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52FR1200
[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM-50-47]

Quality Technology Company; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-50-47) filed by Mr. Owen L. Thero, President of Quality Technology Company. The petition is being denied because (1) the existing regulations provide adequate assurance that safety related concerns are being reported; (2) the proposed additional regulation would not substantially increase the overall protection of the public health and safety; and, (3) the need for the proposed rule is not otherwise demonstrated by the information provided.

The petitioner requested that NRC require all utilities involved in a nuclear program to (1) report all identified concerns relating to wrongdoing activities to the Office of Investigation and (2) maintain a nationwide employee concern program. Wrongdoing activities are not specifically defined by the petitioner but are assumed to be criminal-type activities. Examples might include use of drugs or alcohol on the job and the falsification of documents or records. The NRC has carefully considered the issues raised in the petition, and has taken them into account in reaching a decision on the areas which fall within its jurisdiction.

ADDRESSES: Copies of the petition for rulemaking, the public comments received, and the NRC's letter to the petitioner are available for public inspection or copying in the NRC's Public Document Room at 1717 H Street, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Joseph J. Mate, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington DC 20555, Telephone (301)-492-3795.

SUPPLEMENTARY INFORMATION:

- I. The Petition
- II. Basis for Request
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- V. Reasons for Denial

The Petition

In a letter dated October 27, 1986, Mr. Owen L. Thero, President of Quality Technology Company (QTC) filed with the NRC a petition for rulemaking. The petitioner requested that NRC expand the scope of its regulations so that all utilities involved in a nuclear program (1) report all identified concerns relating to wrongdoing activities to the Office of Investigation, much along the same lines as is required to report nuclear safety-related issues, and (2) maintain a nationwide employee concern program incorporating the applicable facets of the Employee Response Team recently conducted at the Tennessee Valley Authority Watts Bar Facility.

Basis for Request

The petitioner (QTC) bases the petition on their experience gained from involvement in employee concern programs at several utilities, most recently the TVA Watts Bar Facility. This involvement included the collection, collation and investigation of safety concerns. As a result of this experience, the petitioner states it had been in the unique position to observe the program's effectiveness from both the perspective of management and the perspective of the employee. The petitioner contends that because of this unique vantage point and experience, they have observed that employees engaged in the construction or operation of a nuclear facility have the most accurate and insightful information about safety related issues. The petitioner claims that several thousand nuclear safety-related concerns and several hundred wrongdoing activities have been identified through the efforts of the employee concern programs conducted by QTC at Watts Bar and other facilities that otherwise would not have surfaced.

QTC believes that without resolution of employee identified safety-related concerns, the potential exists for costly hardware failures or potential danger to the employees of nuclear facilities or the general public.

The petitioner further believes that the disposition of wrongdoing activities by the licensee is not clear and in their experience the licensee has not allowed QTC to investigate reported wrongdoing issues nor have the licensees willingly reported such activities to the NRC or to the Department of Justice. QTC also claims that licensees have no effective corrective action mechanism to investigate or resolve wrongdoing issues; therefore, a corrective action mechanism is needed.

The petitioner concludes that the sheer number of identified concerns along with the very high rate of substantiation (greater than 50%) more than justifies the need for a nationwide employee concern program to be authorized and defined by law.

Public Comments on the Petition

A notice of filing of the petition for rulemaking was published in the Federal Register on January 12, 1987, (52 FR 1200) and included the full text of the proposal. Interested persons were invited to submit written comments. The comment period was subsequently extended 60 days to provide sufficient time for public comments. In response to the invitation in the Federal Register soliciting comments on the petition for rulemaking, a total of 34 letters were received. These letters came from individuals, law firms, public interest groups, utilities, and other companies that manage nuclear plants. Five comments favored the petition and twenty-six comments were opposed to the petition. One comment requested an extension of the comment period to allow more time to respond. One comment favored the thrust of the proposal, but recommended that it be held in abeyance pending Congressional action on some proposed Inspector General bills. The remaining comment by a Congressman favored the first part of the petition (i.e. report all identified concerns related to wrongdoing activities) but could not support the second part (establish an employee concern program) if there were not attendant requirements as to how the program would be operated in order to guarantee its integrity. For the purpose of summarizing, this split comment was considered as a favorable response. Hence, there were seven comments (21%) favoring the petition and twenty-six comments (79%) opposed. The seven comments favoring the petition came from two sources. Three comments were from individual citizens, three from public interest groups and, one from a Congressman. A summary of the significant comments in favor of the proposal are highlighted below.

