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MD0348

**To:**

Bruce Boger

**\*\*\* YELLOW \*\*\***

**For Signature of:**

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**Description:**

Applicability of the Backfitting Rule to the Obligations of NRC Renewal Licensees  
under 10 C.F.R. 54.37(b)

**Assigned To:**

DLR

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GILLESPIE, FRANK P

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NUCLEAR ENERGY INSTITUTE

**Alexander Marion**  
SENIOR DIRECTOR, ENGINEERING  
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March 8, 2006

Mr. Bruce A. Boger  
Associate Director  
Operating Reactor Oversight and Licensing  
Office of Nuclear Reactor Regulation  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

**SUBJECT:** Applicability of the Backfitting Rule to the Obligations of  
NRC Renewal Licensees under 10 C.F.R. § 54.37(b)

Dear Mr. Boger:

I am writing to express industry's concern about the Nuclear Regulatory Commission's (NRC) position that the backfitting rule in 10 C.F.R. § 50.109 does not apply to 10 C.F.R. § 54.37(b), as articulated in a May 5, 2005, letter to the Nuclear Energy Institute (NEI):<sup>1</sup>

It remains the Staff's position . . . that after a renewed license is issued, § 54.37(b) requires the licensee to assess newly identified [systems, structures, and components] and manage their aging, if necessary, without the Staff's performance of a backfit analysis. The requirement stems from application of the rule language itself, and therefore, does not constitute a new requirement or a new interpretation that could be considered a backfit.

10 C.F.R. § 54.37(b) requires licensees with renewed operating licenses ("renewal licensees") to include in Final Safety Analysis Report updates any "newly identified" systems, structures, and components (SSC) that "would have been subject to an aging management review or evaluation of time-limited aging analyses in accordance with § 54.21." For any such SSCs, the Final Safety Analysis Report (FSAR) update must "describe how the effects of aging will be managed" during the period of extended operation.

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<sup>1</sup> The Nuclear Energy Institute is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Any “newly-identified” SSCs would be a subset of those SSCs within the scope of 10 C.F.R. Part 54 at the time of license renewal for the facility in question. Thus, the scoping and screening criteria (including positions and interpretations in effect at the time) for the plant in question, determine whether a “newly identified” SSC should be added to a nuclear plant’s aging management programs after license renewal, under Section § 54.37(b). Significantly, new or changed, NRC Staff positions on the scope of the license renewal rule should not, in themselves, trigger inclusion of a SSC under Section § 54.37(b). Rather, this determination should be governed by the NRC’s backfitting rule in 10 C.F.R. § 50.109.

The backfitting rule establishes controls on the NRC’s processes and imposes limits on the NRC Staff’s ability to require NRC licensees to make changes to a facility without proper justification. The Staff may not circumvent the backfitting rule by interpreting a regulation to provide an inherent exception to that rule, as the NRC appears to have done in this case.<sup>2</sup> Further, it is incontrovertible that the NRC must comply with its backfitting regulations before it imposes on renewal licensees new aging management requirements based upon new or changed NRC positions. In the May 5, 2005, letter to NEI, the Staff directly challenges this position.

Under the Staff’s interpretation of Section § 54.37(b), the NRC could establish Interim Staff Guidance and, by that action alone, modify the current licensing basis of a plant that has been issued a renewed operating license. Such an interpretation would allow the NRC to expand the scope of equipment subject to aging management, and impose new aging management requirements on renewal licensees without the disciplined process required by the backfitting rule.

As discussed in the attachment, neither the language nor the regulatory history of 10 C.F.R. Part 54, nor any other evidence presented by the Staff, supports the position that the Commission intended Section § 54.37(b) to subvert the application of the backfit rule to renewal licensees. The Staff’s interpretation as reflected in the May 5, 2005, letter fails to incorporate relevant Commission statements that contradict its position, and includes other passages that provide no substantive support for the Staff’s position. The Staff’s argument also is ill-founded, because it confuses the Commission’s language addressing the applicability of the backfitting rule to license renewal *application* reviews with a justification for imposing additional requirements on *renewal licensees*.

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<sup>2</sup> For this reason, the Staff’s assertion that backfitting protections do not apply to 10 C.F.R. § 54.37(b) because the requirement to assess newly identified SSCs “stems from application of the rule language itself, and therefore does not constitute a new requirement or a new interpretation that could be considered a backfit” is not compelling.

