



REQUEST REPLY BY 11/16/99

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

COMSECY-99-034

October 29, 1999

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date initials

MEMORANDUM TO: Chairman Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers *William Travers*
Executive Director for Operations

SUBJECT: RELEASE OF INFORMATION ABOUT PLANT OUTAGE SCHEDULES

The purpose of this memorandum is to notify the Commission about a planned change in staff practice associated with the release of information about outage (planned and unplanned) schedules for commercial nuclear power plants. Information related to outage schedules (i.e., expected plant restart dates) is routinely provided verbally by power reactor licensees to support NRC regional offices in their planning of inspection activities, to help NRR schedule completion of licensing actions, and as a matter of course during communications between licensees and the staff. Increasingly, the public, the media, and other parties, such as financial institutions, request information about plant outage durations, and the NRC staff then questions whether they should release the available information.

A similar issue arose in early 1998 regarding the information included in the daily plant status reports placed on the NRC web site. The daily status report no longer includes information on plant restart schedules because some licensees expressed concerns that the release of plant outage schedules compromised their competitive positions and issues were raised regarding the accuracy of the information. The possible treatment of plant restart schedules as confidential business information results from the increasingly competitive environment of the electric generation sector and the possible influence of plant outage schedules on matters such as company bond ratings and electricity trading prices. Our handling of the information may become more contentious as the electric utility industry continues to change because of economic deregulation. Recognizing the need for additional guidance in this area, OPA requested support from NRR and OGC. The interim guidance issued as a result of the OPA inquiry, a memorandum dated May 6, 1999, was made available to the public.

As a routine matter, the NRC does not require licensees to provide information about outage schedules in a way that is publicly available because such information is not directly related to our mission to protect public health and safety. The staff draws a distinction between the information about schedules and the information about actual plant configurations, repair activities, and other matters that would be important to the NRC during an outage or before the restart of a particular power plant.

Based on informal inquiries from licensees, the staff has discussed the possible treatment of outage schedules as proprietary information because of the possible financial implications that such information may have on affected licensees. The staff has generally concluded that

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outage information, if provided in a document submitted by a licensee with a request for withholding from public disclosure in accordance with 10 CFR 2.790, would likely be withheld from public disclosure because the outage information is likely to be considered confidential business information. Given that the outage schedule information is not, in and of itself, used for safety decisions and that numerous documents generated by the NRC staff are available to the public for assessing the safety of nuclear power plants, the balancing of the competing concerns would likely favor protecting the licensee's confidential information. The challenge to the NRC staff is how to balance competing interests by being as responsive as possible to those requesting information without depriving the licensees of their right to request withholding from public disclosure that information that might unnecessarily harm their competitive economic position.

The staff's handling of information provided by licensees in correspondence to the NRC, in handouts during meetings with the NRC staff, or in other written forms is specifically addressed by our rules and guidance for managing agency records. The staff and the various stakeholders with whom we interact generally understand our processes for handling and releasing documents given to the NRC by licensees. The staff is questioning how we should handle requests for information about outage schedules when our only source of information has been verbal communications with licensees or with other NRC staff members (e.g., resident inspectors or project managers based on their verbal communications with licensees). Following discussions with OGC, I have decided that the appropriate course of action is to issue guidance to the staff regarding this subject. Furthermore, we deem this course of action to be prudent since it avoids placing the staff in the position of possibly violating laws, such as the Trade Secrets Act, by improperly disclosing what may be proprietary information.

The guidance to the staff serves to (1) inform the NRC staff that some licensees may (if not now, then in the future) consider information about plant outage schedules to be confidential business or proprietary information and (2) instruct the staff to use our established formal processes for handling requests for information about plant outage schedules. The advantage of applying the processes and procedures established for controlling our written records to the handling of information received verbally about plant outage schedules is that those procedures have received the appropriate reviews and approvals and have incorporated checks and balances associated with administrative law, our regulations, and the possibly competing interests of various stakeholders. For example, Management Directive 3.1, "Freedom of Information Act" (FOIA), includes specific guidance for processing requests for information that, although not specifically marked as proprietary, the staff believes may contain confidential business or proprietary information. The management directive states that if the NRC staff is processing a request for an agency record and determines that the information may be considered proprietary, then the staff should provide the affected company an opportunity to request withholding of the information from public disclosure before the staff releases the information. We include this step in our guidance so that the staff does not improperly disclose proprietary information. The guidance on releasing plant outage information will incorporate this protection by instructing the staff to contact licensees before giving out outage schedules unless the information is already in the public domain.

