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RA-23-0284

10 CFR 73.5

November 16, 2023

ATTN: Document Control Desk
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Brunswick Steam Electric Plant, Unit Nos. 1 and 2
Docket Nos. 50-325, 50-324 / Renewed License Nos. DPR-71 and DPR-62

Catawba Nuclear Station, Unit Nos. 1 and 2
Docket Nos. 50-413, 50-414 / Renewed License Nos. NPF-35 and NPF-52

Shearon Harris Nuclear Power Plant, Unit No. 1
Docket No. 50-400 / Renewed License No. NPF-63

McGuire Nuclear Station, Unit Nos. 1 and 2
Docket Nos. 50-369, 50-370 / Renewed License Nos. NPF-9 and NPF-17

Oconee Nuclear Station, Unit Nos. 1, 2, and 3
Docket Nos. 50-269, 50-270, 50-287 / Renewed License Nos. DPR-38, DPR-47, and DPR-55

H. B. Robinson Steam Electric Plant, Unit No. 2
Docket No. 50-261 / Renewed License No. DPR-23

Subject: Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation

On March 14, 2023, the Nuclear Regulatory Commission (NRC) noticed in the Federal Register, Final Rule, Enhanced Weapons, Firearms Background Checks, and Security Event Notifications. This final rule became effective April 13, 2023, with a compliance date of January 8, 2024.

In response to the publication of the final rule, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (henceforth referred to as Duke Energy), performed a gap analysis to compare the new rule against current requirements, NRC-endorsed documents, and other guidance documents published by the NRC. Duke Energy also evaluated the broad impact across multiple organizations and the change management scope.

In accordance with 10 CFR 73.5, Duke Energy is requesting an exemption from the specific requirements in 10 CFR Part 73, Subpart T, "Security Notifications, Reports, and Recordkeeping," 10 CFR 73.1200(a) through 10 CFR 73.1200(t), "Notification of Physical Security Events," 10 CFR 73.1205(a)(1) through 10 CFR 73.1205(e), "Written Follow-up Reports of Physical Security Events," 10 CFR 73.1210(a)(1) through 10 CFR 73.1210(h), "Recordkeeping of Physical Security Events," and 10 CFR 73.1215(a) through 10 CFR 73.1215(f), "Suspicious Activity Reports," until the later of December 31, 2024, or 180 days after publication of the final Regulatory Guides. The exemption request herein pertains to Catawba Nuclear Station, Units 1 and 2, McGuire Nuclear Station, Units 1 and 2, Oconee Nuclear Station, Units 1, 2, and 3, Shearon Harris Nuclear Power Plant, Unit No. 1, H.B. Robinson Nuclear Power Plant, Unit No. 2, and Brunswick Steam Electric Plant, Unit Nos. 1 and 2.

Duke Energy is requesting an exemption from using the definitions for the terms "Contraband," and "Time of Discovery" as recently revised in 10 CFR 73.2, "Definitions," until the later of December 31, 2024, or 180 days after publication of the final Regulatory Guides. The exemption would not apply to the definitions of those terms that were in effect prior to the issuance of the 2023 revisions.

Duke Energy is not requesting an extension to the compliance date for specific requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, Subpart B, "Enhanced Weapons, Preemption, and Firearms Background Checks," described in 10 CFR 73.15, "Authorization for Use of Enhanced Weapons and Preemption of Firearms Laws," and 10 CFR 73.17, "Firearm Background Checks for Armed Security Personnel."

Based on NRC's projected timeline for completion of revision to the applicable Regulatory Guides associated with this final rule, and the time necessary for Duke Energy to go through the change management processes adequately to include the number of training weeks that will be required, Duke Energy is requesting a new compliance date of December 31, 2024, or 180 days after publication of final Regulatory Guides, whichever is later.

The attachment to this letter provides the justification and rationale for the exemption request. The requested exemption from the specific requirements in 10 CFR Part 73, is permissible under 10 CFR 73.5 because it is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security.

