

project 689

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Date: Fri, Jul 7, 2000 4:05 PM
Subject: White Paper

Peter,

I have attached the white paper I discussed with you earlier today that captures our understanding of the compliance exception provision of the backfitting rule. This forms the basis our discussion relative to its application.

Alex

<<ComplianceExcPpr.doc>>

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BACKFIT RULE

USE OF THE COMPLIANCE EXCEPTION

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Background

In 1985, the NRC revised its regulations governing nuclear power plant licensees “to establish standards and an agency discipline for future management of backfitting of power reactors.”¹ The Commission's position was codified in 10 CFR 50.109, *Backfitting*. The backfit rule requires that the NRC conduct a systematic and disciplined review of any proposed rule or new or changed regulatory staff position to ensure that it meets one of three criteria.

To justify imposition of a backfit, a cost-benefit analysis must be performed to demonstrate that the proposed backfit will achieve a “substantial increase in overall protection” of public health and safety and that the direct and indirect costs of implementation of the proposed backfit are justified in view of the substantial safety benefit that will result. The Commission’s intent in this regard in the 1985 backfit rule is pertinent:

The standard against which proposed backfits would be measured is stated in § 50.109(a)(3) as “substantial increase in the overall protection of the public health and safety or the common defense and security.” Substantial means “important or significant in a large amount, extent, or degree.” Under such a standard the Commission would not ordinarily expect that safety improvements would be required as backfits which result in an insignificant or small benefit to public health and safety or the common defense and security, regardless of implementation cost. On the other hand, the standard is not intended to be interpreted in a manner that would result in disapprovals of worthwhile safety or security improvements, having costs that are justified in view of the increased protection that would be provided.²

¹ 50 Fed. Reg. 38097, September 20, 1985. Final Rule, *Revision of Backfitting Process for Power Reactors*. Reversed on other grounds, *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (1987). The backfit rule was revised in response to the court’s decision and reissued as a final rule effective July 6, 1988, 53 Fed. Reg. 20603 (June 6, 1988), and subsequently upheld by the court in *Union of Concerned Scientists v. NRC*, 880 F.2d 552 (1989).

² 50 Fed. Reg. at 38102.

The backfit rule provides two exceptions – where the regulatory action is necessary to provide the minimum level of “adequate protection” required by the Atomic Energy Act, or where it is necessary to bring a licensee’s facility into compliance with its license, written commitments or the Commission’s regulations (the “compliance exception”).

The Compliance Exception

There have been numerous instances where new requirements have been imposed where the compliance exception has been cited as the basis for satisfying the requirements of the backfitting rule. It appears that the compliance exception frequently has been cited because neither of the other two criteria of the backfit rule – adequate protection or cost-justified substantial safety enhancement – can be satisfied for a new requirement or position that the NRC staff wants to adopt. In its justification to rely on the compliance exception, the NRC staff points to a very broad statement in regulation, and the staff then argues that the proposed new agency position is meant to accomplish what that regulation always intended.

The misuse of the compliance exception to the backfitting rule defeats the fundamental policy behind the backfitting rule. When the NRC promulgated the current backfitting rule in 1985 (and amended it in 1988), the Commission intended to promote greater regulatory stability so as not to require licensees to continually update their facilities to conform with any and all new developments or new ideas for improving the operation of nuclear power plants. The rule is structured to allow imposition of only those new requirements or NRC staff positions that offer substantial safety benefits for the costs involved in implementing the changes at existing facilities, unless required for adequate protection or compliance with existing regulatory requirements, the facility’s license, or written commitments.³ If new positions are routinely imposed under exceptions to the rule without the requisite cost-benefit analysis, the instability that led to the need for the backfitting rule will be created again. As the Commission recognized when it promulgated the backfitting rule in 1985, a proper cost-benefit analysis of proposed new initiatives will promote regulatory stability and overall safety by ensuring that only cost-justified, substantial safety enhancements are mandated and that they are assigned a proper priority and scheduled for action in view of existing licensee activities.

Analysis

The fundamental purpose of the backfit rule is to require that a disciplined review be conducted of any proposed regulatory action that would impose new requirements on licensees. As the Commission observed in promulgating the 1985 rule, “[s]afety and sound management require that analysis precede imposition of a new or modified

³ 10 CFR 50.109(a)(3), (4).

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regulatory requirement or staff position.”⁴ By its express terms, the backfit rule applies equally to NRC consideration of a proposed rule, a proposed generic communication, or any other regulatory mechanism sought to be used by the NRC staff to impose new requirements or to articulate a new NRC staff interpretation or position.

In the section of the backfit rule as promulgated titled *Supplementary Information: Commission Position*, the Commission observed:

“Because there must be safety reasons for the agency to impose any changes to a regulatory requirement or a staff position, applicable to a licensee, because the safety consequences are unknown until analyzed, and because the Commission should fully understand the effects of a proposed backfit before its imposition, it is of little consequence how a backfit is imposed.”⁵

This statement is clearly intended to ensure that the type of regulatory mechanism (e.g., proposed rule, generic communication, branch technical position) does not determine the backfit rule’s applicability. The backfit rule applies to any proposed rule or position that the NRC is considering imposing on Part 50 licensees.

Additionally, whether the potential regulatory action under consideration is recommended by the NRC, an NRC licensee, or a member of the public is not material. The discipline of the backfit rule applies, regardless of the initiating source.

Turning specifically to the proper application of the compliance exception, the Commission’s discussion of the compliance exception to the backfit rule provides clear guidance relevant to the rule’s intended use:

The compliance exception is intended to address a situation 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 backfit analysis and application of the standard.⁶

The compliance exception was intended to address situations where a licensee did not meet explicit requirements. It was not intended, for example, to allow the NRC

⁴ 50 Fed. Reg. at 38101.

⁵ Id.

⁶ 50 Fed. Reg. at 38103 (emphasis added).

staff to require that licensees use new technology as it becomes available to demonstrate compliance with an existing NRC regulation. In a similar vein, the compliance exception was not intended to be used to implement new regulatory methodologies that it subsequently deems necessary to satisfy a broad standard such as 10 CFR Part 50, Appendix A. Further, it cannot be appropriately cited to compel a licensee to comply with a new regulatory position or a new interpretation of what a previously adopted regulation requires or intended.

Conclusion

The intent of the Commission when it adopted the backfit rule is clear as to the scope of the backfit rule and how the compliance exception should be applied. The Commission should require NRC staff to strictly adhere to the Commission's stated intent regarding the application of the compliance exception to the backfit rule as it reassesses existing regulations and implements new initiatives.