

September 29, 2016

Mr. David R. Kline
Director, Security
Nuclear Energy Institute
1201 F Street NW, Suite 1100
Washington, DC 20004

SUBJECT: ENDORSEMENT OF NEI 16-02, "LICENSING BASIS OF VITAL EQUIPMENT AND VITAL AREAS," REVISION 0, DATED APRIL 2016

Dear Mr. Kline:

The U.S. Nuclear Regulatory Commission (NRC) is providing this letter in response to your letter dated April 28, 2016, entitled; "Endorsement of NEI 16-02, "Licensing Basis of Vital Equipment and Vital Areas," Revision 0, Dated April 2016," (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16119A277) to Mr. Michael C. Layton, Director, Division of Security Operations, Office of Nuclear Security and Incident Response.

In your letter you requested NRC endorsement of the proposed NEI 16-02 and stated that; *"Extensive research and interaction with the staff indicated that both an interim and a final solution were needed to effectively address the issue. It was further determined that the best interim solution was an NRC endorsed, NEI guidance document and the ultimate solution would be best accomplished through rulemaking. The industry is requesting that the NRC endorse the attached guidance document, NEI 16-02, "Licensing Basis of Vital Equipment and Vital Areas," Revision 0, dated April 2016 by June 3, 2016."*

In a letter dated June 13, 2016, (ML16131A705), the NRC stated in part, that the NRC staff has initiated a review of the proposed guidance contained in NEI 16-02, "Licensing Basis of Vital Equipment and Vital Areas," Revision 0, dated April 2016 to determine if the document contains sufficient information to justify the expenditure of resources for a detailed evaluation. The letter further stated that upon the completion of this initial review, we would either request additional information or notify you of the results of our review.

The NRC staff has completed its initial review and concluded that the document does not contain sufficient information to justify the expenditure of resources for a detailed evaluation. Accordingly, the subject guidance cannot be endorsed at this time without significant clarification and revision. The NRC staff determined that the following concerns should be considered:

1. The title of this document is "Licensing Basis of Vital Equipment and Vital Areas." The NRC staff inferred from the title that the proposed document would discuss issues related to the "licensing basis" for vital equipment and vital areas. It is important to note that the NRC does not license vital equipment and vital areas, but rather, the NRC has established in Title 10 of the *Code of Federal Regulations* (10 CFR), Part 73, regulatory requirements for the identification and protection of vital equipment and vital areas. To this point, the proposed NEI 16-02 does not contain significant pertinent discussion of the applicable regulatory requirements, or the regulatory basis, for identifying vital equipment and vital areas.

2. The “Executive Summary” of the proposed NEI 16-02 states that the intent of this document is to “*memorialize*” the processes that led licensees to identify different methods for implementing 10 CFR 73.55(e)(9)(i) and to describe why these different methods are appropriate. Consistent with this, the majority of the discussion contained in the proposed NEI 16-02 focuses on the “industrial security” physical protection program requirements and processes that were effective before the 2009, 10 CFR Part 73 Power Reactor Rulemaking. While the NRC staff agrees that understanding this historical context is important, the staff is concerned that limiting the discussion in the proposed NEI 16-02 to past licensee implementation practices does not provide a sufficient discussion or understanding of the regulatory requirements that are applicable to the identification and protection of vital equipment or vital areas, including how past licensee practices deviated from those requirements.
3. Contrary to the title, Section 1 of the “Introduction” identifies one of the issues being addressed by the proposed NEI 16-02 as, “differing interpretations” on the characterization of equipment that was not previously identified as vital. The NRC staff does not agree that the definition of vital equipment in 10 CFR 73.2, or the applicable regulatory requirements for their identification and protection in 10 CFR 73.55, have changed. Licensees have always had the obligation to correctly identify and protect vital equipment and vital areas in accordance with these regulatory requirements. Licensees are always free to seek an exemption from those requirements (i.e., 10 CFR 73.5) or propose an alternative measure (i.e., 10 CFR 73.55(r)) for implementing those requirements. However, past practices that deviate from established requirements do not excuse a licensee from complying with established regulatory requirements, absent an NRC-approved exemption or alternative measure.
4. Related to the above point, it appears to the NRC staff that one purpose of the proposed document is to seek NRC approval, through endorsement of NEI 16-02, of past licensee practices for identifying and protecting vital equipment and vital areas. The NRC is not prepared to provide such a generic approval of past licensee practices.
5. The proposed NEI 16-02 does not consider the Commission requirements in 10 CFR 73.55(a)(2) and 73.55(b)(4) for each licensee to conduct a site-specific analysis, nor the Commission requirements in 10 CFR 73.55(m) for security program reviews. However, the proposed NEI 16-02 recognizes the evolution of power reactor physical protection programs from a focus on “industrial security” to a focus on “radiological sabotage” but does not recognize or discuss the licensee’s obligation to review its site-specific programs to determine what impact that this transition has had on the site-specific identification and protection of vital equipment. To the contrary, the proposed NEI 16-02 appears to take the position that the identification of vital equipment and vital areas is a “one time task” that, once completed and described in the NRC-approved security plans, does not ever need to be reviewed or modified. The NRC staff disagrees with this assumption.

