

Mendiola, Doris

Subject: NEI Comments on Draft Regulatory Guide DG-1229, Revision 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors"
Attachments: 03-24-11_NRC_DG-1229 Comment Letter.pdf

From: MANTSCH, Scott [mailto:rsm@nei.org]
Sent: Thursday, March 24, 2011 4:30 PM
To: Bladey, Cindy; Szabo, Aaron
Cc: KASS, Leslie; BONANNO, Jerry; BELL, Denise
Subject: NEI Comments on Draft Regulatory Guide DG-1229, Revision 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors"

Please see attached. Thank you very much.

Scott Mantsch, Administrative Assistant
Policy Development Division

Nuclear Energy Institute
1776 I St. N.W., Suite 400
Washington, DC 20006
www.nei.org

P: 202-739-8141
F: 202-785-1498
E: rsm@nei.org

1/13/2011

76 FR 2425

①

RECEIVED

MAR 25 AM 9:35

RULES AND DIRECTIVES
ENVIRONMENTAL
PROTECTION

nuclear
Putting Clean Air Energy to Work.

SUNSI Review Complete
Template = ADM-013

LRDS = ADM-03
Call = A. Szabo (AL55)
m. Case (m5c)



NUCLEAR ENERGY INSTITUTE

Leslie Compton Kass
Senior Director, Business Policy & Programs

March 24, 2011

Cindy K. Bladey, Chief
Rules, Directives and Announcements Branch
Office of Administration
Mail Stop TWB-05-B01M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Comments on Draft Regulatory Guide DG-1229, Revision 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," (76 FR 2425, January 13, 2011)

Project Number 689

Dear Ms. Bladey:

The Nuclear Energy Institute (NEI),¹ on behalf of the nuclear energy industry, is pleased to provide comments on the U.S. Nuclear Regulatory Commission's (NRC) Office of Nuclear Regulatory Research's Draft Regulatory Guide DG-1229, revision 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors." The final changes will be published as Revision 2 to Regulatory Guide 1.159.

As a general matter, NEI would like to point out that much of the licensee information requested in the proposed regulatory guide is in excess of the requirements of the regulations. Licensees are only required to submit the information identified in 10 CFR § 50.75. Submittal of additional information in the biennial reports may be undertaken at the licensee's discretion, but is not required. If the NRC has questions or needs additional information to verify decommissioning funding assurance, licensees will provide this data on an as-needed basis.

In this regard, and to further emphasize that DG-1229, Revision 1, is guidance, and that it may only be used in that fashion, NEI recommends supplementation of the guide's direction regarding backfitting. NEI believes that the current language in the guide should be more specific with respect to the staff's use of this guidance. Accordingly, NEI urges the inclusion

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

here of language drawn from other more recent draft regulatory guides.² Specifically, NEI proposes the following modification (additional language underlined) to the paragraph at DG-1229, p. 23 (DG-1229, Section D. Implementation):

During inspections of specific facilities, the staff may suggest or recommend that licensees consider various actions consistent with staff positions in this regulatory guide. Such suggestions and recommendations would not ordinarily be considered backfitting even if prior versions of this Regulatory Guide are part of the licensing basis of the facility with respect to the subject matter of the inspection. However, unless this Regulatory Guide is part of the licensing basis for a plant, a failure to comply with the positions in this Regulatory Guide, by itself, may not be identified by the staff as a violation. Accordingly, the staff may not represent to the licensee that: (1) the licensee's failure to comply with the positions in this regulatory guide constitutes a violation; (2) the licensee may avoid the violation only by agreeing to comply with this regulatory guide; or (3) the only acceptable way for the licensee to address the NRC-identified noncompliance or violation is to commit to this regulatory guide (i.e., including this regulatory guide in the facility's licensing basis).

The industry has one specific technical comment regarding the interactions between rate-regulated licensees and their regulators. The third paragraph in Section 2.1.5 includes guidance on what constitutes a "good-faith effort" to cover a shortfall by a licensee operating in a rate-regulated environment. That paragraph seems to assume that if a shortfall exists, it will be discovered annually – *i.e.*, by December 31. The draft guidance proposes that licensees notify their rate-regulators within three months of discovering such shortfalls (*i.e.*, by March 31) and suggests that a licensee reporting a shortfall should request that the rate regulator schedule a review of decommissioning cost recovery by the end of the year.

