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Joan Claybrook, President

December 23, 2005

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 "Standby Support for Certain Advanced Nuclear Facilities"

Dear Mr. Wade:

The "risk insurance" provision, which was not in either the House or Senate versions of the bill, was slipped into the Energy Policy Act of 2005 at the 11th hour during the energy bill conference committee negotiations. This means that there was no opportunity to publicly debate this provision before it became law. (President Bush's April 27, 2005 speech calling for risk insurance does not constitute public debate of the specific legislation.) Given that DOE must determine how to implement this undemocratic and outrageous subsidy to the nuclear industry, however, the following comments of Public Citizen are provided to DOE regarding its request for comments on "Standby Support for Certain Advanced Nuclear Facilities," published in the November 25, 2005 issue of the *Federal Register* (Vol. 70, No. 226).

Definitions

All the important clarifications and definitions and contract terms should be included in the regulations, because otherwise they are too open to abuse. For example, the Federal Power Act requires the prior filing and making available for public inspection:

> Schedules showing all rates and charges for any …sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together will all contracts which in any manner affect or relate to such rates, charges, classifications, and services. Section 205(c), 16 U.S.C. 824d(c).

This is so that FERC can review these rates, charges, practices and contracts to ensure that they are reasonable and that there has been no undue preference or advantage, or discrimination or disadvantage given. For these same reasons, DOE should have transparent and public filings of all contracts, or include all the relevant definitions, practices, and contract terms in its regulations.

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.

Also, in cases in which the "market price" for replacement power, however determined, is actually *less* than the contractual price as a result of a covered delay, then the sponsor should have to pay the difference to the government.

Contract Authority

The DOE should not enter into "binding agreements" with COL applicants that would commit DOE to "standby support contracts" with the first six reactors that are granted a COL and begin construction. First, the statue clearly states that the DOE "shall not enter into a contract" unless sufficient funds are already in the Standby Support Program Account to cover the facility's debt costs. Second, it is unclear what a "binding agreement" would actually bind. The "binding agreement" would have to be contingent on (a) the granting of a COL, (b) the commencement of construction, and (c) funding of the Standby Support Program Account. Therefore, these "binding agreements" would essentially be "conditional standby support contracts." Finally, what is the benefit of placing DOE in yet another compromising commitment? It would be prudent for DOE to examine the lack of sophistication (and hence high taxpayer costs) of its contract with utilities that guaranteed the taking and management of nuclear reactor wastes as a model of what to avoid.

The standby support contracts should require that sponsors deposit sufficient funds into an escrow account to cover all of the anticipated funding requirements of the contract at the time the contract is to begin, assuming that there is no prior "binding agreement." Like all insurance programs, the nuclear industry should be required to pay premiums that ultimately will not require the insurer to pay out of its own pocket (in this case, the taxpayers' pockets). Clearly, a Standby Support Program Account with a reduced tax rate would achieve the objective of the "risk insurance" (to reduce financial disincentives and uncertainties for utilities) by allowing the industry to put aside funds that will be taxed at a lower rate.

According to the statute, DOE can only enter into six "standby support contracts." DOE absolutely should not be allowed to cancel a contract if the utility does not "diligently" build a facility that has received a COL and has begun construction, only to sign a "standby support contract" with another utility. The objective of this program is not to ensure that there will be $6

billion in payments to the nuclear industry. The DOE should not "shop around" until it finds the nuclear power plant with the most problems (therefore, the most delays), so that it can give out taxpayer dollars to the nuclear industry.

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.

Appropriations and Funding Accounts

The Energy Policy Act of 2005 included numerous massive subsidies to the nuclear industry in addition to risk insurance, including loan guarantees and production tax credits. The industry should not be allowed to double-, triple-, or quadruple-dip into these subsidies. In particular, if a company is granted a loan guarantee, which protects the company if it cannot pay back its loans, then the same company should not also be eligible to receive risk insurance for its loan payments.

