

June 21, 1999

SECY-99-159

FOR: The Commissioners

FROM: William D. Travers /s/
Executive Director for Operations

SUBJECT: RESPONSE TO STAFF REQUIREMENTS MEMORANDUM (SRM)
SECY-97-304, FEBRUARY 5, 1998, "RESPONSE TO SRM: SECY-97-144,
'POTENTIAL POLICY ISSUES RAISED BY NON-OWNER OPERATORS' "

PURPOSE:

This paper presents the staff's plans for the issues raised by the Commission in its staff requirements memorandum (SRM) of February 5, 1998, on SECY-97-304, "Response to SRM: SECY-97-144, 'Potential Policy Issues Raised by Non-Owner Operators.'" The staff is seeking approval for publication of the attached draft regulatory guide for public comment on "Criterion for Triggering a Review Under 10 CFR 50.80 for Non-Owner Operator Service Companies."

BACKGROUND:

In its SRM of February 5, 1998, the Commission approved the staff's proposal to continue to assess new non-owner operating entities in order to determine the applicability of 10 CFR 50.80 on a case-by-case basis and to develop final criteria for triggering a review under 10 CFR 50.80. The proposed assessment criteria were to be published in a draft regulatory guide after being submitted to the Commission for approval.

On October 9, 1998, the "Preliminary Criterion on the Use of Non-Owner Operating Companies" was published in the *Federal Register* for public comment [63 FR 54398]. The notice stated that various alternative and potentially complex non-owner operator arrangements might be pursued by licensees as nuclear utilities evolved within a deregulated environment. The decision on whether 10 CFR 50.80 consent would be necessary, as discussed in SECY-97-144, would depend on the extent to which the ability to control operations (within the broadest sense of the Commission's regulations and the terms of the operating license) was being transferred and the degree of autonomy that was being granted to the operating company.

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The *Federal Register* notice stated that the NRC staff has developed a proposed criterion regarding changes to nuclear plant operating entities by which the need for NRC review and consent under 10 CFR 50.80 can be judged. The criterion is focused on the concept of final decisionmaking authority: If an operating service company provides advice but does not make the final decision in a particular area (i.e., a decision that cannot be overruled or is not subject to reversal by the current licensee), then there has been no transfer of operating authority for that area. The areas to be considered, as listed in the *Federal Register* notice, include the following:

- Decision to shut down for repairs
- Decision to start up the plant
- Approval of licensee event reports
- Decision on whether to make a 10 CFR 50.72 report
- Authority to make operability determinations
- Authority to change staffing levels
- Authority to control the terms of employment for licensed staff
- Authority to make organizational changes
- Decision to defer repairs
- Authority for quality assurance responsibilities (selecting audits, approving audit reports, accepting audit responses)
- Budget-setting and spending authority
- Decision to continue operation with equipment problems
- Authority over the design control of the facility
- Decision to continue operations or to permanently cease operation

The *Federal Register* notice went on to state that, if a threshold review indicates that the new entity is being granted such final decisionmaking authority in these areas, then the NRC staff would expect the licensee to request full NRC review and consent under 10 CFR 50.80. If the NRC concludes that the new entity is qualified to become a licensee, then an order approving the proposed transfer would be issued. Before implementation of the transfer, a conforming license amendment request would have to be submitted and, following consent under 10 CFR 50.80, the license would be amended upon implementation of the transfer to reflect the new transferee.

The NRC received four public comments on the “Preliminary Criterion on the Use of Non-Owner Operating Companies”: three from electric utilities and one from a nuclear industry policy group. Overall, the comments were positive and supportive of the NRC’s proposal to provide detailed criteria that would help to determine whether the formation of a non-owner operating company requires NRC’s approval before implementation. The commenters also agreed that identifying such criteria in advance could contribute to more timely NRC staff reviews of proposed operating arrangements.

Specific Comments on Areas Mentioned in the Criterion:

Excerpts from the text of these comments are provided in the Appendix (attached).

In response to a comment that the first bulleted area, “Decision to shut down for repairs,” appeared redundant to another area, “Decision to continue operation with equipment problems,” the staff revised the first bulleted area to read “Decision to continue operation or

shut down for repairs,” and deleted the other area.