From a regulatory standpoint, this guidance is inconsistent with the direction that the Commission provided in SRM-SECY-10-0084 on the timing of funding adjustments for licensees operating in merchant environments. Specifically, in SECY-10-0084, the staff suggested an approach to the timing of funding adjustments that was based on the annual recalculation of the minimum funding amount, rather than the submittal of the biennial decommissioning funding reports. In its comments on the draft guide, NEI pointed out that funding shortfalls are to be identified through submittal of the biennial reports required by § 50.75(f). The annual recalculation of the regulatory minimum amount required by § 50.75(b) does not address identification or reporting of shortfalls. Thus, the start of the two-year time period for merchant licensees should be coincident with the submittal of the biennial decommissioning funding report. Consistent with NEI's argument, the Commission directed the NRC staff to interpret the guidance for merchant licensees to require that shortfalls *identified in a biennial report* must be corrected by the time the next biennial report is due two years later. The

² See, e.g., DG-1245, "Inspection of Water-Control Structures Associated with Nuclear Power Plants," January 2011.

same logic applies to licensees operating in regulated environments. Thus, the guidance should use submittal of a biennial decommissioning funding report identifying a shortfall, not the annual recalculation of the minimum funding amount, as the reference point for the timing of funding adjustments.

Further, the proposed guidance provided in Section 2.1.5 is out of step with the rate-setting process. Under many public utility laws, retail electric rates are set by the utility commissions in a general rate case. A general rate case is based upon a test year taking into consideration a representative level of ongoing operating and maintenance costs, investment in utility property, plant and equipment, and appropriate financing costs, including setting a return on equity to provide an opportunity for shareholders to earn a reasonable return. Decommissioning funding costs are included as an operating cost. A general rate case is broad-scoped, time consuming (typically taking more than a year to prepare and prosecute) and expensive. Section 2.1.5 would prescribe a timeline for interacting with the rate regulator to obtain rate relief. The actions and timeline provided in the draft guide are not consistent with many existing state regulatory processes.

Public utility statutes frequently provide for certain specific types of costs, most significantly fuel costs, to be evaluated on a stand-alone basis and adjusted annually through a rate rider. Generally, a public utilities commission does not have statutory authority to adjust other costs, such as decommissioning funding expenses, on a standalone basis. Absent statutory authority to approve a rate rider, in the context of a general rate case, the public utilities commission may consider whether a certain cost item meets specific criteria (such as a cost which is volatile and beyond the utility's control) and create an adjustment mechanism for some period of time in the future; however, such a decision is within the commission's discretion.

Rate-regulated utilities inform the public utilities commission about the funding status of their decommissioning funds on a regular basis; however, the utility cannot require the commission to take action outside of a general rate case to adjust rates to address a funding shortfall. Furthermore, the commission may take the position that absent specific statutory authority it does not have authority to make such an adjustment.

Further, the proposed interface with rate-setting authorities, and suggestions of specific direction to licensees in dealing with their jurisdictional rate-making bodies, is contrary to a fundamental principle established during the NRC decommissioning rulemaking, *i.e.*, that there is a separation of jurisdiction and authority between the NRC and Federal and State rate regulators that must be respected. This principle was codified in the NRC decommissioning funding regulations when initially promulgated in 1988.³ Specifically, 10 C.F.R. 50.75(a) provides:

³ See 53 Fed. Reg 24018, 24050 (June 27, 1988) "General Requirements for Decommissioning Nuclear Facilities." In sum, as the NRC stated in the original rulemaking where such questions were carefully considered – "*Hence, NRC will not become involved in the rate regulation process as it relates to decommissioning.*" *Id.* at 24,031 (emphasis added).

Funding for the decommissioning of power reactors may also be subject to the regulation of Federal and State Government agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) that have jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c) of this section, are in addition to, and not substitution for, other requirements, and are not intended to be used by themselves or by other agencies to establish rates.

To address the above considerations, NEI proposes a modification to the draft guide that would remove the prescriptive text that conflicts with long-recognized principles in this area, without changing the underlying intent of the guide. This change would result in an approach that is more performance-based and cognizant, yet accommodating, of the relative agency authority concerning the rate-setting process. NEI proposes the following changes to DG-1229, Section 2.1.5, third paragraph (page 14):

~~A licensee that may rely exclusively on an external sinking fund to provide financial assurance under the circumstances defined in 10 CFR 50.75(e)(ii)(A) or (B) (that is, where the total cost of decommissioning is provided through rates established by cost-of-service ratemaking or non-bypassable charges) may make a good-faith effort to obtain rate relief to cover its shortfall. Generally, obtaining such relief within 5 years of submittal of the biennial report identifying the shortfall will be considered a good-faith effort to obtain rate relief. A licensee meeting these criteria should inform its rate regulator by March 31 of each year when a shortfall in financial assurance has occurred as of December 31 of the preceding year. The information should include the NRC minimum financial assurance requirement, the actual amount of the licensee's decommissioning financial assurance, and the amount of additional cost recovery needed to meet the NRC amount. The licensee should request its rate regulator to schedule a review of decommissioning cost recovery by the end of the year. A copy of the information and request should be included in the licensee's decommissioning fund status report in the years that the report is required. The licensee is expected to make adjustments to the amount of funds set aside as necessary to meet the minimum requirement of 10 CFR 50.75(c), but in every case, within 5 years.~~

We appreciate the opportunity to provide comments on the proposed guidance. Please do not hesitate to contact me if you have any questions.

Sincerely,



Leslie C. Kass

c: Mr. Aaron Szabo, U.S. Nuclear Regulatory Commission