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January 21, 1986

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

Re: Proposed Rulemaking to Revise the Commission's Enforcement Policy to Apply to Vendors of Products or Services Supplied to the Nuclear Industry

Dear Mr. Chilk:

In a recent notice published at 50 Fed. Reg. 47716, the Nuclear Regulatory Commission ("NRC" or "Commission") stated its intention to revise its General Statement of Policy and Procedure for NRC Enforcement Actions, as set forth in 10 C.F.R. Part 2, Appendix C. The purpose of the changes, which the notice describes as "minor revisions," is to apply the NRC's enforcement policy to "vendors of products or services that are supplied to the nuclear industry for ultimate use in facilities or activities that are licensed by the NRC."1/ We submit the following comments on behalf of our firm as well as our client utilities.

The Commission states its belief that the proposed revisior is editorial only and therefore "reflects for the most part the NRC's practices that have evolved over the years and are currently in use."2/ We have no quarrel, of course, with the basic principle that a licensee "should be held primarily responsible for the procurement of high quality products that are to be used in nuclear

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1/ 50 Fed. Reg. at 47716.

2/ Id. at 47717.

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activities,"3/ and that toward that end, a licensee is required to maintain quality assurance programs which include inspection and audit of its vendor's quality assurance programs.

The Commission further explains, however, that enforcement action against a reactor licensee will be taken for "significant breakdowns" in a vendor's quality assurance program "that have resulted in the use of products or services of defective or indeterminate quality that have safety significance."4/ The proposed rule itself states that enforcement action will be taken, inter alia, when "vendors have failed to fulfill contractual commitments that could adversely affect the quality of a safety significant product or service."5/

If the Commission means to say that licensees may be cited for failing to implement their own quality assurance programs, including necessary inspections and audits relating to materials, services and equipment provided by vendors and suppliers, its current Policy Statement is adequate. If it means something more, for example, that reactor licensees will now be cited for a new category of penalties based upon vicarious liability without fault for vendor "nonconformances," the changes are unjustified and illegal.

The logical underpinning of strict and vicarious liability, if that is what the Commission proposes, is that reactor licensees need economic incentives or do not possess sufficient economic incentives to enforce their own quality assurance programs with regard to vendors. This merely perpetuates the stereotypical assumption by some that licensees consciously weigh the economic costs of violating NRC requirements. The Commission's own Advisory Committee for Review of the Enforcement Policy recently urged the Commission to reject this view and the Commission should do so here.6/ The NRC may deny, suspend or revoke a permit to

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3/ Id.

4/ Id.

5/ Id. at 47722.

6/ See Report of the Advisory Committee for Review of the Enforcement Policy at 43-45 (November 22, 1985).

construct or a license to operate a reactor. It is therefore wholly unnecessary to create yet another category of penalties on the mistaken premise that licensees require the constant threat of civil penalties to maintain a vigilant and watchful eye over their vendors and suppliers.

More than a year ago, the Commission formally established and sought the advice of its newly appointed Advisory Committee.7/ The NRC gave the Advisory Committee a broad charter in reviewing the NRC's current enforcement policy "to determine whether it has achieved its defined purposes and to provide the Commission with recommendations on any changes it believes advisable."8/ Notwithstanding this broad charter, the Commission elected not to wait for its Advisory Committee's report before publishing its proposed revisions. Nothing in the exhaustive analysis of the report even remotely suggests any need to formulate new theories for imposing civil penalties based on a licensee's oversight of vendor activities. Nothing in the report nor anything else cited by the Commission in its proposed change really explains why the current Policy Statement is inadequate or exactly what particular problems the Commission is attempting to rectify.

Contrary to the Commission's characterization, we do not regard its proposed amendment of Appendix C as effecting only "minor revisions" to existing enforcement policy if, in fact, reactor licensees are to be cited for vendor

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7/ 49 Fed. Reg. 35273 (September 6, 1984).

