



NUCLEAR ENERGY INSTITUTE

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Dr. Pao-Tsin Kuo
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Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Dr. Kuo:

The NRC has undertaken a significant effort to revise its guidance documents for reviewing nuclear power plant license renewal applications. This process has been beneficial for the agency and stakeholders alike. It has encouraged active discussion regarding the process by which revisions to license renewal guidance documents will be made, the substance of the revisions, and the manner in which proposed and final revisions will be communicated to licensees and applicants. By continuing to involve stakeholders early in this process, the agency can foster the efficient resolution of matters this process brings to light.

As part of its effort to revise its license renewal guidance documents, the NRC staff developed the interim staff guidance ("ISG") process, which the staff employs to capture lessons learned from license renewal reviews and inform licensees and applicants of the staff's guidance on new issues as they are identified. As part of its participation in the development of the ISG process, in a letter dated February 13, 2004, the industry posed questions about and requested clarifications regarding the NRC's "Process for Interim Staff Guidance Developments and Implementation."¹ On July 21, 2004, the NRC staff issued a response² ("Staff Response") to the industry's letter.

¹ A. Marion (NEI) to P. T. Kuo (NRC), Letter (Feb. 13, 2004), submitting questions on the final Interim Staff Guidance process for license renewal.

² P. T. Kuo (NRC) to A. Marion (NEI), "Staff Response to 'Industry Questions on the Nuclear Regulatory Commission (NRC) Interim Staff Guidance Process Document Dated December 12, 2003' – Response to Your Letter Dated February 13, 2004" (July 21, 2004).



Dr. Pao-Tsin Kuo
February 18, 2005
Page 2

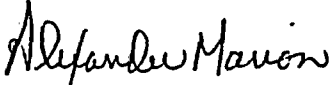
The statements contained in the Staff response limiting the applicability of the backfit rule to actions taken pursuant to 10 CFR 54.37(b)³ are of particular concern to the industry. Our review of the original and amended 10 CFR Part 54 rules, 10 CFR 50.109, the associated statements of consideration, agency and industry correspondence, and other Commission documents, supports the conclusion that new or changed NRC Staff positions on the scope of the license renewal rule, such as those identified in an ISG, *would* trigger application of the backfit rule for renewed licenses.

Additionally, the industry has a related recommendation for NRC's communication of the agency's guidance on new license renewal issues. The ISG process should be integrated into, or replaced by, the staff process for communicating generic issues in LIC-503, Rev 2, *Generic Communications Affecting Nuclear Reactor Licensees*. The current ISG process does not include the formal procedural controls (including backfit reviews) applicable to other generic communications. The industry should be afforded consistency in the manner in which the NRC reviews updates to license renewal guidance documents.

The enclosed industry position paper explains in detail the industry's position with regard to the issues identified above. In summary, (1) the regulations do not create an exception to the backfit rule unique to license renewal; and (2) the ISG process should be subject to the same controls as other generic communications.

If you have questions or would like to discuss the views stated in the enclosed industry position paper, please contact me (202.739.8080; am@nei.org), Fred Emerson (202.739.8086; fae@nei.org), or Ellen Ginsberg, NEI Deputy General Counsel (202.739.8140; ecg@nei.org).

Sincerely,


Alexander Marion

Enclosure

c: Geary Mizuno, NRC/OGC

³ See *Id.*, Response to Question 4.

**INDUSTRY POSITION PAPER
ON THE INTERIM STAFF GUIDANCE PROCESS**

I. Application of the Backfit Rule to 10 CFR 54.37(b)

In the July 21, 2004, Staff Response, the Staff takes the position that 10 CFR 54.37(b) offers “a specific exception to the general requirements of the backfit rule (10 CFR 50.109)” and that “there is no need to perform an analysis in accordance with the backfit rule when communicating newly identified SSCs to licensee holding a renewed license.” Neither the rule language nor the supplemental information accompanying the license renewal rulemakings supports such a conclusion, nor does the backfit rule contain such an exception. Rather, this interpretation of 10 CFR 54.37(b) would allow the Staff to improperly circumvent the backfit rule.

Section 54.37 (b) states:

(b) After the renewed license is issued, the FSAR update required by 10 CFR 50.71(e) must include any systems, structures, and components newly identified that would have been subject to an aging management review or evaluation of time-limited aging analyses in accordance with § 54.21. This FSAR update must describe how the effects of aging will be managed such that the intended function(s) in § 54.4(b) will be effectively maintained during the period of extended operation.

