

EGAN & ASSOCIATES, P.C.

Counselors at Law

2300 N Street, N.W.
Washington, D.C. 20037
Telephone (202) 663-9200
Fax (202) 663-9066

PRM-50-64

November 3, 1998

VIA LOCAL COURIER

Secretary

Office of the Secretary of the Commission

U.S. Nuclear Regulatory Commission

Washington, DC 20555-0001

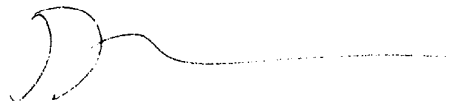
ATTENTION: Emile L. Julian, Chief, Docketing and Services Branch

Dear Mr. Secretary:

In accordance with 10 CFR § 2.802, enclosed for filing are an original and two copies of a Petition for Rulemaking submitted on behalf of Atlantic City Electric Company; Austin Energy; Central Maine Power Company; Delmarva Power & Light Company; South Mississippi Electric Power Association; and Washington Electric Cooperative, Inc. This petition relates to the subject of joint and several liability of non-operating co-owners of nuclear power plants.

Would you please file-stamp one of the enclosed copies and return it to the courier for our records. If there are any questions regarding the petition, please do not hesitate to give me a call at (202) 663-9338.

Sincerely,



Martin G. Malsch

MGM/ec
Enclosures



NOV 3 1998
Office of the Secretary

**IN THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

COMMISSIONERS:

**Shirley Ann Jackson, Chairman
Nils J. Diaz
Greta J. Dicus
Edward McGaffigan, Jr.
Jeffrey Merrifield**

In the Matter of:

Docket No. PR14-50-64

**Petition for Rulemaking Regarding
Joint and Several Liability of Non-Operating
Co-Owners of Nuclear Power Plants.**

PETITION FOR RULEMAKING

I. INTRODUCTION

1. This petition for rulemaking is filed by Atlantic City Electric Company, Austin Energy, Central Maine Power Company, Delmarva Power & Light Company, South Mississippi Electric Power Association, and Washington Electric Cooperative, Inc. ("Petitioners"). Petitioners are all non-operating co-owners of nuclear power plants. The petition is filed pursuant to 5 U.S.C. §§ 553(e) and 10 CFR Part 2, Subpart H.

2. On August 13, 1997, the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") issued a "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" ("Policy Statement") (62 Fed. Reg. 44071).

The Policy Statement was issued by NRC after consideration of public comments on a draft policy statement published in the *Federal Register* on September 23, 1996 (61 Fed. Reg. 49711). The purpose of the Policy Statement was to discuss NRC's concerns regarding the potential safety impacts on NRC power reactor licensees which could result from economic deregulation and restructuring of the electric utility industry and the means by which NRC intends to address those concerns.

3. In the Policy Statement, the Commission correctly recognized that many licensed nuclear power plants are jointly-owned facilities. The Commission also recognized that "co-owners and co-licensees generally divide costs and output from their facilities by using a contractually-defined, *pro rata* share standard." The Commission further stated that it believed this *pro rata* sharing of plant costs "should continue to be the operative practice." However, the Commission then went on to state that such *pro rata* cost-sharing arrangements might be ignored by the Commission in certain circumstances.

[The Commission] 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 minimus* shares when one or more co-owners have defaulted.¹

¹ The Commission also indicated that it viewed all co-owners as "co-licensees who are responsible for complying with the terms of their licenses." It is of course true that licensees must comply with their licenses.

4. A group of publicly-owned joint owners sought Commission reconsideration of the above-quoted portion of the Commission's Policy Statement and, when reconsideration was not forthcoming, petitioned for judicial review in the U.S. Court of Appeals for the D. C. Circuit, *American Public Power Association, et al. v. Nuclear Regulatory Commission, et al.* (Case No. 98-1219). Petitioner later agreed to dismissal of the case after discussing the matter with NRC counsel and receiving NRC authorization to make the following representation to the court:

Counsel for petitioners is authorized to state that it is the NRC counsel's position that, should petitioners seek to raise and litigate *ab initio* the legal issue of whether the NRC has the authority to impose joint and several liability on minority licensee/owners, such a challenge would not be precluded by petitioners' not pursuing the present litigation. NRC counsel states that it can foresee no circumstances in which it would argue otherwise.

