NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-11-0003 – STATUS OF ENFORCEMENT DISCRETION REQUEST AND RULEMAKING ACTIVITIES RELATED TO 10 CFR PART 26, SUBPART I, "MANAGING FATIGUE"

Approved __X__ **Disapproved** _____ **Abstain** _____

Not Participating _____

COMMENTS: **Below** ___ **Attached** _X__ **None** ___

_____
SIGNATURE

2/16/11
_____
DATE

Entered on "STARS" **Yes** _x__ **No** ___

Chairman Jaczko's Comments on SECY-11-0003,
"Status of Enforcement Discretion Request and Rulemaking Activities Related To 10 CFR Part 26, Subpart I, Managing Fatigue"

On February 8, 2011, the Commission received a briefing on implementation issues associated with the minimum days off requirement in 10 CFR Part 26, Subpart I, "Managing Fatigue," that supplemented the information provided by the staff in SECY-11-0003, "Status of Enforcement Discretion Request and Rulemaking Activities Related To 10 CFR Part 26, Subpart I, Managing Fatigue." The regulatory requirements in Subpart I of Part 26 on work hours for personnel at nuclear power plants are necessary to prevent worker fatigue from adversely affecting public health and safety and the common defense and security. It was mentioned by the staff at the briefing that the importance of fatigue management was one of the many lessons learned from the Three Mile Island accident.

From the information that has been provided to date, it is clear that the minimum days off for operations (i.e., non-outage) requirements are prescriptive, complex, and difficult to implement. Also, from the presentations from both the staff and external stakeholders, I am convinced that there is a viable alternative to the current requirement, which would make the rule easier to implement without weakening the intent of the rule. There appeared to be widespread agreement among all of the stakeholders that the proposed alternative developed by the staff would address the stated concerns. I support making adjustments to the rule that would make implementation easier without changing, from a performance standpoint and a fatigue management standpoint, the effectiveness of the rule.

As stated during the briefing, the staff is planning to provide the Commission with a separate Commission paper next month that further discuss the five options mentioned during the Commission briefing. Because the option that I prefer, rulemaking, was characterized as taking too long, I felt compelled to convert the information paper provided by the staff last month in order to propose an expedited process. I hope the process describe below will encourage the adoption of the rulemaking option by the Commission. Not only do I believe our highly skilled and innovative staff will be able to issue a change to the Part 26 rule in a timely manner, but I believe we are not being honest with ourselves or our stakeholders to not consider rulemaking our preferred option.

I believe an accelerated limited scope rulemaking would be a preferable, viable, and timely solution to the concerns raised during the briefing for three reasons:

- Because of the importance to safety and the acknowledged need for effective fatigue management requirements, it is important to keep a requirement in place. An accelerated limited scope rulemaking provides for an actual replacement of the current requirement with a comparable requirement.

- Because of the extensive interactions with external stakeholders during the development of the Part 26 rule, it would be appropriate to go through a direct final rule or notice and comment process when considering changes to the rule.

  As I noted during Commission briefing, a lot of the concerns labeled as unintended consequences were in fact raised by various external stakeholders in letters to the NRC during the public comment period for the changes to 10 CFR Part 26. I do not raise this point to diminish difficulties that some licensees are having implementing the minimum

days off requirements or the need to improve the rule, but simply to acknowledge that the Commission at the time was aware of these concerns prior to approving the rule.

- This is an ideal opportunity for the NRC to demonstrate that rulemakings do not need to take years to complete. I have a long standing belief that one step the NRC can take to improve the timeliness of individual rulemakings is to limit the scope of the rulemaking. A limited scope rulemaking would be easier for external stakeholders to understand and ascertain the impact of proposed rules.

I am confident with the right set of conditions provided by the Commission, an accelerated limited scope rulemaking can be issued as final within four months. A proposed rule and direct final rule should be issued for publication within five weeks. Three days prior to publication in the *Federal Register*, the proposed rule, direct final rule, and final rule should be provided to the Commission. To minimize the overall duration of this rulemaking:

- The scope of the rulemaking should be limited solely to providing an alternative to the current requirement for minimum days off for operations (i.e., non-outage) in Part 26, Subpart I with the new proposed requirement for a 54-hour per week average over a rolling period of up to six weeks for operations (i.e., non-outage).

- The staff should promulgate rule language consistent with the interim approach described by the staff at the February 8, 2011, Commission briefing, allowing an essentially like-for-like alternative to the current non-outage minimum days off requirements.

- The petitions for rulemaking concerning Part 26 and other changes being considered to the rule should be handled in a separate rulemaking effort.

- For this rulemaking, all rulemaking authority is delegated to the Executive Director for Operations. This delegation includes the proposed rule, direct final rule, and final rule, unless substantive changes are made to the alternative that was presented at the February 8, 2011, Commission briefing. If substantive changes are made, the final rule should be provided to the Commission for approval.

- The lead office for this rulemaking should be the Office of General Counsel (OGC), because the staff has done sufficient technical work to establish an appropriate technical basis for the new proposed requirement.

- The offices assisting OGC in this effort should provide assistance on a priority basis.

- Because the staff has done sufficient work to establish an appropriate technical basis for the new proposed requirement, OGC should rely on existing technical work and regulatory analysis. Any additional internal technical reviews should be eliminated or minimized.

- Because of the public interaction held to date on the development of the proposed alternative requirement, the public comment period should be kept to 30 days with no extension of the public comment period.

- Specific comments should be sought on whether the alternative provides comparable assurance of fatigue management. Comments outside the limited scope of the rule change should not be considered or should be addressed under the separate rulemaking on Part 26.

In parallel with this accelerated limited scope rulemaking, the staff should prepare updated regulatory guidance on an expedited basis for issuance in four months.

The Part 26 rule is an incredibly complicated rule, but it is a rule that went through a lot of internal and external discussion; a lot of input from fatigue experts, industry representatives, union representatives, and other external stakeholders; and thoughtful consideration by the Commission. It is a rule that is providing an important safety benefit. Despite our best efforts to strike the right balance between establishing necessary regulatory requirements and imposing a necessary burden on the regulated industry, we sometimes miss the mark. The challenge then is to efficiently use the appropriate regulatory process to make any needed improvements to the regulatory framework to ensure the right balance is restored, which in this case would be rulemaking.

Many months have already lapsed pondering the correctness, wisdom, and possibility of granting the enforcement discretion requested by the Nuclear Energy Institute to relieve power reactor licensees from their obligation to meet the minimum days off requirements that were put in place to ensure worker fatigue was adequately managed to avoid adverse impact on safety from fatigue induced errors. In hindsight, this time would have been better spent advancing an accelerated limited scope rulemaking to put in place an alternative requirement that provides a comparable safety benefit and, in addition, addresses the difficulty that some licensees are having implementing the minimum days off for operations (i.e., non-outage) requirements.

2/16/11

Gregory B. Jaczko Date