COMMISSIONER MERRIFIELD'S COMMENTS ON SECY -99-279

I agree with Commissioner McGaffigan that the staff has done an excellent job detailing the numerous changes to the Fitness For Duty (FFD) rule. He is also quite right to question whether the burdensome process used by the staff to address the "substantial increase" question is necessary or desired. Clearly, the staff was merely following Commission direction. However, as Commissioner McGaffigan suggests, such detailed parsing is not required by "Commission decision or law." I would add that it also risks distorting the contribution to safety to an extent that it precludes any meaningful backfit analysis.

The staff, following Commission guidance, applied the backfit rule to each change, irrespective of its nexus to other changes or more importantly that it was an integral part of a larger change aimed at improving safety. In short, our goal was to separate the wheat from the chaff. However, it is necessarily true that each time a larger change is broken down and analyzed only on a component basis, the total increase in safety from the larger change is lost. In other words, estimating the increase to safety on a component-by-component basis may never yield a "substantial increase" because each component may contribute only a small amount toward safety. This may be true even if together the various changes may more than satisfy the substantial increase test. Similarly, a component-by-component analysis distorts the cost picture, because it attributes only minor or negligible costs to each component and fails to show the overall cost of a larger change.

I want to emphasize that I recognize that the backfit rule provides an important measure of discipline to the process of imposing new regulatory requirements. It provides a meaningful threshold against promulgation of requirements which do not clearly further the NRC's mission of protecting public health and safety. At bottom, its aim is consistent with the Commission's efforts to become more risk informed and to avoid having our licensees divert resources to matters that do not enhance safety. If the backfit rule is to have any meaning, therefore, the staff needs to avoid aggregating various unrelated changes together with one change that substantially contributes to safety since this too would preclude any meaningful backfit analysis. Thus, I recognize that there has to be a careful balance between avoiding separating integral parts and inappropriately aggregating unrelated parts. It is important that the merits of each component, irrespective of whether it is ultimately aggregated for purposes of the backfit analysis, is carefully explained and its cost is separately itemized. This will give our licensees and the interested public an opportunity to challenge the backfit analysis or to urge rejection of a specific change even if it passes the backfit test.

Turning to the specific analysis of the FFD rule, I find that its promulgation, except for two recommendations discussed in more detail below, is appropriate.

The most difficult question is posed by the staff's recommendation of thirty-six changes that they deem are "worthwhile" exceptions to the backfit rule. Each is justified on an individual basis and none, individually analyzed, substantially contributes to safety. The sheer number raises the question whether these exceptions have overtaken the backfit rule. Clearly, so many exceptions may under most circumstances warrant their rejection. However, for this particular rule change, I am not willing conclude that the worthwhile changes should be altogether disapproved. The overall scheme into which these worthwhile changes fall is not clearly identified, but even a quick glance reveals that some of them could have been viewed collectively as one change. For example, just from their titles or short descriptions it is obvious that the aim of several worthwhile changes was to prevent subversion of alcohol testing. The backfit rule was applied to each particular effort aimed at preventing subversion. Some were seen as compliance exceptions, not subject to the backfit rule, others were seen as changes that failed the backfit test, but were deemed worthwhile exceptions. To me, in order to reject the worthwhile changes, we would first have to go back and ensure that each change should not be considered collectively as part of a larger change. Such an analysis would hold up the entire package, since some of the worthwhile changes may be integral parts of changes that already passed the backfit rule or were compliance exceptions, as with the subversion issues. This does not seem prudent. There are many justified and important relaxations of requirements proposed in the package. Indeed, the cost savings of the entire package far outweigh the costs to be expended as a result of this rulemaking and the Commission has already expended an extraordinary amount time and effort on this rulemaking. I also agree with Commissioner McGaffigan that it is not clear that the backfit rule was intended to exclude reasonable useful changes such as those identified here as "worthwhile." Therefore, it would be difficult to reject these changes in light of their purpose to further our confidence that the nuclear power plant workplace is drug and alcohol free.

Further, and perhaps more importantly, the rationale for each component has been fully explained and the cost of each change was considered in analyzing the total savings of the overall rulemaking package. Therefore, I am confident that the licensees and the public are on notice of the basis for each component and the overall cost benefit analysis, and have had an opportunity to comment on the merits of each.

As I stated earlier, the staff has recommended the following 2 changes which I believe lack sufficient justification and represent poor public policy. Thus, I **disapprove** the staff imposing either of these new requirements.

1. Based on the comments on the proposed rule, despite the staff's analysis to the contrary, I believe that we should not impose a "[m]ore restrictive temperature range for an acceptable urine specimen." See proposed change of 2.4(g)(13) and (15) of Appendix A. Under the current rules, a specimen is acceptable if its temperature falls between 90.5 -99.8 F. The staff has proposed that the Commission reduce the range by changing the lowest acceptable temperature from 90.5 to 94 . Although staff acknowledges that the current range is the same as that recommended by Health and Human Services Administration and used by the Department of Transportation, the staff argues that this range does not adequately prevent subversion. The staff has a heavy burden to demonstrate that our range should vary from these established standards. I strongly believe that the staff has not satisfactorily met this burden. It goes without saying that preventing subversion of tests is absolutely necessary. However, we cannot be so steadfast on preventing subversion that we overlook the costs imposed by the more restrictive tests or the burden on personal privacy. Nor should we overestimate the success at preventing the subversion. The staff has not adequately itemized the costs to licensees of having to repeat tests, i.e., the cost of employee downtime associated with waiting to be retested and the actual cost of the repeat examinations. There is no adequate discussion of the personal privacy issues that will be raised as each sample that falls outside the temperature range will require the next specimen to be retrieved while being personally observed. There will always be attempts and successes at subverting

the test, even at the more restrictive temperature. For these reasons, the staff has not convinced me that the present range, combined with other methods of detecting alcohol and drug use, such as personal observation, does not provide an adequate method of detection. Thus, I disapprove the staff's proposal to impose a more restrictive temperature range, and instead request that the staff maintain its current temperature standard.

2. I also believe the staff has not provided adequate justification for imposing a requirement that a medical determination be performed to evaluate **all** employees tested for-cause. Specifically, the revision requires that the worker's unescorted access status be suspended until he or she is pronounced fit for duty based on a management **and** a medical determination of fitness. The staff, in SECY-99-279, as well as in briefings for the Commission staff, has failed to provide a rational basis for imposing a medical determination in addition to a management determination of fitness. They have not adequately accounted for the unnecessary and impractical regulatory burden associated with actually implementing this requirement, especially during off-normal work hours. They have failed to discriminate between credible and non-credible cases and have not demonstrated a sound basis for why a management determination of fitness alone is inadequate in all such cases. Finally, they have not demonstrated to me that a rigorous assessment of the actual cost implications was performed. Based on the facts presented to me, I believe that requiring a medical determination of fitness after **all** for-cause tests is unnecessary, and thus I disapprove the staff's recommendation.