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October 4, 1982

(48)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR-50
(47 FR 33980)

Attn: Docketing and Service Branch

Re: Proposed Rule on Fitness for Duty of Personnel
with Unescorted Access to Protected Areas

Dear Sir:

The following comments are submitted on behalf of
Arkansas Power & Light Company, Northeast Utilities and
Texas Utilities Generating Company. They are in response
to the Commission's notice of a proposed rule which
appeared in the Federal Register on August 5, 1982 (47
Fed. Reg. 33980). This rule would add a new section to 10
C.F.R. § 50.54 to require that NRC licensees with an
operating license issued under 10 C.F.R. § 50.21(b) or §
50.22 establish, document and implement written procedures
to insure that, while on duty, licensee and contractor
personnel with unescorted access to protected areas are
not:

- (i) Under the influence of alcohol;
- (ii) Using any drugs that affect
their faculties in any way con-
trary to safety; or

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add: E. Merschoff
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- (iii) Otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any [way] contrary to safety.

47 Fed. Reg. 33981 (1982).

While we commend the Commission's concern in the area of employee "fitness for duty," and agree that drug and alcohol abuse by licensee or contractor personnel while on duty should not be tolerated, we disagree with the Commission's apparent conclusion that adoption of this proposed rule would provide greater assurance of safe and reliable power plant operation. Specifically, as pointed out below, the Commission has failed to demonstrate convincingly that the imposition of industry-wide regulations is necessary. It has not shown that the ongoing programs of individual licensees to gauge employee "fitness for duty"--which include provisions for detecting instances of drug and alcohol abuse--are inadequate.

Absent such a showing, we submit that allowing NRC licensees to continue to monitor the behavior of licensee and contractor employees voluntarily, without the interference of the NRC, will provide a more effective, more appropriate, and much less burdensome way of dealing with this potential problem than imposing mandatory generic regulations. Accordingly, we oppose adoption of the proposed rule. Recognizing that the Commission may neverthe-

less determine that such a rule is needed, however, we have also responded to several aspects of the proposed rule on which the NRC has solicited public comment.

I. Lack of Demonstrated Need for Proposed Rule

The stated basis for this proposed rule is the Commission's concern that personnel could become "unfit for duty due to the effects of substances such as alcohol or drugs and, thereby, could perform actions that might adversely impact the health and safety of the public" (47 Fed. Reg. 33980). In support of the rule, the Commission cites only its finding that "the number of reported drug-related incidents in which licensee or contractor employees were arrested or terminated has increased substantially."¹ This finding does not provide a sufficient basis for establishment of the proposed rule.

In the first place, without a more informative description of these incidents (i.e., how many involved operating personnel? How many involved possession of alcohol or drugs as opposed to actual use on the job? How many involved regular employees of the licensee as opposed to temporary workers brought on-site for particular

¹ The "IE Information Notice No. 82-05: Increasing Frequency of Drug-Related Incidents" (March, 1982), reports that the number of such incidents during the last five years is as follows: 1977 (2), 1978 (none), 1979 (1), 1980 (5), 1981 (12). These reported incidents are said to "implicate a range of licensee or contractor personnel, including personnel in construction, operations, and security."

jobs?), it is difficult to evaluate their seriousness.² This lack of specific detail is particularly troublesome since the Commission apparently gives these statistics such great weight. Moreover, the Commission has not supplemented this finding with any specific evidence that this increase in arrests and terminations is the result of inadequate licensee controls. An equally plausible interpretation of these statistics is that existing, voluntary licensee programs to detect the possession or use of drugs and alcohol by employees on duty have been increasingly effective.

In its recent "Survey of Industry and Government Programs to Combat Drug and Alcohol Abuse" (NUREG-0903) (June, 1982), the Drug Abuse Task Force of the Office of Inspection and Enforcement (IE) suggests that a generic approach to this issue is needed because IE "has received information which suggests that some utilities in the nuclear industry may not have in place effective programs to address the problem of drug or alcohol abuse among their employees" (NUREG-0903, p. I-1) (emphasis added). We do not believe that such unsubstantiated allegations

² NRC documents made available under our Freedom of Information Act (FOIA) request indicate that at least three of the twelve 1981 arrests were for offsite possession or use of drugs. At least two other arrests were for drug sales rather than use. (Complete information on the nature of each of the 1981 arrests was not included in the FOIA documents.)

justify the imposition of a generic regulation on employee "fitness for duty," particularly since the survey revealed that all but one of the utilities surveyed had a "clearly-defined policy regarding work-related use or possession of drugs or alcohol" (NUREG-0903, p. II-4). (The remaining utility apparently had no written policy on this subject).

