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February 10, 1997

John C. Hoyle  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Attention: Docketing and Service Branch

**RE: Draft Policy Statement on the Restructuring and Economic Deregulation  
of the Electric Utility Industry, (61 Fed. Reg. 49711)**

Dear Mr. Hoyle:

Enclosed for filing in the above matter are the Comments of the Massachusetts Attorney General. Thank you for assistance.

Sincerely,

[document retrieved from Electronic  
Bulletin Board]

Joseph W. Rogers  
Assistant Attorney General

Enclosure

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UNITED STATES OF AMERICA  
BEFORE THE  
NUCLEAR REGULATORY COMMISSION

Draft Policy Statement on the Restructuring  
and Economic Deregulation of the Electric  
Utility Industry

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10 C.F.R. Part 50

**COMMENTS OF THE MASSACHUSETTS ATTORNEY GENERAL**

The Massachusetts Attorney General ("MassAG") hereby submits Comments on the Nuclear Regulatory Commission's Draft Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 61 Fed. Reg. 49711 (Sept. 23, 1996).

**I. INTRODUCTION**

The Nuclear Regulatory Commission ("NRC" or "Commission") is seeking public comments on a Draft Policy Statement issued in connection with the restructuring and economic deregulation of the electric utility industry. These comments address appropriate NRC direction for nuclear licensees in an environment which is moving from traditional rate regulation and protected retail monopolies toward competition and customer choice. In light of these changes, the NRC should monitor developments to ensure that licensees continue to be capable of discharging their responsibilities relating to the safe shutdown and decommissioning of nuclear generating units. The MassAG, too, is committed to these objectives and, in pursuing his restructuring efforts has taken steps designed to ensure safe shutdown and decommissioning.

As the restructuring of economic regulation proceeds, the NRC should make it clear that, while licensees will be held to their responsibilities, the present system of cost-based

economic regulation is not the only means through which an "electric utility" licensee may satisfy its obligations. In particular, the Commission should accept commitments from licensees, that following restructuring and the introduction of competition, dedicated revenue streams and/or other financial resources are available to meet the obligations imposed to ensure safe shutdown and decommissioning. However, the Commission must accept a lesser degree of assurance with respect to the recovery of the on going costs of operating nuclear units, such as operations and maintenance costs and incremental capital expenditures. Those costs, to the extent that they will be recovered at all, will be subject to market forces. In this way, owners of nuclear plants will have the appropriate incentives concerning whether to continue the operation of those plants.

The MassAG has entered into a restructuring settlement with Massachusetts Electric Company ("MECo") and its wholesale generating affiliate New England Power ("NEP"). That settlement is now under consideration by the Massachusetts Department of Public Utilities. The MassAG has also reached an agreement in principle with Boston Edison Company as well as Eastern Edison Company, and its wholesale generating affiliate, Montaup Electric Company. The MassAG expects that a finalized restructuring agreement will be filed with the Massachusetts Department of Public Utilities shortly.

The Massachusetts proposal, "Consumers First," calls for the introduction of customer choice on January 1, 1998. "Consumers First" provides competition for electric service at both the wholesale and retail levels and the divestiture of generating units, including, if feasible, interests in nuclear units. At the same time, the Consumers First plan is premised, among other things, on the regulatory assurance of recovery of nuclear decommissioning costs.

The Commission's concerns about the financial capabilities of licensees in the face of

increased competition are legitimate. However, the MassAG's settlement demonstrates that the introduction of competition need not be incompatible with the NRC's objectives of continuing to assure the ability of licensees to meet the financial burdens associated with operating and, especially, decommissioning, nuclear generating facilities. The MassAG does not contend that the Consumers First plan represents the only means of achieving a balance among these objectives or that the plan is necessarily suitable for the circumstances of other utilities and licensees. It nevertheless illustrates that these objectives can be reconciled in a way that protects both the public interest in the safe operation and decommissioning of nuclear generating units and the public interest in realizing lower prices for electric service through competition.

The Commission's policy on the restructuring of the regulation of the electric utility industry should recognize that a careful balancing of interests, such as that reflected in the Massachusetts restructuring plan, is critical.

## **II. BACKGROUND**

The Massachusetts Department of Public Utilities ("Department") issued orders on August 16, 1995 and May 1, 1996, calling for utilities to develop plans for the introduction of retail choice by January 1, 1998.<sup>1</sup> On October 1, 1996, the MassAG, MECo, (NEP's Massachusetts affiliate), and other parties<sup>2</sup> filed a restructuring settlement with the

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<sup>1</sup>See *Electric Industry Restructuring*, D.P.U. 95-30 (1995); *Electric Industry Restructuring*, D.P.U. 96-100 (1996).

<sup>2</sup>The settlement was also sponsored by American National Power, the Conservation Law Foundation, the Massachusetts Division of Energy Resources, KCS Power Marketing, Inc., Low-Income Intervenors represented by the National Consumer Law Center, Massachusetts Community Action Directors Association, Massachusetts Energy Directors Association, Massachusetts High Technology Council, Northeast Energy and Commerce Association, Northeast Energy Efficiency Council, Inc, The Energy Consortium, Union of Concerned Scientists, U.S. Generating Company, and NEES affiliate Nantucket Electric Company.