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We believe that had the Commission intended to create a backfitting rule exception applicable to renewed licenses in the context of 10 C.F.R. § 54.37(b), it would have done so directly.<sup>3</sup> Instead, the Commission stated in connection with the 1991 license renewal rule that: "Once a renewed license is issued, normal backfit protections apply and all changes to the current licensing basis of the renewed license would be subject to the backfit rule in accordance with § 54.35 of the final rule." The NRC staff's view on § 54.37(b) as reflected in the May 5, 2005, letter is inconsistent with the Commission's language.

We note that a primary objective of the 1995 license renewal rule was to "establish a more stable and predictable license renewal process." In our view, regulatory stability and predictability would be significantly eroded if the NRC Staff could require renewal licensees to amend their FSARs to add SSCs to their aging management programs simply by issuing new interpretations that expanded the scope of license renewal without regard to the backfitting rule.

We request that the NRC Staff reconsider its position and confirm the applicability of the backfitting rule to 10 C.F.R. § 54.37(b). We believe the NRC should prepare a backfit analysis in connection with any future determination that a renewal licensee must analyze and address aging effects for a newly-identified SSC, when that NRC action is based on a new or changed Staff position interpreting Part 54.

The Staff's position in the May 5, 2005, letter and its previous unwillingness to address industry concerns in this area, have generated confusion within the industry. We respectfully request a meeting with you and the NRC Office of General Counsel to advance our efforts to resolve this issue. If you have any questions regarding this matter, please contact me (202-739-8080; [am@nei.org](mailto:am@nei.org)) or James Ross (202-739-8101; [jr@nei.org](mailto:jr@nei.org)).

Sincerely,



Alexander Marion

Attachment

c: Mr. James E. Dyer, NRC Office of Nuclear Reactor Regulation  
Mr. R. William Borchardt, NRC Office of Nuclear Reactor Regulation  
Mr. Frank P. Gillespie, NRC Office of Nuclear Reactor Regulation  
Dr. P.T. Kuo, NRC Office of Nuclear Reactor Regulation  
Ms. Karen Cyr, NRC Office of General Counsel

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<sup>3</sup> Nor is there evidence that 10 C.F.R. § 54.37(b) should be viewed as a compliance exception to the backfitting rule, which applies when the backfit is necessary to bring a facility into compliance with a license or a Commission rule or order, or into conformance with a written licensee commitment. In promulgating the backfitting rule, the Commission stated that "new or modified interpretations of what constitutes compliance would not fall within the exception and would require a backfit analysis and application of the standard." Significantly, it is such new and/or modified NRC Staff positions that appear to be driving the Staff's position on Section § 54.37(b).

**APPLICABILITY OF THE NRC BACKFITTING REGULATION  
TO 10 CFR § 54.37(b) ACTIVITIES**

**I. OVERVIEW**

10 C.F.R. § 54.37(b) requires NRC reactor licensees that hold renewed operating licenses ("renewal licensees") to include in Final Safety Analysis Report (FSAR) updates any "newly identified" systems, structures, and components (SSCs) that "would have been subject to an aging management review or evaluation of time-limited aging analyses in accordance with § 54.21." For any such SSCs, the FSAR update must "describe how the effects of aging will be managed" during the period of extended operation. In a May 5, 2005, letter to the Nuclear Energy Institute (NEI), the Nuclear Regulatory Commission Staff stated that the backfitting regulation in 10 C.F.R. § 50.109 does not apply to Section 54.37(b):

It remains the Staff's position . . . that after a renewed license is issued, § 54.37(b) requires the licensee to assess newly identified [systems, structures, and components] and manage their aging, if necessary, without the Staff's performance of a backfit analysis. The requirement stems from application of the rule language itself, and therefore does not constitute a new requirement or a new interpretation that could be considered a backfit.<sup>1</sup>

For the reasons discussed below, NEI believes that the Staff's position is legally deficient, and should be revised. The NRC must comply with the backfitting regulation before it imposes new aging management requirements on renewal licensees based on new or different NRC Staff positions, whether pursuant to Section 54.37(b) or otherwise. Under the Staff's interpretation of Section 54.37(b), as described in the May 5, 2005 letter, the NRC could establish Interim Staff Guidance (ISG) and, by that action alone, modify the current licensing basis of a plant that has been issued a renewed operating license.

