



L-2020-098

July 17, 2020

Office of Administration
Mail Stop: TVFN-7-A60M,
U.S. Nuclear Regulatory Commission
Washington, DC 20555- 0001
ATTN: Program Management
Announcements and Editing Staff

Re: Request for Comment on Draft NUREG-1409, "Backfitting Guidelines," Revision 1
(Docket ID NRC-2018-0142)

Florida Power & Light Company on behalf of itself and of its affiliates, NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, and NextEra Energy Point Beach, LLC (collectively, "NextEra") provides the following comments on Draft NUREG-1409, "Backfitting Guidelines," Revision 1. The NRC published the Draft RIS for comment in the *Federal Register* on March 23, 2020 (85 Fed. Reg. 16278).

The NRC extended the deadline for comments on May 15, 2020 (85 Fed. Reg. 29358). NextEra appreciates the Staff's efforts to update this guidance document and to implement the Commission's direction on forward fitting. However, as expressed in the attached comments, we believe that the staff should reconsider portions of the draft NUREG, especially as to defining the scope and limitations on forward fitting.

We look forward to continued engagement on this matter.

Sincerely yours,

A stylized blue signature of William L. Parks, consisting of several sweeping, connected lines.

William L. Parks
General Manager, Safety Assurance and Learning
Florida Power & Light Company

Enclosure: NextEra Comments

**NextEra Comments on NUREG-1409, Revision 1
 “Backfitting Guidelines, Draft Report for Comment”**

Page, Line #	Draft NUREG Statement	Comment
Chapter 1		
1-3, line 17-18	“There is no statutory requirement for the agency’s backfitting and issue finality requirements.”	In light of the Supreme Court case mentioned in footnote 4 on the same page, the NRC may consider modifying this sentence to note that, while the NRC did not originally recognize a statutory basis for backfit rule, current precedent interprets the Administrative Procedure Act to require consideration of costs where not otherwise directed by the Atomic Energy Act.
Chapter 3		
3-3, line 9-11	“Based on a risk-informed evaluation, if the safety benefit of imposing the forward fit is determined to be very low or negligible, then the staff should no longer consider imposing the forward fit.”	The NRC should explain how it will distinguish between forward fits with low safety benefits that may still be imposed and those with very low safety benefits that may not. What standard would be applied to distinguish these?
3-3, lines 20-22	“For example, if the licensee’s license amendment request concerns the emergency diesel generators, then the new or modified requirement or regulatory staff position that the staff wants to impose on the licensee cannot involve the height of the fence surrounding the protected area.”	<p>This example is used to help explain what types of requirements directly relate to a licensee’s request, but is not especially helpful at deciding hard cases. In the July 14, 2010 letter from General Counsel Burns to Ellen Ginsberg at NEI, the NRC provided an example of a requirement that would directly relate - a licensee seeking to transition to NFPA 805 would be required to implement NFPA 805-related guidance documents. This example better illustrates the relationship required to establish a direct nexus. These help identify “easy” cases on both sides of the issue, but do not help to distinguish the more difficult cases.</p> <p>The NRC should consider additional examples demonstrating the relationship of the two criteria (direct nexus and essentialness), as they can be seen as two parts of the same inquiry. A change can only be essential if it is directly related to the issues being evaluated. Also, a change would likely only be directly related to a licensee’s request if its consideration is essential to the staff’s review. While these criteria are not coextensive, they can help to reinforce each other.</p>
3-3, line 43-48	“Requesting additional information through carefully worded questions to the licensee is an appropriate method for obtaining the information the staff needs to make its finding. These information requests must not tell the licensee what it needs to do to obtain staff approval.	It would be more efficient for the NRC Staff to clearly outline any potential forward fits to the licensee. In the event the Staff identifies an adequate protection issue, why should the Staff not explain that clearly to the licensee so that the licensee can identify a path forward, whether accepting a proposed forward fit or proposing another alternative? The Staff should be allowed to inform the licensee that some change to an application would be necessary in order for it to reach a finding of reasonable assurance of adequate protection.

