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ADDRESSEE:

SUBJECT: COMMENTS ON SECY 00-0022, RM PLAN, DECREASE N THE SCOPE OF RANDOM  
FITNESS-FOR-DUTY TESTING REQUIREMENTS FOR NUC POWER REACTOR  
LICENSEES, FOR AMDTS TO 10 CFR PT 26, 2/1/2000

ACTION: Appropriate

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June 9, 2000

Annette L. Vietti-Cook  
Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

**Re: Comments on SECY-00-0022, "Rulemaking Plan, 'Decrease in the Scope of Random Fitness-for-Duty Testing Requirements for Nuclear Power Reactor Licensees,' for Amendment to 10 CFR Part 26," February 1, 2000**

Dear Ms. Vietti-Cook:

The following comments are submitted on behalf of the Nuclear Utility Backfitting and Reform Group ("NUBARG")<sup>1</sup> on the rulemaking plan described in the above captioned SECY paper, and approved for rulemaking by the Commissioners.<sup>2</sup> We recognize that the proposed rule will be published for comment; however, we believe that commenting at this point in the regulatory process is necessary to ensure that the proposed rule is subject to a timely backfit analysis, which we believe is required by the Commissions' backfitting rule (10 C.F.R. § 50.109) for the reasons discussed below.

The "backfit analysis" section in the SECY paper suggests that the proposed amendment to the Fitness-for-Duty ("FFD") rule in 10 C.F.R. Part 26 would not constitute a backfit as defined in 10 C.F.R. § 50.109(a)(1). The basis for this conclusion is that compliance

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<sup>1</sup> NUBARG is a consortium of 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.

<sup>2</sup> SRM SECY-00-0022, April 24, 2000.

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with the revised regulations would be "voluntary" because the revised rule would give licensees the "option" of reducing the scope of their FFD program to only those individuals granted access to vital plant areas, or of continuing random FFD testing for all personnel who are granted unescorted access to the protected area. We believe that Constitutional considerations will cause the proposed rule change to not result in a voluntary option, but a mandatory change, in each licensee's FFD program.

Moreover, we are concerned that characterization of compliance with the revised rule as "voluntary" is not consistent with Constitutional considerations. Currently, a licensee can justify the scope of its FFD program against Constitutional claims based on the Fourth Amendment and other privacy considerations only by relying on the legal compulsion of the NRC's regulations and the NRC's preemption authority. In Skinner v. Railway Labor Executives' Assn. (489 U.S. 602 (1989)), the Supreme Court held that the Fourth Amendment was applicable to a drug and alcohol testing program conducted by a private industry when mandated by Federal regulations. In Skinner, the Court also held that the need for the intrusions and searches (*i.e.*, the drug and alcohol testing) must meet the Fourth Amendment's reasonableness requirements. If the NRC gives licensees an "optional" relaxation from the existing regulations, the reasonableness of opting to continue the more restrictive (*i.e.*, current) regulations will be questionable and may be subject to a legal challenge on Constitutional grounds. In particular, we believe that the holding in Skinner could enable employees to rely on any justification the NRC Staff provides for not mandating random testing of certain employees (*e.g.*, those who have access to only the protected area) to support a claim that continued random drug and alcohol testing of those employees would be an unconstitutional, "unreasonable" search.

Accordingly, if the NRC provides the option of relaxing drug testing in the rule, licensees may have no option but to relax their FFD programs to be consistent with the decreased scope of the revised rule. This would require licensees to change their FFD programs and to expend resources in making those changes. Such resource expenditures would likely be ongoing, as licensees will need to determine and re-determine which individuals are subject to random drug and alcohol testing each time a licensee reorganizes its staff or when personnel transfers occur. It is these kinds of expenditures that the backfit rule requires the NRC to consider in proposing revisions to a rule.

Additionally, as discussed in the rulemaking plan,<sup>3</sup> a number of public comments were received on an initial proposed rule published in 1994 (59 Fed. Reg. 24373 (May 11, 1994)). The NRC summarized the comments: "Generally, the licensees, the Nuclear Energy

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<sup>3</sup> SECY-00-0022, Attachment 2.

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Institute (NEI), the State offices, and individual members of the public preferred retaining the current testing scope."<sup>4</sup> In fact, the only comments mentioned as supporting the proposed changes were comments submitted by the International Brotherhood of Electrical Workers union, which has sought an exemption request from Part 26 random FFD testing for a specific group of clerical workers at Diablo Canyon. (See SECY-00-0022.) We believe that the strong support against the proposed reduction in the scope of employees subject to FFD testing was, in part, due to the administrative burden (and enforcement exposure) imposed on licensees in implementing a program that contains separate groups of individuals subject to random FFD testing, and concerns with potential Constitutional issues. We believe that reasons would apply equally to a proposed rule to provide an "option" to the current scope of employees subject to random FFD testing.