A rule promulgated in response to the petition, would:

- Provide a safe, confidential means for information to be volunteered by employees with no fear of reprisal.
- Be conducive to the identification of personnel who are using drugs or alcohol.
- Define wrongdoing activities to include non-nuclear and non-utility business, e.g. drug sales and bookmaking.
- Require licensees and holders of construction permits to report allegations of management wrongdoing or evidence bearing on the character and/or suitability of management.

The twenty-six comments opposed to the petition included twenty-four from utilities or companies that run utilities, one from a company (SYNDECO) that is a subsidiary of Detroit Edison Co. and the remaining comment was from the Atomic Industrial Forum. A summary of the significant comments opposing the petition are highlighted below:

- The petition may be motivated by self interest on the part of the petitioner (not considered).
- Current regulations are adequate to ensure safety problems are reported.
- Utilities' experience with employee concern programs does not support the petitioner's claim that the rate of substantiation is greater than 50%.
- No evidence was presented to show that public safety would be significantly enhanced as a result of the proposed rule.
- Various utilities indicated they were not aware of any industry problems regarding licensee treatment of employee concerns.

- Several employee concern programs voluntarily set up by utilities currently exist.
- No factual need was provided for the proposed rule.
- Mandatory employee concern programs could reduce the effectiveness of industry's voluntary programs by reducing management flexibility and safety related matters could go unreported.
- Current utility experience does not justify the imposition of additional regulatory reporting requirements.

One of the public comments raised an issue that was not raised by the petitioner. The issue is: Provide a safe, confidential means for information to be provided by employees with no fear of reprisal. Employees who wish to provide information or who have concerns have two options available to them. They may discuss the particular concern with their supervisor or plant management. If they cannot obtain satisfactory resolution or if they do not desire to use this avenue, they can take the concern directly to the NRC. NRC has maintained a policy that allows licensee employees to bring concerns to its attention. This can be done either verbally or in writing and can be done through the resident inspector, regional personnel, or NRC Headquarters personnel. This option may afford the individual confidentiality.

Staff Action on the Petition

The proposed petition was published in the Federal Register in January 1987. The comment period was extended (thru mid-May) in order to provide sufficient time for public comments. The resumption of action on the petition was delayed for approximately six months because of the NRC reorganization and the subsequent realignment of duties and responsibilities, and the prioritization of ongoing work. Action on the petition resumed in mid-November of 1987.

Reasons for Denial

The NRC has considered the petition, the public comments received, and the current regulatory structure. After consideration of the above, NRC has concluded that the petitioner's request should be denied. The discussion that follows addresses the various allegations contained in the petition and the NRC response to each of these allegations.

1. ALLEGATION

Several thousand nuclear safety-related concerns and several hundred wrongdoing activities have been identified through the efforts of the employee concern programs that QTC has either conducted or been associated with at several nuclear facilities that otherwise would not have surfaced.

RESPONSE

The main purpose of an employee concern program is to provide a forum in which to resolve employee concerns about the safety of a nuclear plant. Several utilities have established such programs, on a voluntary basis, some at a considerable expenditure of resources to assure that all employee concerns are investigated and resolved. Many of these programs have continued into the operational phases of a plants existence. There is no question

that these programs can and will identify employee concerns. But no evidence was presented that these concerns would not have surfaced through some other mechanism such as: a good quality assurance program, the normal employer-employee working relationship; or by reporting to the NRC. Although a large number of specific concern files from Watts-Bar are in the possession of NRC, the information contained in these files is very cryptic and generally does not contain specific technical detail to support the assertions by the petitioner. Additionally, no specific documentation concerning the rate of substantiation at Watts-Bar or other units has been provided by the petitioner to support the assertions.

2. ALLEGATION

Unresolved nuclear safety-related concerns could have surfaced through a series of costly hardware failures and/or potential endangerment of the employees and the general public if allowed to go into operation uncorrected.

RESPONSE

In response to this assertion, one of the commenters (an engineering firm) felt strongly that there are very few engineering decisions made that are totally conclusive. Instead, considerable expertise and judgment go into the determination of most requirements of this type. The commenter stated that management makes decisions based on analysis and opinions. Experience has shown that very few, if any, employee concerns actually require hardware changes and very few of the hardware changes materially improve safety. No documented evidence of any type has been provided by the petitioner to support this assertion.

3. ALLEGATION

The disposition of wrongdoing activities by licensees is not clear. In our experience, the licensee has not allowed us to investigate wrongdoing issues reported. Neither have they been willing to report these activities to the NRC or to the Department of Justice. They have no effective corrective action mechanism to investigate or resolve wrongdoing issues. These issues fall into a "black hole."

