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Dr. Thomas D. Ryan

SENIOR VICE PRESIDENT

REGULATORY POLICY & REFORM

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DOCKETING & SERVICE
STATION

February 7, 1997

Mr. John C. Hoyle
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTENTION: Docketing and Service Branch

SUBJECT: NRC Draft Policy Statement on the Restructuring and
Economic Deregulation of the Electric Utility Industry
(61 Fed. Reg. 49711; September 23, 1996)

Dear Mr. Hoyle:

The Nuclear Energy Institute (NEI)¹ offers the following comments on behalf of the U.S. commercial nuclear energy industry on the Nuclear Regulatory Commission's (NRC) *Draft Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry*.

I. General Principles

The NRC's Draft Policy Statement is a valuable first step toward an important goal—providing clear guidance to nuclear power plant licensees, state and federal government policy-makers, the NRC staff and others as they address the nuclear regulatory issues that will emerge as the business of electricity generation evolves from a fully regulated, cost-of-service framework into a competitive environment.

The nuclear industry recognizes that growing competition in electricity generation and restructuring of the electric power industry will have some impact on

¹ The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect-engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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nuclear power plant licensees. The industry also recognizes that certain of the NRC's regulations may need to be changed or refined (1) to reflect these changing conditions and circumstances, and (2) to maintain the NRC's confidence that nuclear power plants can be operated and decommissioned safely.

The nuclear industry encourages the NRC to continue the process of defining and developing new generic requirements where necessary, and the industry (through NEI) will continue to work with the NRC on reshaping its regulatory framework and requirements. The industry believes that NRC should adopt a deliberate, measured approach to industry restructuring, taking appropriate actions when necessary to (1) ensure protection of public health and safety; (2) allow nuclear power plant licensees to make timely business decisions; and (3) provide guidance for federal and state policy-makers as they consider possible changes to electric utility industry structure that affect nuclear power plants.

The existence of regulatory requirements and processes that are clear, stable and predictable is absolutely essential. The existence of such requirements will allow federal and state government policy-makers to make sound, reasoned decisions as they consider possible changes to industry structure. And clear, predictable regulatory guidance is essential to allow nuclear utilities to make timely business decisions and to allow the NRC to make its regulatory decisions.

II. Comments on Specific Issues

Assurance of Adequate Decommissioning Funds. The Draft Policy Statement recognizes correctly the need to assure the adequacy of funds for decommissioning nuclear power plants. There can be no question of the necessity of assuring adequate decommissioning funding.

Although there is no crisis with respect to assuring adequate decommissioning funding, we understand that the NRC plans to proceed with its proposed rulemaking in this area. In previous comments to the NRC,¹ we acknowledged the possible need for additional assurance of adequate decommissioning funding if a nuclear power plant licensee no longer meets the definition of "electric utility" in 10 CFR 50.2, or is unable to satisfy the intent of the NRC's regulations in some other way. In those comments, the industry also urged the NRC to avoid precipitous action—e.g., requiring accelerated funding of decommissioning obligations for all licensees—because such actions could unnecessarily decrease the competitive

¹ NEI Comments on the NRC's Advance Notice of Proposed Rulemaking, *Financial Assurance Requirements for Decommissioning Nuclear Power Reactors*, June 24, 1996.

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position of nuclear power plants compared to other forms of generation and possibly influence business decisions regarding nuclear power plants' continued operation.

NEI reaffirms those comments here. It is impossible today for the industry or the NRC to predict all the possible new forms of ownership that may emerge. Because it is impossible to foresee how any utility or the industry in general might be restructured, any requirements for the assurance of decommissioning funds should be flexible and should not prescribe how licensees attain the required level of assurance. To that end, 10 CFR 50.75 already establishes criteria for alternative ways of providing reasonable assurance for decommissioning funding and, therefore, provides a sound basis from which to consider any modifications to existing NRC requirements.

Because decommissioning is a public health and safety issue, we believe the NRC can play an important role by (1) formally encouraging the National Association of Regulatory Utility Commissioners and the Federal Energy Regulatory Commission (FERC) to assure collection of all necessary decommissioning funds as part of ongoing rate proceedings; (2) advocating to the Executive Branch and Congress the inclusion of appropriate provisions to assure adequate decommissioning funding in any federal legislation to restructure the electric power industry; and (3) supporting such provisions in testimony before the U.S. Congress.