II. THE CURRENT STATE OF CONFUSION

5. Thus, notwithstanding dismissal of the petition, it is clear that no one is precluded from raising and litigating in any future case in which NRC seeks to impose joint and several liability on a licensed co-owner, any legal challenge to the imposition of joint and several liability, including the right to raise and litigate the issue whether NRC has the legal authority to impose such liability. However, this still leaves the above-quoted portion of the NRC's Policy Statement in effect—whatever "in effect" may mean for such a Policy Statement in these circumstances. As a result, there remains substantial

confusion about individual joint owners' potential liabilities. The quoted portion of the Policy Statement appears to create the possibility that the owner of a relatively small ownership share of a nuclear power plant could incur the burden of all, or an excessive portion of a plant's costs if other co-owners or the operators were to default or become financially incapable of bearing their share of the burden. Further, there is no information provided as to what would constitute a "*de minimus*" share, and the particular circumstances under which the Commission might find the imposition of joint and several liability necessary to protect the public health and safety are undefined. These factors considered collectively create a vast cloud of uncertainty as to the potential liability of a joint owner. This can adversely effect the ability of the joint owners to raise capital in the financial markets (or the costs of raising capital) even for activities that are unrelated to nuclear power plant operations. This is especially unsettling to an industry undergoing consolidation and restructuring. There is an emerging market for the sale of nuclear power plants and interests in those plants, and the Commission's Policy Statement might stifle the emergence and vitality of this market. Finally, the unsettled nature of this issue could serve as a "poison pill" to co-owning utilities seeking to be acquired by other utilities, since actual or projected decommissioning costs are an unknown contingent liability.

III. THE PROPOSED RULE

6. The Commission has acknowledged on numerous prior occasions the need for a predictable and stable regulatory process. The situation described above is the antithesis of this. Petitioners submit that the following rule change is necessary in order to eliminate confusion and establish a stable and predictable regulatory process, at least in this particular area. Thus, Petitioners propose the following language to be included among the "Enforcement" provisions of 10 CFR Part 50:

Whenever the Commission finds it necessary or desirable to impose additional requirements by rule, order or amendment on a person subject to this part to promote or protect the public health and safety, the additional requirements will be directed first to the person licensed to possess and operate the facility. If it becomes necessary to impose additional requirements on persons who only own the facility, and were never licensed to operate, then the Commission will not impose greater than the agreed allocation of responsibility among all the owners and operators reflected in applicable joint ownership or similar agreements pertaining to the plant.

IV. REASONS FOR THE RULE

7. The prospect of joint and several liability, even in limited circumstances, is directly contrary to the contractual basis on which numerous joint ownership arrangements for nuclear plants have been structured. In most, if not all, such arrangements, ownership commitments were made and substantial sums of capital raised based on a contractual *pro rata* allocation of liability for plant costs. The reasonable expectations of co-owners and investors (e.g., bondholders), as well as rate commissions,

would be completely overturned by the imposition of joint and several liability, especially given the Commission's prior acceptance of *pro rata* allocations. Assessments of assets and liabilities for purposes of a potential sale of ownership interests is made more difficult by speculation about the meaning of the Commission's Policy Statement and the circumstances in which the Commission might carry out its threat to impose joint and several liability.

8. Moreover, nothing in the Atomic Energy Act of 1954, as amended ("AEA"), or NRC's regulations authorizes the Commission to impose any "liability," much less "joint and several liability," as those terms are ordinarily understood. At most, the Commission may, in the exercise of its regulatory powers under the AEA, impose certain substantive safety obligations on licensees. The Commission has no authority under the AEA, comparable to the U.S. Environmental Protection Agency's authority under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), to institute safety improvements at taxpayers' expense and then sue the licensee for reimbursement. Thus, the Commission's statement about joint and several liability is all the more confusing.

9. At most, the quoted Commission statement regarding joint and several liability might be understood as a Commission statement that it could hold co-licensees jointly and severally responsible for meeting specific substantive safety obligations under the AEA. However, even as so understood, the Commission statement is directly

contrary to the contractual basis on which numerous joint ownership arrangements for nuclear power plants have been structured. In most, if not all, such arrangements, ownership commitments were made and substantial sums of capital raised based on a contractual *pro rata* allocation of responsibility for plant costs. NRC has long acquiesced to such arrangements. The reasonable expectations of co-owners, investors, bondholders and rate commissions would be completely overturned by imposition now of joint and several liability. This is all the more evident given that NRC acknowledged in the Policy Statement that it implicitly accepted the practice of *pro rata* allocation in the past.

