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DOCKET NUMBER
PROPOSED RULE **PR 50**
(67FR 12488)

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF



NUCLEAR ENERGY INSTITUTE

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June 10, 2002

Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Attention: Rulemakings and Adjudication Staff

SUBJECT: Supplemental Comments on Proposed Rule to Incorporate by Reference
ASME Code Cases (67 Fed. Reg. 12488)

PROJECT NUMBER: 689

This letter supplements the June 3, 2002, letter containing the Nuclear Energy Institute¹ (NEI) comments on the proposed rulemaking (67 Fed. Reg. 12488) to incorporate by reference certain ASME Code Cases. In a March 26, 2002, letter, NEI provided comments on the draft regulatory guides (66 Fed. Reg. 67335) referenced by the proposed rule. Both sets of comments should be evaluated as part of the proposed rule.

NRC has historically established new regulatory positions by using regulatory guides to approve, to impose limitations or modifications, or to not approve ASME Code Cases. This process is inefficient, ineffective and burdensome. The ASME issues Code Cases as alternative requirements that remain in effect for a three-year period. After that time the ASME makes a determination to renew, to annul or to incorporate the Code Cases into a subsequent addenda or edition of the ASME Code. NRC reviews the published addenda and editions as part of 10 CFR 50.55a rulemaking plan.

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

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Code Cases are developed and published by a voluntary consensus standard development organization that includes NRC staff participation in the balloting process. The NRC has not identified NRC regulations that are in direct conflict with the published Code Case, nor has the NRC documented a regulatory basis for imposing limitations or modifications. This is contrary to what we believe Congress intended when it passed Public Law 104-113, which led to the guidance contained in OMB Circular A-119 and NRC Management Directive 6.5.

We believe the current proposed rulemaking to incorporate by reference regulatory guides that approve, limit the use of, or reject ASME Code Cases, is unlawful because it is not in compliance with the 10 CFR 50.109, *Backfitting*. We recommend that NRC use the generic communication process, specifically a Regulatory Issue Summary (RIS), to communicate to licensees when NRC approves a published Code Case. The RIS can be issued on individual Code Cases, or periodically on a 6-month or an annual basis. NRC should identify the specific regulations that are in direct conflict with Code Cases that are not approved, or for which limitations/modifications are imposed. It is unlawful to cite 10 CFR 50.55a as a conflicting regulation since NRC has not historically provided an appropriate regulatory analysis as required by the backfitting rule.

Lastly, we believe the NRC process for review of ASME Code Cases is inconsistent with the NRC Strategic Goal for improving efficiencies in the regulatory process. In a February 2002, meeting with the NRC staff, the NEI Licensing Action Task Force proposed that alternative approaches for streamlining the process for NRC adoption of ASME Code Cases be explored. We would appreciate the opportunity to discuss industry concerns with the current burdensome process and will contact NRC management to schedule a public meeting to discuss alternative approaches in greater detail

If you have questions, please contact me at 202-739-8080, am@nei.org.

Sincerely,



Alexander Marion

AM/maa
Enclosures

c: Mr. Harry S. Tovmassian, U. S. Nuclear Regulatory Commission
Mr. Michael E. Mayfield, U. S. Nuclear Regulatory Commission