Backfitting is defined as “the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position.” 10 CFR 50.109(a)(1). According to the backfit rule, a backfit may be imposed when (1) the backfit would provide a substantial increase in public health and safety; (2) when the backfit is necessary to bring a facility into compliance with a license or Commission rules or orders, or into conformance with written commitments by the licensee; (3) when the backfit is necessary to assure adequate protection of the public health and safety, or (4) when the backfit would redefine what level of public protection is adequate.⁴ 10 CFR 50.109. The backfit rule is applicable to renewed licenses through 10 CFR 54.35.⁵

⁴ The Staff often refers to the last three provisions as the “exceptions” to the backfit rule on the basis of compliance or adequate protection.

⁵ Section 54.35, “Requirements During Term of Renewed License,” states: “During the term of a renewed license, licensees shall be subject to and shall continue to comply with all

From the start, the Commission has based its approach to license renewal on two fundamental principles. The first principle is that “the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety” and that continuing this regulatory process “will ensure that this principle remains valid during any renewal term.” 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). The Commission based this principle on its conclusion that both “the licensees’ programs for ensuring safe operation and the Commission’s regulatory oversight program have been effective in identifying and correcting plant-specific noncompliance with the licensing basis.” *Id.* at 64,952. Thus, “a formal review of compliance with its licensing basis . . . as part of the review of that plant’s renewal application” was not required to provide reasonable assurance that the current licensing basis (“CLB”) was accurate at the time of license renewal. *Id.*

The Commission’s second principle for license renewal was that “each plant’s [CLB] must be maintained during the renewal term.” *Id.* at 64,946, 64,953. In issuing the original license renewal rule, the Commission identified several provisions of its rules that serve “to ensure adherence to the licensing basis,” including that 10 CFR 54.37(b) “requires the licensees to periodically update their FSAR supplement to accurately reflect the current status of systems, structures, and components important to license renewal and age-related degradation management programs.” *Id.* at 64,953 (emphasis added).

These provisions, together with the continuation of the NRC’s regulatory oversight program throughout the term of a plant’s renewed license, will ensure that the current licensing basis will be maintained throughout the term of the renewed license in the same manner and to the same extent as during the original licensing term.

Id. (emphasis added). The Commission explicitly reaffirmed these principles in adopting amendments to Part 54 in 1995. 60 Fed. Reg. 22,461, 22,464 (May 8, 1995).

From this explanation, it is evident that Section 54.37(b) was not intended to be used to expand the CLB. In other words, the CLB in place at the time of license renewal provides the framework against which SSCs must be evaluated to determine whether they should be added to the aging management programs described in the FSAR. The CLB is defined in 10 CFR 54.3 and includes, for each plant, the NRC requirements applicable to that plant and the licensee’s commitments in docketed correspondence. The scoping and screening methodology

Commission regulations contained in 10 C.F.R. parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, and 100 and appendices that are applicable to holders of operating licenses.”

described in a license renewal application and approved in the NRC Staff's safety evaluation report becomes part of the CLB when a renewed license is issued, *but subsequent NRC Staff positions do not become part of the CLB unless applied in accordance with the backfit rule.*

In fact, the Statement of Considerations ("SOC") accompanying the final rule addressed backfitting applicability during the renewed license term:

The Commission also indicated [in the proposed rule] that once a renewed license was issued, the normal backfitting requirements of 10 CFR 50.109 would apply to NRC-imposed changes to the renewed license's current licensing basis. . . . Once a renewed license is issued, normal backfit protections apply and all changes to the current licensing bases of the renewed license would be subject to the backfit rule in accordance with § 54.35 of the final rule.⁶

Although the SOC discusses that the NRC may impose additional requirements to address age-related degradation if necessary to ensure compliance with the plant's CLB in accordance with the "compliance exception" to the backfit rule, or impose requirements necessary for "adequate protection," the SOC discusses no exceptions to the backfit rule included in Part 54 regulations that are unique to license renewal or to aging management programs during the renewal term. Neither does the language in 10 CFR 54.37 imply that its provisions constitute an exception to the backfit rule. Thus, for those already granted a renewed license, scoping in an SSC not considered during the original license renewal review because it was not within scope of 54.4, would trigger a backfit analysis unless a specific exception is applicable.