In particular, the Task Force found that all of the utilities surveyed screened new employees by using background investigations and psychological testing (supplemented in some companies by polygraph tests), had programs which included supervisory training in recognizing aberrant or abnormal behavior and continuing supervisor observation of employee behavior and performance, sponsored employee assistance or rehabilitation programs, and conducted searches of personnel, packages and vehicles as required by the NRC. Some companies also conducted additional exit searches of personnel, packages and vehicles, used dogs trained to sniff drugs, employed private or in-house investigators, and monitored chronic absenteeism. Other than suggesting that utilities should do more to "heighten employee awareness" of the dangers of alcohol and drug abuse, the report does not suggest how any of these voluntary programs could be improved. In our experience, such extensive employee monitoring techniques are

representative of the nuclear utility industry in general. They serve to emphasize that comprehensive programs already exist to evaluate the behavior of those classes of employees with which the Commission is concerned.

The Task Force acknowledges in its survey that time "did not permit the gathering of supporting data to determine the quantitative effectiveness of the programs reported on, or of drug and alcohol programs of the nuclear industry in general" (NUREG-0903, p. iii). In the absence of such data or of any evidence indicating that ongoing licensee efforts in this area are ineffective, the Commission should not require that its power reactor licensees also implement regulatory controls such as those proposed here.

Equally unconvincing are other NRC documents, provided pursuant to our Freedom of Information Act request, which allegedly demonstrate the need for this rule. After reviewing this material--which consists largely of reports on the adverse effects of alcohol upon job performance and human motor function, and internal NRC correspondence regarding early drafts of the proposed rule--we have found in it no additional information which lends credence to the Commission's position that a "fitness for duty" regulation is called for. On the contrary, several internal NRC memoranda reveal the doubts (with which we concur) of

various Staff members as to the wisdom of such a rule since, as one Staff member recognized, "supervisors at the plants . . . already are performing the same function on behalf of the licensees without any encouragement from us."³ Another Staff official, warning that the Commission appeared to be "overreacting" by considering "an overly prescriptive program," added that

I believe the Zion investigation demonstrated . . . [that] drug abuse and drug use problems at operating nuclear power plants are minimal among those nuclear power plant personnel responsible for key decisions and actions⁴

Finally, the fact that the Commission is currently considering similar concerns in another proposed rule further undermines the need for this regulation. As described in NUREG-0903, the proposed "Access Authorization" rule (10 C.F.R. § 73.56) would provide a means for determining the reliability and trustworthiness of individuals with unescorted access to or control over special nuclear material, by requiring background investi-

³ Memorandum to E. W. Merschhoff, Office of Nuclear Regulatory Research, Human Factors Branch, from L.P. Crocker, Licensee Qualification Branch, Division of Human Factors Safety, on Proposed Rule on Alcohol and Drug Abuse, May 11, 1981.

⁴ Memorandum to Richard C. DeYoung, Director, Office of Inspection and Enforcement, from Ronald C. Haynes, Regional Administrator for Region I, on Utility Programs Dealing with Drug and Alcohol Abuse, April 19, 1982.

gation, psychological assessment, and continual behavioral observation of such individuals. We disagree with the Commission's statement that the "different orientations" of this regulation and the "fitness for duty" rule mandate the establishment of a separate regulatory basis for each. On the contrary, if it is determined that employee "fitness for duty" does indeed warrant Commission involvement, it would appear much more practical to address all of the NRC's concerns in the Access Authorization regulation, which the Commission has been considering and refining for the past several years. (We submit, however, that neither employee reliability nor employee "fitness for duty" are concerns which mandate Commission regulation. See section II, below.)

In sum, absent a more conclusive determination of need, the Commission should not promulgate the proposed rule. Such an approach would reinforce the NRC's announced intention to control the issuance of new requirements and backfitting requirements applicable to existing plants, to set priorities among proposed safety requirements, and to identify those which can reasonably be deferred or dropped entirely.⁵

⁵ Remarks of Chairman Palladino before the Atomic Industrial Forum Annual Conference, December 1, 1981.