Duke Energy requests approval of this exemption by December 15, 2023 so actions can be taken to ensure consistent and reliable reporting procedures.

There are no regulatory commitments contained in this submittal.

If you have any questions or require additional information, please contact Mr. Ryan Treadway, Director - Nuclear Fleet Licensing, at 980-373-5873.

Respectfully,



Kevin M. Ellis
General Manager – Nuclear Regulatory Affairs, Policy & Emergency Preparedness

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Attachment: Request for Exemption from Specific Requirements in New 2023 Security Rule.

cc:

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ATTACHMENT

Request for Exemption from Specific Requirements in New 2023 Security Rule.

A. BACKGROUND

On March 14, 2023, the Nuclear Regulatory Commission (NRC) issued a Final Rule entitled “Enhanced Weapons, Firearms Background Checks, and Security Event Notifications.”¹ This final rule became effective April 13, 2023, with a compliance date of January 8, 2024. The final rule contains several new elements such as:

- New terminology and associated requirements covering “conditions adverse to security”
- New definitions of the terms “contraband” and “time of discovery” in 10 CFR 73.2
- New point of contact requirements with the Federal Aviation Administration (FAA)
- Changes reporting requirements applicable to security events from:
 - 1-hour notifications and 24-hour recording of security events, to 1-hour, 4-hour, 8-hour notifications and 24-hour recording of security events.
 - Codifies the accelerated call to the NRC from NRC Bulletin 2005-02 to a new 15-minute notification.

Concurrently with the publication of the final rule, the NRC issued the following Regulatory Guides to support the implementation requirements set forth in the final rule:

- 5.62, “Physical Security Event Notifications, Reports, and Records,” Revision 2
- 5.86, “Enhanced Weapons Authority, Preemption Authority, and Firearms Background Checks,” Revision 0
- 5.87, “Suspicious Activity Reports,” Revision 0

During the August 23, 2023, public meeting, the NRC recognized there are ambiguities and inconsistencies contained by the final rule language and associated guidance. The discussed revision date for clarifying guidance publication was April 2024, which is 3 months after the compliance date of January 8, 2024. Additionally, the NRC recognized the need for rulemaking to address the issues with the final rule language.

Accordingly, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (henceforth referred to as Duke Energy), is requesting an exemption from the specific requirements in 10 CFR Part 73, Subpart T, “Security Notifications, Reports, and Recordkeeping,” 10 CFR 73.1200(a) through 10 CFR 73.1200(t), “Notification of Physical Security Events,” 10 CFR 73.1205(a)(1) through 10 CFR 73.1205(e), “Written Follow-up Reports of Physical Security Events,” 10 CFR 73.1210(a)(1) through 10 CFR 73.1210(h), “Recordkeeping of Physical Security Events,” and 10 CFR 73.1215(a) through 10 CFR 73.1215(f), “Suspicious Activity Reports,” until the later of December 31, 2024, or 180 days after publication of the final Regulatory Guides. The exemption request herein pertains to Catawba Nuclear Station, Units 1 and 2, McGuire Nuclear Station, Units 1 and 2, Oconee Nuclear Station, Units 1, 2, and 3, Shearon Harris Nuclear Power Plant, Unit No. 1, H.B. Robinson Nuclear Power Plant, Unit No. 2, and Brunswick Steam Electric Plant, Unit Nos. 1 and 2.

¹ “Enhanced Weapons, Firearms Background Checks, and Security Event Notifications; Final rule and guidance,” 88 Fed. Reg. 15864 (March 14, 2023).

Duke Energy is requesting an exemption from using the definitions for the terms "Contraband," and "Time of Discovery," as recently revised in 10 CFR 73.2, "Definitions," until the later of December 31, 2024, or 180 days after publication of the final Regulatory Guides. The exemption would not apply to the definitions of those terms that were in effect prior to the issuance of the 2023 revisions.