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	<p>The staff also should not provide advice or direction to a licensee that is not appropriate given the staff's role as the regulator."</p>	<p>The forward fit process cannot work properly without clear communication. In what sense does the staff "pursue a forward fit" (p. 3-4, line 2) if it does not explain the forward fit to the licensee? Where is it pursued, if not in an RAI or other clear statement to the licensee?</p>
<p>3-4, lines 14-15</p>	<p>"The NRC's denial of the request may allow the licensee to seek redress of the denial through a demand for hearing."</p>	<p>Section 3.3 indicates that forward fitting applies to relief requests, proposed alternatives, exemptions, license amendments, and other requests. The NRC should clearly identify the subset of licensing actions for which a demand for hearing would be applicable under 10 CFR Part 2, and acknowledge that some licensing actions may not carry hearing rights.</p>
<p>3-4, lines 5-14</p>	<p>"If the staff determines that the two criteria are met and it cannot approve the licensee's requested action because granting the request would not provide reasonable assurance that the licensee's activities would be conducted in compliance with the Commission's regulations, but the staff's determination does not involve adequate protection (because a licensee's non-compliance with one or more applicable requirements does not necessarily mean that public health and safety are no longer adequately protected), then the staff can deny the request, ask for additional information, or approve the request with a cost-justified forward fit to ensure continued compliance with the Commission's regulations. The licensee can also request an exemption from the applicable regulation. If the forward fit cannot be cost-justified, then the staff may have to deny the request."</p>	<p>We agree that if a forward fit is necessary for adequate protection, the NRC should be able to impose it without consideration of costs. And we agree that a forward fit with very low or negligible safety benefits should not be imposed (p. 3-3, 10-11).</p> <p>However, this passage highlights a lack of clarity on those "essential" forward fits in the middle – those not considered necessary for adequate protection and not of so low a safety benefit as to be abandoned. Here, the guidance suggests that the NRC is applying a cost-benefit test, but in reality the NUREG would just prescribe the pretense of a cost-benefit analysis that would have the same result regardless of its outcome. This is shown by the example below discussing a hypothetical license amendment request (LAR).</p> <p>For an essential forward fit that can be cost-justified, the NRC would impose the forward fit and approve the LAR. Presumably, if the licensee did not want to proceed with the forward fit, it could withdraw its LAR (if the NRC clearly informed the licensee of its finding).</p> <p>For an essential forward fit that cannot be cost-justified, the NRC would deny the LAR. Presumably, if the licensee still wanted to proceed it could supplement its LAR to add a "voluntary" request to impose the NRC's non cost-justified forward fit (if the NRC clearly informed the licensee of its finding).</p> <p>In either case, the end result is the same. The NRC would either grant the LAR with the forward fit, or it would be denied in its entirety. But the licensee's LAR would not be approved without it. If the NRC Staff deems a forward fit "essential" and "directly related," economic cost would be no factor, unless the benefit is very low or negligible.</p>

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		<p>Presumably, the Supreme Court in <i>Michigan v. EPA</i> and the Commission in approving Management Directive 8.4 did not want the agency to consider costs as a pretense, but instead wanted it to meaningfully influence agency decision-making.</p> <p>By agreeing that compliance requirements can be disregarded for forward fits of “very low or negligible” safety benefits, the NRC has agreed in principle that essential requirements can be disregarded based on cost. The Draft NUREG has not clearly explained why all compliance issues that cannot be cost-justified should not be treated in the same manner.</p>
Chapter 4		
4-4, lines 25-27	<p>“In the case of a denied appeal of a forward fit that the NRC staff communicated to a licensee prior to the NRC staff completing the licensing action, if the licensee does not appeal the decision within 30 calendar days, then the licensee may..”</p>	<p>This passage indicates that an NRC position regarding forward fits expressed during the pendency of a Staff’s review of a licensing action request would trigger the beginning of the 30-day clock. For efficiency purposes, it seems to be a good idea to hold a forward fit appeal while the rest of the Staff’s review remains ongoing.</p> <p>But this seems inconsistent with the text on page 3-3 (lines 43-48) indicating that the NRC would not clearly explain the forward fit to the licensee during the licensing review.</p> <p>In this case, the NRC should send formal correspondence to the licensee regarding the forward fit determination, together with the appeal instructions, in order to make clear what the issue is and that the clock would begin to run.</p>

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