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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 27, 1990

MEMORANDUM FOR: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick

FROM: William C. Parler
General Counsel

SUBJECT: BACKFIT CONSIDERATIONS OF PROPOSED IPEEE GENERIC LETTER

In SECY-90-192 (July 17, 1990), the Commission requested that OGC review a backfit issue raised by the Nuclear Utility Backfitting and Reform Group (NUBARG) in an April 13, 1990 letter from Nicholas S. Reynolds to Edward L. Jordan. In that letter, NUBARG asserts that a 10 CFR 50.109 backfit analysis should be performed for the IPEEE generic letter. We have reviewed that letter, as well a June 20, 1990 letter from Mr. Reynolds to the Commission presenting essentially the same arguments, the advance notice of proposed rulemaking (ANPR) for the 1985 Backfit Rule (48 Fed. Reg. 44217, September 28, 1983), the proposed rule (49 Fed. Reg. 47034, November 30, 1984), the final rule (50 Fed. Reg. 38097, September 20, 1985), and the NRC Manual Chapter 0514 on the management of plant-specific backfitting. We disagree with NUBARG's position that a 10 CFR 50.109 backfit analysis should be performed for the IPEEE generic letter.

First, the IPEEE generic letter is not a "backfit" as that term is defined in Section 50.109(a)(1) of the Backfit Rule. Backfits are defined in that section as modifications or additions to any plant systems, structures and components, design or design approvals, or plant procedures. The IPEEE generic letter does not involve such modifications or additions to hardware, design, or procedures. Therefore, the information request is not a "backfit," and a backfit analysis need not be prepared.

NUBARG, however, argues that because of the substantial costs of the IPEEE[1] and because the IPEEE would require reviews against criteria which may be more stringent than a plant's current licensing basis, the IPEEE is more appropriately characterized as a backfit and a backfit analysis should be

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[1]NUBARG also argues that a backfit analysis is necessary because the NRC Staff's estimates of the cost of performing an IPEEE are not accurate, citing the ACRS's concern about the accuracy of the Staff's estimate, and presenting some evidence that the cost of the underlying IPE was underestimated by the Staff in a previous analysis for the IPE. OGC does not see why a cost estimate performed pursuant to 50.54(f) is or need be any more or less accurate than one performed pursuant to 50.109.

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performed. See June 20, 1990 letter, p. 1. In support of this position, NUBARG quotes several passages from the statement of consideration (SOC) for the final 1985 Backfit Rule[2].

We do not agree with NUBARG's analysis. NUBARG's first point, that a 50.54(f) information request constitutes a 10 CFR 50.109 backfit if the cost of responding to the information request is high, is not supported by the history of the 1985 rulemaking. In that rulemaking, 50.54(f) was amended to require preparation of an evaluation demonstrating that the burden imposed by a 50.54(f) information request "is justified in view of the safety significance of the safety issue being addressed." When the amendment to 50.54(f) was proposed, the Commission stated:

> The proposed amendment of 50.54(f) is to assure that information requests of licensees are not unduly burdensome. Accordingly, each information request is justified in view of the potential safety significance of the issue to be addressed. Amendment of this section also provides for management control and accountability by requiring that staff evaluations be reviewed by the Executive Director for Operations prior to issuance of the request.

49 Fed. Reg. 47035. In the SOC accompanying the final rule, the Commission expanded its discussion of the need for the amendment:

> The proposed amendment of 50.54(f) ensures that except for information sought to verify licensee compliance with the current licensing basis for that facility, the reason or reasons for each information request must be prepared prior to its issuance to determine whether the request is for information already in the possession of the applicant or licensee or instead will require the institution of studies, procedures, or other extensive effort to generate the necessary data to respond. If extensive effort is reasonably anticipated, the request will be evaluated to determine whether the burden imposed by the information request is justified

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[2]In addition to adopting the text of Section 50.109, the 1985 rulemaking also adopted a revision to 50.54(f) which required preparation of an "evaluation" for each 50.54(f) information request which demonstrates that the burden imposed by the information request is justified by the potential safety significance of the issues addressed in the information request. The 1985 rule was overturned on appeal, see UCS v. NRC, 824 F.2d. 103 (D.C.Cir. 1987); a slightly-modified rule was adopted in 1988, see 53 Fed. Reg. 20603 (June 6, 1988). However, the 1985 amendment to 50.54(f) was not the subject of the 1985 appeal, and was not modified in the 1988 rulemaking. Therefore, this memorandum assumes the continuing vitality of the 1985 SOC's discussion of 50.54(f).

> in view of the potential safety significance of the issue to be addressed.

50 Fed. Reg. 38102. Clearly, the Commission was well aware of the potential burden that could be imposed by unreasonable 50.54(f) information requests. The Commission could have addressed the problem by requiring that 50.109-type backfit analyses be performed for 50.54(f) information requests, either by defining such requests as backfits (thereby requiring preparation of 10 CFR 50.109 backfit analyses unless otherwise exempted under 10 CFR 50.109(a)(4)), or by incorporating the standards of 50.109(a)(3) and the factors that a backfit analysis must address directly into 50.54(f). Significantly, the Commission did not take either of these approaches and instead adopted the requirement for an evaluation balancing the burden of the information request against the safety significance of the issue, even for 50.54(f) requests which required "extensive effort." OGC regards this as compelling evidence that the Commission did not intend 10 CFR 50.109 backfit analyses to be a necessary precondition to issuing 50.54(f) information requests, but instead intended only that an evaluation be made showing whether the burden to imposed by the information request was justified in view of the safety significance of the issue being addressed.