RESPONSE

In contemplating the addition of new regulations, NRC must ask if the new regulations are required to provide adequate protection of the public health and safety. The next level of questioning is: Will the proposed rule result in enhanced health and safety or an improved plant operation? Finally, what is the cost of the new regulation versus the benefits to be derived? This applies to the licensee as well as NRC. The present regulations set up a rather extensive system of reporting requirements which licensees are required to follow. The regulatory system is designed to provide a framework to ensure that events which are significant to the safe operation of nuclear power plants are reported to NRC so that the appropriate corrective action can be taken. In cases where employee concerns have not been resolved to the employees satisfaction, there are means available for discussing their concerns with NRC. To date, non-safety-related concerns have essentially been the responsibility of licensee management. If licensee management demonstrates that they are unwilling or unable to handle such concerns, and NRC determines that these concerns are a problem at more than a few isolated plants, then NRC can consider taking a more direct action. Until then, licensee management

should be given the opportunity to address the matter. The petitioner has not provided any factual evidence to show that a problem exists at any plant as alleged in the proposal.

4. ALLEGATION

The sheer numbers of concerns identified along with the very high rate of substantiation (greater than 50%) more than justifies the need for a nationwide employee concern program to be authorized and defined by law.

RESPONSE

The petitioner's assertion appears to be based on experience gained primarily at TVA's Watts Bar Facility. Before considering the implementation of a mandatory program on all nuclear power plants in the United States, a definitive basis should be established to show that such a requirement is in fact needed. As noted in reason #1 on page 9, the petitioner has provided no evidence or specific documentation other than its stated experience at one facility to support its assertion. With respect to experience with substantiation rates, three of the commenters stated that their experience does not support a substantiation rate in excess of 50%. In fact, their experience reflects a substantiation rate which is significantly less than 50%. The information provided is not sufficient to establish that a problem exists in the "industry" and that a rulemaking is needed to solve the problem.

In addition to reviewing the assertions of the petitioner and comments from the public, the petition was also examined in light of the existing regulatory structure. Although there are no regulations currently in effect regarding specific reporting of identified concerns related to wrongdoing activities as raised by the petitioner, there are several regulations in effect concerning the reporting of safety-related matters. These regulations are briefly listed below.

- 10 CFR 21 reporting of defects and noncompliance
- 10 CFR 50.55(e) requires holders of construction permits to notify NRC regarding deficiencies in design or construction which could adversely affect safety.
- 10 CFR 50.7 prohibits licensees from discriminating against employees engaging in certain protected activities including providing information to the Commission regarding violations.
- 10 CFR 50.72 requires the notification of NRC regarding various classes of emergency and non-emergency events.
- 10 CFR 50.73 requires the notification of NRC of specific events reportable via the licensee event report program.
- Appendix B to 10 CFR 50, criteria 15 and 16 requires the licensees to document defects and take the appropriate corrective action including defects brought to the attention of the licensee by employees.
- 10 CFR 70.52 requires the licensee to report on accidental criticality or loss or theft of special nuclear material.
- 10 CFR 73.71 requires the licensee to report on unaccounted for shipments, suspected thefts, unlawful diversion, radiological sabotage or other events which significantly threaten safeguards.

In addition to the above regulations, the NRC is presently preparing a proposed rule concerning fitness for duty at nuclear power plants which is expected to be published for public comment in June or July 1988. The objective of the fitness for duty rule is to provide for the public health and safety by eliminating access to protected areas at nuclear power plants by personnel who are judged to be unfit for duty. Personnel considered unfit for duty are those who are under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause which in any way affects their ability to safely and competently perform their duties. Employee assistance programs would be available for rehabilitation.

The regulations cited above have been promulgated by NRC with the intention of identifying deficiencies and non-compliances that either reduce or have the potential to reduce the degree of protection afforded to public health and safety or the environment. It is not NRC's intention to receive all employee non-safety-related concerns. The management of the utilities have certain responsibilities relative to employee concerns and as long as the concerns do not affect safety, they should remain the responsibility of utility management. If the utility management is not responsive or if there is concern with retaliation, there are adequate alternative means to bring matters of health and safety concern to the NRC for resolution, as discussed in this notice.

It appears that good management practices by the utilities and the existing regulatory structure together provide a reasonable assurance that valid problems identified by employees will be investigated and corrected. In light of the above, no additional action is required at this time.

Because each of the issues raised in the petition have been substantially addressed and resolved, the NRC has denied the petition.

Dated at Rockville, Maryland this 11th day of July 1988.

For the Nuclear Regulatory Commission



Victor Stello, Jr.

Executive Director for Operations