NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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July 7, 1982

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MEMORANDUM FOR: Samuel J. Chilk, Secretary

FROM: Jessica H. Laverty

SUBJECT: COMMISSIONER ROBERTS' DISSENTING VIEW IN COOPER (EA-82-46)

Attached hereto is Commissioner Roberts' Dissenting View on the Cooper Enforcement Action.

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Ahearne
Commissioner Asselstine
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COMMISSIONER ROBERTS' DISSENTING VIEW ON THE COOPER ENFORCEMENT ACTION TMR 7/1/82

Introduction

Based on my review of the documentation before the Commission, my conversations with NRC Staff members,[1/] my longstanding disagreement with the Commission's definition and use of the legal term "material false statement,"[2/] and my review of the Commission's Enforcement Policy Statement,[3/] I disagree with the decisions reached by the Commission in this matter. Specifically, I conclude that the Nebraska Public Power District (NPPD) should not be cited for a "very significant violation" (Severity Level II) because I do not believe that characterization to be consistent with the terms of the Enforcement Policy Statement. Instead, based on the guidance provided in that Statement, I believe the appropriate category to be Severity Level III, a less serious violation. Moreover, I believe a more appropriate penalty would be $30,000; this represents a $2,500 daily penalty for failure to install and test the required prompt notification system.[4/] Finally, consistent with my

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1/ See Memorandum for T.M. Novak from Byron Siegel, Proposed Civil Penalty for Nebraska Public Power District (Cooper Nuclear Station), June 8, 1982.

2/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Powe: Plant, Units 1 and 2), CLI-82-1 (Feb. 10, 1982); General Statement of Policy and Procedure for Enforcement Actions (Commissioner Roberts' Separate View, February 4, 1982).

3/ 47 FR 9987 (March 9, 1982).

4/ The Commission's practice regarding other licensees who informed us of their inability to install and test the required prompt notification system by February 1, 1982 is to impose a fine of $1,000 a day beginning on March 1, 1982 and $2,000 a day beginning on April 1, 1982. My proposed fine of $2,500 a day beginning on March 1, 1982 takes into consideration NPPD's failure to inform the NRC that the system would not be completely installed by the regulatory deadline.

disagreement with the rest of the Commission on when the Commission legally may cite a licensee for a "material false statement," I would not cite NPPD for the commission of "material false statements" nor would I assess a monetary penalty for the instances labeled "material false statements" by the Commission.

Background

By regulation, NPPD was required to have a prompt public notification system installed and tested by February 1, 1982.[5/] In June 1981, NPPD indicated its intent to comply with this regulatory requirement by installing an emergency warning system consisting of nine fixed sirens and thirty-two portable sirens to be distributed among six area volunteer fire departments.[6/] In January 1982, an NRC employee talked to two members of NPPD corporate management in order to determine the state of readiness of this system. The NRC employee was informed that the system was installed and operational. That assertion was later reiterated and confirmed in writing.[7/] A subsequent NRC investigation determined, however, that while nine fixed sirens had been installed and were operational, five of the thirty-two mobile sirens had not yet been installed and one mobile siren was not operational due to a missing part. That investigation also determined that volunteer fire departments had not received training in the use of the portable sirens.

5/ 10 CFR 50.54(s)(2)(i) and Section IV.D.3 of Appendix E to 10 CFR Part 50 (46 F.R. 63032, December 30, 1981).

6/ NPPD determined that the minimum number of units needed to satisfy the NRC's regulatory requirement was 25. Letter from J.M. Pilant to J.T. Collins, March 19, 1982.

7/ These three instances are labeled material false statements by the Commission.

The cause of this violation of NRC regulations appears to be inadequate corporate management attention to and involvement in completion of the prompt notification system. While the individual responsible for ensuring that the system was installed gave incorrect information to his management and to the NRC, there is no evidence that management attempted to verify this information independently. This failure to assure that the system was installed, operational, and tested by February 1, 1982 constitutes a violation of NRC regulations.

Discussion of the Commission's Decision

Failure to exercise its discretion reasonably

While I deplore the above-described series of events, I conclude that the Commission's response is unduly harsh and overly reactive. During the Commission's briefing on the proposed Cooper enforcement action, the Staff advised the Commission that "the Cooper plant has been a top performer," that it has "never been assessed a civil penalty," that Cooper was rated in the top category in the NRC's last two SALP reports, and that INPO also regards the plant highly.[8/] Despite this outstanding record and despite the provision in the Enforcement Policy Statement that licensee behavior can be taken into account when determining the amount of a civil penalty,[9/] the Commission chose to impose a very harsh

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8/ The Cooper project manager indicated in his memorandum of June 8, 1982 that NPPD also had an excellent record on completing TMI action plan items, generic issues, and unresolved safety issues. Memorandum to T.M. Novak from B. Siegel, June 8, 1982, p. 1.