Duke Energy is not requesting an extension to the compliance date for specific requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, Subpart B, "Enhanced Weapons, Preemption, and Firearms Background Checks," described in 10 CFR 73.15, "Authorization for Use of Enhanced Weapons and Preemption of Firearms Laws," and 10 CFR 73.17, "Firearm Background Checks for Armed Security Personnel."

B. BASIS FOR EXEMPTION REQUEST

10 CFR 73.5 allows the Commission to grant exemptions from the requirements of Part 73 "as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." As explained below, this exemption request meets the criteria provided in section 73.5.

Duke Energy has identified several issues in the final rule and the supporting Regulatory Guides that require clarification from the NRC in order to successfully implement the requirements. As mentioned above, the NRC is currently developing a resolution for code language issues and addressing guidance revisions. The NRC plans to issue additional guidance in April 2024, 3 months after the compliance date of January 8, 2024. Without additional guidance, enforcement relief, and/or the approval of this exemption, it is likely that Duke Energy will need to make changes to its respective physical security plans and processes twice – once to come into compliance with its own interpretation of the final rule (without the benefit of the additional guidance being developed by NRC), and again once the additional guidance is issued. The ambiguity and conflict created by the final rule language and existing guidance, which is described below, could result in unnecessary confusion and distraction that detract from the current high level of assurance provided by Duke Energy's existing physical security programs. Thus, implementation of the final rule prior to issuance of additional clarifying guidance, at a minimum, is not in the best interest of the public. The following are several issues that have been identified as examples:

1. CONDITIONS ADVERSE TO SECURITY

The introduction of the term "conditions adverse to security" within 10 CFR 73.1210 is undefined, and ambiguous. Duke Energy has established, as required, a formal Corrective Action Program in accordance with 10 CFR Part 50 Appendix B, Criterion XVI. NEI 16-07, *Improving the Effectiveness of Issue Resolution to Enhance Safety and Efficiency*, provided recommended approaches to the industry to enhance corrective actions, and facilitate a better organizational focus on conditions affecting safety and reliability. As a result, Duke Energy has developed procedures/processes to determine

conditions adverse to quality as it relates to the security organization, (e.g., Condition Adverse to Regulatory Compliance).

- Duke Energy Nuclear Fleet Administrative Procedure AD-PI-ALL-0100, Corrective Action Program, defines specific events, situations or occurrences that result in a condition adverse to quality. Security-related items are included.

Given the robust nature of the Corrective Action Program, the additional duplication of procedures and/or revision of procedures to accommodate a new term is unnecessary, adds burden, and provides no increased value, safety margin or improvements to security programs or the Corrective Action Program.

2. DEFINITIONS IN 10 CFR 73.2

New definitions in § 73.2 expand existing definitions provided in NRC-endorsed, NEI 03-12, "Template for the Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, [and Independent Spent Fuel Storage Installation Security Program]," Revision 7 and Regulatory Guide (RG) 5.76, "Physical Protection Programs at Nuclear Power Reactors." Duke Energy has used the existing definitions to design its Security Plans and associated programs and procedures. Examples of the issues include:

- *Contraband*: Specifically, the *exempli gratia* or "e.g.," parenthetical describing "other dangerous materials" as specifically including "disease causing agents" requires licensees to protect against circumstances beyond the current Design Basis Threat (DBT) as described in 10 CFR 73.1. The application of this expanded definition will require changes to Duke Energy's methods of compliance with the requirements of 10 CFR 73.55(g)(1)(ii)(B). Paragraphs (g)(1)(ii)(B) requires (emphasis added):

§ 73.55(g) *Access controls.*

(1) Consistent with the function of each barrier or barrier system, the licensee shall control personnel, vehicle, and material access, as applicable, at each access control point in accordance with the physical protection program design requirements of § 73.55(b).