II. Desirability of Monitoring Employee Fitness for Duty
by Non-Regulatory Means

Our opposition to this proposed rule is based not only upon the Commission's failure to demonstrate the need for such a regulation, but also upon our conviction that licensee programs designed to monitor employee "fitness for duty" and to detect drug or alcohol abuse are best carried out on an individual utility basis as they now are, without the involvement of the NRC. This was the position taken by most of the utilities interviewed by the IE Drug Abuse Task Force:

Although some [utilities] felt that more uniformity and minimum standards were needed for industry screening programs, most would prefer to achieve these goals through nonregulatory means such as greater industry compliance with a revised ANSI Standard N18.17.⁶

Allowing NRC licensees to continue to control potential employee problems with drug and/or alcohol abuse by non-regulatory methods is appropriate for several reasons. First, adopting this approach rather than implementing an industry-wide rule would satisfy the Commission's goal of assuring employee "fitness for duty" without imposing unnecessary additional regulatory burdens on licensees. Utilities which operate nuclear facilities do not need additional NRC regulations to make them acutely aware of

⁶ NUREG-0903, p.B-1.

the need to monitor the behavior of licensee and contractor employees with unescorted access to protected areas. On the contrary, the findings of the IE Task Force reported in NUREG-0903 indicated that those licensees surveyed have voluntarily instituted appropriate controls to continuously evaluate employee "fitness for duty" and to respond to aberrant behavior as a matter of sound operating practice. In view of these licensees' demonstrated willingness and ability to deal with this problem without NRC requirements, the imposition of such generic requirements now would be redundant. It would, moreover, require unnecessary expenditures of time and money on the part of utilities whose staff and resources are already heavily burdened with more significant regulatory requirements.⁷

In addition, as pointed out by several of the utilities interviewed by the IE Task Force on Drug Abuse,⁸ any attempt to impose a regulatory framework upon existing

⁷ In this regard, it should be pointed out that the value-impact analysis prepared by the Staff gives insufficient consideration to the significant licensee costs (in terms of time, money and resources) which implementation of this proposed rule would entail. See NRC Value/Impact Statement for Proposed Action to Assure Personnel with Unescorted Access to Protected Areas Are Not Under the Influence of Drugs or Alcohol or Otherwise Unfit for Duty (hereafter cited as NRC Value/Impact Statement).

⁸ See NUREG-0903, p. II-2.

licensee efforts could have an adverse effect upon the morale of licensee employees, many of whom already feel beleaguered by post-TMI requirements and a perception of public distrust of the industry. A generic regulation on employee fitness could be interpreted as evidence of a lack of trust by the Commission. This in turn could exacerbate current licensee difficulties in hiring and retaining qualified personnel.

In sum, we submit that the proposed rule should not be adopted because the NRC has failed to make a sufficient showing of need to justify its promulgation. Unsubstantiated allegations that "some" nuclear utilities "may" not have effective programs for detecting and dealing with drug or alcohol abuse among licensee or contractor employees are not enough to warrant the considerable licensee burden which an industry-wide rule would impose. This is particularly true when these allegations are not supported by the findings of the NRC survey of nuclear utility programs in this area (NUREG-0903). If problems exist at individual utilities, then those utilities should be dealt with on a case-by-case basis.

This inconclusive demonstration of need for regulatory controls by the NRC, coupled with the obvious merits of allowing continuation of the current voluntary approach to this problem, provide strong support for our

position that this proposed rule should not be implemented. Furthermore, by its proposal that each licensee be allowed to develop specific procedures which consider "fairness and due process" to employees as well as any conditions or circumstances unique to the company or plant, the Commission itself acknowledges that this is a facet of utility personnel management which is best left to the affected utilities, and, if necessary, to law enforcement officials working with the licensees. If the NRC continues to feel that its concerns will not be met by this approach, then at most the Commission should issue a general statement of policy delineating NRC perspectives on fitness for duty of employees with unescorted access to protected areas.⁹

III. Comments on Proposed Structure of Rule

In the event that the Commission decides to adopt a rule regarding the "fitness for duty" of designated licensee and contractor employees regardless of the considerations discussed above, we wish to submit the following comments on the proposed nature and scope of regulation.

⁹ This alternative approach was briefly considered by the Staff in the NRC Value/Impact Statement.