9/ 47 F.R. 9987, 9987 (March 9, 1982); Nuclear Regulatory Commission Authorization Act, Conference Rpt. (H. Rpt. No. 1070) 4481 (June 4, 1980).

penalty on NPPD in order "to emphasis to NPPD and other licensees that similar actions cannot be tolerated."[10/] Perhaps because I am the only member on the Commission today to come from private industry, the Commission's action raises this question in my mind: If the Commission chooses to use a "good" licensee as the vehicle of a message to all licensees, what incentive does any licensee have to perform in a highly satisfactory and responsive manner? The Commission's action also makes me wonder what it will do if something happens that truly has serious safety implications. In this case, the Commission's response appears analogous to the use of a sledge hammer when a tack hammer will do.

Failure to adhere to the Enforcement Policy Statement

A second problem I have with the Commission's action concerns its failure to abide by its own Enforcement Policy Statement. That Statement provides guidance as to how to categorize the severity of a particular violation. The Commission has classified NPPD's failure to install and initially test a prompt notification system as a Severity Level II violation. The Commission's definition of a Severity Level II violation follows:

> B. Severity II--Very significant violations involving:
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> 1. A system designed to prevent or mitigate serious safety events not being able to perform its intended safety function; or
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> 2. release of radioactivity offsite greater than five times the Technical Specifications limit.

47 FR 9987, 9993 (March 9, 1982). On its face, I believe this definition to be inapplicable to the present case. First, I note that a siren

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10/ Letter to H.B. Kasman from R.C. DeYoung, p. 3 (emphasis added). Obviously, this penalty, which is to be a lesson to other utilities, will be paid by NPPD's ratepayers.

system is not a "system designed to . . . mitigate a serious safety event." Rather, that description applies to something which directly mitigates an event, such as the emergency core cooling system or the containment structure. To say that a siren system mitigates a serious safety event is illogical.[11/] A siren system is designed to respond to a serious safety event. In other words, a siren system is a system intended to mitigate the consequences of a serious safety event, not the event itself. Thus, a siren system does not fall within the Commission's definition.

Even if one assumes for the sake of argument that a siren system does fall within this definition, the Severity Level II definition again does not apply on its face. There is no question that the siren system had the capability to perform its intended safety function. Rather, a portion of the system was not operable. This is the definition of a Severity Level III offense ("not able to perform its intended function under certain conditions, e.g., safety system not operable . . . ."). [12/] Thus, even if one assumes that a siren system falls within the scope of "a system designed to . . . mitigate a serious safety event," the

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11/ To illustrate the safety significance of this regulatory requirement, I cite a memorandum from V.Stello to W.J.Dircks on Emergency Planning Zone Practices (February 2, 1982):

> [T]he current practices of installing fast-alert systems such as sirens substantially beyond 5 miles from the plant site are not warranted by the technical information at hand. An effective communication network from about 5 to 10 miles should suffice and should not mandate the use of sirens as part of the planning to avoid very improbable life-threatening exposure levels.

12/ 47 FR 9987, 9993.

offense committed is not a Severity Level II offense. Instead, it is a Severity Level III offense. In sum, then, I conclude that the Commission's decision is not warranted under its Enforcement Policy Statement.

Material False Statement

Third, I would not cite and penalize NPPD for the commission of material false statements because I do not believe that the statements here cited fall within the legal definition of "material false statement" provided in the Atomic Energy Act. 42 USC 2011 et seq. My conclusion is merely a reiteration of my long-held and often stated view that the Commission may not, by policy statement, expand the applicability of a term whose coverage is explicitly limited by the Commission's organic act. I repeat here the objections that I voiced in the Diablo Canyon proceeding and in my dissent from Supplement VII of the Enforcement Policy Statement (which provides the Commission's (not the Act's) definition of "material false statement").

Section 186 of the Act states that the Commission may revoke a license for any material false statement in the application or in a statement of fact required under Section 182.[13/] To construe this section otherwise is to ignore the presence in Section 186 of qualifying language after the language that a license may be revoked for any material false statement. To construe this section otherwise is also to ignore the legislative history of Section 186.