(ii) Where vehicle barriers are established, the licensee shall:

(B) Search vehicles and materials for contraband or other items which could be used to commit radiological sabotage in accordance with paragraph (h) of this section.

§ 73.55(h) *Search programs.*

(1) The objective of the search program is to detect, deter, and prevent the introduction of firearms, explosives, incendiary devices, or other items which could be used to commit radiological sabotage. To accomplish this the licensee shall search individuals, vehicles, and materials consistent with the physical protection program design

requirements in paragraph (b) of this section, and the function to be performed at each access control point or portal before granting access.

(2) Owner controlled area searches.

(iv) Vehicle searches must be accomplished through the use of equipment capable of detecting firearms, explosives, incendiary devices, or other items which could be used to commit radiological sabotage, or through visual and physical searches, or both, to ensure that all items are identified before granting access.

(3) Protected area searches. Licensees shall search all personnel, vehicles and materials requesting access to protected areas.

(i) The search for firearms, explosives, incendiary devices, or other items which could be used to commit radiological sabotage shall be accomplished through the use of equipment capable of detecting these items, or through visual and physical searches, or both, to ensure that all items are clearly identified before granting access to protected areas. The licensee shall subject all persons except official Federal, state, and local law enforcement personnel on official duty to these searches upon entry to the protected area. Armed security officers who are on duty and have exited the protected area may re-enter the protected area without being searched for firearms.

§ 73.55(g) uses the term contraband, while § 73.55(h) uses terminology consistent with that found in the definition of contraband in NEI 03-12 (and RG 5.76). The specific inclusion of “disease causing agents” in the new regulatory definition of contraband will require Duke Energy to modify its programs and procedures describing the methods of compliance with paragraph § 73.55(g). Duke Energy understands that the NRC is looking at potential resolutions for this issue, but until further guidance is issued, or rulemaking occurs, Duke Energy is unable to come into compliance with this requirement as written without making significant changes to its physical security program.

- *Time of Discovery*: Specifically, the term “cognizant individual” and “is considered anyone who, by position, experience, and/or training, is expected to understand that a particular condition or event adversely impacts security.” Currently, security plans incorporate the definition for Time of Discovery, that is found in NEI 03-12 and RG 5.76, being “a supervisor or manager makes a determination that a verified degradation of a security safeguards measure or a contingency situation exists,” to establish T=0 for a security related event.

The new definition expands the pool of personnel previously used by licensees to determine T=0 for an event, due to the undefined nature of “position, experience, and/or training.” Additionally, the broader nature and lower threshold for recognition of something that simply “adversely impacts security,” versus “recognition of verified degradation of a security safeguards measure or a contingency situation” contributes to the expansion of pool of personnel. Duke

Energy is confident, the term in NEI 03-12 and RG 5.76, is the appropriate threshold for T=0 for security related events.

The application of this expanded definition will require Duke Energy to expand current security programs to incorporate the expanded and revised training modules onsite for general plant employees, (potentially with INPO and the NANTeL course they facilitate), and the responsibility for implementation of the expanded training across a broad spectrum of personnel at the station.

3. REGULATORY GUIDES

Examples of clarification needed in the supporting Regulatory Guide 5.62, Revision 2, "Physical Security Event Notifications, Reports, and Records" include:

4-hour vs. 15-minute notification requirement:

- § 73.1200(e)(1)(iii) and (iv) requires a 4-hour notification for contraband attempted or actual introduction of contraband into a Protected Area (PA), Vital Area (VA), or Material Access Area (MAA).
 - The definition of contraband contains the term "incendiaries".
- § 73.1200(a) required a 15-minute notification for hostile actions.
 - RG 5.62, Rev 2, Section 7.1, page 24, provides examples of hostile actions:
 - (4) The discovery of unauthorized explosive materials, incendiary materials, or an improvised explosive device within the licensee's site boundary.
- The code language requires a 4-hour notification for an incendiary device at or inside the PA, VA, or MAA. The reg guide drives licensee to a 15-minute notification for an incendiary device at the site boundary, which is further away from safety related equipment.

