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USNRC

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'96 NOV 21 P3:17

Steven P. Frantz
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November 20, 1996

DOCKET NUMBER
PROPOSED RULE PR Misc.
(61FR 54461)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTN: Docketing and Service Branch

RE: Revision of Policy and Procedure on Enforcement Actions; Departures from FSAR; 61
Fed. Reg. 54461 (October 18, 1996)

Dear Sir:

On October 18, 1996, NRC published a revision to its enforcement policy related to departures from Final Safety Analysis Reports (FSARs). Arizona Public Service Company (APS) endorses the attached comments submitted by Morgan, Lewis & Bockius LLP on November 18, 1996 on the revised enforcement policy. On behalf of APS, we also request that the NRC consider the following additional comment.

Under the revised enforcement policy, NRC will not apply its normal escalation and mitigation factors for FSAR nonconformances identified more than two years after October 18, 1996. NRC's stated purpose in establishing this two-year limitation is to encourage licensees to establish and implement such initiatives within the next two years. However, two years may not be sufficient to complete an FSAR review, especially for newer plants that have extensive FSARs. Therefore, we believe that the enforcement policy should be revised to continue to allow for mitigation of FSAR nonconformances identified after the end of the two-year period if the licensee has not been dilatory in implementing its FSAR review program.

The revised enforcement policy appears to be predicated upon the assumption that licensees have already had sufficient time to conduct FSAR reviews. The revised enforcement policy states that the previous mitigation policy was established in the early 1990s "to encourage voluntary initiatives to establish *design reconstitution programs*." (Emphasis added). However, as recognized by NRC in its October 9, 1996 letters under Section 50.54(f), the design basis is a subset of the licensing basis in the FSAR. As a result, previous design reconstitution programs (e.g., pursuant to NUMARC 90-12) would have a smaller scope than an FSAR review.

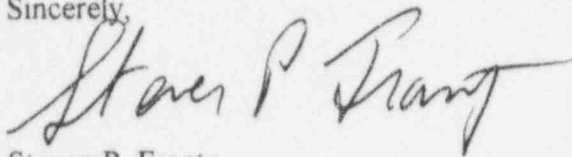
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Therefore, even if a licensee previously conducted a design reconstitution program in the early 1990s, it may still desire to conduct an FSAR review now. Because an FSAR review may take longer than two years to implement, we believe that mitigation should be allowed as long as the FSAR review is progressing at a reasonable pace.

Thank you for the opportunity to submit these additional comments on the revised enforcement policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven P. Frantz". The signature is fluid and cursive, with the first name "Steven" being the most prominent part.

Steven P. Frantz

cc: Angela Krainik (APS)

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C O U N S E L O R S A T L A W

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RE: Revision of Policy and Procedure on Enforcement Actions; Departures from FSAR; 61
Fed. Reg. 54461 (October 18, 1996)

Dear Sir:

On October 18, 1996, NRC published a revision to its enforcement policy related to departures from Final Safety Analysis Reports (FSARs). Although the revision was immediately effective, the NRC requested comments on it. On behalf of Texas Utilities Electric Company, Houston Lighting & Power Company, IES Utilities, Inc, and Illinois Power Company, we are submitting the following comments on the revised enforcement policy.

Two-Year Period

Under the revised enforcement policy, NRC will not apply its normal escalation and mitigation factors for FSAR nonconformances identified more than two years after October 18, 1996, and "intends to use its discretion to increase the fine" for such violations. Additionally, the revised enforcement policy states that NRC will allow mitigation for FSAR nonconformances identified by NRC, only if they would likely be identified as a result of a voluntary licensee initiative during the next two years. NRC's stated purpose in establishing this two-year limitation is to encourage licensees to establish and implement such initiatives within the next two years.

NRC's revised policy will have the effect of penalizing licensees who find problems as a result of routine efforts after the end of this two year period. The revised policy will also have the effect of penalizing licensees who establish voluntary initiatives after the two year period, because FSAR nonconformances identified by NRC while inspecting those initiatives could result in civil penalties even if the initiative would have likely identified the nonconformance. We believe that such penalties are inappropriate. NRC should not discourage efforts which could contribute to safety. We appreciate NRC's desire to encourage licensees to complete voluntary initiatives within the next two years; however, this goal can be accomplished without the punitive features of the revised policy. In particular, we believe that:

- The previous policy should remain in effect for those licensees that have provided reasonable assurance of conformance with the FSAR, either by means of a voluntary initiative prior to the end of the two year period or through previously completed programs or initiatives. NRC's policy should have the effect of encouraging licensees to identify their own problems. Instead, the revised enforcement policy would have the effect of penalizing licensees who self-identify FSAR nonconformances after the end of the two-year period, even in cases where a licensee had previously taken appropriate actions to assure conformance with the FSAR.
- Under 10 CFR § 50.71(e), licensees are required to update their FSARs periodically. During the updating process, licensee personnel should be encouraged to identify FSAR nonconformances. Instead, the revised enforcement policy will penalize licensees who identify such nonconformances. We believe that such a penalty is inappropriate and sends the wrong message to licensees and their personnel.