10. Moreover, there is no need for such a draconian Commission imposition of liability. Nuclear power reactor licensees, even licensees in bankruptcy, have always been able to comply with Commission-mandated safety requirements, and the Commission has never confronted the situation where a nuclear power reactor licensee was financially unable to meet its safety obligations.² Even in the very extreme case, with the operating licensee in bankruptcy, the Commission's safety authority is preserved. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 506-507 (1986) ("The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety.") *See also, Ohio v Kovacs*, 469 U.S. 274 (1985); *Penn Terra, Ltd. v.*

² The unique situation at TMI Unit 2, following the accident, is ameliorated by the accident cleanup insurance requirements in 10 CFR § 50.54(w).

Department of Environmental Resources, 733 F. 2d 267 (3rd Cir. 1984) (automatic stay under bankruptcy laws does not stay injunction to require compliance with environmental laws); *In re METCOA, Inc., fdba the Pesses Company*, Adversary Case No. B-85-0092 (Bankr., N.D. Ohio, Nov. 18, 1996).

11. The quoted Commission statement on joint and several liability is also inconsistent with the Commission's September 4, 1997, "Proposed Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Plants" (62 Fed. Reg. 47588). In that proposed rule, the Commission noted the difficulties that could arise from attempting to impose joint liability on co-owners and co-licensees for decommissioning costs. The Commission noted that these difficulties include problems with respect to potential disagreement on decommissioning methods, the inhibition of flexibility, the weakening of competitive position, and difficulty in implementation (62 Fed. Reg. 47594). These same factors should be considered decisive here as well.³

12. NRC's quoted statement regarding joint and several liability raises serious legal questions. No provision of the AEA authorizes the Commission to impose "joint and several liability," as the term is ordinarily understood. Moreover, the imposition of joint and several liability, if understood as the imposition of a joint and several safety regulatory obligation on a group of co-owner licensees, is contrary to the overall intent

³ The final rule is consistent with the proposed rule in this respect. 63 Fed. Reg. 50465 (Sept. 22, 1998)

of the AEA that there be a proportionality or symmetry between the safety obligations imposed by the Commission and the scope of licensed activity. Given that ownership by itself poses no safety hazard, it would be unreasonable for the Commission to impose an onerous safety obligation on non-operating co-owners simply because the person with the real safety obligation—the operator—is facing financial difficulty. This is especially the case given that the Commission has ample authority to assure the financial qualifications of operating licensees. Atomic Energy Act § 182a. The Policy Statement raises further questions of impermissible retroactivity, as applied to those currently owning nuclear power reactors. A Memorandum of Law is attached hereto in further support of this petition.

13. Finally, the Commission has plenary authority to prevent an unsafe plant from operating, and a plant which cannot operate is a liability rather than an asset. In the real world, it is in the interest of all of the licensees, co-owners and operators, to agree as to the funding of necessary safety measures so that the plant may operate. *See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988)*. The Commission's Policy Statement interferes with the right of licensees to reach their own decisions as to allocation of safety expenses. Everyone has the same objective—safe plant operation—and Commission interference in allocation decisions among co-owners is not necessary for safety, and it creates

potentially huge and unnecessary problems for co-owning utilities as they seek to consolidate, restructure, or spin off assets.

V. CONCLUSION

14. For the above reasons, petitioners respectfully request that this petition be granted, and that the regulations in 10 CFR Part 50 be amended as suggested.

Respectfully submitted,



Martin G. Malsch
Joseph R. Egan
EGAN & ASSOCIATES, P.C.
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9338 (Telephone)
(202) 663-9066 (Facsimile)

COUNSEL FOR PETITIONERS

DATED: November 3, 1998

Attachment

**IN THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

COMMISSIONERS:

**Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.**

In the Matter of:

Docket No. _____

**Petition for Rulemaking Regarding
Joint and Several Liability of Non-Operating
Co-Owners of Nuclear Power Plants.**

**MEMORANDUM OF LAW
IN SUPPORT OF PETITION FOR RULEMAKING**

1. For the reasons set forth below, the Atomic Energy Act of 1954, as amended ("AEA"), does not authorize the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") to issue any rule or order to a group of non-operating co-owners holding them "jointly and severally liable," as those legal terms are ordinarily understood. Instead, if the Commission's reference to joint and several liability is intended to mean that the Commission may, in the stated circumstances, impose a new operational safety requirement on a group of non-operating co-owners which holds all and each of them equally responsible, without regard for *pro rata* sharing agreements, or for the principal responsibility of the operator, then such a requirement would also be unreasonable and unlawful. Moreover, it would be unnecessary for safety.

