORS***

The NJDRA encourages the NRC to maintain an ongoing dialogue with state and federal economic regulators, including the state utility commissions, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, and the National Association of Regulatory Utility Commissioners (NARUC). The NRC can bring important and unique insights into the national discussion and into federal and local proceedings concerning electric utility industry restructuring.

The NJDRA also encourages the NRC to establish an ongoing dialogue with representatives of all classes of utility ratepayers. The NJDRA recognizes that the NRC does not have direct regulatory authority on economic issues. However, as the NJDRA has seen through its involvement in nuclear-related issues on the state level, actions taken by the NRC, and positions advocated by the NRC, can have significant economic impacts on utilities and

their ratepayers. For this reason, the NJDRA believes that it is essential that the NRC be fully informed both as to the positions advocated by ratepayers and their representatives on all important issues related to electric utility restructuring and rate regulation and to the reasoning behind those positions. The NRC regularly communicates in a number of different forums with those electric utilities who are Commission licensees. NJDRA believes that the NRC should reach out to representatives of ratepayers as well, perhaps through the National Association of State Utility Consumer Advocates (NASUCA).

The issuance of this Draft Policy Statement and the acceptance of public comments are excellent first steps in establishing the needed dialogue between the NRC and ratepayers. The NJDRA encourages the NRC to take the additional step of actively seeking out and meeting with responsible representatives of ratepayer interests to discuss on a continuing basis the specific issues raised in the Draft Policy Statement, as well as any other important issues that concern the restructuring and economic deregulation of the electric utility industry.

NASUCA will be holding a conference in Washington, D.C. at the end of March, 1997, on electric utility industry restructuring. Representatives of ratepayers, utilities, and firms who are potential participants in a competitive electricity market will attend this conference. The NJDRA urges the NRC Commissioners and their representatives to attend and participate in the conference as a next step toward establishing an ongoing dialogue.

**B. *CO-OWNER DIVISION OF RESPONSIBILITY***

In the future competitive market, the NRC should continue its current policy that views all co-owners of a nuclear plant as co-licensees who are responsible for complying with the terms of their licenses. The NRC also should work with State and Federal economic regulators to ensure that the entry of a nuclear plant owner into financial difficulties or bankruptcy does not increase the financial burdens on the ratepayers of co-owner utilities. For example, the NRC should require some form of advance assurance that plant co-owners would continue to make their pro rata contributions for operating and decommissioning expenses even while in financial difficulty or bankruptcy. In this regard, the NRC should investigate whether legislative or regulatory clarification of the Commission's jurisdiction vis-a-vis the U.S. Bankruptcy Court's jurisdiction with respect to nuclear plant licensees is warranted.

Competitive pressures in a restructured and deregulated market will increase the economic and financial pressures on all nuclear plant owners while threatening the continued viability of some owners. The examples of Public Service Company of New Hampshire and El Paso Electric Company, which were cited in the Draft Policy Statement, may not be indicative of what will happen in similar circumstances in the future. In a competitive market, some nuclear plant owners, whether electric utilities or not, may not be able to reorganize and successfully emerge from bankruptcy.

The future will undoubtedly see many transfers and changes in nuclear plant ownership, mergers, and company restructurings, including the establishment of holding companies with both regulated and unregulated subsidiaries. It is essential that the NRC work

with State and Federal economic regulators to assure that, despite all of these changes, assets of nuclear plant owners that should be available for nuclear plant operating and decommissioning expenses in times of financial difficulty or bankruptcy can actually be reached and are not unreasonably shielded or hidden away in complex corporate structures.

As discussed in the introduction to these comments, the NJBPU has recently initiated a restructuring framework that, if adopted, will require vertically-integrated utilities to, at a minimum, functionally separate their generation-owning business from their transmission and distribution businesses. Corporate restructuring into legally separate entities is a likely result of this requirement. The NJBPU report also suggests that voluntary or mandatory divestiture of generating plants may be desirable in certain circumstances. The NRC should ensure that its licensing and enforcement jurisdiction remains sufficiently effective under each of these levels of utility restructuring.

The NJBPU Report also addresses the mechanism by which the future "distribution utility" which has been "functionally unbundled" from its affiliated nuclear generation company, will recover operation, maintenance, and decommissioning costs from customers. The Report calls for such costs to be collected through a non-bypassable "wires charge" that, in theory, would be assessed on all customers. The NRC should review the States' plans for recovery of such costs in the restructured electric industry, to insure that once recovered through rates, these revenues are employed for the purposes for which they were collected.

In addition, many nuclear plant owners may receive substantial cash flow benefits during the transition from regulated to competitive markets as a result of the state regulator-

authorized recovery of stranded nuclear assets. The NRC should work closely with State and Federal economic regulators to require that all stranded nuclear plant costs that are recovered are first allocated to the future payment of operating and decommissioning expenses. Only after the future payments of these essential expenses have been assured by nuclear plant owners, should electric utilities be allowed to use the funds acquired through the recovery of stranded nuclear plant costs for any other activities.

