UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

8/28 NOON

COMGBJ-07-0003

COMMISSIONER

August 27, 2007

I agree in part and dissaprove in part. See attached comments.

Dale E. Klein 08/28/07

MEMORANDUM TO: Chairman Klein
Commissioner McGaffigan
Commissioner Lyons

FROM: Gregory B. Jaczko

SUBJECT: VIOLATION OF THE INDIAN POINT ORDER

Entergy is now in violation of the Confirmatory Order (EA-05-190), which required an approved Emergency Notification System with back-up power. An order was issued and the date for compliance has passed. Therefore, I believe, based upon the current information and subject to the later development of a full record, the Commission should direct the staff to immediately proceed to propose a daily civil penalty in the amount of not less than $10,000.00 per day.

SECY, please track.

cc: OGC
EDO

07 AUG 27 PM 4:05

CHAIRMAN KLEIN'S COMMENTS ON COMGBJ-07-0003

I am of the view that Entergy is in violation of the requirements of the NRC's order of July 30, 2007 (EA-07-189), which among other things required Entergy to obtain FEMA acceptance of the new Emergency Notification System (ENS) and put it in service as the primary ENS for alerting the public by August 24. I am also not inclined to believe that Entergy has sufficient justification for its request for a relaxation of the requirements of the July 30, 2007 Order, based on the need for further FEMA review. For these reasons, I believe that the further imposition of civil penalties needs to be seriously considered.

However, I do not find a compelling basis for intervening at this time in the staff's review and process for taking enforcement action. Moreover, the Commission may ultimately have to decide whether or not the staff's additional enforcement decisions were appropriate. As a theoretical matter, for example, the Commission may find that a penalty of less than, or more than, $10,000 per day is justified, and its judgment may be informed by an assessment of Entergy's diligence in working with FEMA to obtain FEMA's acceptance of the new ENS.

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REQUEST REPLY BY: 8/28 NOON

COMMISSIONER

COMGBJ-07-0003

August 27, 2007

Disapproved. See attached comments.

8/29/07

Edward McGaffigan, Jr. (Date)

MEMORANDUM TO: Chairman Klein
Commissioner McGaffigan
Commissioner Lyons

FROM: Gregory B. Jaczko

SUBJECT: VIOLATION OF THE INDIAN POINT ORDER

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SECY, please track.

cc: OGC
EDO

Commissioner McGaffigan's Comments on COMGBJ-07-0003

I disapprove Commissioner Jaczko's proposal.

I agree that the licensee is not in compliance with the NRC's Order dated July 30, 2007, (EA-07-189). However, while Entergy may be in technical violation of the NRC's Order, I believe that Entergy's request for modification of the Order has merit and should be granted in light of their good cause argument concerning the need to await FEMA's review. Furthermore, I strenuously disagree that any enforcement action should be taken at this time, prior to understanding all of the facts in this case necessary to make a well-reasoned decision on what is the most appropriate course of action. A politically motivated decision to take a prematurely prescriptive enforcement action does not reflect the non-safety related issues at stake and simply compounds the NRC's earlier error of issuing the prior NOV and civil penalty and subsequent Order that conditioned compliance on FEMA approval, the timing over which Entergy has no control.

The Commission could conditionally grant the request to modify the Order, relaxing the compliance date provision pending FEMA's determination that the new siren system is acceptable. If FEMA determines the system was in place and adequate as of August 24, as asserted by Entergy, then Entergy would be deemed to have been in compliance with the Order. Should FEMA determine the system in place on August 24 is not approved, then Entergy will be deemed to have been in violation of the Order and would be subject to enforcement, including potential daily civil penalties beginning on August 24, 2007.

I believe this course of action is completely justified in light of Entergy's claims to have a system in place that will meet FEMA's guidelines for approval, and that they simply are awaiting official approval of FEMA. How could Entergy on May 23 have possibly guessed that FEMA was going to take "at least 45 days" to decide whether the new system meets its requirements? After issuance of the Order, if FEMA had announced that approval would take at least 6 months to render a decision on acceptability, then the licensee essentially would automatically have been placed into non-compliance and we would have had to modify the Order to reflect the realities of the situation. That is essentially what has happened now and, as such, the concept of good faith impossibility clearly warrants the relief requested by Entergy for the duration of the FEMA review.

Finally, I believe the Commission must look at this issue in light of the fact that there is absolutely no safety significance to this "violation" and, as such, there is no reason not to grant the relief based on the good cause argument discussed above. Congress passed a law that applied to one of 64 reactor sites nationwide. If Congress had thought the need for this sort of alert system was driven by safety, presumably they would have required it nationwide. Instead they made a deal with part of the New York delegation and limited this politically motivated, non-safety related requirement to Indian Point.

Our enforcement policy is supposed to be risk-informed. Since there is zero risk in this case, we never should have given the first fine that I also opposed, and we should certainly not compound that error by finding them in violation again before we have all of the facts.

for 8/29/07

Edward McGaffigan, Jr. **(Date)**

Commissioner Lyons' Comments on COMGBJ-07-0003

Violation of the Indian Point Order

I agree with Commissioner Jaczko that Entergy is in noncompliance with the July 30, 2007, Order requirement to obtain FEMA acceptance of the new ENS, and place the new system in service as the primary ENS for alerting the public, by August 24, 2007. I believe that appropriate enforcement action should be taken, however, I agree with the staff that it would be prudent to have the benefit of FEMA's assessment of the acceptability of the new ENS to better inform the final agency enforcement action.

Therefore, I do not support Commissioner Jaczko's enforcement proposal, but do support the staff's current position to determine an appropriate enforcement action, including considering the imposition of daily civil penalties, in a deliberate manner.

Peter B. Lyons 8/30/07
Date