I. THE ATOMIC ENERGY ACT IN GENERAL

2. The AEA grants the Commission authority to promulgate rules and orders necessary or desirable to protect and promote the public health and safety. AEA §§ 161b and 161i.¹ Nowhere here, or elsewhere in the AEA, is the Commission granted power to do anything referred to as imposing “liability,” let alone something called “joint and several liability.” To be sure, the Price Anderson Act (“Act”), as amended (principally AEA § 170) sets forth an elaborate statutory framework for “public liability” and “public liability actions,” and provides for various fees and Commission involvement in deferred premiums. But notably absent from this Act is any indication that, in order to protect safety, the Commission may itself impose liability or initiate or adjudicate claims of liability on behalf of the public. Instead, under the Price Anderson Act, as amended, legal actions are brought by injured persons, the rules for decision in public liability actions are derived from state law, to the extent consistent with the AEA, and the U.S. district courts are vested with jurisdiction to adjudicate claims (AEA §§ 11hh, 170).

¹ These sections of the AEA authorize both rules and orders. The AEA also grants separate authority to the Commission to promulgate rules applicable to its licensees to protect and promote public health and safety. AEA §§ 103a, 103b, 161b, 161i, 161p, 182a, 183, and 187. The Commission may also impose reporting, record-keeping, and inspection requirements by rule or order under AEA § 161o. The purported reservation of power to impose joint and several liability applied to “highly unusual situations.” This clearly suggests a reservation of a case-specific ordering power, rather than a power to address a generic problem by rule. Moreover, the Policy Statement, especially considered in conjunction with the statement of NRC counsel, is not a rule.

3. The Independent Offices Appropriation Act of 1952, AEA § 161w, and various Congressional Appropriations acts, grant power to the Commission to impose and collect fees, but this implicit power to create fee liability does not extend to other kinds of liability.

4. The Commission has authority to impose financial qualifications requirements, and has exercised this authority to require that funds be provided for decommissioning. 10 CFR § 50.75. But there is no comparable funding requirement for operation. Moreover, it was never contemplated that these financial qualifications rules would empower the Commission to decommission a plant and impose liability for reimbursement.

5. In sum, there is nothing in the AEA which grants the Commission power to impose any “liability” for safety measures, as that legal term is ordinarily understood, and there is no Commission power under the AEA, comparable to the power of the Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to initiate substantive safety measures at a plant at taxpayers’ expense, and sue the responsible party or parties for reimbursement. To our knowledge, the Commission has never claimed such power. At most, the purported reservation of power to impose “joint and several liability” can be understood as an effort to reserve the power to impose a regulatory safety obligation on a group of co-owner licensees which requires that all and each of them comply to the same extent.

II. ADDITIONAL SAFETY REQUIREMENTS

6. The AEA contemplates a proportionality between the scope of the licensed activity and the nature of the safety obligations imposed. For example, the principle statutory basis for the Commission's imposition of additional safety requirements on licensees is AEA §§ 161b and 161i, and both these subsections authorize the imposition of safety measures "to govern" the possession and use of nuclear materials and other AEA-authorized activities. The term "govern" suggests clearly that the additional safety measures must bear a direct relation, or at least be in proportion, to risk posed by the licensed activity. More fundamentally, the imposition of safety requirements, wholly out of proportion to the safety risk of the licensed activity, would be unreasonable and unlawful under 5 U.S.C. § 706.

7. Ownership of a nuclear power plant, without actual possession or operational responsibility or authority, carries no safety risk. Indeed, the AEA as a whole contains little concern for ownership without physical possession. Abolition of government ownership of special nuclear material in 1964 was never considered to be significant for regulatory purposes. Section 184 of the AEA expresses specific concern for direct or indirect transfers only when they involve the "right to utilize or produce special nuclear material," and for the rights of secured creditors only when they are sought to be enforced (by assumption of actual possession of the secured interests). *See* 10 CFR § 50.81(a)(2). Section 170r of the AEA goes even further, making it clear

that persons under a *bona fide* lease cannot be held liable for an incident unless they are in actual possession at the time of the incident.

8. Given the need for proportionality, the lack of safety significance associated with ownership, and the structure of the AEA as a whole, it would be arbitrary, capricious, and unlawful for the Commission to impose onerous safety obligations on persons licensed only to own—and never licensed to physically possess or operate—the plant, merely because the more appropriate subject of enforcement (the person licensed to operate) is in financial difficulty. This is all the more evident given that the Commission has ample authority to impose financial qualifications requirements on persons proposing to operate. AEA § 182a. The problem of retroactivity, discussed below, would make such an imposition even more unreasonable.

