UNITED STATES
NUCLEAR REGULATORY COMMISSION
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MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: COURT OF APPEALS DECISION ON FIRE PROTECTION RULE

As you may be aware, on March 16 the Court of Appeals for the District of Columbia Circuit rendered its decision in the case challenging the fire protection rule, 10 CFR 50.48 and Appendix R. (A copy of the decision is attached.) Although the NRC prevailed and the rule was upheld, the Court was critical of the NRC on several points. I thought it would be timely to outline the OELD interpretation of this case because your office is now evaluating a large group of Appendix R exemption requests, some of which have been filed by the same parties challenging the rule.1/

On the positive side, the Court upheld our rule in its entirety. The Court found that there was adequate justification in the record of the rulemaking (and in other documents identified during the lawsuit) to support the final rule. The Court rejected out-of-hand the contention that the Commission should have continued to deal with fire protection solely on a plant-by-plant basis. In answer to petitioners claim that the NRC had not made a "backfit" finding required by 50.109, the Court stated its agreement with our interpretation of that provision as not applicable to backfits accomplished via rulemaking. The final sentence of the opinion seems to suggest that the Court found the Commission's substantive judgment sound that a fire protection rule was necessary to protect public health and safety.

On the procedural aspects of the rulemaking, however, the Court was highly critical, stating its view that the Commission had "barely" complied with the requirements of the Administrative Procedure Act. The most serious of the Court's criticisms focused on two matters: the disclosure of the technical basis for the rulemaking in the notice of proposed rulemaking, and the justification for changes made in the final rule. Our argument on the first point centered on the fact that while the notice of proposed rulemaking itself did not contain or cite extensive technical materials, the utilities affected by the rule were fully aware of the issues and technical data as a result of previous interchanges with the NRC. Further, most of the technical documents relied upon were in the public domain and had been published for

1/ The time for seeking a rehearing en banc from the Court of Appeals has already passed, and the Office of the General Counsel informs us that it has received no petition seeking such a rehearing. Petitioners have until May 16 to seek review in the Supreme Court.

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comment during the years following the Browns Ferry fire. While the Court acknowledged these facts, it stated that "it would have been better practice for the NRC to have identified these technical materials specifically in the notice of proposed rule-making." (Opinion at 13) The court indicated that this was important on the following reasoning:

> In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with important information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. (Opinion at 10)

Although the Court found the facts in this case not to be this one-sided, this language may be taken as "the handwriting on the wall" in regard to future rulemakings. We will be well-advised to err on the side of too much, as opposed to too little, in disclosing all technical documents and data in future rulemaking notices.

The change in the final rule giving the Court the most difficulty was in Section III.G.2 of Appendix R, which specifies three alternative methods for protecting shutdown capacity. The proposed rule had employed the "postulated hazards" approach used during previous fire protection reviews. Standing alone, the Court indicated that this complete change of regulatory philosophy might have been cause to require renoticing of this aspect of the rule. The Court found, however, that the built-in exemption feature of 50.48(c)(6) added a "critical element of flexibility", with the practical effect being, in essence, a "fourth alternative: if the company can prove that another method works as well as one of the three stipulated by the NRC, in light of the identified fire hazards at its plant, it may continue to employ that method." (Opinion at 16-17) The Court appeared to agree with the argument of NRC counsel that the burden is on the utility to show that safety would not be enhanced by use of one of the rule's specified methods.

The Court offered some observations on how it understood the exemption process to work in connection with its discussion of the fire retardant coatings issue. This specific language should be kept in mind as we review the exemption requests filed on III.G.2:

> The exemption procedure, however, indicates that the Commission did not intend to limit protective measures to the three methods stipulated in the rule .... If the utility can show that some combination of protective measures provides protection equivalent to that afforded by one of the Commission's three stipulated methods, it will be entitled to an exemption, regardless of

> whether the combination of measures includes fire retardant coatings. The statement [from the final rule notice] that "based on present information, the Commission does not expect to be able to approve exemptions for fire retardant coatings used as fire barriers" ... must therefore be regarded as mere mischievous dictum. Whatever the Commission's present expectations, it must remain open to power companies to show in individual exemption applications that fire retardant coatings in conjunction with other protective means can provide adequate levels of fire protection. (Opinion at 20-21)

It is fair to generalize from this statement that, because the NRC was lax in its duty to fully disclose the technical basis for all aspects of the rule and the changes made during the rulemaking, it must maintain an open mind on the various measures which may be relied upon in exemption requests. This is not to say, however, that the Court implies a different legal standard for these requests. On the contrary, the Court stated that a utility must be able to show that its "system is as protective of the public safety as the system chosen by the Commission."[2/] (Opinion at 21)

The following summary points may be made:

(1) The Court fully upheld the substance of 10 CFR 50.48 and Appendix R, and did not question the necessity for their adoption;

(2) The Court indicated that the procedures used in the rulemaking were satisfactory by a narrow margin;

(3) The Court insisted that the NRC maintain an open mind in regard to combinations of fire protection measures proposed in exemption requests; and

(4) The Court did not suggest that the NRC apply a different safety standard to exemption requests filed under 50.48(c)(6) than it would to other exemption requests (i.e., 50.12).

2/ As you may know, a meeting was held on April 8 in the EDO's office which, in part, dealt with how the NRC would treat these requests. The meeting was requested by counsel for the petitioners in the lawsuit, and was attended by, among others, Edson Case and Richard Vollmer of your office. It was agreed that the NRC would review the requests carefully and would not reject them merely because alternatives other than those in Appendix R are proposed. The efforts by counsel for the petitioners to suggest that the Court's opinion mandates a different review standard, however, were properly rejected by Mr. Case.

Outside of the fire protection area, it is clear that in future rulemakings we must make every effort to avoid the procedural shortcomings criticized in the opinion. I offer the full cooperation and assistance of OELD in ensuring that our future rulemaking efforts are not jeopardized by a failure to fully comply with the requirements of the Administrative Procedure Act. I realize that this may involve an increased level of effort from both our offices, particularly in the preparation of proposed rule notices. This increased effort, however, is fully justified when compared to the disruption in our safety program which could result from a judicial remand of an important rule.

/s/ James P. Murray

for Guy H. Cunningham, III
Executive Legal Director

Enclosure:
As stated
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