6. The proposed NEI 16-02 appears to assume that the 2004 NRC approval of licensee security plans constituted an approval of licensee practices for the identification and protection of vital equipment and vital areas. The NRC staff does not agree that approval of the security plans authorized licensees to deviate from the regulatory requirements applicable to the identification and protection of vital equipment and vital areas. Furthermore, absent documented NRC approval of a specific exemption or alternative measure, licensees must comply with those established requirements.
7. Finally, the proposed NEI 16-02, Section 4, "Justification," appears to view the Commission's guidance to NRC staff contained in Management Directive 8.4, (ADAMS Accession No. ML12059A460), regarding "Backfit," as a "*prohibition*" to the staff from questioning whether certain equipment should be categorized as vital. The instruction provided in MD 8.4 does not prohibit the NRC staff from taking action where the provisions of 10 CFR 50.109, "Backfit," may apply. Should the NRC determine that a "new" position is needed, the NRC staff will follow all applicable Commission requirements and direction associated with the "Backfit" process.

The staff is available to discuss the above comments regarding the information currently contained in the proposed NEI 16-02. The point of contact is Dennis Gordon at (301) 287-3633 or email Dennis.Gordon@nrc.gov.

Sincerely,

/RA/

Melanie A. Galloway, Director
Division of Security Policy
Office of Nuclear Security and Incident Response

/RA/

Michael C. Layton, Director
Division of Security Operations
Office of Nuclear Security and Incident Response

6. The proposed NEI 16-02 appears to assume that the 2004, NRC approval of licensee security plans constituted an approval of licensee practices for the identification and protection of vital equipment and vital areas. The NRC staff does not agree that approval of the security plans authorized licensees to deviate from the regulatory requirements applicable to the identification and protection of vital equipment and vital areas. Furthermore, absent documented NRC approval of a specific exemption or alternative measure, licensees must comply with those established requirements.

7. Finally, the proposed NEI 16-02, Section 4, "Justification," appears to view the Commission's guidance to NRC staff contained in Management Directive 8.4 (page 30) regarding "Backfit," as a "*prohibition*" to the staff from questioning whether certain equipment should be categorized as vital. The instruction provided in MD 8.4 does *not* prohibit the NRC staff from taking action where the provisions of 10 CFR 50.109 "Backfit" may apply. Should the NRC determine that a "new" position is needed, the NRC staff will follow all applicable Commission requirements and direction associated with the "Backfit" process.

The staff is available to discuss the above comments regarding the information currently contained in the proposed NEI 16-02. The point of contact is Dennis Gordon at (301) 287-3633 or email Dennis.Gordon@nrc.gov.

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 Division of Security Policy
 Office of Nuclear Security and Incident Response

/RA/

Michael C. Layton, Director
 Division of Security Operations
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ADAMS ACCESSION NUMBER: ML16193A517

*concurrence via email

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