As stated in the Introduction and Purpose of NRC's enforcement policy, one of the primary purposes of NRC enforcement action is "to encourage prompt identification and prompt, comprehensive correction of violations." We believe that some of the revisions to the enforcement policy are inconsistent with this purpose and will have the effect of penalizing licensee who identify FSAR nonconformances. Accordingly, we recommend that the enforcement policy be revised to eliminate such punitive features.

Requirement for Initiative to be in Writing and Publicly Available

The revised policy states that mitigation will be allowed only if the voluntary initiative is described in writing, incorporated in a publicly available document, and followed by NRC as an inspection report open item. This may inadvertently penalize those licensees who find problems through other, less formal, initiatives. For example, a problem identified by an alert employee outside the formal initiative would not qualify for mitigation under the revised policy, even in cases where the licensee established special training or incentives to promote identification of problems. Such behavior should be encouraged even if it is not part of a written, publicly available initiative. Accordingly, NRC should revise its policy to allow mitigation when a problem is found as a result of any voluntary initiative and is promptly corrected.

Multiple Violations

The revised policy states that NRC will issue a Severity Level II citation for multiple violations involving several unreviewed safety questions or conflicts with the technical specifications, if there is an impact on operability. Additionally, the revised policy states that NRC will consider assessing separate civil penalties for each violation that is aggregated into the Severity Level II citation -- in other words, NRC may "double count" violations by aggregating violations to establish a higher severity level and then treating the violations separately for purposes of determining the amount of the civil penalty. We do not believe this is appropriate. If several

Severity III violations exist, NRC should determine the amount of the civil penalty either by aggregating the violations and assessing the base civil penalty for one Severity Level II citation or by assessing multiple penalties for Severity Level III violations, but not both.

Duration of the Violation

The revised policy implies that NRC may assess a civil penalty for each day that an FSAR nonconformance existed. This represents a radical departure from NRC's past practice, in which NRC typically has treated FSAR nonconformances as one-time occurrences rather than continuous violations. Since FSAR nonconformances generally occur months if not years before being found, it is apparent that the revised policy may result in extraordinary civil penalties.

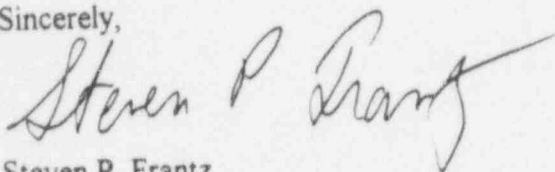
We believe that, absent unusual circumstances, NRC should continue to treat FSAR nonconformances as one-time occurrences. For example, Section VIIA.3 of the enforcement policy states that a civil penalty will be issued for each day a violation existed "if a licensee was aware or clearly should have been aware of a violation, or if the licensee had an opportunity to identify and correct the violation but failed to do so." Typical FSAR nonconformances satisfy neither of these criteria and therefore do not warrant a separate civil penalty for each day the nonconformance existed. A contrary approach may result in civil penalties that are wholly disproportionate to the underlying safety significance of the violation and may lead to contentious and adversarial enforcement proceedings.

Not All FSAR Nonconformances Are Violations

Although the revised enforcement policy states that an FSAR nonconformance may be subject to a Notice of Deviation, it appears to emphasize treatment of FSAR nonconformances as violations of 10 CFR § 50.59, 10 CFR § 50.9, or an underlying regulation. Given the massive amount of detail in FSARs (especially FSARs for recently licensed plants), many if not most FSAR nonconformances only rise to the level of a Deviation. Accordingly, we believe that the enforcement policy should be revised to provide for a more balanced discussion of the likely enforcement ramifications of an FSAR nonconformance - - the discussion should not be tilted in favor of issuance of violations. Furthermore, although implicit in the revised policy, it should explicitly state that a notice of violation cannot be issued against the FSAR itself but only against a regulation, order, or license requirement.

Thank you for allowing this opportunity for comment

Sincerely,

A handwritten signature in cursive script, reading "Steven P. Frantz". The signature is written in dark ink and is positioned above the printed name.

Steven P. Frantz

cc: Roger Walker (Texas Utilities Electric Company)
Kenneth Peveler (IES Utilities, Inc.)
Mark McBurnett (Houston Lighting & Power Company)
Paul Telthorst (Illinois Power Company)