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February 6, 1990

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention : Docketing and Service Branch

Re: **Revisions to Policy and Procedure for Enforcement Actions (54 Fed. Reg. 50610)**

Dear Mr. Chilk:

On December 8, 1989, the Nuclear Regulatory Commission ("NRC" or "Commission") published in the Federal Register and made effective a revision to the NRC's General Statement of Policy and Procedure for NRC Enforcement Actions (10 C.F.R. Part 2, Appendix C). See 54 Fed. Reg. 50610. Although the revisions are presently in effect, the Commission invited public comments. On behalf of several power reactor licensees,1/ we respectfully submit the following comments.

We recognize that comments on this policy revision will also be filed by the Nuclear Management and Resources Council (NUMARC). We support the comments filed by NUMARC; the comments below should be read as consistent with and complementary to NUMARC's effort.

1/ Alabama Power Company; Arkansas Power & Light Company; Commonwealth Edison Company; Duke Power Company; Florida Power and Light Company; Georgia Power Company; Long Island Lighting Company; Niagara Mohawk Power Corporation; Northeast Utilities; Pacific Gas & Electric Company; Rochester Gas & Electric Corporation; South Carolina Electric & Gas Company; System Energy Resources, Inc.; TU Electric; Washington Public Power Supply System; and Wisconsin Public Service Corp.

1. Summary

The NRC's latest revision to the Enforcement Policy is, we believe, very significant. This modification adds an additional civil penalty adjustment factor for violations involving alleged maintenance deficiencies. Specifically, the revision provides the following:

> The base civil penalty may be increased as much as 50% for cases where a cause of a maintenance-related violation at a power reactor is a programmatic failure. For the purposes of application of this factor, a cause of the violation shall be considered to be maintenance-related if the violation could have been prevented by implementing a maintenance program consistent with the scope and activities defined by the Revised Policy Statement on the Maintenance of Nuclear Power Plants. In assessing this factor, consideration will be given to, among other things, whether a failure to perform maintenance or improperly performed maintenance was a programmatic failure. The degree of the programmatic failure will be considered in applying this factor.

We oppose this revision for several reasons.

First, the modification appears to represent an effort by the Commission to, at least temporarily, circumvent its previous sound decision to suspend the proposed maintenance rulemaking. New maintenance requirements have not been justified from a safety perspective. The Commission should continue to defer action on the maintenance issue until a technical justification has been established.

Second, the revision to the Enforcement Policy will effectively impose new substantive requirements on licensees without the benefit of the prior notice and comment procedures mandated by the Administrative Procedure Act ("APA") or the prior analysis compelled by the NRC's backfit rule.

Third, the Enforcement Policy modification is unbounded with respect to the scope of "maintenance" problems that could be considered for escalation and therefore gives extremely broad sweep to this new escalation factor. This would almost inevitably lead to escalation decisions that are arbitrary and/or selectively applied.

Fourth, the modification provides no guidance to the NRC Staff on how to determine that "maintenance" was a root cause of

a violation and establishes no objective criteria for applying the factor. This also could lead to extremely subjective enforcement decisions.

Fifth, the modification raises the question as to the proper definition of a "programmatic" failure and could enable the NRC Staff to evaluate any number of violations greater than two in the aggregate and deem them "programmatic." In addition, this raises the issue of whether the NRC Staff will use low severity level violations to establish a single escalated violation, and then use the same violations to increase the base civil penalty under the new escalation factor.

Finally, escalation factors based on root cause are contrary to sound policy. This escalation factor could unnecessarily color licensees' own root cause analyses. In addition, the Commission's action potentially heralds future adjustment factors aimed at other specific functional areas, depriving licensees and the NRC of the discipline inherent in proceeding to address new requirements through generic regulations.

For these reasons, we respectfully submit that the NRC should rescind this revision to the Enforcement Policy.

2. Discussion

The Commission's Enforcement Policy modification could result in increased civil penalties in many different cases, involving many different types of violations and many different substantive requirements. The revision raises a number of significant legal and policy concerns.

First, the modification appears to represent an effort by the Commission to, at least temporarily, revise its prior decision on the maintenance issue and circumvent the normal rulemaking process. New maintenance requirements have not yet been justified from a safety perspective.

In the Statement of Consideration, the NRC claims support for its modification in the "decision to hold in abeyance the rulemaking on maintenance."2/ However, contrary to the NRC's reading of this factor, we believe that this previous decision argues against the modification. Given the Commission's decision to hold off on a maintenance rule, based in part, on the "industry's commitment to improving plant maintenance,"3/ we are troubled that the agency is now bypassing that decision through

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2/ 54 Fed. Reg. 50610.