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<sup>1</sup> See May 5, 2005, letter from P.T. Kuo, Program Director, License Renewal and Environmental Impacts Program, NRC Office of Nuclear Reactor Regulation, to A. Marion, NEI, and D. Lochbaum, UCS, re "Staff Response to 'Industry Position Paper on the Interim Staff Guidance Process' – Response to Your Letter Dated February 18, 2005," at 1; *see also* p. 3 ("A reading of the 1991 and 1995 SOC's for the Part 54 rule confirms the staff's position that it may impose the requirements of § 54.37(b) without conducting a backfit analysis.") (May 5, 2005, letter).

NEI and the NRC have been unable to reach a satisfactory resolution of this issue despite the fact that our efforts spanned several years. (See Section II, below.) As noted in NEI's February 18, 2005, letter to the NRC,<sup>2</sup> the regulatory history of the NRC license renewal rule clearly supports industry's position on this question. We do not agree with the Staff's characterization of that regulatory history in its May 5, 2005, letter (see letter, at p. 2), which relies only upon the Staff's selective excerpts from the Supplementary Information provided by the NRC in connection with the 1991 and 1995 license renewal rules.

In particular, the snippets of Commission language that the Staff cites from the 1991 license renewal rule (56 Fed. Reg. 64,943, 64,965-66) relate to the applicability of the backfitting rule to license renewal *application* reviews, and not to the applicability of Section 54.37(b). In that context, the Commission's remarks on backfitting take on a different meaning than that which the Staff ascribes to them, and do not support the imposition of new requirements on renewal *licensees*, based solely on new Staff positions.

Additionally, in the citation included in the May 5, 2005, letter, the Staff has neglected to cite or otherwise address other key sections in this same passage of the Supplementary Information. In one of those omitted portions, the Commission summarizes its position in the proposed license renewal rule as follows: "*The Commission also indicated that once a renewed license was issued, the normal backfitting requirements of 10 C.F.R. 50.109 would apply to NRC-imposed changes to the renewed license's current licensing basis.*" Later in this same passage, the Commission comments with respect to the 1991 license renewal final rule: "*Once a renewed license is issued, normal backfit protections apply and all changes to the current licensing basis of the renewed license would be subject to the backfit rule in accordance with § 54.35 of the final rule.*"<sup>3</sup> This Commission language, which contradicts the Staff's current position, is not included in the May 5, 2005 letter. (See Section III.C., below.)

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<sup>2</sup> See Feb. 18, 2005, letter to P.T. Kuo, NRC Office of Nuclear Reactor Regulation, from A. Marion, NEI, and attached "Industry Position Paper on the Interim Staff Guidance Process" (Feb. 18, 2005, letter). In addition to reiterating concerns regarding the NRC's position on the inapplicability of the backfitting rule to Section 54.37(b), NEI's Feb. 18, 2005, letter addressed the ISG process. This paper is not intended to address that portion of the NEI letter.

<sup>3</sup> 10 CFR 54.35 provides that: "During the term of a renewed license, licensees shall continue to comply with all Commission regulations contained in 10 CFR Parts 2, 19, 20, 21, 30, 40, 50, 51, 54, 55, 70, 72, 73, and 100 and appendices thereto that are applicable to holders of operating licenses."

We also dispute the Staff's claim (May 5, 2005, letter, at p. 2) that the Commission language it cites from the 1995 license renewal rule Supplementary Information "similarly supports the Staff's position." In fact, that language essentially restates the content of Section 54.37(b). However, it is silent on the pivotal question of whether the backfit rule applies if a renewal licensee is required by 10 C.F.R. § 54.37(b) to assess newly-identified SSCs and manage their aging. Thus, this quotation does not further the Staff's argument.

Further, the Staff's interpretation is not supported by the Commission's "principles of license renewal." (See Section III.D., below.) Nor does the Staff provide other evidence that the Commission intended Section 54.37(b) to establish a process that allows the NRC Staff to subvert the backfitting process in Section 50.109. Had the Commission intended to create a backfitting rule exception applicable to renewal licenses under 10 C.F.R. 54.37(b), then it would have done so. But instead, the Commission stated in connection with the license renewal rule that once a renewed license is issued, all changes to the CLB of the renewed license are subject to the backfit regulation.<sup>4</sup> This Commission language cannot be squared with that in the May 5, 2005, letter to NEI.

The interpretation of 10 C.F.R. § 54.37(b) set forth in the May 5, 2005, letter, if left uncorrected, would allow the NRC to expand the scope of equipment subject to aging management and to impose new aging management requirements throughout the renewed term of operation, all without the discipline of the backfitting regulation. Under this approach, the Staff could require a renewal licensee to expand its facility's current licensing basis solely on the basis of a new NRC Staff position, or, worse yet, an "interim" Staff position contained in NRC guidance. This result is contrary to the intent of the backfitting rule in general and also contrary to the Commission's specific expectation that once a license is renewed, the backfit protections of 10 C.F.R. § 50.109 apply in accordance with 10 C.F.R. § 54.35.

