

POLICY ISSUE
NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN SVINICKI
SUBJECT: SECY-20-0070: Technical Evaluation of the Security Bounding Time Concept for Operating Nuclear Power Plants

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Kristine L. Svinicki
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**Chairman Svinicki Comments on SECY-20-0070
Technical Evaluation of the Security Bounding Time Concept for Operating
Nuclear Power Plants**

The staff, in this paper, proposes to update regulatory guidance to provide for a risk-informed method to protect against the design basis threat (DBT) by defining a “reasonable assurance of protection time” concept and seeks Commission consideration of a concept initially proposed by industry to implement a security bounding time (SBT) concept. The staff recommends approval of Policy Option 1 to use an interpretive rule process to reinterpret existing security regulations to allow licensees to account for external assistance in physical protection using the SBT concept. Because no reinterpretation of what the Commission requires is necessary for the staff to implement this concept under its existing delegations of authority, I disapprove Policy Option 1. I similarly disapprove Policy Option 2, as unnecessary.

The staff’s recommendation relies on interpreting extracted portions of the Commission’s commentary in the Statements of Considerations provided for the Design Basis Threat (DBT) Final Rule (72 FR 12705; March 19, 2007) and the Power Reactor Security Requirements Final Rule (74 FR 13925; March 27, 2009). Because the staff has failed to interpret the extracted statements in the appropriate context, the meaning they ascribe to them is flawed. As a result, the staff’s recommended means of achieving the outcome of implementing the SBT concept is inappropriate; this outcome may be achieved more simply.

In SECY-17-0100, the staff previously advanced a similar interpretation, prompting Commissioner Burns to state the following in his vote:

In SECY-17-0100, the staff states that it is "current Commission policy to defend against the DBT without external assistance." In support of this statement, the staff cites language from the Statements of Consideration for the 2007 DBT rulemaking and the 2009 Power Reactor Security Rulemaking. Although I do not dispute that the Commission noted concerns about reliance on law enforcement agencies to augment a licensee’s ability to defend nuclear power plants, I do challenge the view that the Commission has taken a particular policy position on the matter. This question was not specifically put to the Commission in either of these rulemakings relied on by the staff. The staff’s references cited above were, in actuality, responses to comments on those rulemakings, and I would suggest that the comments that resulted in those responses were not precisely germane to the question of whether licensees can rely on the assistance of law enforcement. I appreciate the regulatory challenge in giving credit to licensees for something that is beyond the control of both the licensee and the NRC, but I would observe that the NRC has considered such matters in another context, emergency preparedness. In its regulations on emergency preparedness, the NRC has codified its recognition of "the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." 10 CFR 50.47(c)(1)(iii)(B).

I joined Commissioner Burns in his skepticism of that interpretation of current Commission policy, as did the majority of the Commission in its deliberations on SECY-17-0100. The staff’s proffered basis for that interpretation in SECY-20-0070 is similarly unconvincing.

First, the staff relies on the statement of the Commission in the DBT rule that “[t]he capabilities of off-site responders are beyond the scope of [the DBT rule]” (72 FR 12720) as part of its basis for concluding that the Commission had expressed a policy that licensees must

defend against the DBT without external assistance.¹ However, it is important to read the Commission's statement in its context and for what it is expressing. Of particular note, the statement in question was made in the resolution of public comments received on the DBT rule and does not purport to express what any regulation means or requires. In fact, the comments the Commission addressed were that licensees should have self-sufficient defense capabilities that do not rely on off-site responders because of the communications and transportation difficulties in some areas that would make assistance impossible. The Commission disagreed and explained that the comments were outside the scope of that regulation. This comports with the Commission's response to comments within the scope of that rulemaking suggesting that "the DBT rule should define clearly demarcated boundaries where the responsibilities of the licensee and those of the Government begin for defending nuclear facilities." The Commission responded that "establishing set boundaries demarcating a division of responsibilities is neither possible nor desirable." This response suggests that the Commission indeed envisioned some role for offsite response in facility defense. When read in context, the isolated statement identified by the staff only reflects the Commission's observation that it did not need to consider the exact capabilities of such responders for the DBT rulemaking. Moreover, as an outgrowth of this contextual reading, the earlier Statement of Considerations for the DBT rulemaking is fundamentally contradictory to the staff's proposed reading.