3/ See Memorandum, S. Chilk to V. Stello, Jr., dated June 26, 1989.

its Enforcement Policy. At a minimum, enforcement should not begin until after the maintenance initiatives have been implemented and accepted after the 18-month trial period.

Furthermore, although the Commission suspended development of its proposed rulemaking (originally published at 53 Fed. Reg. 47822) in June 1989 due to acknowledged improvements by industry,4/ in issuing the Enforcement Policy revision the NRC asserts that further improvements in maintenance-related activities are needed. We believe that this premise is not well-supported by the enforcement results associated with the NRC's ongoing maintenance team inspections. Our analysis of those programmatic inspections indicates that there have been no escalated enforcement actions resulting from maintenance team inspections -- hardly a substantial indictment of industry's maintenance practices.5/

Second, the Enforcement Policy revision will effectively impose substantive requirements on licensees. Licensees will be required to meet the "standards" of the Revised Maintenance Policy6/ or face increased civil penalties. This backhand approach to regulation is inconsistent with the APA.7/ The APA specifies that new agency requirements may be imposed only through rulemaking or formal order. Rulemaking involves at least prior notice and opportunity for public comment.8/ Orders in individual cases must be backed by adequate technical justification.9/

The APA, in Section 551(4), agency "rules" in broad terms:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the

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4/ See id.

5/ In addition, the NRC's imposition of substantive maintenance requirements could force licensees to intensify attention to maintenance at the expense of other safety significant areas.

6/ 54 Fed. Reg. 50611 (1989).

7/ 5 U.S.C. § 551 et seq. (1982 & Supp. IV 1986).

8/ 5 U.S.C. § 553; Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 523-24 (1978).

9/ 5 U.S.C. § 554; see also 10 C.F.R. § 2.204 and Part 2, Appendix C, § V.C.

> organization, procedure, or practice requirements of an agency . . . .

The agency cannot escape the procedural requirements of the APA simply by calling a rule an "enforcement policy."

When confronted with an agency communication such as a modification to agency policy, courts will specifically look behind the label attached to the agency statement to determine whether in reality it constitutes a substantive rule. See Batterton v. Marshall, 648 F.2d 694, 702-04 (D.C. Cir. 1980); Chamber of Commerce of United States v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980). If the agency statement establishes binding norms or substantially affects the rights or obligations of private parties, it constitutes a substantive rule. See, e.g., Morton v. Ruiz, 415 U.S. 199, 232 (1974); Batterton, 648 F.2d at 702; see also Pacific Gas & Electric Company v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). Unless promulgated in accordance with the APA rulemaking procedures, such statements are legally defective. See Batterton, 648 F.2d at 710 (Department of Labor method of calculating unemployment statistics held to constitute a substantive rule); Pickus v. United States Board of Parole, 507 F.2d 1107, 1113-14 (D.C. Cir. 1974) ("guidelines" for parole of federal prisoners held to constitute a substantive rule).

These cases make clear that when informal agency statements cross the line from setting only guidance or policy to establishing new substantive rules, the procedural requirements of the APA must be followed. The present modification to the Enforcement Policy clearly falls into the latter category, as it establishes enforcement sanctions for failure to meet NRC "policy" on maintenance -- an area where there never has been any NRC regulation. Accordingly, maintenance requirements, if justified at all, should be addressed under the APA rulemaking requirements.

Similarly, the NRC's own backfit rule, 10 C.F.R. § 50.109 (1989), requires that new rules or new Staff positions be formally justified in accordance with the backfitting standard. The NRC no doubt believes that its "mere policy" is not subject to the backfit rule. However, as discussed above, the revision to the Enforcement Policy constitutes a new Staff position on maintenance and effectively establishes new substantive requirements. The NRC has, however, followed none of the procedures required by the backfit rule for the maintenance program requirements. This end run around the backfit rule deprives both licensees and the NRC Staff of the discipline provided by the rule.

Third, we are troubled by the mechanism that would be utilized under the revised policy to determine what constitutes a "maintenance" problem. As the new adjustment factor states,

supra, a "violation shall be considered to be maintenance-related if the violation could have been prevented by implementing a maintenance program consistent with the scope of activities defined by the Revised Policy Statement on the Maintenance of Nuclear Power Plants." Not only does this raise the issue that the Commission is imposing the regulatory "standards" of its Revised Maintenance Policy through enforcement action (part of the concern discussed above), but it also brings into question whether the definition in the Revised Maintenance Policy Statement is appropriately bounded in any technical sense.

