

July 24, 2007

MEMORANDUM FOR: Commissioner McGaffigan  
Commissioner Jaczko  
Commissioner Lyons

FROM: Annette Vietti-Cook, Secretary */RA/*

SUBJECT: REQUEST FOR RECONSIDERATION OF THE WORDING OF 10  
CFR § 26.205(D)(4) AS AFFIRMED ON APRIL 17, 2007

Attached is a Request for Reconsideration from Chairman Klein. In accordance with the Internal Commission Procedures (pages III-12 and III-13), this request is being distributed to you with a vote sheet. Please reply to SECY by COB Wednesday, July 11, 2007. For your convenience, the Staff Requirements Memorandum (SRM) from the April 17, 2007, Affirmation Session is attached. Also, for tracking purposes we have assigned COMDEK-07-0004.

Attachments: 1) Request for Reconsideration from Chairman Klein  
2) Vote Sheets  
3) SRM from April 17, 2007 Affirmation Session

cc: Chairman Klein  
EDO  
OGC  
OCA  
OPA  
CFO

July 3, 2007

MEMORANDUM TO: Annette L. Vietti-Cook, Secretary

FROM: Chairman Klein /RA/

SUBJECT: REQUEST FOR RECONSIDERATION OF THE WORDING OF  
10 C.F.R. § 26.205(d)(4) AS AFFIRMED ON APRIL 17, 2007

As documented in the Staff Requirements Memorandum (SRM) dated April 17, 2007, the Commission affirmed and approved on that date a final rule amending 10 CFR Part 26 governing the domestic licensing of production and utilization facilities to revise, reorganize, and clarify drug and alcohol testing programs. The final rule also establishes requirements for managing worker fatigue at operating nuclear power plants. The Commission voted to approve the publication and implementation of this final rule, subject to the comments and changes provided in the attachment to the Affirmation Notice. The fatigue requirements in the rule are not to be effective until 18 months after publication of the final rule.

One specific change from the proposed draft final rule, based on my initiative during the development of the SRM, was to replace "working on unit outage activities" with "solely performing outage activities" in the first sentence of § 26.205(d)(4). See SRM of April 17, 2007 (Item 15 of the Comments and Changes to the Final Rule in SECY-06-0224). This section of the rule addresses the limits on plant personnel work hours and distinguishes between work performed on an operating plant and a plant that is in an outage. The change to the wording was intended as a simple clarification. I now believe it was a mistake for me to suggest it without fuller consideration. It could result in unintended consequences that are potentially significant and could impede final implementation of the rule. The Nuclear Energy Institute has submitted letters of April 24, 2007, and May 8, 2007, in which it alleges potential impacts on nuclear safety, staffing, collective bargaining agreements, and costs of implementation. I am also concerned that the change in language may prompt much greater consideration of waiver requests, which is an undesirable outcome for a new rule provision.

In my view, sufficient questions are raised by this particular late change in rule language to warrant a Commission decision, as a matter of policy, to revert to the language "working on unit outage activities" as proposed by staff in the draft final rule that was before the Commission and available to the public when the Commission affirmed the final rule on April 17, 2007. As planned, the staff should continue to engage the industry and other stakeholders to complete the regulatory guidance for this rule, with the restored language.

Therefore, I recommend that the Commission agree to reconsider the change in language in 26.205(d)(4) and support prompt affirmation on this proposal to modify the final rule by restoring the words "working on outage activities" in place of "solely performing outage activities" in the first sentence of § 26.205(d)(4) and any other pertinent sections.

cc: Commissioner McGaffigan  
Commissioner Jaczko  
Commissioner Lyons  
OGC  
EDO

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MCGAFFIGAN  
SUBJECT: REQUEST FOR RECONSIDERATION OF THE  
WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS  
AFFIRMED ON APRIL 17, 2007

Approved  Disapproved  Abstain  Not Participating

COMMENTS: Below  Attached  None

*Edward M. Gaffigan Jr.*

SIGNATURE

*July 5, 2007*

DATE

Entered on "STARS" Yes  No

**Commissioner McGaffigan's Comments on COMDEK-07-0004**

I approve the Chairman's request for reconsideration of the wording of 10 CFR § 26.205(d)(4) as affirmed on April 17, 2007.

Clearly the Commission did not understand the implications of item 15 of the attachment to the April 17, 2007 Staff Requirements Memorandum. Now that I do, I believe that going back to the original proposed rule language and handling interpretation of that language through guidance is the appropriate course.

The Commission has been attempting to amend Part 26 for more than a decade. We need to make this change and get this rule to OMB as soon as possible because the new rule will be a substantial improvement over the existing Part 26.



