

October 24, 2000

COMMISSION VOTING RECORD

DECISION SECY-00-0168

ITEM:

TITLE: PUBLICATION OF FINAL REGULATORY GUIDE ON CRITERION FOR TRIGGERING A REVIEW UNDER 10 CFR 50.80 FOR NON-OWNER OPERATOR SERVICE COMPANIES

The Commission (with Chairman Meserve and Commissioners Diaz, McGaffigan, and Merrifield agreeing and Commissioner Dicus disagreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of October 24, 2000.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

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Annette Vietti-Cook  
Secretary of the Commission

Attachments: 1. Voting Summary  
2. Commissioner Vote Sheets

cc: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR

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VOTING SUMMARY - SECY-00-0168

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE		X			X	9/11/00
COMR. DICUS	X				X	9/7/00
COMR. DIAZ		X			X	9/13/00
COMR. MCGAFFIGAN		X			X	9/15/00
COMR. MERRIFIELD		X			X	9/5/00

COMMENT RESOLUTION

In their vote sheets, Chairman Meserve and Commissioners Diaz, McGaffigan, and Merrifield disapproved the staff's recommendation and provided some additional comments. Instead of approving the staff's recommendation, they directed the staff to convert the proposed final regulatory guide into a Regulatory Issue Summary. Commissioner Dicus would have approved the staff's recommendation because she did not believe that devoting additional effort, at this time, would be the most efficient and effective use of staff resources. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on October 24, 2000.

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**Commissioner Comments on SECY-00-0168**

## **Chairman Meserve**

Although I recognize that the staff has made considerable and commendable effort in the preparation of the regulatory guide that is the subject of this Commission review, I share Commissioner Merrifield's concern that the guide may lack sufficient specificity as to provide clear guidance to our licensees as to the circumstances that require reviews under [10 CFR 50.80](#) for non-owner operator service companies. Accordingly, I disapprove the issuance of the regulatory guide at this time.

The difficulties that have confronted the staff in completing the guide may arise in part from the fact that the subject matter of the guide does not lend itself, at least at this juncture, to crisp guidance. Regulatory guides usually serve to provide guidance for licensees on a process or procedure that is deemed by the staff to satisfy a regulatory requirement or set of requirements. The primary purpose of this regulatory guide, by contrast, seems to be to inform licensees of the factors that the NRC will weigh in assessing licensee activities, while preserving substantial room for the application of staff judgment on a case-by-case basis. Under the circumstances, I question whether an effort to complete a regulatory guide that provides specific guidance is the best way to proceed.

General information on regulatory issues and the NRC's evaluation of them is often provided to licensees by means of generic communications, such as Regulatory Issue Summaries. The staff should convert the draft regulatory guide on non-owner operator service companies into such a Regulatory Issue Summary, including lessons learned from the variety of circumstances in which the staff has had to determine whether to undertake a 50.80 review. In this way the staff can provide insights to our licensees on the considerations that are weighed in assessing whether licensees' agreements with non-owner operator service companies will require a 50.80 review, without attempting to provide concrete guidance in the nature of a regulatory guide prematurely.

## **Commissioner Dicus**

I approve the publication of final the Regulatory Guide enclosed in SECY-00-168 concerning criterion for triggering a review under 10 CFR 50.80 for non-owner operator service companies.

I believe it is important to note that the staff and Commission have worked almost 3 years on the effort to develop this regulatory guidance. During this time, the NRC has reviewed and approved over 70 license transfer-related requests. And of those 70 or so reviews only a handful, less than 5, have involved weighty issues associated with non-owner operator service companies. The staff has handled these appropriately.

It is impractical for this regulatory guide to be all inclusive and or try to anticipate every unique situation that might be associated with industry consolidation, mergers and other business decisions that may require consideration for a 50.80 review. The staff is aware of lessons learned in other countries associated with the deregulation of the electric power industry. And while the staff is always able to improve on its guidance, after almost 3 years of effort, I do not believe that devoting additional effort, at this time, is the most efficient and effective use of staff resources. This is a regulatory guide, not a rulemaking. Up to this point, no one has appeared to suggest that 50.80 should be revised.

In addition to publishing the Regulatory Guide, the staff should also publish a Regulatory Issue Summary that discusses lesson learned from the reviews to date. The staff should also review the Regulatory Guide on a biannual basis to determine whether new information has become available that should be incorporated into the Regulatory Guide.

## **Commissioner Diaz**

I disapprove the staff's proposal to proceed with publication of the draft final regulatory guide on the circumstances that require a review under 10 CFR 50.80 for the use of non-owner operator service companies. After reviewing the proposed final regulatory guide and the comments of my fellow Commissioners, I conclude that several issues of clarity and consistency should be addressed before publication of final guidance in this area. These issues include potential difficulties in application of the key criterion ("final decision-making authority") as well as the specification of licensee activities for which final decision-making authority would trigger review. For instance, I continue to recommend ([see my comments on SECY-99-237](#)) that the guide address changes concerning authority over nuclear power plant site security programs. Moreover, additional insights may be gained from ongoing reviews relating to the effects of deregulation and industry consolidation on NRC oversight (e.g., 2/10/00 [SRM for COMNJD-99-006](#)).