Covered and Excluded Delays

The precise definition of a "covered delay" is crucial to ensure NRC's authority to protect the public, and should be included in DOE's regulations, not determined in individual contracts. A contract-by-contract approach would put DOE in a position of potentially hindering the NRC from applying the same standards to its ITAAC evaluations and of appearing to give preferential treatment to utilities that receive a broader definition of "covered delay."

The NRC must not be prevented from fulfilling its mandate to ensure public safety. Subsection (c)(1)(A) could create a conflict of interest within the NRC that pits the pressure to approve construction of a new, complicated technology to avoid payment of risk insurance against the need to slow construction to ensure public safety. If the Nuclear Regulatory Commission is hamstrung to the point of not being able to raise safety issues during construction for fear of missing deadlines, then there is virtually no point in going through the NRC process to license a facility. Therefore, the NRC should be explicitly given wide latitude to delay projects on safety issues. In addition, NRC delays due to unusual circumstances or circumstances beyond its control, such a backload of sponsor submissions towards the end of the 180-day ITAAC review period, should not be considered "covered" under these regulations. Any delays that can be even partly attributed to the company (such as construction or engineering delays) or by other government agencies are not included in subsection (c)(1)(A), and therefore, should also be explicitly excluded from coverage in the regulations.

The second part of subsection (c)(1)(A) should clearly not be defined as "any delay caused by the conduct of preoperational hearings by the Commission." The preoperational hearing is the only opportunity the public has to raise concerns about the operation of the plant once it is built. For example, if the public raises a safety-related problem about construction practices at the site, then the NRC needs to be able to investigate the issue without being pressured to allow the plant to begin operating. Moreover, the taxpayers should not be paying the company for safety issues caused by its poor construction practices. The second part of subsection (c)(1)(A) should be very narrowly defined, such that it includes only a failure by the NRC to schedule a hearing on the

proposed operation of the reactor, but excludes any scheduling delays due to safe operation or other ongoing concerns about the operation of the reactor.
Subsection (c)(1)(B) also be very narrowly interpreted, and should not include administrative litigation at the NRC or appeals of NRC decisions to the courts. 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.

The DOE should define a non-exclusive list of "normal business risks," because all builders of power plants (or anything else) have to insure against delays, whether expected or unexpected. The DOE has the burden of showing what kinds of litigation or other delay risks are NOT "normal business risks." Therefore, the DOE should hire experts to come up with a list of the "normal business risks" that the builder of any power plant, or any nuclear power plant, should expect, as opposed to the "abnormal" risks covered in this statute for "Advanced Nuclear Facilities." For example, if every power plant ever built has had to deal with the risk of lawsuits by, for example, environmentalists, then litigation of such matters are clearly "normal business risks."

Furthermore, as a condition of providing insurance for narrow defined covered risks, the DOE should require that the utilities purchase coverage for "normal business risks" (i.e., business interruption insurance). Having multiple risks insured upfront (and not all by the DOE) would help reduce the risk to the DOE of utilities that are facing delays attempting to reclassify them into the areas that the DOE does cover.

Covered Costs and Requirements

The covered costs should only include the two listed in subsection (d)(5). The statute clearly states "including;" it does not state "including, but not limited to." To interpret the statute otherwise would be an improper broadening of the law.

It appears that there is a serious typo in section (b)(2)(C)(ii), which defines the Standby Support Grant Account as covering the "costs described in subparagraphs (B), (C), and (D) of subsection (d)(5). There are no subparagraphs (C) and (D) of subsection (d)(5).

As the requirements of subsection (b)(2)(C) describe, DOE should limit the Standby Support Grant Account as covering only costs associated with principal of interest on debt [subsection (d)(5)(A)] and the Standby Support Grant Account as covering only costs associated with incremental cost of purchasing power [subsection (d)(5)(B)].

Monitoring and Reporting Requirements

The NRC's quarterly reports to Congress regarding the licensing status of nuclear facilities covered by a standby support contract, any reports by the sponsor or other entities to DOE, and any reports made by the DOE must be made available to the public. It is, after all, the taxpayer's money that is at risk.

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

Sincerely,

Michele Boyd
Legislative Director, Energy Program