8/ Report of the Advisory Committee for Review of the Enforcement Policy at 1 (November 22, 1985). In subsequent correspondence, the Commission's Executive Director for Operations asked the Advisory Committee to determine: (1) Is the current enforcement policy improving compliance with the NRC requirements by: (a) obtaining prompt and corrective actions; (b) deterring future violations; and (c) encouraging development or improvement of a licensee's own programs for detection of incipient problems; (2) Does the current enforcement policy either as written or implemented have any negative impacts on safety; (3) Are their alternative or more effective enforcement options available to the Commission to improve compliance with its requirements? Id.

nonconformances, regardless of the adequacy or intensity of a licensee's vendor oversight. If that is the case, the proposed policy of making licensees answerable in civil penalties for the errors of its vendors is an extraordinary and unprecedented measure. Moreover, it is totally unclear just how far the Commission expects its new policy to reach. The Commission flatly states, for example, that "[t]he Commission's enforcement policy is also applicable to non-licensees (vendors)."9/ Taken literally, the NRC intends to apply existing enforcement policy in its totality to vendors whenever the NRC deems it appropriate, and licensees will be potentially liable for civil penalties assessed.

The problem is complicated by the vast number of sub-contractors utilized by a licensee's primary contractors. The proposed changes leave room for unlimited application of NRC enforcement policy to each of these many firms and suppliers so that licensees could be assessed penalties based on a sub's "nonconformance." This has the result of leaving a licensee's audit and inspection responsibilities under Part 50, Appendix B open-ended. We do not believe that a disclaimer by the Commission that it does not intend to take extreme or unjust enforcement actions is a sufficient substitute for a textually fair enforcement policy.

The Commission implicitly takes the position that vendors, as such, are beyond its regulatory jurisdiction, except within the confines of reporting requirements under 10 C.F.R. Part 21 and packaging and shipping requirements under Part 71. In all other aspects, the proposed change cites the quality assurance responsibilities of reactor licensees under 10 C.F.R. Part 50, Appendix B, as a basis for making a reactor licensee vicariously liable for civil penalties in an enforcement action against its vendor.

The Commission therefore apparently believes that it is obligated to create a wholly new category of civil liability for its reactor licensees because of its inability, legal or otherwise, to regulate vendors and suppliers directly. Thus, the NRC will issue "Notices of Nonconformance" to vendors describing their "failure to meet commitments which

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9/ 50 Fed. Reg. at 47722.

have not been made legally binding requirements by NRC,"10/ but will not attempt to assess a civil penalty against the vendor for nonconformances. Rather, the NRC will merely "request" written explanations and a statement of corrective actions from vendors. Vendors will be assessed civil penalties only insofar as individual directors or responsible officers knowingly and consciously violate the reporting requirements of 10 C.F.R. §21.21(b)(1).11/

We see no basis for issuing notices of violation to reactor licensees or assessing licensees civil penalties on account of a "failure" to ensure that a vendor meets its requirements under Part 21, as the Commission proposes.12/ In Section 206 of the Energy Reorganization Act of 1974, 42 U.S.C. §5846, Congress authorized the Commission to assert direct regulatory control over vendors. Therefore, Congress unmistakably meant for vendors to have independent responsibilities to report defects and noncompliance to the Commission. The Commission implemented this legislative intent in Part 21 by imposing direct responsibility upon vendors for compliance. Moreover, in subsection (d) of Section 206, Congress authorized the Commission "to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section." Accordingly, the Commission cannot shirk its statutory responsibilities for monitoring compliance with Part 21 itself by delegating this responsibility to licensees.

Further, the Commission lacks statutory authority to make reactor licensees liable for Part 21 violations by vendors, assuming that the licensee has not by its own knowledge or actions independently violated Part 21. The only requirement under Section 21.31 is that each licensee must "assure that each procurement document for a facility, or a basic component . . . specifies, when applicable, that the provisions of 10 C.F.R. Part 21 apply."

The decision to assess penalties against reactor licensees for vendor "nonconformances" reflects a regrettable mind set that the NRC's enforcement program cannot work

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10/ Id.

11/ Id.

12/ Id.

unless someone is the target of a civil penalty. The evidence is to the contrary: Strict and vicarious liability is unnecessary for the sound enforcement of the NRC's quality assurance requirements. Again, the Commission has not cited a single instance of any licensee activity, policy or practice which necessitates this change.

