

August 30, 2004

Mr. David A. Lochbaum
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, DC 20006

Dear Mr. Lochbaum:

Your May 14, 2004, petition, supplemented by letter dated May 24, 2004, and filed on behalf of Greenpeace, the Nuclear Information and Resource Service, and the Union of Concerned Scientists, to the Executive Director for Operations, Nuclear Regulatory Commission (NRC), has been referred to the Office of Nuclear Reactor Regulation (NRR) for response, pursuant to 10 CFR 2.206 of the Commission's regulations. In your letters, you essentially expressed a disagreement with the NRC's policy on "regulatory commitments," and requested that we issue Confirmatory Orders to licensees of operating nuclear power reactors for all "regulatory commitments" placed on dockets between January 1, 2000, and June 30, 2004, inclusive. In your May 24, 2004, supplement to your petition, you also noted that, "the staff routinely grants NOEDs [Notices of Enforcement Discretion] for conditions that violate the approved Technical Specifications based on their reliance of 'unenforceable' commitments for compensatory measures. Hence, the actions requested in our petition are necessary to correct this poor staff practice."

Our petition review board (PRB) has reviewed your request and concluded that the issues you raise are not appropriately addressed under the 2.206 process. In our letter to you dated June 25, 2004, we informed you of this decision and our basis for not treating your petition under section 2.206. The purpose of this letter is to address the substantive matters of your request, specifically your disagreement with the Commission's policy regarding licensees' commitments.

The rationale for our policy on regulatory commitments has been well established over the years in the following NRC documents, all of which are discussed in your petition:

- LIC-105, "Managing Regulatory Commitments Made by Licensees to the NRC," dated May 27, 2003.
- SECY-00-0045, "Acceptance of NEI 99-04, 'Guidelines for Managing NRC Commitments'," February 22, 2000.
- SECY-98-224, "Staff and Industry Activities Pertaining to the Management of Commitments Made by Power Reactor Licensees to the NRC," September 28, 1998.
- SECY-97-036, "Millstone Lessons Learned Report. Part 2: Policy Issues," February 12, 1997.
- SECY-95-300, "Nuclear Energy Institute's Guidance Document, 'Guidelines for Managing NRC Commitments'," December 20, 1995.

Various activities undertaken by the staff and the nuclear industry in the early 1990s have led to issuance of the documents referenced above, which contain guidance for handling and administratively processing regulatory commitments, including the criteria to decide if and when changes to regulatory commitments should be reported to the NRC.

As documented in the references above, our policy development over the years has consistently defined "regulatory commitments" as matters in which the staff has significant interest, but which do not warrant either legally binding requirements, or inclusion in Updated Final Safety Analysis Reports (UFSARs) or programs subject to a formal regulatory change control mechanism. As shown in these references, the NRC has maintained regulatory commitments and defined them as part of a hierarchy of licensing basis information. The hierarchy includes (1) obligations or regulatory requirements, which the licensee cannot change without prior NRC approval (e.g., orders, license conditions, and technical specifications), (2) mandated licensing basis documents, (e.g., UFSARs and emergency plans), which have controls and reporting requirements defined by NRC regulations, and (3) regulatory commitments, which are controlled in accordance with licensee and NRC administrative processes. The NRC staff considers that keeping regulatory commitments as part of this hierarchy should continue because, when handled properly, the commitments provide a needed supplement to requirements by adding flexibility, improving efficiency, and maintaining the flow of information between the staff and licensees. Without this supplemental tool, our regulatory effectiveness would greatly be reduced, as we strive to add requirements where they are needed while eliminating unnecessary ones.

The NRC staff's current policy towards regulatory commitments was reflected in NRR Director's Decision (DD) 2004-01, dated April 22, 2004 (related to Davis-Besse), which states that failure to satisfy a regulatory commitment may result in a licensee's failure to meet a regulatory requirement. The regulatory commitment may, for example, involve the selection of a specific action taken to ensure compliance with an obligation. DD 2004-01 states that in such cases, the NRC staff will focus more on the noncompliance with the underlying obligation than on the failure to implement a "regulatory commitment" that in many cases only describes which of the multiple options the licensee planned to take to ensure compliance. In this particular example, a commitment could be treated as a means for the licensee to communicate to the NRC its intention to maintaining compliance with regulatory requirements. Our current process allows for the licensee to make changes as needed to such a commitment so long as the ultimate intention of maintaining compliance is still met.

With only a few exceptions, this process has allowed the NRC to maintain oversight of licensees' activities over the years. The NRC staff continues to monitor licensees' programs for implementing and controlling their regulatory commitments. To address a Davis-Besse Lessons Learned Task Force (LLTF) Action Plan recommendation [3.3.7(5)], we have also revised the most recent version of NRR Office Instruction, LIC-105, "Managing Regulatory Commitments Made by Licensees to the NRC," to provide Project Managers further guidance on verification of licensees' commitment implementation programs. To fully address LLTF recommendation 3.3.7(5), the NRC will be conducting a follow-up evaluation over approximately the next year to assess if the current guidance is being properly implemented, if the periodic sampling technique is effective, and if the licensees' commitment management programs are effective in meeting regulatory obligations. The NRC staff will revise the guidance, if necessary, to address our evaluation findings.

Your May 14, 2004, letter expressed surprise at the NRC's position on the legality of enforcing commitments. This position is, however, a long-standing one. In 1995, for example, the staff had documented the same position in SECY-95-300, where we explained that commitments made by the licensee, either in writing or orally, are not legally binding on the licensee, but are nevertheless an important part of the interactions between the NRC and licensees. Again, we are reiterating this position in response to your May 24, 2004, statement, where you noted that NOEDs are routinely granted by the staff based on "unenforceable" commitments. The NRC staff takes all factors into consideration, as outlined in NRC Inspection Manual, Part 9900 (NOED process), prior to granting NOEDs, treating a licensee's commitment to implement compensatory measures no differently than in other circumstances where commitments are warranted and considered by the staff.

You also stated in your letters that a licensee's failure to implement its commitments should constitute a violation of the legally binding requirement under 10 CFR 50.9, "Completeness and accuracy of information." However, unmet commitments do not automatically represent inaccurate or incomplete information unless evidence is presented or developed to indicate that the licensee knew or should have known that the information was incomplete or inaccurate at the time it was provided.

I hope the above explanation is responsive to your concerns about regulatory commitments. Thank you for bringing your concern to our attention.

Sincerely,

/RA/

J. E. Dyer, Director
Office of Nuclear Reactor Regulation

cc: Mr. James P. Riccio, Nuclear Policy Analyst
Greenpeace
702 H Street, NW, Suite 300
Washington, DC 20001

Mr. Paul Gunter, Director – Reactor Watchdog Project
Nuclear Information and Resource Service
1424 16th Street, NW, Suite 401
Washington, DC 20009

Mr. Tom Gurdziel
9 Twin Orchard Drive
Oswego, NY 13126

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