Recently, the NRC Staff has asked license renewal applicants to address SSCs that were not originally considered to be within the scope of the license renewal rule (10 CFR Part 54), and were not considered in earlier license renewal application reviews (e.g., SSCs relied on for recovery from station blackout). As we interpret the NRC's original intent for application of the backfit rule to license renewal, the Staff is required to comply with the provisions of the backfit rule if it expands the scope of SSCs beyond the requirements of 10 CFR 54.4, or revises its interpretation of those requirements.⁷ Accordingly, without performing a backfit analysis (or otherwise justifying the position in accordance with 10 CFR 50.109), the Staff may not impose its revised Staff position (e.g., even if contained in an ISG) on renewed licenses.

⁶ 56 Fed. Reg. at 64,966.

⁷ 10 C.F.R. 54.4 defines the scope of SSCs within Part 54.

II. ISG Process Issues

The Staff developed an ISG Process to capture lessons learned from license renewal reviews and to communicate those lessons learned to stakeholders prior to formally incorporating them in license renewal guidance documents.⁸ According to the process guidance, once an ISG is approved, it will be incorporated into the next revision of the license renewal guidance (“LRG”) documents.

The Staff’s ISG process guidance, as described in its December 2003 letter, identifies two types of ISGs: (1) “clarification” ISGs (which provide additional guidance to applicants in order to reduce unnecessary requests for additional information); and (2) “compliance” ISGs (which involve actions necessary to demonstrate compliance with license renewal regulations). According to the ISG process guidance, while both types apply to applications for a renewed license, only the compliance ISGs will apply to renewed licenses.

Separate from the ISG process, the Staff has developed and implemented a revised generic communications process, which is described in SECY-99-143⁹ and NRR LIC-503.¹⁰ This process is intended “to address generic concerns that evolve from nuclear reactor operating experience and regulatory initiatives that have broad applicability.”¹¹ The Staff’s ISG process guidance for informing license renewal applicants and licensees of the issuance of new or revised ISGs is not consistent with the generic communications process, outlined in LIC-503, that affords a formal review for backfit implications. The Staff’s December 2003 ISG process guidance explains when the Staff will inform licensees with renewed licenses of such issues.

The process includes an interaction with stakeholders during the development of the ISG, including publishing a *Federal Register* notice requesting comments.¹²

Since licensees will not enter the period of extended operation until after the [license renewal guidance] documents are updated, the staff will wait until the ISGs have been incorporated into the [license renewal guidance] documents

⁸ D. Matthews (NRC) to A. Marion (NEI) and D. Lochbaum (Union of Concerned Scientists), “The Interim Staff Guidance Process” (Dec. 12, 2003).

⁹ SECY-99-143, “Revisions to the Generic Communication Program” (May 26, 1999).

¹⁰ Office of Nuclear Reactor Regulation Office Instruction, LIC-503, “Generic Communications Affecting Nuclear Reactor Licensees” (Nov. 29, 2004).

¹¹ LIC-503, at 1.

¹² See *supra* n. 8 in transmittal letter

before informing the licensees of the requirement to include the information on the application ISGs in their next FSAR update.¹³

The Staff goes on to explain that the review process for revising the LRG documents (e.g., NUREG-1800; NUREG-1801) involves public comment and review by the Committee to Review Generic Requirements ("CRGR"), presumably to address the backfitting implications of the new Staff positions set forth in "compliance" ISGs. Finally, the Staff explains that after these documents are revised, it will "send a letter to each licensee holding a renewed license informing them of the ISGs they need to address in their next FSAR update."¹⁴

In its recent response to NEI's questions, the Staff appears to modify its guidance by indicating that, once the LRG documents are updated, it will issue a generic communication informing the industry of the need to review the LRG documents for ISGs applicable to their facilities. The Staff notes its agreement that ISGs should be implemented in a timely manner for plants operating in the period of extended operation, and recognizes that if these revisions will not be timely, then it would issue a generic communication.¹⁵

Although the Staff may intend to use the generic communication process to inform licensees of ISGs or revised LRG documents, the issuance of the ISGs, as currently proposed, would not be subject to the formal procedural controls afforded generic communications. For example, while the current ISG process will engage stakeholders by seeking public comment, and the revisions to the LRG documents are to be subject to public comment, the ISG process does not include review by the CRGR before issuance. The CRGR is responsible for identifying any backfitting concerns in generic communications, and could provide a worthwhile review of an ISG to ensure that the Staff does not inappropriately impose requirements without consideration of the requirements of the backfit rule (10 CFR 50.109). LIC-503 affords such a process for generic communications that include Generic Letters (GL) and Regulatory Issue Summaries (RIS).

¹³ See *supra* n. 8, at 9.

¹⁴ *Id.*, at 9.

¹⁵ *Supra*, n.2, at 8, responding to NEI Question 13.