## II. BACKGROUND

In a December 12, 2003, letter, the Staff provided the final ISG process guidance document. Regarding ISGs involving newly identified SSCs, the NRC guidance states that: "the regulations [in 10 C.F.R. § 54.37(b)] require a licensee holding a renewed license to submit in its next FSAR update a description of how the effects of aging will be managed." The guidance further states that:

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<sup>4</sup> See 56 Fed. Reg. 64,943, 64,966 (Dec. 13, 1991) (final rule).

ISGs that do not involve newly identified SSCs would for licensees holding a renewed license, be subject to the requirements of the 10 C.F.R. 50.109, the backfit rule [sic]. For example, for licensees holding a renewed license, a change to an existing aging management program would require a backfit evaluation in accordance with 10 C.F.R. 50.109.<sup>5</sup>

In the same letter, the Staff responded to questions submitted by NEI in a letter dated October 29, 2002, regarding the application of the backfitting rule to license renewal. The Staff stated that “license renewal ISGs involving matters covered by 10 C.F.R. 54.37(b) do not involve backfits.”<sup>6</sup>

In a July 21, 2004, letter to NEI, the Staff again interpreted Section 54.37(b) as requiring action by a renewal licensee that “is a specific exception to the general requirements of the backfitting rule (10 C.F.R. 50.109).” It stated that: “there is no need to perform an analysis in accordance with the backfitting rule when communicating newly identified SSCs to licensees holding a renewed license.”

In a February 18, 2005, letter to the NRC, NEI emphasized its concerns about Staff statements in the July 21, 2004, NRC response that limited the applicability of the backfit rule to actions taken pursuant to Section 54.37(b). We noted that our review of the relevant regulatory framework supported the conclusion that “new or changed NRC Staff positions on the scope of the license renewal rule, such as those identified in an ISG, *would* trigger application of the backfit rule for renewed licenses.”<sup>7</sup> NEI noted that NRC regulations “do not create an exception to the backfit rule unique to license renewal,”<sup>8</sup> and argued that the history of the license renewal rule clearly supports NEI’s position.

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<sup>5</sup> See Dec. 12, 2003, letter from D. Matthews (NRC), to A. Marion (NEI), and D. Lochbaum (UCS), “The Interim Staff Guidance Process” (Dec. 12, 2003), Enc. 1 at 9.

<sup>6</sup> *Id.*, Enc. 2 at 1.

<sup>7</sup> See Feb. 18, 2005, letter at 2 (emphasis in original).

<sup>8</sup> *Id.*



While it failed to address all significant points in NEI's February 2005, letter,<sup>9</sup> the Staff's May 5, 2005, letter emphatically reiterated the Staff's position that "after a renewed license is issued, § 54.37(b) requires the licensee to assess newly identified SSCs and manage their aging, if necessary, without the Staff's performance of a backfit analysis."<sup>10</sup> By way of explanation, the Staff noted that the Section 54.37(b) requirement "stems from application of the rule language itself, and therefore does not constitute a new requirement or a new interpretation that could be considered a backfit." *Id.*

### III. DISCUSSION

#### A. The Staff's Interpretation Effectively Obviates the Backfitting Regulation

Backfitting is defined as "the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position." 10 C.F.R. § 50.109(a)(1).

The NRC is permitted to require a backfit when it determines, based on its backfit analysis, that the backfit would provide a "substantial increase in the overall protection of the public health and safety and the common defense and security," and that "the direct and indirect costs of implementation for that facility are justified" by that increased protection. Section 50.109(a)(3). In the case of a backfit, the Commission "shall require a systematic and documented analysis" of the backfit it seeks to impose (see Section 50.109(a)(2)), unless one of the following exceptions under Section 50.109(a)(4) applies:

- The backfit is necessary to bring a facility into compliance with a license or Commission rules or orders, or into conformance with written commitments by the licensee.

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<sup>9</sup> The NRC states in its May 5, 2005, letter that: "§ 54.37(b) does not limit how 'newly identified' [structures, systems, and components] SSCs are found; rather any entity may identify such SSCs." NEI does not dispute this statement.

<sup>10</sup> May 5, 2005, letter at 1.

- The backfit is necessary to assure adequate protection of the public health and safety.
- The backfit would redefine what level of public protection is adequate.