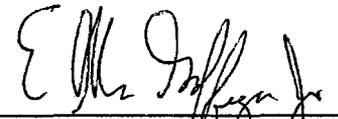
Edward McGaffigan, Jr.

7/5/07  
(Date)

Commissioner McGaffigan's Additional Comments on COMDEK-07-0004

I appreciate Commissioner Jaczko's frustration over the change in rule text which the Chairman is proposing. As I mentioned in my previous vote, clearly the Commission did not understand the implications of the change in question. What I learned from this incident is the danger in "clarifying" proposed rule text without fully understanding the consequences. If we go back to the staff's proposed final rule text as a majority of the Commission has now voted to do, and then leave this potential issue to the guidance process, something done after every rule is finalized, I would expect some adverb such as "predominantly" to emerge in the guidance document. The flexibility that we are restoring as a result of the majority's actions is likely to be very limited in scope and should not in any way threaten the safe operation of the operating unit(s). With the Chairman's rule language change, I believe the Part 26 rule should move more smoothly in the OMB clearance process under the Paperwork Reduction Act and in its implementation. That is important to me because the staff has been working on this rule change since before my arrival on the Commission eleven years ago. This long and fitful process has to have an end.

I do appreciate that the whole rule could have been opened up if the Chairman had chosen to do so in a broader request for reconsideration, and many other provisions might have been changed with Commissioner Merrifield's vote no longer counting. I served together with Commissioner Merrifield for almost nine years on this Commission. I have too much respect for him to nullify his vote and to take advantage of his absence on matters on which we differed in our April round of voting on this rule as a whole. The Chairman's initiative to reconsider the late change in wording of one provision is appropriate, and I support it.

  
Edward McGaffigan, Jr.

7/19/07  
(Date)

NOTATION VOTE

RESPONSE SHEET

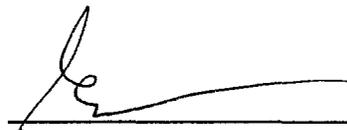
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER JACZKO  
SUBJECT: **REQUEST FOR RECONSIDERATION OF THE WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS AFFIRMED ON APRIL 17, 2007**

Approved \_\_\_\_\_ Disapproved  Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_ Attached  None \_\_\_

*See attached comments*

  
\_\_\_\_\_  
SIGNATURE  
7/16/07  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_

**Commissioner Jaczko's Comments on COMDEK-07-0004  
Request for Reconsideration of the Wording of 10 CFR § 26.205(d)(4)  
as Affirmed on April 17, 2007**

I disapprove of this request to reconsider the language of 10 CFR § 26.205(d)(4) in order to remove the word "solely". Eliminating this important distinction creates a loophole that eases worker fatigue requirements for key staff maintaining reactor safety on the operating unit. The common industry practice of treating all site personnel at a multi-unit site as being in outage status is a practice that is contrary to the intent of the rule and the current technical specifications licensing basis. Changing the rule would allow operators and maintenance workers on operating units to be exempt from work hour limits. Therefore, the words were appropriately changed by the Commission to ensure clarity in the final rule language and to defend the intent of the regulations and licensing basis. The Commission voted on the final rule for Part 26 and affirmed that final rule three months ago, after much discussion and debate, and I have been provided with no persuasive reason to reopen this closed record, especially as it relates to this provision.

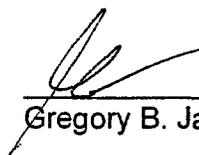
Part 26 is an important regulation approved by the Commission to enact provisions that are aimed at guarding against worker fatigue by setting limitations on the number of hours workers at nuclear power plants can work before being provided some break in their schedule. The intent of the provision in section 26.205(d)(4) was to provide some relief to the work-hour limitations for those employees who work on an outage unit rather than on an operating unit. By eliminating the word "solely" and allowing those "working on unit outage activities" to be exempt from the work hour limitations, employees working on both the operating and outage unit at a site would fall within this exemption.

Although the Nuclear Energy Institute (NEI) expressed concerns about this provision in letters dated April 24, 2007 (ML071150291), and May 8, 2007 (ML071360033), I believe it is too early to make a decision to change the rule until the staff has had sufficient time to complete the regulatory analysis, including determining the cost of the rule, which NEI estimates to be \$190 million per year. I am unconvinced by NEI's conclusion that additional requirements implemented by this provision to reduce worker fatigue will result in additional and significant negative impacts on plant resources. NEI appears to include costs attributed to security forces which are not affected by this provision as well as costs for being in compliance with current technical specifications. Even if their cost estimates are accurate, I believe the safety benefit of the provision would be severely degraded if the word "solely" was taken out. Furthermore, this effort was the culmination of a public rulemaking effort. If the Commission is going to make a change based upon letters from one source, then we should elicit comments from all public stakeholders and give them equal consideration and deliberation.