The notification conflict the Regulatory Guide introduced between a 15-minute and 4-hour notification is burdensome, confusing, and makes the consistency and success for this notification unpredictable. Station personnel are trained in referencing published Regulatory Guides, station procedures and guidance, and other industry documents, as a best practice, to support the accuracy of determination of notification events.

The inconsistency created by RG 5.62 unnecessarily creates the potential for confusion and human performance error.

4-hour notification vs. 24-hour recording of "lost or uncontrolled weapon":

- § 73.1200(e)(1)(v) requires a 4-hour notification for a lost or uncontrolled weapon.
- § 73.1210(f) requires recording within 24-hours "physical security events or conditions that decreases the effectiveness of the physical security program."
 - RG 5.62, Rev 2, Section 18.2, page 38, provides examples of the "Recordable Events and Conditions Regarding Decreases in

Effectiveness”, that 73.1210(f) requires. The Regulatory Guide includes an event involving the loss of control of an authorized security weapon within a PA, VA, MAA, or Control Access Area (CAA).

- The conflict between the notification and recording of a lost or uncontrolled weapon only exists because of the regulatory guidance in RG 5.62. As a best practice, and to support accurate determination of notification events, station personnel are trained in referencing published Regulatory Guides, station procedures and guidance, and other industry documents. Additional clarity is needed in order to support the implementation of notifications and recordkeeping in a consistent and successful manner.

Malevolent intent discussion:

- 10 CFR 73.1200 only refers to the term “malevolent intent” in § 73.1200(q)(2) as *exempli gratia* or “e.g.,” parenthetical describing a circumstance where a licensee may desire to retract a previous physical security event notification.
 - RG 5.62, Rev 2, Section 2, page 21, titled, “Malevolent Intent and Credible Bomb Threat Considerations,” states the NRC’s position that only government officials have the necessary resources and qualifications to determine whether malevolent intent was present in a security event.
 - During the May 2023, and August 2023, public meetings, the NRC was unable to consistently describe when licensees were capable of this determination, and when licensees were required to have government officials make this determination.
 - Within the “NRC Response to Public Comments”, ML16264A004,² comment K-21 contains the discussion regarding “credible,” and puts into context, the circumstances of the NRC’s position, as it relates to the determination of malevolent intent.
 - It is clear, that as of the publication date of March 2023, the discussion revolves around the 15-minute notification requirements, and not blanketly across all security related events.
- Duke Energy is aligned that in certain circumstances, external government agencies would be the most appropriate to determine malevolent intent, (e.g., credible bomb threat, credible threat). However, Duke Energy’s position on the capability to determine intent as it relates to identifying Human Performance errors, as well as determining Trustworthy and Reliability for Access purposes remains with Duke Energy.
- The lack of clarity of the scope and/or intent of when it is appropriate for external government officials to determine malevolent intent creates ambiguity. Final clarity is needed to prevent Duke Energy having to

² NRC Response to Public Comments, “Enhanced Weapons, Firearms Background Checks, and Security Event notifications Rule”, NRC-2011-0018; RIN 3150-AI49

unnecessarily change security programs and procedures, such as access authorization, to incorporate a process to await investigation results from NRC's Office of Investigations (OI), the intelligence community, or a federal, State, or local law enforcement agency.