Finally, consistent with the intent of the backfitting rule, the NRC Committee to Review Generic Requirements ("CRGR") has long included proposed relaxations or decreases in current requirements or Staff positions in its Charter for review of proposed changes.<sup>5</sup> According to the CRGR Charter, the Staff must explain its rationale that the public health and safety would be adequately protected if the proposed reduction were implemented, and that the cost savings attributed to the action would be substantial enough to justify taking the action. These considerations would be in addition to the Staff's need to justify the expenditure of additional resources to implement program revisions.

For these reasons, our comments are provided to ensure that the Staff follows the backfitting process that the Commission's regulations require for this proposal. Application of the backfitting process is particularly important here because the impact of the proposed rule is different from other rules that the NRC has relaxed without performing a backfitting analysis on the premise that licensees could "voluntarily" elect to implement the relaxed requirements. Because of the Constitutional issues associated with random drug and alcohol testing, the proposed rule changes must consider the implications from a larger perspective than simply the confines of the NRC's regulations. We believe that, because of the sensitivity of the issues involved, it is critical that the Staff adhere to the regulatory process to ensure that all of the

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<sup>4</sup> Id.

<sup>5</sup> See NUREG-1409, "Backfitting Guidelines," Appendix C, "Charter, Committee to Review Generic Requirements (Revision 4, April 1987)," July 1990, at C-7. Also, the recently revised CRGR Charter (for contents of packages submitted for CRGR review and endorsement) provides "requirements that apply to all new proposals or proposals to modify (reduce or increase) the existing requirements." CRGR Charter, Revision 7, November 1999.

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appropriate factors are considered in making the substantive decision to modify the requirements.<sup>6</sup>

If you have any questions regarding these comments, please contact us.

Sincerely,



Thomas C. Poindexter  
Sheldon L. Trubatch  
Patricia L. Campbell

Counsel for the Nuclear Utility Backfitting  
and Reform Group

cc: J. Murphy, Chairman  
Committee to Review Generic Requirements

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<sup>6</sup> We also note that, in its Staff Requirements Memorandum for SECY-00-0063 (April 12, 2000), the Commission approved a reevaluation of power reactor physical protection regulations (10 C.F.R. Part 73) and directed the Staff to consider opportunities to further risk-inform the regulations and make them performance based. To the extent that the performance-based or risk-informed changes redefine the security area designations (e.g., from the "protected" area and "vital" area designations to the "island" concept), the amendments to 10 C.F.R. Part 26 should reflect those changes. Any changes to Part 73 that affect the assignment of access levels to groups of employees should also be included in the NRC Staff's assessment of the effects of Part 26 changes on licensees.

April 24, 2000

MEMORANDUM TO: William D. Travers  
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary /RA/

SUBJECT: STAFF REQUIREMENTS - SECY-0022 - RULEMAKING PLAN,  
"DECREASE IN THE SCOPE OF RANDOM FITNESS-FOR-DUTY  
TESTING REQUIREMENTS FOR NUCLEAR POWER REACTOR  
LICENSEES," FOR AMENDMENTS TO 10 CFR PART 26

The Commission has approved the staff's recommendation to initiate rulemaking to amend the NRC's requirements for the scope of random fitness-for-duty (FFD) testing for nuclear power reactor licensees required by 10 CFR Part 26, "Fitness for Duty Programs," as described in SECY-00-0022. The staff should seek detailed comment on this matter and, as the rulemaking proceeds, undertake a careful analysis of the balance of public and private interests. In particular, the staff should carefully assess the risks associated with unescorted access to protected areas if the scope of random drug testing is changed in light of the fact that some equipment of safety significance may be found in the protected areas, but outside of vital areas.

The Commission has disapproved the staff's recommendation to approve in part a petition filed by the IBEW so as to grant an exemption from Part 26 for certain clerical workers at Diablo Canyon. The Commission believes that important factual issues relating to the exemption remain to be resolved and it would be premature to rule on the exemption prior to resolving the underlying rulemaking issues. Therefore, the staff should continue to hold this petition in abeyance and the Commission will rule on it at the conclusion of the Part 26 rulemaking.

cc: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
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