I considered it appropriate to inform the Commission on this matter because the implementation of this approach differs from past practice and affects a variety of agency stakeholders. Unless instructed otherwise by the Commission, I will issue the guidance for the staff to implement this policy 10 days from the date of this memorandum. OPA concurs in this policy and has agreed to issue the same guidance to its staff. Because we intend this approach to ensure our compliance with federal and state laws for protecting commercially valuable information and we have applied existing related policies and procedures to the release of information on plant outage schedules, we do not plan to solicit public comment before issuing the guidance to the staff. We will, however, make the staff guidance memorandum available to the public and we will respond to related inquiries from our stakeholders.

SECY, please track.

Attachment: Draft Memo to Staff

cc: SECY
OCA
OGC
OPA
CFO
CIO



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**
WASHINGTON, D.C. 20555-0001

MEMORANDUM TO: Samuel J. Collins, Director, NRR
Hubert J. Miller, Regional Administrator, RI
Luis A. Reyes, Regional Administrator, RII
James E. Dyer, Regional Administrator, RIII
Ellis W. Merschoff, Regional Administrator, RIV

FROM: William D. Travers
Executive Director for Operations

SUBJECT: RELEASE OF INFORMATION ABOUT PLANT OUTAGE SCHEDULES

The purpose of this memorandum is to provide guidance for the staff regarding the release of information about outage (planned or unplanned) schedules for commercial nuclear power plants. Information related to outage schedules is routinely provided by power reactor licensees to support NRC regional offices in their planning of inspection activities, to help NRR schedule completion of licensing actions, and as a matter of course during communications between licensees and the staff. Increasingly, the public, the media, and other parties, such as financial institutions, request information about plant outage schedules, and the NRC staff then questions whether they should release the available information. The staff's handling of information provided by licensees in correspondence to the NRC, in handouts during meetings with the NRC staff, or in other written forms is specifically addressed by our rules and guidance for managing agency records. The staff and the various stakeholders with whom we interact generally understand our processes for handling and releasing documents given to the NRC by licensees. The staff does, however, need guidance for handling requests for information about outage schedules when the source of information has been verbal communications with licensees or with other NRC staff members (e.g., resident inspectors and project managers based on their verbal communications with licensees).

The possible treatment of plant restart schedules as confidential or business information results from the increasingly competitive environment of the electric generation sector and the possible influence of plant outage schedules on matters such as company bond ratings and electricity trading prices. Our handling of this information may become more contentious as the electric utility industry continues restructuring and the NRC receives requests for information from various sources while also receiving comments from licensees and industry representatives indicating concerns about our disclosure of plant outage information.

As a routine matter, the NRC does not require licensees to provide information about outage schedules in a way that is publicly available because such information is not directly related to our mission to protect public health and safety. It is important to recognize the distinction between the information about schedules and the information about actual plant configurations, repair activities, and other matters that would be important to the NRC during an outage or before the restart of a particular power plant.

From this time forward, the staff should not release outage schedule information provided verbally by licensees (and not otherwise known to be in the public domain) without following the process described in our management directives for the release of information to the public (e.g., MD 3.1, "Freedom of Information Act" and MD 3.4, "Release of Information to the Public"). The advantage of applying the processes and procedures established for controlling our written records to the handling of information received verbally about plant outage schedules is that those procedures have received the appropriate reviews and approvals and the staff should be familiar with the requirements of our existing directives. This guidance does not change our general policy of being as responsive as possible to those requesting information and does not imply that someone requesting information on plant outage schedules should be directed to submit a written request in accordance with the Freedom of Information Act (FOIA). The potential sensitivity of the information about plant outage schedules does, however, warrant that the staff exercise some caution before releasing the information to the public. Following the general FOIA guidelines may, therefore, prevent the staff from giving an immediate response to a caller. Information that is known to be in the public domain can be shared freely with anyone seeking assistance from the NRC. Likewise, we may generally mention activities of the NRC staff, such as the conduct of special inspections or the issuance of license amendments, that might relate to a request for information. I wish the staff to be as responsive as possible to those requesting information without depriving the licensees of their right to request withholding from public disclosure that information that might unnecessarily harm their competitive economic position.

