

# Facility-Specific & Compliance Backfits

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**Exelon** Generation®

# Compliance Exception to Backfit Rule

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- NRC may forego a backfit analysis when "necessary to bring a facility into compliance with a license or the rules or orders of the Commission, or into conformance with written commitments by the licensee." (10 CFR 50.109(a)(4)(i))
- Commission explanation of the compliance exception is clearly articulated in the Backfit Rule Statements of Consideration and reiterated in NUREG-1409:
  - "to address situations in which the licensee has failed to meet known and established standards of the Commission 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"

# What is a “Known and Established Standard”?

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- Specific (e.g., not solely a general design criteria)
- In existence at time of prior NRC approval
- Applicable to the licensee at time of prior NRC approval
- Legally binding requirement, or licensee commitment necessary to comply with a legally binding requirement

The known and established standard must be clearly defined before the NRC can determine whether the licensee has failed to meet that standard due to an omission or mistake of fact

# What is an “Omission” or “Mistake of Fact”?

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- Not defined in NRC regulations or guidance
- Must be viewed in the context of the regulation
- NRC staff recently (and for the first time) defined “omitted fact” in the backfit evaluation for the Open Phase Condition issue:

“An omitted fact (i.e., ‘new’ information) may be information which (i) did not exist; (ii) was not recognized as relevant and significant by all relevant stakeholders; or (iii) could not have reasonably been known to all of the relevant stakeholders at the time of NRC staff approval.”

Compliance exception cannot be interpreted in a way that renders the backfit rule meaningless

# What is NOT an “Omission” or “Mistake of Fact”?

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- New or modified interpretations of what constitutes compliance do not fall within the compliance exception
- Information that did not exist (or was not known to exist) at the time of the approval
- Allowing these to justify the compliance exception would lead to perverse results:
  - Erode the regulatory stability provided by the backfit rule
  - Create moving target of regulatory compliance
  - Could effectively render all prior NRC approvals – no matter how explicit or thorough – meaningless simply because subsequent NRC staff has different interpretation of compliance

A new or modified interpretation of compliance, in itself,  
is not an “omission” or “mistake of fact”

# **Facility-Specific Backfit Process**

## **Exelon Experience with the Backfit Appeal Process**

# Recent Experience

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Recent experience with compliance backfit imposed on Byron and Braidwood regarding pressurizer safety valves

- NRC relied on the compliance exception to forego a backfit analysis

Exelon appealed the backfit to the Director of NRR

- NRR Director upheld use of the compliance exception to impose the backfit

Exelon appealed the NRR Director's backfit decision to the EDO

- Appeal is currently pending before the EDO

# Observations

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Need clear guidance on, and consistent application, of compliance exception

Difficulties associated with citing General Design Criteria as the basis for a compliance backfit

Two NRC Staff management appeals (NRR Director and EDO), but no role for the CRGR unless the CRGR serves as the panel making a recommendation to the NRR Director or the EDO on the backfit appeal

Equal opportunity for staff and licensee involved in the backfit to present their case to an independent appeal panel