June 19, 2006

Kenneth Wade
Office of Nuclear Energy
U.S. Department of Energy
Forrestal Building
1000 Independence Avenue, SW
Washington, D.C. 20858

Re: DOE's Request for Comments on the Interim Final Rule for "Standby Support for Certain Nuclear Plant Delays"

Dear Mr. Wade:

The following comments of Public Citizen are provided to DOE regarding its request for comments on the Interim Final Rule for "Standby Support for Certain Nuclear Plant Delays," published in the May 15, 2006 issue of the *Federal Register* (Vol. 71, No. 93). We apologize for submitting comments late, but would appreciate their full consideration in the finalizing of the rule.

Purpose

According to a July 2000 study by the Renewable Energy Policy Project, the nuclear industry has received $115 billion in direct subsidies from the federal government from 1947 to 1999. Including the Price-Anderson liability cap, the subsidy increases to $145.4 billion. During the same period, solar and wind industries received $5.7 billion. Clearly, the 50-year-old nuclear industry has received the lion's share of the federal energy subsidies and should not be given any more handouts.

Unfortunately, the Energy Policy Act of 2005 passed with more than $12 billion in new subsidies to the mature nuclear industry, including risk insurance, loan guarantees and production tax credits. Given that the nuclear industry includes some of the wealthiest companies in the U.S., the same company should not be eligible for numerous subsidies for the same plant. Moreover, the same company should not be allowed to double-, triple-, or quadruple dip into the same subsidy. For example, if a company is granted risk insurance (or loan guarantee) for a plant, then the same company should not also be eligible to receive risk insurance (or loan guarantee) for a second plant. Finally, as we mentioned in our NOI comments, a company that is granted a loan guarantee, which protects the company if it cannot pay back its loans, should not also be eligible to receive risk insurance for its loan payments.

Definitions

Regardless of whether there is a "no later than" date for design certification, companies should not be encouraged to apply for design certification at the same time as a combined construction and operation license (COL). Unlike the Early Site Permit process, a utility is required to declare its design in the COL application, and the chosen design is integral to evaluating COL application. How exactly will the COL application be analyzed when the design could change significantly as part of the design certification? Another (albeit highly remote) possibility is that the NRC could refuse to certify a design that is integral to a COL application.

Standby Support Contracts
The regulations do not specifically mention an application fee to apply for a standby support contract to cover the administrative costs of this program and separate from contributions to the Program and Grant Accounts. As we stated in our NOI comments:

> The DOE should charge sponsors a non-refundable fee to apply for a standby support contract. It clearly does not make sense to charge a refundable fee, since processing the application will require expenditure by DOE, regardless of the outcome of the application. A non-refundable fee will also help deter frivolous applications that would further drain the DOE's resources.

It should be clearly stated in the regulations that funds contributed by a utility to the Program or Grant Accounts are non-refundable, even if there are remaining funds in either account that are not paid out for covered delays.

Covered costs
While we are satisfied that administrative litigation at the NRC is not included in the definition of "covered delays," we remain seriously concerned about including appeals of NRC decisions to the courts in this definition, even if the definition is limited to construction delays that are a result of a stay of permit, Temporary Restraining Order, or injunction. As we wrote in our NOI comments:

> Including court appeals of NRC decisions would improperly put the NRC in a position of the Supreme Court, because it would *de facto* becomes the highest court if the public feels intimidated into not challenging an NRC ruling, because it will cost taxpayers money.
>
> Litigation that delays the operation of a reactor based on safety or security issues should absolutely not be covered. Clearly, a company should not be compensated if turning on the reactor could harm the public. Litigation delays should only cover frivolous lawsuits, which are defined as lawsuits that are "brought in spite of the fact that both the plaintiff and his lawyer knew that it had no merit and it did not argue for a reasonable extension or reinterpretation of the law or no underlying justification in fact based upon the lawyer's due diligence investigation of the case before filing" (U.S. Federal Rule 11). Frivolous lawsuits are not lawsuits in which the judge decides for the defendant, but rather lawsuits in which the argument is incompetent.

Calculation of Covered Costs
DOE is appropriately interpreting the legislation and defining the covered costs to include only the two costs listed in subsection (d)(5).

The definition of “fair market price” under §950.25 Covered Costs fails to distinguish between “merchant power plants” and plants that are in a utility’s “rate base,” as we recommended in our NOI comments:

> In particular, the term “fair market price of power” needs further clarifying within the regulations. The DOE should make a distinction between “merchant power plants,” which are just selling into the “market,” and power plants that are in a utility’s “rate base” and selling to retail customers under state regulation. As long as the Federal Energy Regulatory Commission (FERC) is allowing new power plants to sell at “market-based rates” (that is, whatever the seller and buyer agree to), there is no way to tell whether or not the rates are actually “fair market price,” because the buyers can pass such costs through to retail ratepayers under the Supremacy Clause of the U.S. Constitution (see *Nantahala Power & Light* case) and do not have an incentive to bargain down the price. Alternatively, the merchant plant owners can enter into agreements to sell power at very low prices for the first few years, in order to get the sale in a competitive market, knowing that the power they will have to buy to replace in the likely event of initial delays, will be much higher in price, but that taxpayers will pick up the tab. As long as FERC deregulates wholesale power, and particularly that from new plants, there is no way to tell what the “fair market price” would be.

Thank you for taking these comments into account. Please enter them into the official record.

Sincerely,

Michele Boyd

Michele Boyd
Legislative Director, Energy Program