The backfitting regulation provides NRC licensees with regulatory stability and imposes a disciplined process that the Staff must follow when evaluating changes in Staff positions or when establishing new regulations or Staff positions. This rule effectively prevents the escalation of requirements beyond those necessary for assuring adequate protection or compliance with NRC regulations, unless a change provides a substantial increase in safety. Through issuance of the backfitting regulation, the Commission recognized the need to control its own processes and voluntarily imposed limits on the Staff for requiring licensees to make changes to a facility without proper justification.

Under Section 50.109, the Staff must justify its position when it revises an established regulatory position (in this case, with the effect of expanding the scope of the license renewal rule), and before it attempts to apply that new position to a renewal licensee whose renewed license was issued before development of the new NRC position. Moreover, the Staff may not circumvent the backfitting regulation by interpreting another regulation (such as Section 54.37(b)) to provide an "inherent" exception to the backfitting rule, even if the Staff argues that the backfitting rule is discretionary.<sup>11</sup>

Nor should 10 C.F.R. § 54.37(b) be viewed as a compliance exception to the backfitting rule. This regulation is not needed to bring a facility with a renewed license into compliance with a license or Commission rule or order, or into conformance with a written licensee commitment. When it issued the backfitting rule, the Commission indicated that the compliance exception was intended to address those situations "in which the licensee had failed to meet known or established standards because of omission or mistake of fact. It should be noted that new or modified interpretations of what constitutes compliance would not fall within the exception and would require a backfit analysis and application of the standard."<sup>12</sup> Here, "new or modified interpretations" of what constitutes compliance by renewal licensees with the license renewal rule appears to be precisely what is driving the Staff's position on Section 54.37(b). Thus, the Staff may not properly argue that the compliance exception applies here.

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<sup>11</sup> As a principle of administrative law, by issuing regulations, an agency may voluntarily limit its own discretion. A number of cases have held that an agency must comply with its own regulations, even if the action is discretionary by statute. *See, e.g., U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>12</sup> *See* 50 Fed. Reg. 38,097, 38,103 (Sept. 20, 1985).

B. The History of 10 C.F.R. § 54.37 Does Not Support the Staff's Position

As promulgated in the 1991 license renewal final rule, 10 C.F.R. § 54.37(b) required NRC licensees holding renewed operating licenses to identify those SSCs that would be “newly identified” through various processes.<sup>13</sup> It specified that: “The annual FSAR update required by 10 C.F.R. 50.71(e) must include any SSCs newly identified as important to license renewal as a result of generic information, research, or other new information after the renewed license is issued.”<sup>14</sup> Note the emphasis on SSCs identified by the discovery of new information. The implementation of new NRC Staff positions reinterpreting the scope of the license renewal rule was not listed as a possible basis for a “newly-identified” SSC (and should not be so considered now).

In the 1995 amendments to Part 54, the NRC revised Section 54.37(b) to its current form.<sup>15</sup> The stated purpose of the amendment to this provision was “to limit the information required by the FSAR update” – not expand it.<sup>16</sup> At that time, the Commission had occasion to explain the purpose of Section 54.37(b) in the context of responding to comments concerning the level of detail required in the FSAR supplement for newly identified SSCs:

The Commission believes that it is important to note that the systems, structures, and components discussed in Sec. 54.37(b) are those newly identified systems, structures, and components that would have been subject to an aging management review in the license renewal process. If identified as part of the license renewal process, information concerning the aging management for these structures and components would have been contained in the application for license renewal. During the license renewal process, the application and the FSAR supplement, together, provide the necessary information and administrative controls to evaluate and help ensure the efficacy of aging programs for these structures and components. After a renewed license is issued, the information in the FSAR supplement serves the dual

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<sup>13</sup> As originally proposed in 1990, Section 54.37 read in its entirety as follows: “The licensee shall retain in an auditable and retrievable form for the term of the renewed operating license all information and documentation required by, or otherwise necessary to document compliance with, the provisions of this part.” See 55 Fed. Reg. 29,043, 29,062 (July 17, 1990) (proposed rule).

<sup>14</sup> See 56 Fed. Reg. 64,943, 64,979.

<sup>15</sup> See 60 Fed. Reg. 22,461, 22,483-84 and 22,494-95 (May 8, 1995) (1995 final rule).