Second, the staff relies upon the statement of the Commission in the Power Reactor Security Requirements rulemaking that "a licensee's ability to defend against the [DBT] of radiological sabotage is not dependent on the availability of offsite responders" (74 FR 13940). As noted by Commissioner Burns, who had served as the NRC Deputy General Counsel at the time of that rulemaking, that statement was made in response to comments; it was not a specific explanation of the rule's requirements. In addition, this statement by the Commission is a purely factual statement that should not be taken to mean any more than it says. Moreover, the Commission specifically considered and rejected the potential interpretation that the "design basis threat is a requirement on licensee personnel to defend the facility without the need for additional response personnel" in the "Integrated Comment Responses Supporting Final Rule: Power Reactor Security Requirements," (ML083390333).

Finally, in the Power Reactor Security Requirements Statement of Considerations, the Commission explained that 10 CFR Part 73, Appendix C, Section II.B.3, "Licensee Planning Base," requires the following (emphasis added):

The licensee planning base must document the site-specific organizational structure of the security response organization, site physical layout considerations, safeguards systems, the protective strategy, **law enforcement assistance**, policy constraints and assumptions and administrative and logistical considerations that could have bearing on the implementation of the licensee's [safeguards contingency plan] SCP. While implementing details are appropriate for procedures and need not be included in the SCP, licensees are expected to provide a sufficient level of detail in the SCP for the information to be meaningful. Within this category of information, licensees must document coordination with off-site entities and explain how the level of protection required by § 73.55(b) during safeguards contingency events will be maintained.

In sum, rather than expressing a Commission policy that power reactor licensees may not take into account offsite response in their physical protection planning, the Commission explicitly required power reactor licensees to document offsite response as part of the planning

¹ Moreover, the Staff relies on this statement to conclude that the Commission found licensees could not rely on external assistance to meet the requirements of § 73.55. But that regulation was promulgated in the Power Reactor Security Requirements Rulemaking two years later. I find it difficult to conclude that the Commission had the foresight to explain the requirements of a regulation two years prior to its imposition. Nonetheless, I will assume that this quotation bears on the requirements of that regulation for the sake of argument.

base for their physical protection planning. This requirement of the Commission cannot be reasonably interpreted as having been modified by the Commission's recognition that the capabilities of offsite responders were outside the scope of the DBT rule or the Commission's observation that at the time of the Power Reactor Security Requirements rulemaking, licensees were capable of defending against the DBT of radiological sabotage without the assistance of offsite responders.

In light of this, the staff should review and remove any instances of implied or stated interpretations in guidance documents such as regulatory guides (RGs) purporting to require that licensees protect against the DBT without external assistance. As stated in Management Directive (MD) 6.6, "Regulatory Guides," "RGs do not impose requirements. The methods, techniques, or data described in an RG are acceptable to the NRC staff for meeting NRC regulations. However, applicants or licensees may use alternatives as long as sufficient information is provided that demonstrates the requirements in NRC's regulations are satisfied." In addition, the staff should continue to work with stakeholders on developing guidance on how power reactor licensees should meet the existing Commission requirement to document law enforcement assistance and coordination with off-site entities as part of the planning base for their SCPs by giving due consideration to the industry proposal of the SBT concept or by other means, as appropriate, under existing processes such as those of MD 6.6.

For the reasons given above, I disapprove Policy Options 1 and 2. I take no position on the Implementation Options proposed by the staff. Rather, the staff should determine the appropriate process by which a licensee could implement any new or revised methods of meeting the Commission's security requirements using its existing delegated authorities.

I disapprove the staff's request to terminate the semi-annual updates to the Commission on the Integrated Response Program; however, in acknowledgement of the current, diminished state of activity, the reporting frequency should be reduced to biennial.

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