Several commenters felt that any decision on whether 10 CFR 50.80 review consent is necessary should be based on a collective review of all the areas of consideration and that one area by itself should not trigger the necessity of obtaining consent. In general, deciding at what point an operating service entity should be added to the operating license is difficult to identify with precision. Clearly, some of the areas of consideration are more important than others, but it is the combination of areas that is likely to be unique to each operating agreement on which the NRC must focus. The staff agrees that the decision should be based on a collective review of all of the areas of consideration, except where an area is expressly or specifically a licensed activity, in which case approval is required. The more areas in which an operating entity has final decisionmaking authority, the more likely it becomes that NRC review and approval of a license transfer and amendment to add the operating entity to the license will be required.

RECENT EXPERIENCE WITH NON-OWNER OPERATING COMPANIES:

On January 15, 1998, Illinois Power Company (IP) entered into a management services agreement with PECO Energy for nuclear operational support at Clinton Power Station. The service agreement between IP and PECO was similar in certain aspects to the Maine Yankee management services agreement with Entergy Nuclear, Inc., signed in early 1997 and discussed in SECY-97-304. The IP service agreement with PECO stated that PECO management personnel serving at Clinton would be treated as employees of IP for operational and functional purposes and would exercise their authority in the IP organization on behalf of, and subject to the direction of, IP senior management. One PECO manager was appointed by the IP Board of Directors as Chief Nuclear Officer, serving as the senior nuclear manager at Clinton and reporting directly to the Chief Executive Officer and President of IP. PECO also provided additional experienced nuclear managers to assist IP in the operation of the station. All licensed operators at Clinton remained employees of IP alone and of no other entity.

The staff agreed with IP's conclusion that, notwithstanding the management services agreement between IP and PECO, IP retained the authority and responsibility for the safe operation of the plant and for regulatory compliance. In addition, PECO would not be performing activities that would require a license. Approval under 10 CFR 50.80 was, therefore, not required.

In a letter dated April 20, 1999, IP notified the NRC of plans to negotiate a sale of all of IP's right, title, and interest in Clinton to PECO or PECO's designee, AmerGen Energy Company, LLC, which is co-owned by PECO and British Energy, Inc. This transaction represents a direct transfer of ownership and of the operating license, which will require NRC review and approval under 10 CFR 50.80 and an amendment to the operating license.

REGULATORY GUIDE:

The staff has developed the attached draft regulatory guide to give the industry the proposed criterion for determining when 10 CFR 50.80 review and consent would be required when using a contract operating service company to assist in the operation of a nuclear power facility.

COORDINATION:

The Office of the General Counsel (OGC) has reviewed this paper and has no legal objection to the staff's position.

RECOMMENDATIONS:

The staff recommends that the Commission:

Approve publication of the attached draft regulatory guide for public comment on "Criterion for Triggering a Review Under 10 CFR 50.80 for Non-Owner Operator Service Companies."

William D. Travers
Executive Director
for Operations

Attachment: Draft Regulatory Guide DG-1086

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Appendix - Comments Received

Comment: Commenters 2 and 3 disagreed with including "Approval of licensee event reports" and "Decision on whether to make a 10 CFR 50.72 report" in the areas to be considered in determining whether there has been a transfer of operating authority. Commenter 2 stated that the authority to comply with NRC reporting requirements in 10 CFR 50.72 and 50.73 merely ensures that information is provided to the NRC. Authority to comply with these requirements does not in any way affect the safe operation of the plant and should, therefore, not require NRC's consent to a transfer of control. Commenter 3 stated that these areas were clearly of secondary importance.

Staff Response: The staff does not concur with these comments. These activities are, or directly affect licensed activities; an entity with (final) authority over these activities must thus have a license (i.e., be a licensee). No changes to these areas are planned.

Comment: Commenter 4 stated that the first bulleted area, "Decision to shut down for repairs," appears to be redundant to another area, "Decision to continue operation with equipment problems," and recommended deleting one of the two areas.

Staff Response: The staff concurs with this comment and will revise the first bulleted area to read "Decision to continue operation or shut down for repairs."

