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Rules and Directives

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August 10, 2000

Mr. David L. Meyers
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: **DG-1097, NRC Draft Regulatory Guide: "Fire
Protection for Operating Nuclear Power Plants"**

Dear Mr. Meyers:

The Nuclear Utility Backfitting and Reform Group ("NUBARG")¹ provides the following comments on Draft Regulatory Guide ("DG") 1097, "Fire Protection for Operating Nuclear Power Plants," as requested in the *Federal Register* on June 22, 2000.² The NUBARG commends the NRC Staff on this ambitious undertaking and welcomes the opportunity to provide our thoughts on this matter. We are concerned, however, that the inclusion of new regulatory positions may constitute impermissible backfits under 10 C.F.R. § 50.109. Specific concerns are discussed in detail below.

Implied Backfit

¹ NUBARG is a consortium of nuclear utilities, operating a substantial number of U.S. nuclear power reactors. NUBARG was formed in the early 1980s and actively participated in the development of the NRC's backfitting rule in 1985. NUBARG has subsequently monitored the NRC's implementation of the backfitting rule.

² 65 Fed. Reg. 38,866 (2000).

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WINSTON & STRAWN

David L. Meyers

August 10, 2000

Page 2

The Introduction to DG-1097 states that the guidance was developed to "provide a comprehensive fire protection guidance document, and to identify the scope and depth of fire protection that the [NRC] staff has determined to be acceptable for operating nuclear plants." In order to meet that goal and set forth comprehensive guidance, the "positions and guidance provided are a compilation of fire protection requirements and guidelines from the existing regulations and staff guidance." In addition, "new guidance is provided where the existing guidance is weak or non-existent" (emphasis added). By combining existing and new guidance, the NRC Staff concludes that its proposed positions and guidance provide "an acceptable level of fire protection for operating nuclear power plants." Moreover, the NRC Staff suggests that this guide may be used for licensee self-assessments to provide "reasonable assurance that the necessary elements of the program described in the positions statements, Regulatory Position C of this guide, have been considered."

Regarding licensee implementation of the Regulatory Guide, the draft Regulatory Guide states that "[e]xisting fire protection programs, or elements thereof, need not be changed to meet the positions contained within this guide to the extent that these existing programs or elements have been found to be acceptable to the NRC, alternative positions are proposed, and any changes to these accepted programs or elements are reviewed in accordance with the criteria of 10 C.F.R. § 50.59." It also states, however, that "it presents the best available methods for meeting fire protection requirements and objectives that are acceptable to the Commission, and will be used in the evaluation of fire protection programs for operating nuclear plants. Nothing in this guide prohibits a licensee from proposing alternative method(s) for complying with specified petitions of the Commission's regulations."

The fact that the Commission will use the Regulatory Guide as the basis for evaluating the adequacy of fire protection programs implies that the positions in the draft Regulatory Guide are mandatory and, therefore, potentially impose multiple backfits without adherence to the backfit rule. To avoid the potential for improperly imposed backfits, the final Regulatory Guide should clearly state that alternative methods will be evaluated on their own merit and that licensees are not required to justify any differences between their fire protection programs and positions in the Regulatory Guide. Rather, the NRC Staff is required to demonstrate that a position in the Regulatory Guide is the only acceptable solution and applicable to a plant *before* suggesting that a plant's fire protection program is not in compliance with NRC requirements.

New Guidance

As mentioned above, the Introduction to the Regulatory Guide explicitly states that "*new* guidance is provided where the existing guidance is weak or non-existent" (emphasis added). Fire protection programs will be inspected for non-compliance with new guidance, or an agreed-upon alternative. Therefore, the guidance has the effect of establishing new NRC Staff positions as official interpretations of the fire protection regulations. Neither a rulemaking proceeding nor backfitting analysis was conducted by the NRC, however, prior to incorporating these new positions in the draft Regulatory Guide DG-1097. Specifically, we note that the draft Regulatory Guide does not indicate which guidance is "new" versus "existing," further complicating these backfitting concerns. Appropriate requirements of the backfitting rule (10 C.F.R. § 50.109) must be followed by the NRC before it imposes new requirements on licensees.

General Design Criteria

Draft Regulatory Guide Sections 2.1.1 through 2.1.4 indicate that General Design Criteria ("GDC") 3, "Fire Protection," 15, "Reactor Coolant System Design," 19, "Control Room," and 23, "Protection System Failure Modes," are applicable to all plants.³ GDC 3 was backfit upon all plants through 10 C.F.R. § 50.48, "Fire Protection," and GDC 15, 19, and 23 were explicitly backfit by other NRC requirements or by specific licensee commitments; however, these GDC do not apply as a general matter to pre-GDC plants. Accordingly, this regulatory position is a backfit for pre-GDC plants. The guidance should distinguish between GDC plants and pre-GDC plants in these sections.

NFPA Codes

NFPA Codes are referenced throughout the draft Regulatory Guide. An attempt to apply any other version of a code that is more burdensome than the code of record for a specific plant would be an impermissible backfit unless the applicable NRC procedures for backfitting, as required by 10 C.F.R. § 50.109, are followed. The draft Regulatory Guide does not specify how licensees are to proceed when there is no code of record for the NFPA Code cited in the Regulatory Guide. Any attempt to apply a code that is not part of the plant's licensing basis would be a backfit. If the final Regulatory Guide imposes backfits in the application of these codes, then they are subject to the cost-benefit analysis requirements of 10 C.F.R. § 50.109.

In summary, we believe that these backfitting concerns must be addressed prior to issuance of a final Regulatory Guide. If you have any questions or would like to discuss these matters further, please contact us.

³ See SECY-92-223, "Resolution of Deviations Identified During the Systematic Evaluation Program," September 18, 1992.

WINSTON & STRAWN
David L. Meyers
August 10, 2000
Page 4

Sincerely yours,

[Original Signed by T. Poindexter.]

Thomas C. Poindexter
Patricia L. Campbell

Counsel to NUBARG