

EDO Principal Correspondence Control

FROM: DUE: 03/25/05 EDO CONTROL: G20050200
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FINAL REPLY:

Daryl M. Shapiro
ShawPittman LLP

TO:

Commission

FOR SIGNATURE OF : ** GRN ** CRC NO: 05-0151

Reyes, EDO

DESC:

Request for Reconsideration of the NRC Staff's
Denial of Entergy Nuclear Operations, Inc.'s
Request for a Copy of OI Report No. 1-2004-040
Prior to an April 8, 2005 Predecisional
Enforcement Conference

ROUTING:

Reyes
Virgilio
Kane
Merschhoff
Silber
Dean
Burns
Caputo, OI
Collins, RI
Travers, RII
Cyr, OGC

DATE: 03/22/05

ASSIGNED TO: CONTACT:
OE Congel

SPECIAL INSTRUCTIONS OR REMARKS:

Commission to review prior to dispatch, add
Commission on for concurrence. Note: response time
is half since Enforcement Conference is
April 8, 2005.

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

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ACTION OFFICE:

EDO

AUTHOR:

Daryl Shapiro

AFFILIATION:

SHAWPITT

ADDRESSEE:

Nils Diaz

SUBJECT:

Request for reconsideration of the NRC staff's denial of Entergy Nuclear Operations, Inc.'s req for a copy of OI's Report No. 1-2004-040 prior to an April 8, 2005 predecisional enforcement conference

ACTION:

Signature of EDO

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LETTER DATE:

03/18/2005

ACKNOWLEDGED

No

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NOTES:

Commission to review prior to dispatch....NOTE response time is half since Enforcement Conference is April 8th

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DATE DUE:

03/29/2005

DATE SIGNED:

EDO --G20050200

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March 18, 2005

Chairman Nils J. Diaz
Commissioner Edward McGaffigan, Jr.
Commissioner Jeffrey S. Merrifield
Commissioner Gregory B. Jaczko
Commissioner Peter B. Lyons
United States Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Washington, DC 20555-0001

Re: Request for Reconsideration of the NRC Staff's Denial of Entergy Nuclear Operations, Inc.'s Request for a Copy of Office of Investigations Report No. 1-2004-040 Prior to an April 8, 2005 Predecisional Enforcement Conference

Dear Commissioners:

Entergy Nuclear Operations, Inc. ("ENO") respectfully requests that the Commission direct the NRC Staff to provide ENO with a copy of NRC Office of Investigations ("OI") Report Case No. 1-2004-040 prior to a scheduled April 8, 2005 Predecisional Enforcement Conference ("PEC") based on the findings and conclusions contained in the OI report. ENO has requested this report from the NRC Staff, and this request has been denied. The NRC Staff's denial is inconsistent with the stated purpose of a PEC, which is to ensure that the NRC Staff has a complete understanding of the facts before making an enforcement decision. Without access to the OI report, ENO is denied a meaningful opportunity to address any inaccuracies or misunderstandings contained in the OI report that could result in the NRC Staff issuing an unwarranted enforcement

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action. Therefore, immediate Commission intervention directing the NRC Staff to provide to ENO a copy of the OI report is necessary.

I. FACTUAL AND REGULATORY BACKGROUND

1. Factual Background

The NRC Staff recently informed ENO and an ENO employee that they will be receiving a letter offering the opportunity to attend a PEC relating to a June 28-29, 2004 incident at the Pilgrim Nuclear Power Station ("PNPS"). This incident involved a former PNPS control room supervisor ("CRS") falling asleep while on duty in the control room and a former PNPS licensed reactor operator filming the CRS while asleep and failing to awaken the CRS. The OI conducted an investigation into the facts and circumstances surrounding this incident, and its analysis and conclusions form the basis of the "apparent violations" that the NRC Staff will discuss with ENO and its employee at the April 8, 2005 PEC.

On February 23, 2005, PNPS requested from the NRC Staff a copy of the OI report relating to the control room incident. On March 8, 2005, the NRC Staff rejected ENO's request and stated that ENO would instead receive "a synopsis" of the OI report as an attachment to a forthcoming correspondence relating to the enforcement conference.

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2. Regulatory Background

The NRC Staff is well aware of stakeholders' concerns about OI reports. For many years the NRC Staff refused all requests for OI reports prior to PECs, instead providing only the two or three sentence "synopsis" contained in the OI report. Yielding to stakeholder concerns, the NRC Staff changed its practice in the late 1990s and began providing, prior to the PEC, a more detailed summary of the OI report that the NRC Staff viewed as forming the basis for its belief that apparent violations of NRC requirements occurred. At the same time, the NRC Staff continued to deny requests for OI reports by PEC participants. This change in the NRC Staff's practice proved unsatisfactory because stakeholders were never confident that all the information contained in the OI report that either formed or could form the basis for a NRC enforcement decision was contained in the summaries.

Most recently, as part of the NRC's review of its process for handling discrimination complaints, the NRC Staff revisited the issue of whether to provide PEC participants with a copy of the underlying OI report in advance of the PEC. Commenters to the Discrimination Task Group ("DTG") expressed overwhelming support for the release of the OI report prior to a PEC.¹ A fair reading of these comments reveals that

¹ See SECY-02-0166, Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues, Attachment 1 at 58-61 (Sept. 12, 2002) ("DTG Final Report").

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the comments applied to all PECs that result from an OI report, not just discrimination PECs. Indeed, the DTG specifically addressed who should and should not receive a copy of the OI report prior to the PEC in the non-discrimination context.² Both the DTG and the Senior Management Review Team ("SMRT")³ recommended that OI reports be released prior to PECs.⁴ The Commission approved of the DTG and SMRT recommendations to provide a copy of the underlying OI report to PEC participants. The Commission's SRM approving the recommendation did not appear to limit its application to discrimination PECs.⁵

Nevertheless, the NRC Staff presently takes the view that the DTG and SMRT recommendations apply only to discrimination cases. Similarly, the NRC Staff interprets the Commission's SRM as applying only to discrimination PECs and refuses to provide OI reports to PEC participants in nondiscrimination PECs.