<sup>16</sup> See 59 Fed. Reg. 46,574, 46,588 (Sept. 9, 1994) (proposed rule).

purposes of (1) Assuring that the licensee has considered relevant technical information regarding the evaluation of aging effects for these newly identified systems, structures, and components and (2) establishing appropriate administrative and regulatory controls on the programs that manage aging for these newly identified systems, structures, and components.<sup>17</sup>

This Commission language suggests that the scoping and screening methodology approved at the time of renewal, and the positions in effect at that time, should determine whether a newly-identified SSC should be added. In this way, the result would be the same as if the evaluation were performed at the time of license renewal. At a minimum, this language does not support the Staff's view that newly-identified SSCs stemming from later (post-renewal) Staff interpretations come under Section 54.37(b) without being subjected to a backfitting analysis.

C. The Staff's Interpretation Ignores the Regulatory History of Section 54.37(b) and its Relationship to the Backfitting Rule

The backfitting regulation applies to renewed licenses through 10 C.F.R. § 54.35.<sup>18</sup> By requiring that the provisions of Part 50 be made applicable to the renewed license, the Commission intended the protections of the backfitting rule to prevent the Staff from arbitrarily imposing new aging management requirements without the appropriate justification once the renewed license is issued. To interpret the Commission's intent in any other way would allow the Staff to impose aging management requirements that would not substantially increase protection of public health and safety, thereby undermining the regulatory stability promised to licensees through the backfitting rule. The regulations clearly provide renewal licensees with the same level of backfit protection as existed before renewal.

1. *The 1990 Proposed License Renewal Rule Does Not Support the Staff's Position*

In developing the original license renewal rule, the NRC considered whether to include a specific provision addressing backfit protection and determined that it was not necessary. The NRC discussed in the 1991 proposed rule how backfitting would be controlled during the renewal review. In this context, the NRC explained why a backfit analysis was not performed *in conjunction with the promulgation of*

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<sup>17</sup> 60 Fed. Reg. at 22,484.

<sup>18</sup> Section 54.35 provides that: "[d]uring the term of a renewed license, licensees shall be subject to and shall continue to comply with all Commission regulations contained in 10 C.F.R. parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, and 100 and the appendices to these parts that are applicable to holders of operating licensees."

*the Part 54 proposed rule.* This matter is of course distinct from that at issue here. Regarding the perceived need for a backfit analysis in connection with the proposed license renewal rule itself, the Commission stated in part:

“XI. Non-Applicability of the Backfit Rule

The proposed rule addresses the procedural and technical requirements for obtaining a renewed operating license for nuclear power plants. The Commission has not previously addressed the policy, technical, and procedural issues unique to renewal of nuclear power plant operating licenses in a rulemaking. Accordingly, the proposed rule, if adopted, would not constitute a “backfit” as defined in 10 C.F.R. 50.109(a)(1) and a backfit analysis need not be prepared. The primary impetus for the backfit rule was “regulatory stability,” *viz.*, that once the Commission decides to issue a license, the terms and conditions for operating under that license would not be arbitrarily changed *post hoc*. Regulatory stability is not a relevant issue with respect to the proposed license renewal rule. The rule, if adopted, would have a prospective effect only. There are no licensees currently holding renewed nuclear power plant operating licenses; consequently, there are no valid expectations that may be changed regarding the terms and conditions for obtaining a renewed operating license.

\* \* \* \*

In sum, because the proposed rule does not constitute a backfit under 10 C.F.R. 50.109(a)(1), because the reasons underlying the Commission’s adoption of the backfit rule are inapplicable to the kind of rulemaking being undertaken here, and because the proposed rule would not adversely affect licensees with respect to backfit considerations, the Commission has determined that a backfit analysis need not be prepared for the proposed rule.”<sup>19</sup>

Read in context, this Commission discussion does not support the Staff’s position on Section 54.37(b).

2. *The 1991 License Renewal Final Rule  
Does Not Support the Staff’s Position*

In promulgating the 1991 license renewal final rule, the Commission included in the Supplementary Information an extremely important discussion regarding the applicability of the backfitting rule. In the first paragraph of that discussion (cited

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<sup>19</sup> See 55 Fed. Reg. 29,043, 29,057-58 (proposed rule).

immediately below), the Commission characterized its position in the proposed rule as requiring the application of the backfitting regulation to NRC-imposed changes to the renewed licensee's CLB *once a renewal license is issued*. Notably, the Commission's position on this question did not change when it promulgated the 1991 final rule. Regarding backfitting, the NRC stated:

*"p. Backfit Considerations*

In the proposed rule, the Commission indicated that a special provision addressing backfitting requirements during the review of a renewed license application was not necessary. Instead, the Commission discussed how backfitting would be controlled during the renewal review. *The Commission also indicated that once a renewed license was issued, the normal backfitting requirements of 10 C.F.R. 50.109 would apply to NRC-imposed changes to the renewed license's current licensing basis.*

Most of the utility commenters were dissatisfied with the Commission's proposal not to include a specific provision in 10 C.F.R. Part 54 addressing the imposition of "backfits" during the review of the renewed license application. In general, these industry commenters indicate that, while they agree with the discussion in the proposed rule describing how the backfitting rule would apply in the context of license renewal, the Preamble to the proposed rule was not legally binding on the Commission and staff and only a rule would be binding and enforceable against the Staff. A commenter stated that backfit analyses are not appropriate to staff-imposed changes needed to address age-related degradation where degradation is significant and the equipment is not covered by an existing effective program. In the commenter's view, however, the "agreement evaporates" because the proposed license renewal rule did not specify a "focused integrated plant assessment similar to the NUMARC methodology" (NUMARC Report Number 90-11, "Methodology to Evaluate Plant Systems, Structures, and Components," December 1990) and did not unreservedly accept the adequacy of the CLB as a standard for license renewal. The utilities also argue that, where there are two or more ways to satisfactorily address age-related degradation, the licensee should be free to choose the most cost-effective alternative, unless the Staff determines that it is necessary or desirable to designate a specific alternative. There was some lack of agreement within the industry as to the amount of documentation that the NRC was required to generate to justify that a proposed backfit is necessary to ensure adequate protection or compliance. NUMARC's proposed rule would require the NRC to

comply with the documentation requirements of 10 C.F.R. 50.109(a)(4). By contrast, a utility commenter states that it would be unreasonable to encumber the NRC with additional justification requirements where the backfits truly relate to adequate protection.

The Commission continues to believe that a special provision in 10 C.F.R. Part 54 that would impose backfit-style requirements on the agency is not needed. All requirements, whether or not age-related, necessary to ensure adequate protection will be required without regard to cost. This is analogous to the "adequate protection exemption" in 10 C.F.R. 50.109(a)(4)(ii). Any additional requirements to address age-related degradation unique to license renewal that are necessary to ensure compliance with the plant's current licensing basis may be imposed without regard to cost. This is analogous to the "compliance exemption" in 10 C.F.R. 50.109(a)(4)(i). The NRC need not prepare a separate document explaining the basis for such a conclusion. Instead, the basis for such a conclusion will normally be documented by the NRC in a safety evaluation report that presents the results of the NRC staff's license renewal application review. The Commission rejects a commenter's proposal that these findings must be made separately from the Staff's overall safety evaluation. A separate finding would be unduly burdensome and elevate form above substance since the Staff's evaluation should clearly state why an action is necessary.

*Once a renewed license is issued, normal backfit protections apply and all changes to the current licensing basis of the renewed license would be subject to the backfit rule in accordance with § 54.35 of the final rule."*<sup>20</sup>

The Supplementary Information cited above was likely intended (at least in part) to address a parallel discussion of backfit considerations found in the 1990 proposed rule; see 55 Fed. Reg. 29,052. In both the 1990 proposed rule and the 1991 final rule, the Commission explained its basis for declining to add a provision to the new license renewal rule that would have explicitly imposed backfit requirements during the NRC's review of license renewal applications. See 55 Fed. Reg. at 29,052; 56 Fed. Reg. at 64,965-66.<sup>21</sup> That question, of course, is distinct from the question at issue here -- whether the backfitting rule protections apply to Section 54.37(b).

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<sup>20</sup> 56 Fed. Reg. 64,943, 69,965-66 (emphasis added).

<sup>21</sup> Thus, the language of this passage reflects the Commission's intent that the Staff impose requirements on license renewal applicants to address aging effects on the basis that the requirements would be necessary for adequate protection or for compliance with the current licensing basis. The Commission also indicated that the Staff need not prepare a separate document

However, the final paragraph of the Commission language cited above appears directly on point. It shows that the Commission did not intend to excuse the NRC Staff from justifying under the backfit rule the imposition of new requirements for renewal licensees to address aging effects for SSCs identified after renewal. In fact, the Commission's statements demonstrate that the Staff must provide such justification before it can impose additional requirements on renewal licensees.