Management Directive 3.1, "Freedom of Information Act," has been prepared to ensure that the NRC processes written FOIA requests in accordance with applicable administrative law, NRC regulations, and our goals to be as responsive as possible to requests for information. The management directive includes specific guidance for processing requests for records that, although not specifically marked as proprietary, the staff believes may contain confidential business or proprietary information. The management directive states:

Records Not Stamped Proprietary but Believed to Contain Confidential Business or Proprietary Information (Part III(F)(2))

When a searching office determines that an internal memorandum or any other record may contain information a company considers confidential business or proprietary information, bracket this information and send the record to the FOIA/PA staff. (a)

The FOIA/PA Officer will advise the company in writing of NRC's review determination. (b)

The NRC will follow procedures specified in paragraph (b) above. (c)

[Paragraph (F)(1)(b) describes our process for handling proprietary information. The process includes notifying a company about the staff's intention to release information and recognizes the company's right to initiate actions to prevent disclosure.]

Because of the changing nature of the electric utility industry, some licensees may (if not now, then in the future) consider information about plant outage schedules to be confidential

business or proprietary information. Given our desire to ensure that the staff appropriately balances the interests of the public, licensees, and the NRC, I am instructing the staff not to disclose information about outage schedules without providing licensees an opportunity to decide whether the information is of such commercial value as to justify a request for the information to be withheld from public disclosure in accordance with the requirements of 10 CFR 2.790. This course of action is deemed prudent since it avoids placing the staff in the position of possibly violating laws, such as the Trade Secrets Act, by improperly disclosing what may be proprietary information. Insofar as our staff can refer a requester to the licensee, thereby removing the NRC from a position as middleman, the staff should attempt to do so. Some requesters will, however, push the staff to provide any information that the NRC may have about an outage schedule.

If a staff member receives a request from an individual or an organization outside NRC (who will not accept a referral to the licensee) for information about a particular plant outage schedule that is not known to be in the public domain or for which a licensee has not clearly stated that the information can be released, the staff member should state that by NRC procedures, we may not disclose the information without first giving the licensee an opportunity to request that the information be withheld from public disclosure. Requests for outage schedule information (when such information is not public or when a licensee has not clearly stated that the information may be released) should be referred to the appropriate NRR project manager or an individual designated by a regional office (e.g., the DRP branch chief or project engineer assigned to the subject facility). The NRR project manager or regional designee will contact the licensee and, if necessary, will initiate the process for a licensee to request withholding the information from public disclosure. Written requests from licensees for withholding of information from public disclosure that might arise from a request for information from the public will need to be reviewed by NRR and OGC in accordance with 10 CFR 2.790. The project manager or regional designee should share the results of his or her discussions with the licensee regarding the release or withholding of information about outage schedules to the appropriate staff in the regional office, NRR and OPA so that we can handle subsequent requests for information as efficiently as possible.

The procedure described in Management Directive 3.1 (FOIA) instructs the staff to send a letter to a company before releasing records that might contain information that is business confidential or proprietary. If the request for information was made in accordance with the FOIA, we advise the company that we will release the subject information to the public 15 days after the date of the letter unless the company submits a request for withholding the information or initiates judicial action to prevent disclosure. In the case of less formal requests for information about a plant outage schedule, the NRR project manager or regional designee should contact the licensee promptly upon receiving or becoming aware of a request. Assuming the licensee can quickly decide whether to request that the information be withheld from public disclosure, the staff can provide a timely response to the public, the media, or other party asking about the outage schedule. The licensee, however, is entitled to a reasonable period in which to decide whether the release of the information might have harmful competitive impact and may request that the staff provide the written notice described in the management directive. It is understood that a licensee's use of several days to reach a conclusion about the commercial value of information or a request for written notice might prevent the release of information for a period that exceeds the duration of the subject outage. We should inform the public, the media, or other party requesting outage schedule information that, in some cases, the legal and regulatory processes not only prevent an immediate answer

but that the staff may not have a response from a licensee regarding the disclosure of the outage schedule before the restart of a unit. The staff should keep requesters informed about the status of requests by contacting them when licensees decide whether to request withholding of outage information or when relevant information enters the public domain (e.g., a plant restart is mentioned in the NRC plant status report).