Department which was designed to provide a resolution of some issues presented in the generic proceeding on industry restructuring and in the Company's restructuring proceeding. Hearings have been held on the settlement and the parties are awaiting a final decision. Contemporaneously, discussions were held with other utilities. On December 16, 1996, the MassAG reached agreements in principle with Eastern Edison Company ("EECo") and Boston Edison Company ("BECo"). These agreements are set forth a Memorandum of Understanding (M.O.U.) That was filed with the Department. BECo and EECo will make a formal filing for Department approval shortly.

These three Companies serve the majority of the ratepayers in Massachusetts. They all have agreed to the MassAG's restructuring principles<sup>3</sup> and to a settlement that will implement the MassAG's "Consumers First" plan for industry restructuring. These settlements address the costs associated with the Companies nuclear entitlements. They allow recovery of sunk costs in nuclear units through an access charge which is payable by all customers in the service territories regardless of the supplier from whom they purchase

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<sup>3</sup>It is the MassAG's position that electric industry restructuring must be based on the following five principles: (1) Rate Reduction. There must be both immediate and long term rate reductions for all customer classes (residential and business) through real competition in the electric generation market. The gap must be lowered between rates in Massachusetts and those of the other regions in order for the state experience economic growth and be competitive; (2) Customer Choice. Customers served by the electric industry should be able to choose among a range of service providers, services, demand-side management programs, pricing options, and payment terms; (3) No Cost Shifting. Competition must yield greater efficiency and not just shift costs from one customer class to another. All customers must have the opportunity to share in the benefits offered by competition; (4) Low-Income Protection. Electric service is essential and must be available and affordable for low-income customers. The current protection for low- and fixed-income customers must be maintained, and (5) Environmental Protection. Preserving and continuing the state's success over the past ten years in reducing pollution. Progress must continue towards a cleaner energy industry by creating incentives for suppliers to anticipate and minimize the costs of complying with current and future environmental regulations at both existing and future plants.

power after competition is introduced. The utility is also permitted to recover through the access charge the costs of shutting down and decommissioning its nuclear units.

In addition, Consumers First settlement requires that the Companies divest its non-nuclear generating business to an unaffiliated entity or entities and to endeavor to divest its nuclear generating units. The Settlement requires the utility, to retain responsibility for costs associated with decommissioning, after a divestiture of its nuclear units. The sale or other disposition of a Company's nuclear entitlements is expressly made subject to the approval of this Commission, as necessary.

If a Company is unable to divest its nuclear interests, the Massachusetts settlement includes a performance-based rate recovery plan for the recovery of ongoing operating costs. Under that plan, minority nuclear plant owners, like NEP and Montaup would credit the access charge with 80 percent of the revenues they receive from the sale of the energy the plants produce and would recover 80 percent of their share of the plants' operating costs in the access charge. However, as to majority owners, the MassAG believes that they should bear greater risks in regard to going costs. Under the terms of the agreement with Boston Edison, the Company would initially credit the access charge with only 25 percent of the revenues it receives from the sale of the energy the Pilgrim plant produces and 25 percent of the share of the Pilgrims's operating costs. After three years, BECo would assume full responsibility for all going forward costs and would retain all future revenues.

The Massachusetts plan will also specify a performance standard for nuclear safety indicators with a penalty (not to exceed \$1 million) for failure to satisfy that standard in any given year. This mechanism promotes safe operation of any nuclear plants in which the Companies retain an interest, by giving the Companies a financial incentive for safe operation and allowing for regulated recovery of the majority of the plants' operating costs.



At the same time, making the recovery of ongoing operating costs subject to market forces, gives them an incentive to advocate for the closure of any nuclear generating unit that is not economic on the basis of its ongoing costs.

Taken together, these provisions represent a careful balance that recognizes both the importance of providing funds for the safe shutdown and decommissioning of nuclear plants and for the safe operation of those plants, as long as they remain economical. The inclusion of these provisions in the Consumers First settlement demonstrates that adequate resources can be made available to assure the safety of licensed nuclear generating units, even as competition is introduced for retail electric service.

### **III. COMPETITION IN THE ELECTRIC UTILITY INDUSTRY**

#### **A. THE RECOVERY OF DECOMMISSIONING COSTS AND OTHER NUCLEAR-RELATED POST-SHUTDOWN COSTS.**

The Commission's position in the Draft Policy statement is correct. Its primary focus should be to ensure that there is adequate provision of funding to cover decommissioning costs. This especially true given the recent permanent shutdown of the Connecticut Yankee plant. It is in the public interest that adequate sources of funding are available when an asset has come to the end of its economic usefulness.