Comment: Commenter 4 recommended that the bulleted areas being considered be limited to those directly related to operation of the plant and suggested deleting areas such as "Authority to change staffing levels," "Authority to make organizational changes," and "Budget-setting and spending authority." Commenter 3 also thought that the first two of these areas were of secondary importance.

Staff Response: The staff does not concur with these comments. If an operating entity has been granted final decisionmaking authority to change staffing levels, make organizational changes, and set budgets and control spending, all of which are activities that could affect licensed activities, then that entity may need to be on the license. No changes to these areas are planned.

Comment: Commenters 2 and 3 both stated that any decision on whether 10 CFR 50.80 approval is necessary should be based on a collective review of all of the areas of consideration and that one area by itself should not require approval.

Staff Response: Deciding at what point an operating service entity should be added to the operating license is difficult to identify with precision. Clearly, some of the areas of consideration are more important than others, but it is the combination of areas that is likely to be unique to each operating agreement on which the NRC must focus. The staff agrees that the decision should be based on a collective review of all of the areas of consideration. The more areas in which an operating entity has final decisionmaking authority, the more likely it becomes that NRC review and approval of a license transfer and amendment to add the operating entity to the license will be required. However, if a proposed operating entity is to have final decisionmaking authority over an area that is specifically or expressly a licensed activity, NRC review and approval would be required.

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Comment: Commenters 2 and 3 both requested clarification concerning the area “Authority to control the terms of employment for licensed staff.” Commenter 2 stated that it was not clear whether this area concerns the authority to control wages or the ability to select operating staff. They believed that the authority to control wages, in and of itself, should not result in a finding that a transfer of control has occurred.

Staff Response: This area concerns licensed operating personnel who actually are employees of, or report directly to, the operating service company. The regulations contemplate that licensed operating personnel are employees of licensees. The ability to control wages would normally be viewed as within the authority of an employer. Thus, if a contract service company had this ability, it would be considered an employer, and thus a licensee, requiring approval.

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U.S. NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

DRAFT REGULATORY GUIDE

Contact: M. J. Davis, 301-415-1016

DRAFT REGULATORY GUIDE DG-1086

**CRITERION FOR TRIGGERING A REVIEW UNDER 10 CFR 50.80
FOR NON-OWNER OPERATOR SERVICE COMPANIES**

A. INTRODUCTION

According to 10 CFR 50.80, "Transfer of Licenses," the Commission must give its consent in writing before a license for a production or utilization facility may be transferred, assigned, or in any manner disposed of. As nuclear utilities evolve, the NRC recognizes that licensees may pursue various alternative and potentially complex non-owner operator arrangements. With regard to such new arrangements with nuclear operating service companies, whether an application must be submitted for NRC approval under 10 CFR 50.80 depends on the extent to which operating control is being transferred and the degree of autonomy being granted to the operating company. The NRC recognizes that more detailed criteria for the submission of new arrangements pursuant to 10 CFR 50.80 could be helpful. This guide provides information so that the nuclear industry and the NRC staff may have a common understanding on the criterion for deciding when the use of a non-owner operating service company would require NRC review and approval under the requirements of 10 CFR 50.80.

B. DISCUSSION

To date, in most instances involving non-owner operating companies, an existing operations organization was split off from the owner and transferred to a newly formed operating company in connection with a reorganization or merger agreement. These instances include the transfer approval and license amendments for Farley Units 1 and 2, Hatch Units 1 and 2, and Vogtle Units 1 and 2 when Southern Nuclear Operating Company became the licensed operator of the facilities in place of Alabama Power Company and Georgia Power Company. All three companies are subsidiaries of the Southern Company. A similar example is the transfer approval and license amendment for River Bend Unit 1 when Entergy Operations, Inc., a subsidiary of Entergy Corporation, became the licensed operator at the same time that Entergy Corporation acquired Gulf States Utilities, the former owner. In each of these cases, there was no wholesale change of operations personnel, just a transfer of the existing operations organization to a new operating company. In each of these cases, the licensees recognized that a 10 CFR 50.80 license transfer review and approval was necessary.