The contrary view set forth in the NRC's May 5, 2005, letter to NEI inexplicably ignores this Commission guidance, set forth at 56 Fed. Reg. 69,965-66. Indeed, the Staff's discussion omits entirely Commission language that appears dispositive: "Once a renewed license is issued, normal backfit protections apply and all changes to the current licensing bases of the renewed license would be subject to the backfit rule in accordance with § 54.35 of the final rule."<sup>22</sup>

### 3. *The 1995 License Renewal Rule Does Not Support the Staff's Position*

The May 5, 2005, letter to NEI also refers (at p. 2) to language from the Supplementary Information accompanying the 1995 license renewal rule in support of the Staff's position. Having reviewed this excerpt in context, we must disagree with the notion that it supports the Staff's argument on the backfitting question. The Commission language in question (which appears at 60 Fed. Reg. 22,483-84) essentially recites the language of Section 54.37(b), as revised in 1995. This language is silent as to whether a backfit analysis is required in connection with a Staff determination that a renewal licensee must assess newly-identified SSCs, manage their aging, and describe how the aging effects will be managed the FSAR update.

In sum, the Staff's regulatory analysis of this question in the May 5, 2005, letter is deficient. It fails to incorporate relevant Commission language from the license renewal rule history that contradicts the Staff's position, and also appears to rely on Commission language addressing the applicability of the backfitting rule to license renewal *application* reviews to bootstrap its arguments concerning the imposition of new requirements on *renewal licensees*. Additionally, the Staff's letter cites other Commission language that simply provides no substantive support for the NRC's position.

### D. The Staff's Interpretation of 10 C.F.R. § 54.37(b) Is Contrary to the Commission's Principles of License Renewal

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explaining how the requirements would be in accordance with the "exceptions" in the backfitting rule, but would provide its basis in the safety evaluation for the renewed license.

<sup>22</sup> See February 18, 2005, letter, quoting 56 Fed. Reg. at 64,965-66.



The Staff's position on the applicability of the backfitting rule to Section 54.37(b) is undercut by the Commission's two fundamental principles of license renewal. The first principle is that "the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation" and that continuing this regulatory process "will ensure that this principle remains valid during any renewal term."<sup>23</sup> The Commission based this principle on its conclusion that both "licensees' programs for ensuring safe operation and the Commission's regulatory oversight program have been effective in identifying and correcting plant-specific noncompliance with the licensing bases."<sup>24</sup> Thus, a "formal review of compliance by a plant with its licensing basis is not needed as part of the review of that plant's renewal application" to provide reasonable assurance that the current licensing basis was accurate at the time of license renewal. *Id.*

The Commission's second principle for license renewal is that "each plant's current licensing basis must be maintained during the renewal term."<sup>25</sup> In issuing the original license renewal rule, the Commission identified several provisions of its rules, including 10 C.F.R. § 54.37(b), that serve "to ensure adherence to the licensing basis."<sup>26</sup> The Commission explained that:

These provisions, together with the continuation of the NRC's regulatory oversight program throughout the term of a plant's renewed license, will ensure that the current licensing basis will be *maintained throughout the term of the renewed license in the same manner and to the same extent* as during the original licensing term.<sup>27</sup>

The Commission explicitly reaffirmed these principles of license renewal in promulgating the 1995 license renewal rule.<sup>28</sup>

These principles indicate that Section 54.37(b) is intended to maintain, not expand, the CLB. The CLB provides the framework against which SSCs must be evaluated to determine whether they should be added to the renewed licensees' aging management review programs described in the FSAR. The CLB, as defined in 10

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<sup>23</sup> See 56 Fed. Reg. 64,943, 64,946.

<sup>24</sup> *Id.* at 64,952.

<sup>25</sup> *Id.*, at 64,946, 64,953.

<sup>26</sup> *Id.*, at 64,953 (emphasis added).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> See 60 Fed. Reg. 22,461, 22,464.

C.F.R. § 54.3, does not include new or different NRC Staff positions developed after license renewal unless those positions and interpretations are applied in accordance with the backfit regulation. Accordingly, these policy considerations provide additional support for NEI's view that the Staff may not use 10 C.F.R. § 54.37(b) to require a renewal licensee to modify its CLB without proper justification in accordance with the backfitting rule.

More broadly, we note that a primary objective of the 1995 license renewal rule was to "establish a more stable and predictable license renewal process."<sup>29</sup> In our view, regulatory stability and predictability would be significantly eroded if the NRC Staff could require renewal licensees to amend their FSARs to add SSCs to their aging management programs simply by issuing new interpretations that expanded the scope of license renewal without regard to the backfitting rule.

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<sup>29</sup> *Id.*, at 22,462.