Further, the new liability under the proposed revisions may not be legally imposed under the Atomic Energy Act. Although the NRC discusses the statutory bases for its enforcement jurisdiction, specifically including the imposition of civil penalties, nowhere does it cite any statutory authority for assessing penalties against reactor licensees based upon vendor "nonconformances.13/ The Commission has expressly acknowledged that nonconformances do not constitute a violation of its regulations.14/ As an example of a possible nonconformance, the Commission cites "a commitment made in a procurement contract with a licensee as required by 10 C.F.R. Part 50, Appendix B."15/ Yet, the nonconformance will apparently be the basis for assessing penalties against a reactor licensee, irrespective of the fact that no regulation has been violated.

As a result of the Commission's struggle to legitimize its jurisdiction over vendors via licensees, its new policy on vendor enforcement seems almost deliberately obscure and ambiguous. As noted, the Commission states that its

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13/ Thus, Section 234 of the Act, 42 U.S.C. §2282, authorizes the NRC to impose civil penalties for the violation of "any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or . . . any violation for which a license may be revoked. . . ." Other statutory provisions cited by the NRC merely authorize the imposition of civil penalties for violations of regulations implementing those provisions, for knowing and conscious failure to provide safety-related information to the NRC, and for criminal sanctions against those who knowingly and willfully violate NRC requirements, interfere with NRC inspectors or attempt or cause sabotage.

14/ 50 Fed. Reg. at 47722.

15/ Id.

"enforcement policy is also applicable to non-licensees (vendors)," 16/ but it is far from clear whether the Commission is referring to existing requirements for vendors and suppliers under 10 C.F.R. Parts 21 and 71, or whether the entire panoply of enforcement policies and actions will apply. Further, after reciting that the NRC will determine whether violations of NRC requirements have occurred, or vendors have failed to fulfill contractual commitments that could adversely affect the quality of a safety significant product or service, the Commission vaguely states that "enforcement action will be taken." 17/ Here again, it appears that a licensee will be held vicariously liable for any vendor "nonconformances," independent of the licensee's knowledge of or responsibility for the occurrence.

In the same vein, the proposed changes state that the "NRC expects licensees and vendors to adhere to any obligations and commitments" resulting from enforcement actions and that it "will not hesitate to issue appropriate orders to licensees to make sure that such commitments are met." 18/ This provision could be construed to mean that licensees will be subjected to enforcement actions because of a vendor's failure to meet its commitments to the NRC.

Another objectionable ambiguity in the proposed policy is the declaration that licensees will be assessed penalties for failing "to ensure that their vendors have programs that meet applicable requirements including Part 21." 19/ First, as noted, the NRC has clearly asserted regulatory jurisdiction over non-licensees for Part 21 violations. 20/ As we stated, the NRC ought not to ask utilities to enforce its regulations as to requirements imposed directly upon non-licensees themselves. Second, it is far from certain exactly what are the "applicable requirements."

16/ Id.

17/ Id.

18/ Id. at 47721 (emphasis added).

19/ Id. at 47722.

20/ Id. at 47717.

Reactor licensees have always had to meet the requirements under 10 C.F.R. Part 50, Appendix B, for ensuring quality assurance in their procurement of material, equipment and services. It is well established that this includes programs for document and material control, inspections and audits. In fact, quality assurance requirements under Appendix B for licensees with respect to their vendors and suppliers have remained unchanged for the past 15 years. As the recently proposed imposition of a $900,000 civil penalty against Toledo Edison for quality assurance violations at Davis-Besse amply demonstrates, the Commission already has all the regulatory powers it needs to enforce quality assurance standards for reactor components, systems and structures.

In sum, the proposed Policy Statement is utterly devoid of any information justifying a new category of civil penalties. It carries an unprecedented potential for strict and vicarious liability on the basis of a licensee's oversight of its vendors' quality assurance programs. The proposed revisions are fraught with a far greater potential for creating confusion and unfairness than for solving any minor problem in the current phraseology of the policy perceived by the Commission.

Sincerely,

Troy B. Conner, Jr.

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