That the 50.54(f) information request in the IPEEE generic letter would have the effect of requiring some licensees to review their plants against criteria more stringent than the licensees' current licensing basis for their plants is not significant, in OGC's view. The purview of 50.54(f) is broader than simply the acquisition of information for the purpose of determining whether the licensee's plant is in conformance with its licensing basis. 50.54(f) also extends to acquiring information for the purpose of determining whether, in light of new information and understanding, licenses should be modified, suspended or revoked because previously accepted standards and requirements are no longer sufficient to assure adequate protection, or that enhancements to adequate protection are currently justified. Once the NRC requires that such licenses be modified, suspended or revoked, there is a backfit and the requirements of 50.109 come into play. Since the IPEEE is an information request, OGC does not regard it as a backfit.

NUBARG asserts that, as a practical matter, performance of the IPEEE is likely to result in backfits, and that the SOC accompanying the 1985 amendment to 50.54(f) indicates that 10 CFR 50.109 backfit analyses should be prepared for those 50.54(f) information requests which are likely to result in backfits. OGC does not agree with NUBARG's reading of the final rule's SOC. It is our view that when the passages quoted by NUBARG are considered in context, the SOC does not clearly establish that a 10 CFR 50.109 backfit analysis should be prepared for extensive information requests which are likely to result in backfits. The full discussion in the SOC states:

> The proposed amendment of 50.54(f) ensures that except for information sought to verify licensee compliance with the current licensing basis for that facility, the reason or reasons for each

information request must be prepared prior to its issuance to determine whether the request is for information already in the possession of the applicant of licensee or instead will require the institution of studies, procedures, or other extensive effort to generate the necessary data to respond. If extensive effort is reasonably anticipated, the request will be evaluated to determine whether the burden imposed by the information request is justified in view of the potential safety significance of the issue to be addressed.

It should be noted that 50.54(f) does not by its terms apply to the review of applications for licenses or amendments. Consequently, if the staff seeks information of the type routinely sought as part of the standard procedures applicable to the review of applications, no analysis will be necessary. If the request is not part of routine licensing review and falls within the purview of 50.109, however, a full analysis is most likely indicated. Requests for information to determine compliance with existing facility requirements or for fact-finding reviews, inspections and investigations of accidents or incidents, however, usually are not made pursuant to 50.54(f) nor are such requests normally considered within the scope of the backfit rule. Amendment of this section also provides for management control and accountability for backfits by requiring that staff evaluations be reviewed by the Executive Director for Operations or his designees prior to the issuance of the request.

The amendment of 50.54(f) should be read as indicating a strong concern on the part of the Commission that extensive information requests be carefully scrutinized by staff management prior to initiating such requests. The Commission recognizes that there may be instances where it is not clear whether a backfit will follow an information request. Those cases should be resolved in favor of analysis. In short, staff management should develop an internal review process to ensure that there is a rational basis for all information requests, even where it is not clear that a backfit will result.

50 Fed. Reg. 38102. OGC believes that the reference in the second paragraph to "a full analysis" of an information request which is not part of a routine licensing review but which is within the "purview of 50.109," is limited to those few situations where a backfit (as defined in 50.109) is included with the "information request". By "within the purview of 50.109," we believe the Commission meant, "otherwise subject to the Backfit Rule." Therefore, OGC does not believe that this passage offers support for NUBARG's contention that 10 CFR 50.109 backfit analyses must be prepared where backfits are likely to follow the 50.54(f) information request.

The third paragraph suggests that "where it is not clear whether a backfit will follow an information request," such cases "should be resolved in favor of analysis." It is not clear whether the "analysis" being referred to is a 10 CFR 50.109 backfit analysis or a 50.54(f) evaluation. However, the next sentence encourages NRC staff management to develop an "internal review process" to ensure rationality of the information request, even when it is "not clear" that a backfit will result. OGC does not read this language as calling for 50.109 backfit analyses for all 50.54(f) information requests likely to result in backfits. Rather, the SOC is simply emphasizing the point that 50.54(f) information requests should be carefully scrutinized in a regularized internal staff process to ensure that the burden of responding to the request is justified whatever the outcome of the information request might be. The "analysis" being referred to in this paragraph, then, is the "evaluation" under 50.54(f) - not the 10 CFR 50.109 backfit analysis.

In sum, we do not agree with NUBARG that a 10 CFR 50.109 backfit analysis must be prepared for 50.54(f) information requests such as the proposed IPEEE generic letter which are likely to result in backfits. The evaluation required by 50.54(f), if properly conducted and documented, should provide a sufficient basis to determine whether the information request is warranted. No change to the existing regulation or the language of the SOC is necessary to reach this result[3/]. However, if the Commission believes that a 50.54(f) evaluation is not sufficiently rigorous for the information gathering activities associated with the IPEEE, then more can be done as a matter of policy.

/s/

William C. Parler
General Counsel

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[3/] A 50.54(f) evaluation was prepared for the proposed IPEEE generic letter. See SECY-90-192, Enclosure 1, Appendix 5.