A. Establishment of Specific Fitness Criteria

We do not believe that detailed fitness criteria should be established for nuclear plant personnel. Some degree of guidance from the Commission would of course be needed as to what it means by "fitness for duty," such as the definition included in the proposed revision of § 50.54. However, any attempt to promulgate more specific criteria--such as the specific blood alcohol limit, required period of abstention from alcoholic beverages and periodic medical recertification used by the Federal Aviation Administration (FAA)¹⁰--would, as the NRC Staff has pointed out, "be premature for application to nuclear facilities since no studies have been performed to support quantitative restrictions on nuclear facility personnel."¹¹

The imposition of such exact regulatory standards would also be inconsistent with the Commission's desire to "allow each licensee to develop procedures which take into consideration not only fairness to and due process for its employees, but also any conditions or circumstances unique to its facility." (47 Fed. Reg. 33980). As the Commission has recognized, individual licensees are in a much better position than the NRC to draft, implement and enforce

¹⁰ See 14 C.F.R. § 91.11; 14 C.F.R. § 67.

¹¹ NRC Value/Impact Statement, p. 3.

effective and appropriate standards of behavior for licensee and contractor employees, and they should be allowed to do so with minimal Commission involvement. In addition, any such controls and procedures established by licensees should be presumed to be adequate and reasonable, and should not be subject to "second-guessing" by the NRC Staff, either at headquarters or in the regional offices.

Finally, we oppose establishment of specific fitness standards because of the administrative problems which they would entail. First, it would be difficult to develop workable criteria equally applicable to all of the types of licensee and contractor employees with unescorted access to protected areas. The fact that such a broadly worded rule has been proposed by the Commission suggests that the Staff recognizes this difficulty. In addition, enforcement of such regulatory standards in addition to the individual company standards already in use would create confusion, cause delays, and increase reporting and recordkeeping requirements.

B. Establishment of Specific Implementation Methods

Here again, we suggest that no particular methods of implementing licensees' fitness for duty rules be mandated by the Commission. As is the case with specific fitness criteria, individual utilities are in a much stronger

position to make such determinations since they are more aware of factors such as their company's particular needs and sensitivities, the relative success of various procedures used in the past, any specific company policies which should be addressed, and the peculiarities of state and local law in their location. For instance, certain screening and search procedures might conflict with state law and individual utilities are in the best position to structure their programs in accordance with state law.¹² In sum, we feel strongly that this is the type of individual management decision in which the Commission should not become involved in detail.

Moreover, the imposition of certain implementation methods such as breath tests, blood alcohol level tests or urine tests on a routine basis (i.e., without probable cause for doing so) would probably have such a serious effect upon employee morale that their use would be counter-productive.¹³ Such draconian measures by the Com-

¹² It is not clear whether the Commission has reviewed the language of the proposed rule for possible conflicts with state law. Any inconsistencies with state law should of course be resolved by the Commission before issuance of a final rule.

¹³ This concern was voiced by several Staff officials, one of whom noted that an overly-prescriptive NRC rule "will probably lead to the kind of overkill that we encounter when the NRC gets involved in non-nuclear socially oriented programs that are not directly
(footnote continued)

mission would be unwarranted, and would almost certainly create resentment and frustration among licensee employees. Their use might also trigger legal actions by the affected employees.

C. Scope of the Proposed Rule

If the NRC adopts a regulation on "fitness for duty," we believe that it should apply to "all personnel with unescorted access to protected areas," as currently proposed. (We assume that the term "protected area" would be defined as it is in 10 C.F.R. §73.2.) Limiting the scope of the rule to individuals with access to vital areas would be more difficult to implement and would create confusion and delay in routine plant operation.

In response to Commissioner Gilinsky's query, we urge that any regulation imposed on this subject be made applicable to NRC employees as well as licensee and contractor employees. Failure to require NRC employees to satisfy "fitness for duty" standards along with other

(footnote continued from previous page)

related to nuclear safety, such as security and safeguards." Emphasizing his concern over "the rapidly deteriorating morale problem" among utility employees, this Staff member concluded that routine measures such as the use of drug detecting dogs, polygraphs, and chemical and biological screening tests would "not only push many low morale operators over the brink into resignation, but are suggestive of a police state mentality and threats to Constitutional rights of privacy." Memorandum on NUREG-0903 to R. C. DeYoung, Director, NRC Office of Inspection and Enforcement, from R. H. Engelkin, Regional Administrator for Region V, April 29, 1982.

individuals with unescorted access to protected areas could engender the resentment of licensee personnel, and would leave gaps in the regulatory framework that the Commission feels is necessary to assure "fitness for duty" of personnel with access to protected areas.

D. Suggested Language of Rule

In accordance with the above comments, appropriate changes to the Commission's regulations are provided below.

A new section (2) should be added to 10 C.F.R.