NRC Responsibilities vis-a-vis State and Federal Economic Regulators. The nuclear energy industry supports the NRC's intention to increase its interactions and working relationships with state and federal economic regulators. Increased cooperation between the NRC and state public service commissions, and between NRC and other federal regulatory agencies like the FERC, can help the NRC stay abreast of developments and allow the NRC to provide input concerning actions that could have public health and safety implications.

In addition to increasing interactions and cooperation with state and federal economic regulators, we believe the NRC should undertake a systematic and continuing effort to increase its interactions with (1) the appropriate committees of the U.S. Congress with an interest in, and jurisdiction over, restructuring of the electric power industry, and (2) with state governments, through their national organizations, including the National Governors Association, the National Conference of State Legislatures, the American Legislative Exchange Council, and other similar groups. In several states (e.g., California, Rhode Island, Pennsylvania), legislatures have played as critical and important a role in industry restructuring as state regulators, and we believe that state governments will

continue to play an important role in the restructuring of the electric power industry.

Financial Qualifications Reviews. The nuclear industry agrees with the Draft Policy Statement's conclusion that the "existing regulatory framework ... is generally sufficient at this time to provide reasonable assurance of the financial qualifications of both electric utility and non-electric utility applicants and licensees under the various ownership arrangements of which the staff is currently aware" (61 Fed. Reg. at 49713).

Given this conclusion, there is no pressing need "to develop additional requirements" as the Draft Policy Statement suggests.

From a public health and safety perspective, the key issue is not whether nuclear power plant licensees can generate sufficient revenue to assure safe operation of nuclear power plants, nor how much revenue is enough. The key issue is whether that revenue, and other resources, are well-managed and allocated appropriately.

The sole focus for the NRC should be plant safety-related performance. The NRC has adequate programs and processes to detect any deterioration in operational safety, and adequate authority to take any steps necessary to assure public health and safety.

As conditions in the industry change, we believe the NRC may find it appropriate and necessary to broaden its definition of corporate entities judged financially qualified to own and operate nuclear power plants beyond the narrow and restrictive definition embodied in 10 CFR 50.2. What is important here is the desired result—reasonable assurance of sufficient revenue for safe operation and decommissioning of a nuclear power plant or plants—not the corporate structure that produces the desired result.¹

Antitrust Reviews. Notwithstanding the fact that the Atomic Energy Act imposes on the NRC a statutory obligation to conduct antitrust reviews, market power

¹ In January 1996, the Nuclear Energy Institute established an Executive Task Force on Nuclear Regulatory Aspects of Industry Restructuring, comprised of nuclear utility Chief Nuclear Officers, as the focal point for the industry's interactions with the NRC on these issues. That Executive Task Force has created Issue Task Forces to conduct detailed reviews of certain issues. An Issue Task Force on Legal/Financial Implications of Nuclear Industry Restructuring is examining the existing financial qualifications criteria in detail and will be making recommendations to the Executive Task Force. At that time, the industry will be better positioned to engage in a substantive dialogue with the NRC on these issues.

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considerations are an integral part of the debate over how best to restructure the electric power industry, and antitrust issues may arise in proceedings before the NRC.

The nuclear industry believes that state regulatory agencies, the U.S. Department of Justice, the Federal Energy Regulatory Commission and the Securities and Exchange Commission have considerable expertise and resources in this area, and are dealing with market power issues in every case involving mergers, transmission tariffs or other restructuring initiatives.

NRC's statutory mandate to perform antitrust reviews is an artifact of the early years of commercial nuclear power and no longer relevant or necessary in today's environment. We suggest, therefore, that the NRC work with the appropriate jurisdictional committees of Congress to amend the Atomic Energy Act to remove the statutory requirement that the NRC perform antitrust reviews. The NRC resources now allocated to this activity could be deployed more usefully elsewhere.

Until such statutory changes are made, we suggest the NRC develop a Memorandum of Understanding (MOU) with FERC and SEC, through the ongoing dialogue established pursuant to the NRC Action Plan, that would allow the NRC to rely on those agencies' judgments about market power and antitrust issues in matters involving nuclear power plants that do not raise issues unique to the NRC's mandate.

License Transfers. The nuclear industry believes that the issue of license transfers and the NRC's authority under 10 CFR 50.80 deserves significant policy attention by the Commission.

