

alternative energy sources and the need for power. In addition, the petitioner believes that the NRC can, and should, conclude that its implementation of NEPA no longer requires these reviews because of the fundamental changes that have occurred in the electric utility industry. Moreover, the petitioner believes that doing so is important to ensure the efficiency and the safety focus of NRC reviews of new licensing applications.

Role of State and Local Governments

The petitioner appeared to argue that the NRC's licensing process does not change the division of authority between the Federal Government and the States over the construction and operation of electric power generating facilities. According to the petitioner, an NRC license or permit constitutes approval of a site or plant only under the Federal statutes and regulations administered by the NRC, and not under other applicable laws. For example, individual State laws may require a State determination of the need for power and an evaluation of alternative energy sources, or may require the issuance of a certificate of public convenience and necessity, and various environmental permits.

The petitioner argued that the NRC's evaluation of the environmental impacts of the proposed plant neither supplants nor interferes with the traditional responsibilities of States in evaluating the need for power and the suitability of alternative energy sources with respect to the potential use of that site. The NRC explicitly recognized the extent of its authority in the evaluations of alternatives in 10 CFR 51.71(e), *Preliminary recommendation*, Footnote 4.³

Nonetheless, the petitioner noted that in the context of the license renewal rule (61 FR 28467; June 5, 1996) many States expressed concern that the NRC's findings, although not legally dispositive, would establish an official Federal position that the States believed would be difficult to rebut in State proceedings. Specifically, the States expressed concern regarding the NRC's consideration of the need for power and alternative energy sources in the generic environmental impact statement for license renewal (NUREG-1437,

Chapters 8 and 9) and the associated proposed amendments to 10 CFR part 51 (56 FR 47016; September 17, 1991). The States were concerned that an NRC finding on those matters would infringe on State jurisdiction over economic regulation of utilities, including the generation, sale, and transmission of electric power produced by nuclear power plants. To address the States' concerns and the questions raised by the U.S. Environmental Protection Agency and the Council on Environmental Quality (CEQ), the NRC issued a supplement to its proposed License Renewal Rule (59 FR 37724; July 25, 1994) to address whether, under NEPA, the agency could and should eliminate consideration of issues over which States have primary jurisdiction.

The petitioner argued that, in that supplement, the NRC thoroughly and thoughtfully evaluated its responsibility under NEPA in the context of the States' expressed concerns. First, the NRC clearly recognized the primacy of State regulatory decisions regarding future energy options. Second, the agency recognized that the electricity-generating company will also make the choice of energy options. Third, the NRC characterized its process as one that preserves the option of continuing to operate nuclear plants.

The petitioner stated that, in the license renewal context, the NRC revised the definition of the purpose of the Federal action to reflect the applicant's goals in seeking NRC approval of the licensing action. According to the petitioner, the NRC's definition of the purpose of the Federal action in the license renewal context was "to preserve the option of continued operation of the nuclear power plant for State regulators and utility officials in their future energy planning decisions" (59 FR 37725; July 25, 1994).

The petitioner stated that the NRC revised the definition of the proposed Federal action to more accurately reflect what is really to be accomplished: establishing a stable and predictable regulatory approach to determine whether the option of nuclear power as a source of generating capacity at that site could be considered in future State energy planning decisions. The petitioner argued that the proposed definition allows only two basic alternatives: renewing the license to preserve the nuclear option or not renewing the license (59 FR 37725; July 25, 1994).

The petitioner believes that the license renewal example demonstrates that the NRC has the authority to determine which matters are pertinent

to the agency's NEPA evaluation of an application to build new nuclear power plants. The petitioner did not mention that the NRC does, in fact, continue to consider alternative energy sources in its license renewal reviews. In addition, the petitioner did not mention that license renewal is a post-construction licensing activity.

Application of NEPA to the Construction and Operation of Nuclear Power Plants

According to the petitioner, NEPA requires consideration of "alternatives," but does not require the NRC to evaluate the need for power or alternative energy sources. The petitioner argued that, although NEPA has never required these analyses, the electric utility structure in the 1970s was such that a typical environmental review for constructing and operating a nuclear power plant included an evaluation of the need for power and alternative energy sources. As a result, many licensing decisions and judicial determinations have been based on the NRC's interpretation of its responsibilities under NEPA and the corresponding NRC regulations and practices that the agency adopted accordingly. However, the petitioner believes that what may have been pertinent 30 years ago is no longer pertinent. The petitioner did not acknowledge that the "utility" regulatory structure that has been in place over the past 30 years remains in effect in a number of States and will remain in effect for the foreseeable future.

The petitioner pointed out that, in the 1970s, the typical applicant for a nuclear power plant was an electric utility that was regulated by a State public utility commission. Additionally, as a regulated electric utility, the applicant had the legal authority to exercise the power of eminent domain to build generating facilities and any necessary supporting infrastructure. The petitioner believes that any new nuclear power plant today is likely to be constructed and operated by an unregulated merchant generator, which will operate in a competitive marketplace. The petitioner argued that a merchant generator will not build and operate a plant unless it believes there is a need for power or that the facility will generate electricity at a lower cost than the competing facilities. Additionally, the petitioner believes that a merchant generator will not build and operate a nuclear power plant if a superior alternative source of energy is available. In States where utilities are still subject to regulation, the petitioner argued that the situation described

³ "The consideration of reasonable alternatives to a proposed action involving nuclear power reactors (e.g., alternative energy sources) is intended to assist the NRC in meeting its NEPA obligations and does not preclude any State authority from making separate determinations with respect to these alternatives and in no way preempts, displaces, or affects the authority of States or other Federal agencies to address these issues."