The staff should also use this guidance when it is preparing documents that we will release to the public (e.g., preliminary notifications, highlights, morning reports, and press releases). Unless information about the outage schedule is critical to the document being prepared, the staff should simply avoid placing outage schedule information into documents that we will release to the public. As previously mentioned, documents being prepared by the staff may include information that we know is in the public domain or that the licensee has clearly stated may be released. If a member of the staff believes it is necessary to include specific outage information in a document that we will release to the public and they do not know whether the affected licensee might wish to request the information be withheld from public disclosure, the staff should follow the preceding instructions for responding to a public inquiry. Please note that some NRR or regional procedures may need to be changed to reflect the guidance in this memorandum.

We advised the Commission that we were issuing these instructions. OPA will issue guidance to its staff. Please ensure that you make your staffs aware of the guidance in this memorandum and that they implement it as soon as practical. A summary of the guidance is attached to help you explain this process to your staffs. Any questions about this procedure should be directed to William Reckley of NRR at 301-415-1323. It is possible that the implementation of this procedure will result in questions or concerns from members of the public, the media, or other parties that we previously provided with plant outage information without determining whether it was considered confidential business or proprietary information by the affected licensees. The staff should refer such concerns to OPA.

Attachment: As stated

Summary of Guidance - Handling Requests for Information About Plant Outage Schedules

- The goal of this process is to appropriately balance our desire to be responsive to public inquiries with our responsibility to ensure that we do not improperly disclose proprietary information

The following steps discuss the handling of specific requests for information about plant outage schedules (usually associated with expected plant restart dates):

- (1) If you do not know about the subject outage schedule, simply inform the caller that you do not know and recommend that they call the licensee for the information. In general, the staff should limit requests made to licensees to the information needed to perform our regulatory functions.
- (2) If you have information about the subject plant outage schedule and you know that the information is in the public domain (e.g., docketed correspondence or public announcements by the licensee) or that the licensee has stated that they will not request the information be withheld from public disclosure (e.g., the licensee stated that the information was not proprietary in response to questions about a previous public inquiry about the same outage), you should share the information with the person requesting the outage schedule information. The staff should also provide appropriate disclaimers regarding the accuracy of the information (e.g., information is subject to change, information may not reflect recent plant activities, information is not from an official licensee source, etc.)
- (3) If you have some outage schedule information but do not know whether the information is in the public domain or whether we have asked the licensee if the information is proprietary, you should state that in accordance with NRC procedures, we may not disclose the information without first giving the licensee an opportunity to request that the information be withheld from public disclosure. Before you start an investigation about whether we can disclose the information, you should try to refer the caller to the licensee, thereby removing the NRC from a position as middleman. The referral is justified because disclosure of the information may be inappropriate (e.g., confidential business or proprietary information) and the information available to much of the NRC staff may be outdated or speculative.
- (4) If a caller persists in asking the staff for information about an outage schedule or the staff determines that the caller wants the information from the NRC (i.e., the caller objects to contacting the licensee or requests the information after having contacted the licensee), you should ask the NRR Project Manager (PM) or the designated regional contact for the subject facility to call the licensee regarding the possible release of the information. You should inform the caller that this process may result in the withholding of information as proprietary and, even if the information is not proprietary, the inquiry may not support the immediate release of whatever information the staff has about the outage schedule. Follow step (2) regarding the release of the information, with appropriate disclaimers, whenever the licensee informs the PM or regional designee that the information is not proprietary or we discover that the information is in the public domain. If the licensee decides to request that the information be withheld from public disclosure, update the caller accordingly. If the plant restarts before the licensee requests that the schedule be withheld from public disclosure, the staff should consider, as a courtesy, informing the caller when the restart information enters the public domain (e.g., NRC plant status report indicates plant restart).

ATTACHMENT