§ 0.735-44 (Scandalous Conduct), as follows:

§ 0.735-44(2)(a) No employee shall act or attempt to act in his official capacity while

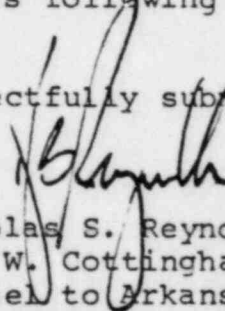
- (i) Under the influence of alcohol;
- (ii) Under the influence of any illegal controlled substance;
- (iii) Under the influence of any prescribed or over-the-counter medication that affects their faculties in any substantial way contrary to safety; or
- (iv) Otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety.

§ 50.54 (x)(1) Each licensee with an operating license issued under § 50.21(b) or § 50.22 shall establish, document and implement written procedures designed to provide reasonable assurance that, while on duty, personnel employed by the licensee or by any contractor who have unescorted access to protected areas, are not

- (i) Under the influence of alcohol;
- (ii) Under the influence of any illegal controlled substance;
- (iii) Under the influence of any prescribed or over-the-counter medication that affects their faculties in any substantial way contrary to safety; or
- (iv) Otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety.

(2) Each licensee shall maintain the written records of each employee covered by these procedures for the duration of his employment and for an additional two years following cessation of that employment.

Respectfully submitted,



Nicholas S. Reynolds
Anne W. Cottingham
Counsel to Arkansas Power &
Light Company, Northeast
Utilities and Texas Utili-
ties Generating Company



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October 4, 1982

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Mr. Samuel J. Chilk, Secretary
 Office of the Secretary of the Commission
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555
 Attention: Docketing and Service Branch

OFFICE OF SECRETARY
 DOCKETING & SERVICE
 BRANCH

Subject: Proposed Rule, Personnel With Unescorted
 Access to Protected Areas; Fitness for
 Duty, 47 FR 33980 (August 5, 1982)

DOCKET NUMBER
 PROPOSED RULE

49
 PR-50

47 FR 33980

Dear Secretary Chilk:

The Commonwealth Edison Co. submits the following comments in response to the Subject Proposed Rule.

We support the general objectives of the proposed rule and share the NRC's concern that personnel with unescorted access to protected areas of commercial and industrial facilities licensed under 10 CFR 50.22 not be under the influence of alcohol or drugs or otherwise unfit for duty. Because of our concern, we have developed programs to address potential problems in this area. These programs include company policy statements on the possession and use of alcohol and drugs, background investigations, psychological tests, behavioral observation programs and employee assistance programs.

NRC research, conducted by an NRC Task Force and issued as NUREG-0903 ("Survey of Industry and Government Programs to Combat Drugs and Alcohol Abuse"), has indicated that the utilities examined are keenly aware of the potential threat of drug and alcohol abuse, have developed clear, firm policies and are taking disciplinary action under these policies when warranted. Additionally, the Continual Behavioral Observation Program of the as-yet-unissued Access Authorization Rule (Proposed 10 CFR 73.56) which would require licensees to establish continual behavioral observation programs (designed to have supervisors detect changes in an individual's on-the-job performance, judgement level or behavior) would address many of the concerns upon which this proposed rule focuses. Consequently, we believe that if the Commission determines that action must be taken in this area, the most cost-effective and practical approach would be the issuance of a general policy statement, rather than a rule.

Although we believe that Commission action in this subject matter area should not presently extend beyond the issuance of a general policy statement, we would like to call attention to several features of the proposed rule which we believe present serious problems.

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 add: E. Merschoff
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The proposed rule states, in part, that

Each licensee with an operating license issued under 10 CFR 50.21(b) or 10 CFR 50.22 shall establish, document, and implement adequate written procedures designed to ensure that, while on duty, the licensee's and its contractors' personnel with unescorted access to protected areas are not--

- (i) Under the influence of alcohol;
- (ii) Using any drugs that effect their facilities in any way contrary to safety; or
- (iii) Otherwise unfit for duty because of mental or temporary physical impairments that could effect their performances in any way contrary to safety..." (Emphasis added)

1. The proposed rule would require a licensee to "ensure" that personnel granted unescorted access are fit for duty. However, to guarantee (or ensure) that each individual who enters the protected area is in all regards fit for duty is manifestly impossible. For instance, the detection of drugs in the human body can only be established with any degree of certainty through laboratory analysis of body fluids. It is clearly unreasonable to require analysis of body fluids each time an individual enters the protected area. It is equally unreasonable, and in fact impossible, to guarantee that an individual is not otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety. As presently worded, the proposed rule would place upon licensees a responsibility which is impossible to fulfill. Consequently, it should not be

adopted as presently written. If the Commission decides to proceed with issuance of a rule, and that rule is in the form of a general descriptive regulation, that regulation's objectives should be reasonably attainable. Therefore, the word "ensure" should be deleted from paragraph (x)(1) and the words "provide reasonable assurance" substituted therefor.