² See "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints" at 31 (April 2001) ("DTG Draft Report").

³ The Executive Director for Operations established the SMRT "to review the [DTG] final report and provide any additional perspectives that could enhance the potential options for Commission consideration." Secy-02-0166, Attachment 2 at 1.

⁴ SECY-02-0166, Attachment 2 at 6.

⁵ See "Staff Requirements – SECY-02-0166 – Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" (Mar. 26, 2003) at 2 ("SRM").

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II. REVIEW OF THE OI REPORT PRIOR TO THE PEC IS NECESSARY TO FULFILL THE STATED PURPOSE OF THE PEC

The PEC provides an early, relatively inexpensive, and efficient process for licensees and individuals to ensure that the NRC Staff makes a fair and informed enforcement decision based on a full understanding of all the relevant facts. Providing the OI report to PEC participants is essential to this process.

The NRC Staff's refusal to release the OI report prior to a PEC stands in stark contrast to the stated purpose of the PEC as set forth in NRC's Enforcement Policy. Specifically, the NRC aims to develop through the PEC process,

*(1) a common understanding of the facts, root causes, and missed opportunities associated with the apparent violations; (2) a common understanding of corrective actions taken or planned; and (3) a common understanding of the significance of issues and the need for lasting comprehensive corrective action.*⁶

Indeed, withholding OI reports from PEC participants handicaps the NRC Staff in fulfilling the purpose of a PEC. To even attempt to develop a "common understanding" of the factual basis supporting an apparent violation, both the NRC and the PEC participants must be able to fully evaluate all relevant information. Both sides should understand which aspects of their respective views of the facts are aligned, and which are

⁶ Enforcement Policy at 13 (emphasis added).

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not. Withholding the OI report, usually the principal manner in which the NRC Staff understands the facts, serves only to hide from PEC participants both the similarities and differences in the NRC Staff's view of the facts. Indeed, as it stands, the PEC is not a forum where the NRC and participants might reach common understandings, but rather only an opportunity for the NRC to determine – for itself alone – whether the participant's assessment of the facts and evidence matches up with its own. This hardly amounts to a "common understanding."

The only real opportunity to address issues raised by the OI report is at the PEC. While parties to a hearing adjudicating the appropriateness of an NRC enforcement action can obtain the OI report through discovery, licensees rarely request a hearing on a NRC enforcement order due to a desire to avoid disputes with the regulatory agency and a desire to move past the underlying enforcement issue. Moreover, individuals rarely request a hearing on an enforcement order because of the time and expense involved in such a challenge.

An oft-stated reason for withholding the OI report is that its release could undermine the NRC's investigatory process, so that the "PEC will likely become a venue to question the strengths and weaknesses of the evidence rather than a forum for the licensee to focus on the issues" thus preventing "[o]ther matters of significant interest to the staff, e.g., safety-conscious work environments, etc.," from surfacing during the

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PEC.⁷ These concerns are misplaced. Addressing deficiencies or inaccuracies in the OI report does not preclude discussion of other issues deemed significant by the NRC Staff. Rather, it levels the playing field. The NRC Staff retains the full opportunity to explore at the PEC any issue it deems important, while licensees or individuals have the opportunity to address deficiencies or inaccuracies contained in OI reports. Moreover, the NRC has a compelling interest in ensuring that a sufficient basis for a violation exists before issuing an enforcement action. Since the underlying OI report is often the primary basis for the NRC Staff's enforcement decision, providing licensees and individuals with a copy of the underlying OI report prior to the PEC enables licensees and individuals the opportunity to address the NRC's basis. Therefore, both the stated purpose of the PEC and sound public policy require that the NRC Staff provide a copy of the OI report to licensees and individuals prior to the PEC.⁸

The NRC Staff's unnecessarily narrow view overlooks the fact that all PECs serve the same purpose: to provide a unique and highly effective means for the NRC to make

⁷ DTG Draft Report at 31; see also SECY-02-0166, Attachment 1 at 59 (Sept. 12, 2002).

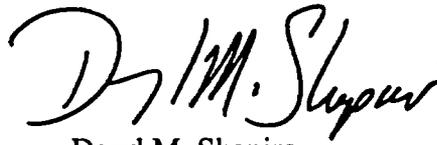
⁸ Any privacy issues, which have also been a stated area of concern, can be overcome by redacting private information from the OI report.

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enforcement decisions based on a complete understanding of facts and evidence.⁹ There exists no reason to distinguish between discrimination and nondiscrimination PECs.

For the foregoing reasons, ENO respectfully requests that the Commission direct the NRC Staff to provide ENO with a copy of OI Report No. 1-2004-040 as soon as possible in order that ENO and its employee may sufficiently prepare for the April 8, 2005 PEC.

Sincerely,



Daryl M. Shapiro

cc: Roger Davis, Legal Assistant, Office of Chairman Nils J. Diaz, NRC
Bradley Jones, Legal Assistant, Office of Commissioner Edward McGaffigan, Jr., NRC
Katherine Barber Nolan, Legal Assistant, Office of Commissioner Jeffrey S. Merrifield, NRC
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Frank J. Congel, Director, Office of Enforcement, NRC
Dr. William D. Travers, Regional Administrator for Region II, NRC
Samuel Collins, Regional Administrator for Region I, NRC

⁹ No difference exists (nor has the NRC Staff identified one) between discrimination and non-discrimination OI Reports.