III. RETROACTIVITY

9. As the U.S. Supreme Court has noted:

“[E]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.... In a free, dynamic, society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.”

Landgraf v. USI Film Products, 511 U.S. 244 at 265-266 (1994). *See also General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). (“Retroactive legislation presents

problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”)

10. Accordingly, a presumption against retroactivity builds on a legal doctrine “deeply rooted in our jurisprudence” and “centuries older than our Republic.” *Landgraf* at 265, quoting *Kaiser Aluminum & Chemical Corp., v. Bonjorno*, 494 U.S. 827, 842-844, 855-856 (1990) (Scalia, J., concurring). Thus, the Supreme Court held in *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”

11. There can be no question that an order imposing onerous safety obligations on a co-owner group, without regard for *pro rata* sharing agreements among them, would, in the words of the Supreme Court, defeat legitimate expectations and upset settled transactions. Co-owners have relied upon *pro rata* sharing arrangements for decades, with implicit if not explicit Commission approval, and the realities of utility restructuring and the emerging market for nuclear power plants make it imperative that these sharing arrangements continue.

12. Under the teaching of *Bowen*, agencies do not have the authority to issue retroactive rules unless such authority is granted explicitly (*i.e.*, the statutory language requires this result). This requirement assures that Congress has made the fundamental policy judgments concerning the proper temporal reach of its laws. See *Landgraf* at 273.

Nothing in the AEA specifically grants the Commission the power to issue retroactive rules, and so the result under *Bowen* is that the Commission lacks such authority.

13. A retroactive rule is one which would “impair any rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf* at 280. A Commission rule which imposed new safety obligations on a group of non-operating co-owners without regard for their *pro rata* sharing agreement would, in effect, impose new duties with respect to past transactions, namely the co-owners’ prior acquisition of their ownership interests and their execution of ownership agreements.

14. On the other hand, a rule is not retroactive merely because it applies to cases arising from past conduct. The Supreme Court in *Landgraf* gives, as an example, a law banning gambling as applied to someone who has begun to construct a casino. *Landgraf* at 269, note 24. In such cases, the law is not retroactive because, strictly speaking, it applies only to future conduct (for example, completion of casino construction), even though the future conduct was foreshadowed by conduct antedating the law’s enactment. The vast majority of Commission backfits may fall in this category in the sense that they apply to plant operation after the effective date of the backfit, but could never have applied without commencement of operation, an event antedating the backfit. However, the imposition of new requirements on non-operating co-owners without regard for *pro rata* cost-sharing agreements is distinguishable from the usual

backfit. Persons licensed to own or operate have no reasonable expectation that the Commission will never impose additional safety requirements as a condition of continued operation. But, in the case of non-operating co-owners, there was a reasonable expectation, even given the Commission's power to impose additional safety measures, that the Commission would continue to honor *pro rata* cost-sharing agreements in the exercise of this power.

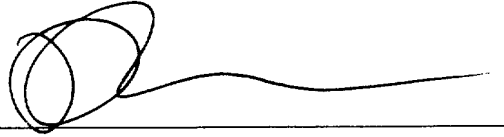
IV. CONCLUSION

15. The Supreme Court has stated that “[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal challenges with perfect philosophical clarity.” *Landgraf* at 270. In the final analysis, any determination that a Commission rule or order is impermissibly retroactive will be made by the courts. However, regardless of the strict legal classification which may be accorded a Commission imposition of joint and several liability, it remains that the fundamental policy underlying the presumption against retroactive laws would apply fully to such an action, since it would deprive co-owners of legitimate expectations and upset settled transactions. Ultimately, this has a direct bearing on the fundamental reasonableness of the Commission action.

16. When the fundamental policy underlying the presumption against retroactivity is taken into account, along with the need for proportionality, the lack of safety risk associated with ownership (and the structure of the AEA as a whole), it is

clear that a Commission imposition of a new operational safety requirement on a non-operating co-owner group, which holds all of them equally responsible without regard for *pro rata* cost-sharing agreements, would be unreasonable and unlawful.

Respectfully submitted,



Martin G. Malsch
Joseph R. Egan
EGAN & ASSOCIATES, P.C.
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9338 (Telephone)
(202) 663-9066 (Facsimile)

COUNSEL FOR PETITIONERS

DATED: November 3, 1998