2. Section 50.54(x)(1)(iii) of the rule addresses the issue of personnel "otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety." Since implementation of this section would most practically be accomplished by means of a program of continual observation by personnel supervisors, it is unnecessary to include this section in the rule for two reasons. First, a continued observation program is currently required under NUREG 0220 ("Interim Acceptance Criteria for a Physical Security Plan for Nuclear Power Plants"), which interprets 10 CFR 73.55. This NUREG document references ANSI Standard ANSI N18.17(1973) (which requires a continued observation program) as a minimum standard to be met by licensees. Second, the Continual Behavioral Observation Program section of the yet-to-be issued Access Authorization Rule (Proposed 10 CFR 73.56) would in its current form (or with slight modification) appear to accomplish the objectives of this part of the proposed rule. Consequently, should the Commission proceed with issuance of a rule along the lines proposed, it should delete subparagraph (iii), recognizing that current requirements as specified in NUREG 0220, as well as a future Access Authorization Rule, cover the same subject matter.
3. We do not recommend the expansion of the proposed rule to cover NRC inspection personnel, although we believe that all personnel granted unescorted access should be fit for duty. The NRC must assume primary

responsibility for assuring that personnel other than licensee and contractor personnel are fit for duty and we are concerned that expanding the proposed rule to include NRC inspection personnel would place the utility industry in the untenable position of policing inspectors. However, the fitness for duty of personnel other than licensee and contractor personnel is unquestionably an important issue and, granting that the NRC is primarily responsible for this and should formulate a fitness for duty program for these personnel, we would be happy to cooperate and assist the NRC with its program in any way. We do, however, recommend that the NRC certify to individual licensees, in a manner similar to the present procedure for granting unescorted access for NRC personnel under 10 CFR 73.55, that these personnel are fit for duty.

4. Section 50.54(x)(2) of the proposed rule would require that each licensee "maintain the written records of these procedures for the life of the plant." We believe that, if this provision is intended to apply to security records relating to individuals, no valid purpose is served by maintaining such records for so long a period of time. We would propose that the retention period be similar to that required for security records required to be maintained by NUREG 0220 ("Interim Acceptance Criteria for a Physical Security Plan for Nuclear Power Plants"), i.e., a period of at least one year. Under the practical utility standards of the Paperwork Reduction Act, 44 USC 3501 et seq., we do not see the usefulness of such records beyond that time.

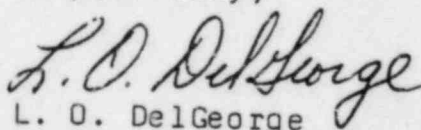
Furthermore, we believe that the licensee should not maintain a record of each employee who has participated in a drug awareness training program, nor should such documentation be required on each individual employee with unescorted access privileges.

We believe, for two reasons, that if the NRC decides to proceed by promulgating a regulation and decides to include detailed specifications in that rule that it would be useful and productive for NRC staff to first meet with knowledgeable industry security personnel. First, the issues involved in developing a rule containing specific, detailed, and yet flexible, requirements are complex. Secondly, there has been no previous formal or informal NRC-industry dialog on the issues covered by this proposed rule. The purpose of such a meeting (or series of meetings) would be to explore the nature, extent, and most effective means of dealing with the issues addressed by this proposed rule. We would be pleased to participate in a Task Force to discuss current company fitness for duty policies and programs, as well as to aid in the evaluation of specific program requirements.

Finally, because this rule has been proposed in general terms, without details as to specific requirements, we feel that if the NRC determines that a rule containing specific program requirements is appropriate, it should reformulate the rule and reissue it to the industry for comment.

We appreciate having been given the opportunity to comment.

