

July 14, 2010

Ms. Ellen C. Ginsberg
Vice President, General Counsel and Secretary
Nuclear Energy Institute
1776 I Street NW, Suite 400
Washington DC 20036-3708

Dear Ms. Ginsberg:

I am responding to your June 4, 2010 letter addressing the applicability of the Backfit Rule, 10 CFR 50.109, to NRC interpretive guidance. In your letter, you present several excerpts from the statement of considerations (SOC) for the 1985 Backfit Rule and the NRC's *Backfitting Guidelines*, NUREG-1409 (1990), to support your view that the NRC has a policy of applying the Backfit Rule to interpretive guidance. You then quote the backfitting discussion contained in three specified regulatory guides, and suggest that this discussion is inconsistent with this NRC policy. You suggest that the backfitting discussion reflects a change in NRC policy, *viz.*, that until a backfit is actually imposed, no backfit analysis need be performed. You conclude by requesting that either: (i) the NRC staff "abide by the agency's stated policy" and provide a backfit analysis upon issuing draft interpretive guidance for public comment; or (ii) if the NRC has changed its policy in the area of backfit analysis and interpretive guidance, then the NRC provide a reasoned basis for the change.

As a general matter, we agree that NRC staff "guidance" must be subject to the Backfit Rule if either: (i) the NRC staff intends the positions presented in the proposed interpretive guidance become (through further NRC action) legally binding upon a licensee; or (ii) the NRC staff's expectation that licensees "voluntarily" adopt the "guidance" constitutes the basis (or a part of the bases) for resolution of a safety or regulatory issue.¹ In these limited circumstances, the NRC's policy is that compliance with the Backfit Rule's provisions should not await the imposition of "guidance," but should be addressed as part of the preparation and issuance of such "guidance." This also includes situations where the staff issues a "recommendation" that a

¹ Cf. Charter of the Committee to Review Generic Requirements, Revision 7, Appendix B, Table 1, dated November 1999, ADAMS Accession No. ML003718374; Management Directive 8.4, "Management of Facility-Specific Backfitting and Information Collection," Handbook Exhibit 1, dated October 28, 2004, ADAMS Accession No. ML050110156.

licensee adopt the proposed guidance, and the recommendation is accompanied by a request for information (for example, under the auspices of 10 CFR 50.54(f)) as to whether the licensee intends to adopt the NRC staff's "recommendation." In this situation, the NRC recognizes the implicit coercive effect of the "guidance." In addition, the NRC recognizes that the necessary backfitting documentation must be prepared before the NRC imposes the new/revised "guidance" as a legally-binding requirement. The 1985 Backfit Rule SOC and NUREG-1409 provisions you cite are intended to address only this "guidance" that the NRC intends to be legally binding. The NRC continues to adhere to this practice.

By contrast, there are guidance documents which the NRC staff intends only to be "forward fit," that is, the guidance will be applied only to: (i) future applicants; and (ii) applications from existing licensees for license amendments, requests for exemptions, and other requests for dispensation from compliance with otherwise-applicable legally binding requirements (an example of such a request would be an application to use an alternative under 10 CFR 50.55a). In these circumstances, the NRC does not consider the issuance of "forward fit" interpretive guidance to constitute "backfitting." As the NRC has stated in several different contexts, the Backfit Rule does not protect the expectations of future applicants (including licensees seeking NRC permission to conduct licensed activities in a manner different than what the NRC previously approved) regarding the regulatory requirements that they must meet to obtain NRC approval.

The three regulatory guides you cite (p. 3, footnote 9) do not reflect any change in the NRC staff's long-standing practices as described above. The backfitting discussions for these regulatory guides are consistent with the discussion on "forward fit" regulatory guides. The staff has represented to us that they do not intend to impose on any current nuclear power plant licensee the positions in the three regulatory guides you identified, absent a voluntary request from a licensee to change its licensing basis in a manner which directly implicates the safety issues addressed in those regulatory guides.² Inasmuch as these regulatory guides are only to be "forward fit," the backfitting discussions for those regulatory guides are consistent with the Backfit Rule, and issuance of these regulatory guides do not fall within the purview of "agency policy" concerning the application of the Backfit Rule to the issuance of interpretive guidance.

Nonetheless, I understand how these regulatory guides' backfitting language could be interpreted as signaling a change in the NRC staff's position as to when a backfit analysis must be prepared in connection with the issuance of NRC interpretive guidance. I have asked OGC attorneys to work with the Committee to Review Generic Requirements (CRGR) and the

² If a licensee voluntarily seeks to change its licensing basis (*i.e.*, the change is initiated by the licensee to take advantage of a voluntary alternative afforded in the NRC's regulations, such as the adoption of NFPA 805 under 10 CFR 50.48(c), and is not compelled by a new or amended regulation), then the NRC may condition its approval of the proposed change upon a licensee agreement to adopt new or revised guidance. Such action will not be deemed to be backfitting if: (i) the new or revised guidance relates directly to the licensee's voluntary request; and (ii) the specific subject matter of the new or revised guidance is an essential consideration in the NRC staff's determination of the acceptability of the licensee's voluntary request.

appropriate NRC staff to examine whether the current backfitting language accompanying the issuance of interpretive guidance should be revised to clarify these backfitting positions. In addition, the CRGR has agreed to look into whether this matter should be the subject of discussion in a backfitting session at the next Regulatory Information Conference (RIC). As you know, the past two RICs have featured a session – conducted by the CRGR – which is devoted to backfitting. An NRC presentation focusing on NRC’s compliance with the Backfit Rule when issuing interpretive guidance may be useful for external stakeholders.

Thank you for your letter, which has provided the NRC with the opportunity to clarify our practices in implementing the Backfit Rule. If you have any further questions, please contact Geary S. Mizuno at 301-415-1639.

Sincerely,

/RA/

Stephen G. Burns
General Counsel

cc: William Borchardt, EDO
James Lyons, RES
Edward Williamson, OGC

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*see previous concurrence

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