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In a separate example, in early 1997, Maine Yankee Atomic Power Company signed a management services agreement with Entergy Nuclear, Inc., under which Entergy would provide operations management personnel, including the Maine Yankee President and the Vice President, Licensing. The Entergy personnel provided were to become employees of Maine Yankee, while at the same time remaining employees of Entergy Nuclear, Inc., and would serve at the pleasure of and take direction from the Maine Yankee Board of Directors. The Maine Yankee licensee stated in a letter to the NRC that it had concluded that neither the management services agreement with Entergy nor the specific management changes would require prior NRC approval or a change to the Technical Specifications (TS). The NRC staff concurred with this assessment since Maine Yankee retained ultimate safety-related decisionmaking authority and Entergy personnel were to become dual employees of Maine Yankee.

In January 1998, Illinois Power Company (IP) entered into a management services agreement with PECO Energy for nuclear operational support at Clinton Power Station. The service agreement between IP and PECO was similar in certain aspects to the Maine Yankee management services agreement with Entergy Nuclear, Inc. The service agreement stated that PECO management personnel serving at Clinton would be treated as employees of IP for operational and functional purposes and would exercise their authority in the IP organization on behalf of, and subject to the direction of, IP senior management. One PECO manager was appointed by the IP Board of Directors as Chief Nuclear Officer, serving as the senior nuclear manager at Clinton and reporting directly to the Chief Executive Officer and President of IP. PECO also provided additional experienced nuclear managers to assist IP in the operation of the station. All licensed operators at Clinton remained employees of IP alone. The staff agreed with IP's conclusion that, notwithstanding the management services agreement between IP and PECO, IP retained the authority and responsibility for the safe operation of the plant and for regulatory compliance. In addition, PECO would not be performing activities that would require a license. Approval under 10 CFR 50.80 was, therefore, not required.

C. REGULATORY POSITION

The NRC staff has developed a criterion by which the need for NRC review and consent under 10 CFR 50.80 can be judged for nuclear power plant operating entities. NRC review and consent are necessary when a license for a nuclear power plant is to be transferred or assigned. The criterion in this guide is to be used to determine whether a nuclear power plant's license would effectively be transferred or assigned if the plant's operating entity changes. The criterion is focused on the concept of final decisionmaking authority: If an operating service company provides advice but does not make the final decision in a particular area (i.e., a decision that cannot be overruled or is not subject to reversal by the current licensee), then there has been no transfer of operating authority for that area. The licensee should consider the following:

- Decision to continue operation or shut down for repairs
- Decision to start up the plant
- Approval of licensee event reports
- Decision on whether to make a 10 CFR 50.72 report

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- Authority to make operability determinations
- Authority to change staffing levels
- Authority to control the terms of employment for licensed staff
- Authority to make organizational changes
- Decision to defer repairs
- Authority for quality assurance responsibilities (selecting audits, approving audit reports, accepting audit responses)
- Budget-setting and spending authority
- Authority over the design control of the facility
- Decision to continue operations or permanently cease operation

If a threshold review indicates that the new entity is being granted such final decisionmaking authority in some of these areas, then the NRC staff would expect the licensee to request full NRC review and consent under 10 CFR 50.80. If the NRC concludes that the new entity is qualified to become a licensee, then an order approving the proposed transfer would be issued. Before implementation of the transfer, the licensee would submit a conforming license amendment request and, following consent under 10 CFR 50.80, the license would be amended upon implementation of the transfer to reflect the new transferee.

It is difficult to identify with precision the point that an operating service entity is required to be added to the operating license. Clearly, some of the areas of consideration are more important than others, but it is the combination of areas that is likely to be unique to each operating agreement on which the NRC must focus. The decision should be based on a collective review of all of the areas of consideration. The more areas in which an operating entity has final decisionmaking authority, the more weight accrues to NRC review and approval of a license transfer and amendment to add the operating entity to the license.

The decisionmaking authority regarding whether to continue operation or to shut down for repairs, to start up the plant, and to continue operations or to permanently cease operation, as well as authority over the design control of the facility, are considered the major areas that show which entity has authority over licensed activities. An entity with final authority over them must thus have a license (i.e., be a licensee).