In this latter regard, we believe that there are at least two problems with the definition in the Revised Maintenance Policy. One involves the concept that maintenance should "prevent the degradation or failure" of systems or components. Contrary to the implications of this concept, maintenance can at best only minimize degradation and/or failure. The sweeping definition suggested by the Revised Maintenance Policy seems to invite escalation for alleged maintenance problems in practically every enforcement case.

The other point, perhaps even more disturbing, is related to the broad scope of the definition, which includes "supporting" activities and functions. A brief review of the seven functions listed in the Revised Maintenance Policy10/ makes it immediately clear that just about any activity can be deemed a "supporting function" to a maintenance program (e.g., maintenance management). This, therefore, also gives extremely broad sweep to the new enforcement escalation factor. This will almost inevitably lead to escalation decisions that are arbitrary and/or selectively applied.

Our fourth comment is related to the third above. Specifically, we fail to see how the NRC Staff will be able to determine with precise clarity that maintenance was the root cause of a violation, as it is required to do by the new adjustment factor. The modification to the Enforcement Policy does not include any objective criteria to be used in applying the factor and does not provide any guidance for the Staff in how to isolate maintenance-related violations from other types of violations. Since the definition and potential interpretation of "maintenance" is so broad, there is no conceptual or practical method for the Staff to use to determine whether a violation is maintenance-related. Without such standards, and with the benefit of 20-20 hindsight, maintenance could be alleged to be a root cause of most, if not all, events at a nuclear power plant. This creates the potential that practically all enforcement actions could be arbitrarily escalated under this factor.

10/ 54 Fed. Reg. 50612-13.

Indeed, in many situations, no subjective criteria exist for establishing specific maintenance requirements for a particular component. In those circumstances, a licensee may draw on expertise in specific disciplines (e.g., fire protection, electrical equipment qualification) to assure continued compliance with the substantive requirements of the particular discipline. Yet, the Staff could find that a "maintenance-related" violation exists where the Staff simply disagrees with the application of discipline-specific criteria in establishing maintenance standards. Unfortunately, experience has taught that in the absence of clear direction for characterizing a violation, the Staff will simply "pick and choose" its characterization of a violation to fit its effort to aggregate violations or show a programmatic problem, irrespective of the actual root cause.

Fifth, the modification to the Enforcement Policy raises the question as to what constitutes a "programmatic" failure. The Enforcement Policy has never defined this concept. The Enforcement Policy has long provided that "[i]n some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations" (emphasis supplied).11/ It is this mechanism that has served to define the term "programmatic." Thus, without a clear definition of the term, any number of violations greater than two could be, and have been, deemed programmatic in nature. We do not believe that this is a sufficiently principled, or technically defensible, basis for defining maintenance problems as "programmatic." Misapplication of the "programmatic" determination is particularly likely where the nature of the violations involved is not well-defined in the first instance.

In this regard, the Enforcement Policy revision also raises the issue of whether the NRC Staff will not only use low severity level maintenance-related violations to establish a single escalated violation, but then use the same violations to increase the base civil penalty under the new escalation factor. This would constitute a kind of enforcement "double counting" that we believe to be inappropriate.

For example, in a case where a set of components is not maintained in strict adherence to the licensee's maintenance standards for those components (e.g., where the licensee determines that a scheduled action can be delayed and the Staff later disagrees with that determination), the Staff conceivably could find a "maintenance-related" violation (see discussion above) and aggregate the violation to a "programmatic" problem because more than two components were involved. This could result in an increased severity level violation, an increased base civil penalty, and then civil penalty escalation. This

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11/ 10 C.F.R. Part 2, Appendix C, Section III (1989).

result may follow irrespective of the actual safety significance of the condition.

Finally, the Commission's action potentially heralds future civil penalty adjustment factors aimed at other specific functional areas. The logical extension of this would be a specific adjustment factor each time the NRC identifies a "hot" root cause. As discussed above, procedurally this strategy deprives the NRC and the licensees of the process and discipline inherent in the rulemaking procedures.

Escalation based on root cause is also inconsistent with the existing generalized Enforcement Policy escalation factors. This would clearly create overlapping escalation considerations. For example, substantive deficiencies in a licensee's program should be considered in the initial violation and the severity level determination. If they are again considered in the escalation factors, licensees will be penalized several times over for the same deficiency as discussed above.

In addition, escalation specifically based on root cause is contrary to sound policy. This policy revision creates an artificial factor that could potentially bias a licensee's own root cause determination regarding a violation. This will undermine the effectiveness of corrective actions -- a result contrary to one of the basic objectives of the NRC's Enforcement Policy.

3. Conclusion

For the foregoing reasons, we urge the Commission to rescind this revision to the Enforcement Policy. As always, we greatly appreciate this opportunity to provide input into the enforcement process.

Respectfully submitted,

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