Respectfully,



L. O. DelGeorge
Director of Nuclear Licensing



ROCHESTER GAS AND ELECTRIC CORPORATION • 89 EAST AVENUE, ROCHESTER, N.Y. 14649

JOHN E. MAIER
VICE PRESIDENT

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September 30, 1982

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Mr. John C. Hoyle
Acting Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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Attention: Docketing and Service Branch

DOCKET NUMBER
PROPOSED RULE PR-50

(47 FR 33980)

Dear Sir:

On August 5, 1982, the Nuclear Regulatory Commission published in the Federal Register a notice of proposed rule-making entitled "Personnel With Unescorted Access to Protected Areas; Fitness For Duty." The proposed rule would add a new paragraph, (x), to 10 CFR § 50.54, "Conditions of Licenses." This letter is submitted by Rochester Gas and Electric Corporation ("RG&E") in response to the Commission's request for comments on the proposed rule.

RG&E has long recognized the importance of having its personnel fit for the duty to which they are assigned -- be it at the Ginna Nuclear Plant or elsewhere on the RG&E system. Consequently, the Company has in place a corporate program designed to provide reasonable assurance that unescorted access to protected areas is denied to persons found to be under the influence of alcohol or drugs or otherwise unfit for duty. The salient features of this program are:

- (1) A strong corporate policy which imposes disciplinary sanctions (up to and including termination) on any employee who drinks alcoholic beverages or uses drugs during working hours; brings alcoholic beverages or drugs onto Company premises, including vehicles and work sites; reports to work under the influence of alcohol or drugs; or allows anyone under their supervision to work while under the influence of alcohol or drugs.
- (2) A behavioral observation program which trains supervisors to identify situations and behaviors which may be the result of alcohol or drug abuse. The two and one-half (2 1/2) hour training program has already been given

PS10
Add: E. Muckloff
5050 NL

Acknowledged by card. 10/18/82 emg

DATE September 30, 1982

TO John C. Hoyle

to half of the supervisory staff. Training of the remainder of the supervisors is scheduled for completion within the next eighteen months. The provision of suitable refresher training is also being considered. This program does not train the staff to analyze personal problems, only to identify that a problem may exist with subsequent referral to the Employee Assistance Program.

- (3) A comprehensive Employee Assistance Program which provides employees and their families with expert counseling and treatment (including total payment for rehabilitation programs) for alcohol, drug abuse, and other personal problems. Total confidentiality is assured to employees taking advantage of the program.
- (4) Extensive pre-employment screening of personnel. Although psychological examinations are administered to all potential employees, heaviest reliance is on the trained observations and interviewing techniques of the medical and personnel staffs in conjunction with physical examinations and background investigations.

In light of our existing corporate policy and implementing procedures, we are not convinced that additional federal regulation is necessary. However, should the NRC adopt a "fitness for duty" rule, we strongly support the Commission's position that the rule be broadly worded. Such an approach would enable licensees to develop procedures which would be consistent with and enhance existing programs. Moreover, a broadly worded rule would permit each licensee to develop procedures which reflect conditions or circumstances unique to its facility, the unique features of its State's privacy laws, and the dictates of fairness and due process. The flexibility necessary to the success of a "fitness for duty" requirement would be destroyed by the imposition of specific fitness criteria and/or methods for implementation. Finally, a broadly worded regulation is necessary to avoid additional licensee exposure to the National Labor Relations Board's "joint employer" doctrine. Adoption of specific fitness criteria and/or implementation methods would greatly increase the chances that the licensee would be found to be dictating the terms of employment to, and hence a joint employer of, contractor employees.

RG&E strongly opposes the proposed requirement that the licensee ". . . establish, document, and implement adequate written procedures designed to ensure that . . ." persons with unescorted access to the protected area are not - "(i) under the influence of alcohol; (ii) using any drugs that affect their faculties in any way contrary to safety; or (iii) otherwise

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unfit for duty . . ." (emphasis added). The regulation as proposed appears to require that the utility develop a program which guarantees that persons granted unescorted access to the protected area will be free of the listed impairments.

Under such an interpretation, compliance with the alcohol and drug provisions of the regulation would require the universal and continuous monitoring of protected area personnel through the use of breath, blood and urine tests. Such monitoring would be so intrusive of personal privacy, expensive, administratively cumbersome and disruptive of plant operations as to be prohibitive. Moreover, our staff physician knows of no medical or psychological examination which we can administer to guarantee that an individual has no "mental or temporary physical impairments that could affect his performance in any way contrary to safety." Consequently, the proposed regulation requires the licensee to ensure that which cannot realistically be ensured. Nevertheless, any after the fact disclosure of alcohol or drug use or of an employee being otherwise unfit for duty would be prima-facie evidence that licensee procedures were inadequate. That is patently unfair.