It is therefore particularly important that the NRC look to the regulatory provisions for the recovery of decommissioning costs to ensure their adequacy. First, the NRC should determine the position of State public utility commissions ("PUC") or, if appropriate, FERC, with respect to the treatment of decommissioning and other nuclear-related costs following the plant's closure when it no longer produces revenues. The MassAG submits that the regulatory agency with jurisdiction should provide regulatory assurance that decommissioning costs will continue to be eligible for recovery through regulated rates or an equivalent

mechanism collected at the retail distribution level. The regulatory assurance should be substantially equivalent to that received in the past. For example as noted above, the Massachusetts "Consumer's First" plan provides for the recovery of decommissioning costs in the access charge included in local distribution rates. Second, the MassAG believes that decommissioning cost studies should be updated no less than every two years or sooner, if there has been a significant change to the assumptions in the decommissioning study currently used to establish retail rates. The MassAG submits that continuing review of decommissioning funding levels is necessary to address the issue of premature plant closure that may result from the introduction of competition.

The Commission should also ensure the security of the funds set aside for decommissioning in trusts. The funds should be placed in separate (one for each unit) irrevocable trusts maintained in accordance with State, Federal Energy Regulatory Commission and Internal Revenue Service regulations. The MassAG believes that these decommissioning funds should be treated uniformly.

The NRC can anticipate more requests for transfer of ownership interests in nuclear plants in light of increased competition and the trend toward separation of generation assets from transmission and distribution facilities. In considering any proposed transfer of nuclear assets, the NRC should focus on the ability of the transferee to assume the decommissioning responsibilities associated with the license and should look to the underlying financial integrity of the transferee.

#### **B. RECOVERY OF ONGOING COSTS OF OPERATION**

The recovery of the ongoing costs of operation of a nuclear plant present a different question. Subjecting nuclear generating units, like all other generating units, to market forces, will have beneficial effects. It will encourage efficient operation and it will



encourage owners to evaluate fairly whether continued operation of the units makes economic sense. The MassAG believes that the MECo restructuring settlement's 80/20 percent split of revenues and operating costs between customers and shareholders is appropriate for this minority owner of nuclear power plants. However, in the view of the MassAG, particularly for majority owners who control the decision to close the plant or continue its operation, equity requires that these owners should be required to bear a substantially greater risk. A majority owner should eventually bear the full burden of the ongoing costs of operation. However, to assure a smooth transition to a competitive market, a short lived transitional 25/75 split of revenues and operating costs between customers and stockholders to allow owners to adjust to the new market realities.

#### **C. COMMISSION OVERSIGHT OF PLANT OPERATIONS**

The Commission must continue to work to ensure that its own inspection and oversight programs identify when a licensee is failing to devote insufficient resources to assuring safe operation. The history of the Commission's Watch List over the past ten years demonstrates that there is need for concern even when the plants operate under traditional regulation. The MassAG submits that if a nuclear plant fails to operate in accordance with safety directives of the Commission, it should be shut down. There should be no compromise with public safety.

#### **IV. ISSUES RELATED TO RESTRUCTURING AND ECONOMIC DEREGULATION OF THE ELECTRIC UTILITY INDUSTRY**

The NRC seeks specific comment with respect to the following issues:

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

In the future, the level of revenues to offset the cost of ongoing operations will be determined in the market. The Commission's jurisdiction with regard to a licensee's

financial condition will lie solely with the decision to allow a plant to operate and not over its revenues. If in the Commission's judgement, the future competitive marketplace does not provide sufficient revenues for continued safe operation of a particular plant, then the Commission should shut the plant down. It is clear that Congress in enacting the Atomic Energy Act "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 electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205 (1983). The Commission should not insist that ongoing costs of operating nuclear power plants be shielded from market forces.

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

The Commission should not look to any licensee for more than its fair share of the costs of a particular licensed facility. The Commission should not look for one joint owner of a facility to in effect "bailout" another owner. Such an approach would simply weaken the financial integrity of the owner or owners forced to subsidize the failing facility. Rate regulators, whether they are state PUCs or the FERC, cannot allow into rates costs which are not incurred to serve the particular utility's customers. Restructuring or changes in economic regulation should not affect allocation of responsibility upon which joint ownership licenses were based. The NRC should look to each co-owner only for its allocable share.

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

It is important that licensees that are able to offer the necessary assurances to remain "electric utilities" as defined in 10 CFR 50.2, will not be subject to NRC financial qualifications review and will continue to fund decommissioning costs over the facility's

anticipated service life. The NRC should affirm that, if the licensee can produce these assurances (in the form, for example, of legislation or a restructuring order of the PUC), it will remain an "electric utility" and there will be no need for financial qualification reviews.

On the other hand, where the licensee is unable to provide rate recovery assurances that are supported by the economic regulator, then the NRC should aggressively seek additional financial assurances from that licensee.

## V. CONCLUSION

The Massachusetts settlement provides an example of a restructuring plan in which nuclear-related costs are given appropriate recognition. NEP has received assurances that unavoidable costs relating to its nuclear power plants, such as decommissioning, will be recovered in rates through an access charge.

Whether a nuclear plant continues to operate will be a function of marketplace developments which neither the utility nor the Commission can control. The Commission should focus its attention on decommissioning. The Commission must take a new look at what it can do to facilitate the prompt and efficient decommissioning of nuclear plants.

Respectfully submitted,  
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