If the Commission approves the request to reconsider, it is clear that a majority of the Commissioners will have to approve the rule with any revisions agreed to at an affirmation session. Because the composition of the Commission has changed since this rule was previously affirmed, a newly affirmed final rule could appear quite different from the existing final rule. Three months ago this rule was approved and affirmed by five Commissioners and only four of those five Commissioners now remain. The absence of a vote could, in fact, shift the outcome on several controversial decisions which were originally decided with a slim 3-2 voting margin. Additional questions could also arise as to any provisions that result in a split 2-2 vote. Because there has been no discussion about these potential complications, it appears that other Commissioners have, at least implicitly, agreed to approve the final rule as previously affirmed by the prior Commission, except for the change noted in section 26.205(d)(4),

regardless of their positions in their prior votes. I strongly believe that if the Chairman's request for reconsideration prevails, the entire Part 26 rule should be reaffirmed in order to preserve the integrity of the Commission's procedures.

Additionally, I believe that, even if a majority of Commissioners support changing Part 26 to allow this loophole, proceeding in the manner requested could result in stakeholders legitimately questioning the validity of any changes ultimately made to Part 26. I fail to see how our stakeholders could have confidence in a decision made on a not-yet-public paper in not-yet-public votes without any additional public engagement on a rule which has, until now, proceeded through the public rulemaking process and has already been publicly affirmed. If the Commission is truly concerned that sufficient questions were raised by late changes in the rule language to warrant reconsideration and an eventual reaffirmation of Part 26, I believe any re-voting on substantive changes to Part 26 should necessarily be preceded by re-noticing the rule and following the rulemaking process, including seeking public comments prior to its reaffirmation.

  
Gregory B. Jaczko

7/16/07  
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER LYONS  
SUBJECT: **REQUEST FOR RECONSIDERATION OF THE  
WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS  
AFFIRMED ON APRIL 17, 2007**

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below  Attached \_\_\_\_\_ None \_\_\_\_\_

I concur with the comments of Commissioner McGaffigan.

  
\_\_\_\_\_  
SIGNATURE  
7/ 6 /07  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

April 17, 2007

MEMORANDUM FOR: Luis A. Reyes  
Executive Director for Operations

John F. Cordes, Director  
Office of Commission Appellate Adjudication

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 12:55  
P.M., TUESDAY, APRIL 17, 2007, COMMISSIONERS'  
CONFERENCE ROOM, ONE WHITE FLINT NORTH,  
ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-06-0244 - Final Rulemaking--10 CFR Part 26 – Fitness-For-Duty Programs

The Commission approved a final rule which amends 10 CFR Part 26 governing the domestic licensing of production and utilization facilities to revise, reorganize, and clarify drug and alcohol testing programs; establish requirements for managing worker fatigue at operating nuclear power plants; and partially grants two petitions for rulemaking; subject to the attached changes. Following incorporation of these changes, the Federal Register notice should be reviewed by the Rules Review and Directives Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.

(EDO)

(SECY Suspense:

5/18/07)

The staff should continue engaging the industry and other stakeholders to complete the associated regulatory guidance for this rule, and ensure that it addresses the broad range of questions of interpretation and implementation.

II. SECY-07-0030 - Final Rulemaking on Limited Work Authorizations

The Commission approved a final rule which amends 10 CFR Parts 2 and 50 to revise the requirements for limited work authorizations (LWA) and preparation activities at the prospective site of a nuclear power plant.

The Federal Register notice should be reviewed by the Rules Review and Directives Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.

(EDO)

(SECY Suspense:

5/18/07)

References to "a LWA" in the final rule (e.g., 2.102(a) and 2.104(d)) and Federal Register package should be changed to "an LWA" throughout (note the inconsistency on p. 91 of the

final rule).

The staff should make any conforming changes to this final LWA rule that are necessary to reconcile it with the Staff Requirements Memorandum dated April 11, 2007, for the final Part 52 rule, recognizing that this final LWA rule approval is the later Commission action.

The staff should work with external stakeholders to develop and publish the necessary implementation guidance. This should be given a high priority. Part of the guidance should include a discussion of optional voluntary site visits that may ultimately assist in processing a future COL application for the site.