The NJBPU restructuring report also suggests that securitization of utility assets, through legislatively-authorized "asset-backed securities," may be an advantageous method of reducing stranded cost charges to customers. Nuclear plants are likely to be a primary source of stranded utility assets in New Jersey. The NRC should ascertain whether such securitization with respect to nuclear generating plants is permissible, from both a regulatory/legal perspective and a public policy viewpoint. Furthermore, the NRC should investigate whether and how it may require that proceeds from securitization of nuclear plant assets be used for nuclear operations, maintenance, and decommissioning expenses.

### **C. *FINANCIAL QUALIFICATIONS REVIEWS***

The NJDRA agrees that the NRC should review, pursuant to Section 184 of the Atomic Energy Act and 10 CFR §50.80, all proposed license transfers to determine their impact on the licensee's ability both to maintain adequate technical qualifications and organizational control and authority over the facility and to provide adequate funds for safe operation and



decommissioning. Certainly, the financial qualifications of all nuclear plant owners, especially those which are not "electric utilities" under 10 CFR §50.2, must be assured.

However, because of the competitive economic pressures inherent in the deregulated market, this scrutiny should not be limited to a one-time review. Instead, the NRC should require that all nuclear plant co-owners, including those that are electric utilities within the definition of 10 CFR §50.2 and those that are not, periodically file information to demonstrate that they remain financially qualified and capable of providing needed operating and decommissioning expenses. These periodic filings, which should be required every two to five years, could also trigger NRC investigations, and possibly public hearings, on whether nuclear plant co-owners remain financially qualified.

**D. *DECOMMISSIONING FUNDING ASSURANCE COMPLIANCE REVIEWS***

Under 10 CFR §50.2, the NRC defines an "electric utility" as:

Any entity that generates or distributes electricity and which recovers the cost of electricity, either directly or indirectly through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing are included within the meaning of "electric utility."

[10 CFR §50.2].

NRC Regulations permit an "electric utility" to provide financial assurance for funding the decommissioning of a nuclear plant through systematic payments into an external sinking



fund. Potential new plant owners that are not "electric utilities" should be required to provide advance assurance of their capability and commitment to funding plant decommissioning.

Because of the great financial uncertainty that will exist in a deregulated environment, the NRC should increase the frequency and detail of periodic licensee reports on nuclear plant decommissioning funds. This filings would alert the NRC, State and Federal Regulators, and the rate paying public to any potential decommissioning fund deficiencies and could provide the basis for prompt regulatory action.

The NRC should review existing federal regulations concerning nuclear decommissioning funds to see if these rules will afford adequate assurance that decommissioning funds are not used for any other purposes in a deregulated electric industry. Decommissioning funds could conceivably become attractive sources of venture capital for entrepreneurs. The NRC and State and Federal regulators should not allow the funds that have been collected from ratepayers for the operation and decommissioning nuclear power plants to be diverted to other, perhaps significantly riskier, uses. This concern would particularly apply in instances where an unregulated non-utility becomes the owner/licensee of a nuclear generating plant.

Finally, the NRC should work with State and Federal economic regulators to determine what actions would have to be taken if competitive economic pressures force the early retirement of a nuclear plant before full funding for decommissioning the plant has been collected. Ratepayers should not be the sole source considered to provide the additional funds

needed to make up for such decommissioning fund short-falls. Investors in the plant should be required to bear an equitable amount the additional cost burdens.

E. ***ANTITRUST REVIEWS***

Although the NRC does not have the primary responsibility for enforcing federal antitrust statutes, in order to prevent anti-competitive practices, the NRC historically has included antitrust conditions in licenses that required, for example, the sharing of nuclear plant ownership. The NRC should continue to review the anti-competitive implications of changes or transfers in nuclear plant ownership, including changes in the control of licensed facilities due to changes in ownership structure, in a future economically-deregulated environment. In particular, the NRC should require that notice of such transfers or changes in ownership be published and that the public be afforded the opportunity to comment on any potential anti-competitive effects of the proposed transfer.

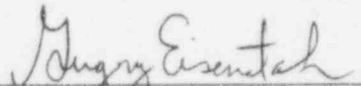
The NJDRA also supports the proposal by Publicly-Owned Systems (in their December 9, 1996 Comments on the Draft Policy Statement) that the NRC should work jointly with the U.S. Department of Justice Antitrust Division to develop a list of guidelines or criteria to apply in evaluating requests for changes in nuclear plant ownership and control. As was noted by Publicly-Owned Systems, if that effort was made early in the transition to a competitive market, there could be no complaint that the regulatory guidelines were not clear and sufficient or that the NRC was impeding the transition to a competitive market.

**CONCLUSION**

The New Jersey Division of the Ratepayer Advocate thanks the NRC for the opportunity to comment on the Draft Policy Statement, and believes that the Statement is an appropriate first step in what should be an ongoing process. The NJDRA requests that the NRC consider and incorporate the foregoing comments into its Policy Statement.

Respectfully submitted,

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