In connection with any electric power industry restructuring, all parties would benefit from clear definition of the range of corporate restructurings that would be acceptable to the NRC. NEI looks forward to working with the NRC to refine existing terms and criteria, or to develop new criteria, to provide the NRC with reasonable assurance that a new corporate entity is financially qualified to operate a nuclear power plant and to accumulate the funds necessary for decommissioning.

The industry does not agree with that portion of the Draft Policy Statement—nor with NRC's June 21, 1996, Administrative Letter 96-02—which suggests broadly that the formation of holding companies, regardless of their inherent structure, would constitute a direct or indirect transfer of license control requiring NRC approval under §50.80.

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Although the industry agrees that the NRC should be informed in advance of all proposed corporate restructurings by licensees, certain restructurings, such as the creation of a parent holding company, do not by themselves necessarily effect a direct or indirect transfer of ownership such that 10 CFR 50.80 applies, and should not be subject to unnecessary regulatory procedures and potential delays without cause. The assertion in the Draft Policy Statement—that "NRC staff has advised licensees that agency consent should be sought and obtained under 10 CFR 50.80 for the formation of a new holding company over an existing licensee"—fails to consider that the creation of holding companies may not effect a direct or indirect transfer of control, which is the jurisdictional criteria established in §50.80. If control is not effected, §50.80 is not implicated and NRC consent is not required.

We believe that a functional, rather than a structural, test should be applied in determining whether the conditions triggering §50.80 approval would or would not occur. Accordingly the NRC should require approval under §50.80 only if, after a specified period for review, the NRC does not concur with a conclusion reached by a licensee that no direct or indirect transfer of control would occur.

The industry also believes that the NRC should provide additional guidance to its Atomic Safety and Licensing Boards as they consider proposed license transfers under §50.80.

The nuclear industry believes that any transition to greater competition in electricity generation will likely result in the formation of new corporate entities such as joint nuclear operating companies. By focusing resources solely on nuclear power operations, such restructurings will likely enhance nuclear power plant reliability, safety performance and, in parallel, economic performance. We believe that the public interest is best-served if such restructurings—which will improve operational reliability and efficiency—are managed with dispatch and not delayed unnecessarily by a lengthy, undisciplined hearing process.

To avoid a repetition of previous license transfer proceedings, some of which were of substantial duration, NEI believes the Commission should stabilize the licensing process by providing its Licensing Boards clear guidance to ensure:

- that Licensing Boards limit their inquiries to issues that arise because of the proposed license transfer or amendment being sought (*i.e.*, but for the license

transfer/amendment, the issue would not otherwise have arisen). The mere existence of a license transfer request should not be viewed as an opportunity to raise issues that intervenors happen to have with the entity or entities seeking regulatory approval.

- that a safety basis exists for issues that intervenors seek to raise in NRC proceedings. This is particularly important because NRC license transfer proceedings could become a forum for competitive interests to challenge proposed restructuring initiatives where they see such initiatives as potentially disadvantaging their competitive position.

We also believe the NRC should provide more explicit guidance on, and more rigorous application of, the "no significant hazards consideration" criteria, as those criteria are applied to restructuring initiatives. Absent extenuating circumstances, most restructurings will pose "no significant hazards" considerations. Such a finding should remove any requested hearing from the critical path—*e.g.*, the NRC can approve the license transfer before the hearing is complete. The NRC would, of course, always retain the authority to withdraw its approval if the decision upon conclusion of the hearing process so requires.

III. Conclusion

The NRC's Draft Policy Statement is a valuable step in the process of providing clear guidance for nuclear power plant licensees, the NRC staff, federal and state government policy-makers and others as they address the issues associated with restructuring of the electric power industry.

A stable, predictable regulatory framework and requirements are essential to allow licensees to make timely business decisions and to permit policy-makers to reach sound, reasoned decisions as they consider possible changes to industry structure.

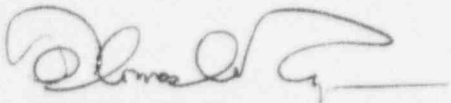
The nuclear industry recognizes that restructuring of the electric power industry could have a significant impact on nuclear power plant licensees and may require changes and refinements to certain of the NRC's regulations.

The nuclear industry encourages the NRC to adopt a deliberate, measured approach to the process of defining and developing new generic requirements where necessary.

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We welcome the opportunity to work with the Commission and the NRC staff on these issues in the months and years ahead.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Thomas D. Ryan', with a stylized flourish at the end.

Thomas D. Ryan
Senior Vice President
Regulatory Policy and Reform