The staff should keep the Commission informed of progress in implementing this new process, and should forward to the Commission any substantive policy or implementation question for resolution.

III. SECY-07-0064 - Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Docket No. 52-011-ESP, Certified Question

The Commission approved a Memorandum and Order responding to a certified question from the Atomic Safety and Licensing Board in LBP-07-03 which requested authority to go forward with merits litigation for Southern Nuclear Operating Company on the Early Site Permit for the Vogtle ESP Site on admitted environmental contentions prior to issuance of the final environmental impact statement. The Memorandum and Order does not authorize or require a merits hearing on the admitted environmental contentions prior to the issuance of the final environmental impact statement.

(Subsequently, on April 17, 2007, the Secretary signed the Memorandum and Order.)

Attachments:           Comments and Changes to the Final Rule in SECY-06-0244

cc:     Chairman Klein  
          Commissioner McGaffigan  
          Commissioner Merrifield  
          Commissioner Jaczko  
          Commissioner Lyons  
          EDO  
          OGC  
          CFO  
          OCAA  
          OCA  
          OIG  
          OPA  
          Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)  
          PDR

**Comments and Changes to the Final Rule in SECY-06-0244**

1. The provisions for minimum days off during normal operating conditions (e.g. 26.205(d)(3)) should provide maintenance personnel within the scope of 26.4(a)(2) a minimum of 2 days off per week when working 10 or 12 hour shifts and 1 day off per week when working 8 hour shifts, as averaged over a 6 week shift cycle.
2. The provisions for minimum days off during outage conditions (e.g. 26.205(d)(4)) should provide maintenance personnel within the scope of 26.4(a)(2) a minimum of 1 day off per week.
3. The staff should include in § 26.5 “Definitions” an appropriate definition of ‘maintenance’ reasonably consistent with the NRC’s existing guidelines in Generic Letter 83-14.
4. The staff should ensure that personnel who actually perform independent quality control/verification (QC/QV) checks under the licensee's NRC-approved Quality Assurance Program are subject to the same Subpart I provisions as operating personnel defined in category § 26.4(a)(1). If staff and OGC determine that this provision of the rule requires re-notice and comment under the APA, staff should issue the final rule without this provision. In that case, staff should separately initiate the additional appropriate noticing for this provision.
5. The staff should delete § 26.205(d)(7).
6. The requirement for licensees to evaluate the effectiveness of their control of work hours of individuals who are subject to this rule should be revised to a frequency of once per year.
7. The staff should delete proposed § 26.203(e)(2)(i) through (iv) and replace it with a revised § 26.203(e)(2) as follows: “A summary of corrective actions, if any, resulting from the analyses of these data, including fatigue assessments.” The deleted items should be moved to an appropriate location in § 26.211 Fatigue Assessments.
8. When construction activities begin, full Part 26 fitness-for-duty (FFD) program, except Subparts I and K, should apply to the following personnel at the site where the plant will be operated:
  - security personnel required by the NRC
  - those who perform quality assurance / quality control / quality verification activities related to safety-related or security-related construction activities
  - individuals directly involved in witnessing or determining inspections, tests, and analyses (ITAAC) certification
  - designated individuals to monitor the fitness of individuals
  - individuals responsible for oversight and implementation of the licensee fitness-for-duty and access authorization programs.
  - second-level and higher supervisors and managers
9. For construction workers and first level supervisors, the Subpart K FFD program

elements required for detecting and deterring substance abuse should be:

- pre-assignment, for-cause, and post-accident drug and alcohol testing, and
- either a fitness monitoring program, or a random drug and alcohol testing program and behavioral observation program

10. The supporting documents to the Commission paper, particularly the Federal Register notice, should be amended to reflect the EDO's resolution of the different staff positions, as further modified by the Commission.
11. The staff should clarify the Statements of Consideration regarding the acceptability of Evidential Breath Testing (EBT) device calibration methods currently in use.
12. The staff should revise the Summary section on page 1 of the final rule package to include that this rule also applies to facilities possessing Category 1A material.
13. Change the word "sanctions" to "disciplinary actions" in § 26.203(b)(4).
14. The staff should delete § 26.401(b) since the requirement to submit a description of the fitness-for-duty program will be required by the new § 52.79(a)(44). The staff should verify that a Part 50 applicant would be similarly required to submit a description of the fitness-for-duty program under existing regulation; if not, the staff should modify 26.401(b) as necessary to create a requirement for Part 50 applicants.
15. The staff should replace working on unit outage activities with solely performing outage activities in the first sentence of § 26.205(d)(4) and any other pertinent sections to clarify the requirements.