C. CONSIDERATIONS FOR EXEMPTION

As highlighted in the selected examples above, Duke Energy moving towards a compliance date of January 8, 2024, without full clarity on key parts of the final rule would result in an inadequate implementation. Unknown success path towards compliance of the final rule, as written, in current code language; along with the conflict and confusion the published, publicly available, stated positions of the NRC, are key elements for this request. Duke Energy would find themselves in a situation where the modification to security plans and procedures would be required at least twice, based on interpretation of this new rule. Duke Energy is requesting the following considerations be taken into account during review of this request:

- Duke Energy's current site security plans implement the requirements of 10 CFR 73.71, "Reporting of Safeguards Events" for reporting the suspension of security measures.
- Duke Energy will continue to comply with security event reporting, as previously required in 10 CFR 73.71, "Reporting of Safeguards Events" and Appendix G to Part 73, "Reportable Safeguards Events."
- Duke Energy will use the definitions for the terms "Contraband" and "Discovery (time of)," in its current site Security Plans consistent with how these terms are currently defined in Regulatory Guide 5.76, Revision 1, "Physical Protection Programs at Nuclear Power Reactors."
- Duke Energy is currently implementing a formal Corrective Action Program and has identified Conditions Adverse to Quality as they relate to Security Programs and items that are Conditions Adverse to Regulatory Compliance.
- Duke Energy is currently capable of making voluntary reports of suspicious activities, and this will not change in the interim until the new compliance date and allow for final revised regulatory guidance issuance.
 - Duke Energy Nuclear Fleet Administrative Procedure AD-SY-ALL-0150, Reporting Safeguards, Security and Fitness For Duty Events
- The burden associated with rework for Duke Energy is unnecessary while awaiting final clarity with publication of associated Regulatory Guides. Several examples of where rework will be required are:
 - Revisions of associated procedures/processes, job aids, training materials and lesson plans that are used to describe and elaborate on reporting requirements.
 - Coordination of work management and resources to align with station outage schedules (i.e., 8 unit outages are to be completed between now and the end of 2024).
 - The re-training of impacted personnel with updated information contained within the revised guidance documents:
 - Security
 - Regulatory/Compliance
 - Emergency Response

- Radiation Protection
- Operations

The retraining will include coordination and scheduling to align with the available training cycles for each impacted group of personnel identified above.

D. JUSTIFICATION FOR EXEMPTION

Based on NRC's projected timeline for completion of revision to the applicable Regulatory Guides associated with this final rule, Duke Energy is requesting a new compliance date of December 31, 2024, or 180 days after publication of final Regulatory Guides, whichever is later.

As stated above, Duke Energy will continue to implement the Security Plans as documented. Since it has been reviewed and approved by the NRC, the Duke Energy Security Plans provide reasonable assurance of safety and security. The delay in implementation of the final rule will not impact proper implementation of the current Security Plans and will ensure that the final rule is effectively implemented. Thus, granting of this exemption will not endanger the life or property or common defense and security.

Implementation of the final rule without further interface, clarity, and refined guidance may result in unintended consequences which could reduce the effectiveness of the current Security Plans. Therefore, it is in the public's interest that Duke Energy's Security Plans and associated procedures/processes comprehensively and accurately implement the regulation and guidance documents once resolution is obtained of identified issues.

The granting of this exemption would not violate the Atomic Energy Act (AEA), as the compliance date for the final rule is not required nor specified in the AEA as amended, any provisions of the Commission's regulations, or any other legally binding requirements imposed by the Commission.

Thus, issuance of this exemption request would be consistent with 10 CFR 73.5 because it is "authorized by law and will not endanger life or property or the common defense and security and [is] otherwise in the public interest."

E. ENVIRONMENTAL ASSESSMENT

Duke Energy is requesting an exemption from the specific requirements for the 2023 Security Rule, "Enhanced Weapons, Firearms Background Checks, and Security Event Notifications," effective as of April 13, 2023. The following information is provided in support of an environmental assessment and finding of no significant impact for the proposed exemption. Duke Energy has determined that the exemption involves no significant increase in the amounts, and no significant change in the types, of any effluents that may be released offsite; that there is no significant increase in individual or

cumulative public or occupational radiation exposure; that there is no construction impact; and there is no significant increase in the potential for or consequences from a radiological accident. Accordingly, the proposed one-time exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(25). Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of this proposed exemption request.