Therefore, we recommend that the proposed rule be changed to require that each licensee institute procedures designed to provide "reasonable assurance" that persons with unescorted access to protected areas are free of the listed impairments. This modification would retain the rule's basic function while eliminating the problem of its being impossible to comply with as presently drafted.

We are also opposed to the scope of the proposed regulation. As it is proposed, only licensee's and their contractors' personnel are subject to the rule. We do not believe that the Commission should, by rule, require the licensee, who has the ultimate responsibility for safety and security, to exempt anyone from the "fitness for duty" requirement. There is no reason to believe that persons not in the employ of the utility (such as NRC inspectors) are immune to the problems of alcohol or drug abuse or are incapable of developing mental or physical impairments. Therefore, we recommend that the proposed rule be changed to apply to all persons with unescorted access to the protected area.

In addition, RG&E opposes restricting the scope of the regulation to personnel with unescorted access to vital plant areas. The rule will be more easily and effectively administered and public safety made more certain by applying the rule to all persons with unescorted access to protected areas.

We also take exception to that portion of the proposed rule which requires each licensee to maintain written records of the policy implementing procedures for the life of the plant. That requirement is inconsistent with the retention period of five years recommended for similar documentation by the American National Standard Institute ("ANSI") report entitled "Requirements for Collection, Storage, and Maintenance of Quality Assurance Records for Nuclear Power Plants," ANSI N 45.2.9 - 1974. The guidelines established by that report have been accepted by the NRC staff and provide an adequate basis for complying with the quality assurance requirements of Appendix B to 10 CFR Part 50. Therefore, we recommend that subsection (2) of the proposed rule be changed so as to be consistent with the ANST guidelines and current practice.

In consideration of the foregoing discussion, we recommend that the proposed rule be changed to read:

"(x) (1) Each licensee with an operating license issued under 50.21(b) or 50.22 shall establish, document, and implement adequate written procedures designed to provide reasonable assurance that, while on duty, all persons with unescorted access to protected areas are not apparently (1) under the influence of alcohol, (2) using any drugs that affect their faculties in any way contrary to safety, or (3) otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety."

(2) Each licensee shall maintain the written records of these procedures for five years from the time of their adoption.

The following comments are made with respect to specific implementation devices under consideration.

Breath and Urine Tests

RG&E strongly opposes the use of random breath or urine tests as an implementation tool for this rule. We are not convinced that twelve (12) drug and alcohol problems in 1981, among all of the nuclear plants nationwide, represents a problem which is serious enough to warrant such action. Our own experience convinces us that the imposition of such measures would have a devastating effect on employee morale and would further inhibit our ability to attract qualified personnel. Daily employee screening procedures at nuclear power plants are stringent and serve to convey to the employees the impression that they are not to be trusted. To impose such additional

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screening tools would only serve to exacerbate what the employees already perceive as oppressive requirements. Moreover, the same purposes can be achieved through less intrusive means (e.g., behavioral observation programs and employee awareness and assistance programs).

Background Investigations

RG&E supports the concept of good employee background investigations. However, in view of our position that the proposed rule should be broadly worded, we are opposed to a regulation which would dictate the nature and extent of such investigations.

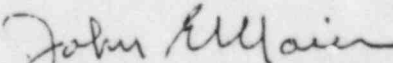
Nevertheless, if licensees are to carry out effective background investigations, there must be federal legislation which would require the several states to make criminal histories available to the operators of nuclear power plants. We would stress the word histories as opposed to convictions. A record of conviction check does not necessarily show the crime for which a person might have been arrested nor does it reveal any pending charges against a prospective employee. It is not inconceivable that a prospective employee could be under indictment for possession of explosives or arson and that this information would not surface through a record of conviction check. The fact that even record of conviction checks are not available to the private sector in New York State seriously inhibits our ability to conduct credible background investigations. Hence, we feel it is incumbent upon the Commission to press for legislation, such as S.1589, which will make such histories available.

Psychological Testing

As indicated earlier, RG&E administers a psychological examination to all prospective employees. However, far greater reliance is placed on other pre-employment screening techniques to identify problems which would render an employee "unfit for duty." We believe that psychological tests are of only modest value in reliably determining whether an individual is and will continue to be "fit for duty." In light of the tests' limited utility and our position that a "fitness for duty" rule should be broadly worded, RG&E opposes the adoption of a regulation which would require psychological testing as an implementing mechanism.

We trust that these comments will be of use in your deliberations.

Very truly yours,


John E. Maier

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