13/ 42 USC 2011, 2236.

The Commission has not always had civil penalty authority. Originally, its enforcement authority was limited to the authority to suspend, modify, and revoke licenses and to issue "cease and desist orders." The Act referred to "material false statement" only in connection with the revocation of a license. The Act narrowly defined the phrase then as it does today. Congressional enactment of authority to impose civil penalties did not alter this statutory scheme.[14/] Thus, a review of the legislative history of the Atomic Energy Act makes it clear that Congress did not intend that a licensee be cited for the commission of a material false statement in the absence of a decision to revoke a license.

Furthermore, contrary to what is frequently argued, the Commission's present definition is not compelled by the Commission decision in Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 487 (1976). In that case, the Commission penalized material false statements made by the licensee in its application and omissions in that application. To the extent that the Commission strayed from the language of Section 186, it did so by including omissions of statements in its definition of "material false statement." Thus, as an omission cannot be in writing and under oath, the Commission strayed from the literal language of the Act. I do not believe that it is necessary or sound to stray farther by interpreting that decision in such a way as to negate the effect of the limiting

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14/ Report by the Joint Committee on Atomic Energy to Accompany S.3169, S. Rep. No. 91-553, 91st Cong., 1st Sess. 9-12 (1969).

language in Section 186 that a material false statement is either a statement in an application or a statement required by Section 182.[15/]

Finally, the Enforcement Policy Statement defines a "material false statement" as any statement that is false and that is related to the regulatory process.[16/] At the time this definition was adopted by the Commission, I was concerned that this definition was so vague and the threshhold for commission of this offense so low that licensees would find themselves in constant jeopardy. Additionally, I worried that this definition in a policy statement, while not legally binding, would be used by the Commission as the basis for enforcement actions. In this case, both of my concerns have been realized. Thus, I wish to voice again my strong dissent from the Commission's definition of "material false statement" and from its use of a policy statement to expand enforcement authority limited by the Atomic Energy Act.

15/ Further, I note that the General Counsel has recently provided legal analysis which undercuts the Commission's loose definition and use of the term "material false statement." In a memorandum to W.J. Dircks from L. Bickwit, the following analysis appears:

> Under Sections 234 and 186 of the Atomic Energy Act, a civil penalty may be imposed and a license revoked for a "material false statement in . . . any statement of fact required under section 182." Section 182 states that all statements required in connection with Sections 103 and 104 licenses should be made under oath or affirmation. A reasonable argument can be made that an unsworn statement in connection with a 103 or 104 license cannot therefore be one required under Section 182 within the meaning of Section 186, and that therefore a material false but unsworn statement will not support revocation or a civil penalty in these cases.

Memorandum to W.J. Dircks from L. Bickwit, November 10, 1981, Draft Enforcement Policy, p. 3.

16/ 47 FR 9987, 9995 n.16 (March 9, 1982). This amounts to a statement of jurisdiction and does not state the elements of the offense.

Policy Implications

In sum, I wish to address the policy implications of the regulatory scheme this and other recent enforcement actions have imposed on NRC licensees. In addition to defining a material false statement as a false statement relevant to the regulatory process, the Enforcement Policy Statement states that licensees are expected to provide full, complete, timely, and accurate information and reports.[17/] Thus, a licensee may be cited and penalized for failure to provide full, complete, timely, and accurate information that is relevant to the regulatory process. I do not know precisely what "full, complete, timely, accurate information relevant to the regulatory process" is and I suspect that NRC licensees also will not know what this is. I speculate that the information to be provided is in addition to that which is already required by regulation, license, or order. Moreover, by not specifying precisely what it wishes to receive, it appears to me that the Commission has delegated to its licensees the job of ascertaining what the Commission needs to know.[18/] Additionally, it would seem that the Commission intends to punish licensees who do not provide all the suggested information or who do not guess what it is that the Commission wants. This situation is extremely unfair. Commission actions such as these contribute substantially to the uncertain and unfavorable regulatory climate experienced by those constructing and operating nuclear plants today. In my opinion, such actions do not enhance the health and safety of the public one whit.

17/ 47 FR 9987, 9990 (March 9, 1982).

18/ Such delegation is contrary to Congressional intent as expressed in the Atomic Energy Act. Sections 103(b) and 161 of that Act contemplates that the Commission will affirmatively determine what it needs to know in order to assure the health and safety of the public.