The decisionmaking authority involving operability determinations and deferring repairs, as well as the responsibility for quality assurance, indicate which entity is running the day-to-day activities on site. An entity with decisionmaking authority in these areas would also be considered to have authority over licensed activities and must be on the license.

Decisionmaking authority concerning changes in the staffing level or the organization, control of the terms of employment (except for licensed staff), budget-setting, and spending indicate which entity is in control of financial decisions. An entity with decisionmaking authority in a majority of these areas would also be considered to have authority over licensed activities and must be on the license.

In addition to the criterion stated above, the NRC notes that lines of authority and responsibility in the organizational chain of command are specified in the plant's TS in the administrative controls section (Section 5.0 in the Standard TS). When considering the use of

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service company management, the NRC staff expects licensees to examine the licensing basis to see what management structure, authorities, and responsibilities have been approved. If the lines of authority or responsibilities specified in the TS are being materially changed, the change would need review and approval by NRC as a license amendment under 10 CFR 50.90. The NRC expects that licensees will ensure that service company personnel meet TS-specified educational and experience requirements for the positions they will be taking and will seek approval for any license changes that may be necessary, above and beyond any transfer approval and conforming amendment approval.

D. IMPLEMENTATION

This section gives information to applicants and licensees regarding the NRC staff's plans for using this guide.

This draft regulatory guide has been published for public comment to encourage public participation in its development. The method to be described in the active regulatory guide (reflecting public comments) will be used in the evaluation of whether approval of the transfer of a Nuclear Power Plant's license should be granted, and whether the license should be amended when changes to the plant's operating entity are made.

VALUE/IMPACT STATEMENT

1. PROPOSED ACTION

.1 Description

The regulations regarding the transfer of an operating license are provided in 10 CFR 50.80. In general terms, no license or right thereunder can be transferred without written consent from the NRC. When the licensed authority to operate a plant is being transferred from one corporate entity to a different entity, NRC review and approval under 10 CFR 50.80 is clearly required.

1.2 Need

Various alternative and potentially complex non-owner operator arrangements may be pursued by licensees. The decision on whether consent under 10 CFR 50.80 is necessary depends on the extent to which operating control is being transferred and the degree of autonomy granted to the operating company. The need exists for a regulatory guide on this topic to assist the industry in deciding when the use of a non-owner operating entity would require the Commission's approval under 10 CFR 50.80.

1.3 Value/Impact

This regulatory guide does not impose any new requirements or costs on current

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licensees. The requirements of 10 CFR 50.80 concerning transfers of licenses are not being changed. This guide provides information so that the nuclear industry and the NRC staff may have a common understanding on the criterion for deciding when the use of a non-owner operating service company would require NRC review and approval under the requirements of 10 CFR 50.80. Issuance of a draft regulatory guide for public comment would also allow for broader input when developing the final guide.

2. TECHNICAL APPROACH

The guide does not set forth any technical positions, thus this section is not applicable.

3. PROCEDURAL APPROACH

NRC procedures that may be used to promulgate the information contained in the guide are:

- Regulation
- Policy statement
- NUREG-series report
- Regulatory guide
- Branch technical position

A policy statement or a regulation are not suitable for incorporating the degree of detail that would be presented in the guide. Branch technical positions (BTP) are sometimes prepared for specific guidance. However, no BTP is being developed on this subject. NUREG reports provide information, but they usually contain results of specific studies and are not suitable for providing guidance. This proposed action is to provide nuclear reactor licensees with information related to when NRC review and approval under 10 CFR 50.80 is required for contracts with non-owner operating service companies. A regulatory guide is considered the best alternative for accomplishing this purpose.

4. STATUTORY CONSIDERATIONS

Need for Environmental Assessment

Issuance or amendment of guides for implementing regulations in Title 10, Chapter I, of the Code of Federal Regulations is a categorical exclusion under paragraph 51.22(c)(16) of 10 CFR Part 51. Thus no environmental impact statement or assessment is necessary.

5. RELATIONSHIP TO OTHER EXISTING OR PROPOSED REGULATIONS OR POLICIES

The draft regulatory guide would be issued for public comment to provide clarification in support of 10 CFR 50.80.

6. CONCLUSION

The proposed regulatory guide should be issued for public comment.

The Commissioners