I appreciate the staff's efforts toward finalizing a guide that outlines licensing implications of the use of non-owner operator service companies. This is an important subject that deserves continued staff attention so that the public, NRC staff, and licensees have the benefits of as much predictability as can reasonably be brought to bear in the discharge of the agency's responsibilities in this area. In this regard, I agree with Chairman Meserve that the communication of the experience and analysis to date through issuance of Regulatory Issue Summary would be an appropriate interim step.

## **Commissioner McGaffigan**

I concur in the Chairman's vote.

## **Commissioner Merrifield**

I disapprove the staff's recommendation to proceed with publication of the final regulatory guide. Given the dynamic nature of

the electric industry in the United States, I clearly recognize the importance of having sound guidance associated with 10 CFR 50.80 reviews for non-owner operator service companies. Thus, I appreciate the staff's efforts associated with SECY-00-0168. However, I believe there are significant weaknesses in the staff's proposed regulatory guide that must be corrected prior to publication. Specifically, I believe that the guidance lacks the clarity and specificity that are necessary to ensure appropriate and consistent implementation by licensees and our staff, and places an unreasonable burden on our inspectors.

My specific concerns are:

1. The list of 16 areas that will automatically trigger a 10 CFR 50.80 review includes two areas pertaining to the authority to change staffing levels and to make organizational changes. I am concerned because the staff does not clearly articulate any threshold for the organizational changes and staffing changes that would trigger such a review. In response to questions I asked of the staff during the review of SECY-00-0168, the staff indicated that these two triggers only apply to licensed positions and positions described in the Technical Specifications. I believe that the guidance as written is inadequate to ensure that our licensees and our staff consistently come to the correct interpretation of applicability. The staff should modify these two triggers to reflect that they apply only to licensed positions and positions described in the Technical Specifications.
2. In Section C (Regulatory Position) of the regulatory guide, the staff states that the criterion is focused on the concept of final decisionmaking authority. This sole focus is reflected throughout the regulatory guide. In response to questions I had regarding this focus, the staff confirmed that a 10 CFR 50.80 review would be automatically triggered only if the service company had final decisionmaking authority in one or more of the 16 areas listed in the guidance. However, I am concerned about the language in the paragraph which precedes this list. Specifically, the staff states "If a service company has been retained by a licensee with the authority to control and perform licensed activities or activities that substantially impact licensed activities, it must be on the license, i.e., it is required to be approved as a licensee." I believe that this de facto criterion is broader in scope, or could be interpreted to be broader in scope, than the final decisionmaking authority criterion. The staff should clarify the guidance so that its intentions are clearly articulated. If the staff intends to apply this broader criterion, it should clearly state what it means by such terms as "control" and "substantially impact" to facilitate correct and consistent implementation.
3. This concern is related to my previous concern. The regulatory guide lacks a definition of the term "final decisionmaking authority". It is not clear to me what the staff's expectations are with respect to actual implementation. There could be a wide variation in how licensees interpret and carry out such authority and it is not clear to me what the staff would find acceptable and unacceptable. At the risk of sounding sarcastic, it appears that a 10 CFR 50.80 review would not be triggered as long as a licensee maintains a position within its organization with the designation of "Final Decisionmaking Authority". I am certain that this is not the staff's intent; however, my point is that the regulatory guide is not clear with respect to where the line between acceptable and unacceptable is. This lack of clarity raises the potential for inconsistent interpretation among both our licensees and our staff. Apparently the Office of Research is working on a study and corresponding NUREG pertaining to safety insights associated with deregulation. During that study, the staff identified international experience which illustrated the problems that can occur when "final decisionmaking authority" is not clearly defined and when the competencies that must be maintained by a licensee to effectively carry out this authority in a licensee/service company relationship are not codified. The staff has indicated that the insights gained from that ongoing study have not been accounted for in the regulatory guide. While I appreciate the difficulty of defining such terms as "final decisionmaking authority" and the terms discussed in Comment #3, I also appreciate the potential problems that could arise as a result of a "you'll know it when you see it" approach. I believe the staff should revise the regulatory guide to clearly define the term "final decisionmaking authority" and the responsibilities/competencies that must be maintained by a licensee to effectively carry out this authority.
4. In response to questions I had during my review of SECY-00-0168, the staff indicated that our inspectors would have some degree of responsibility for identifying if a licensee crosses a 10 CFR 50.80 review threshold, as outlined in the regulatory guide, without seeking a license amendment. This raises my concern with respect to the clarity and definition of the regulatory guide. It also raises my concern about the adequacy of our inspection guidance. I am opposed to putting this licensing matter in the hands of our inspectors without clear regulatory guidance and clear inspection guidance. By relying on our inspectors to identify whether a 10 CFR 50.80 review threshold has been crossed without sound regulatory and inspection guidance, we are unfairly putting them in a difficult position and leaving the agency and our licensees vulnerable to inconsistent inspector interpretations.
5. I believe there may be some inconsistency between the list of "automatic triggers" and the list of "collective triggers". For example, "Authority to perform maintenance on safety-related equipment" is listed as an automatic trigger while "Authority for engineering work on safety-related systems" is listed as a collective trigger. In response to my questions on this matter, the staff indicated that engineering modifications on safety-related equipment must undergo review by the plant safety review committee before implementation, and thus this area does not warrant inclusion as an automatic trigger. I would argue that maintenance on safety-related equipment is subject to rigorous QA requirements and a level of oversight/review by the licensee's QA organization, and thus using the same logic provided by the staff, should not be included in the list of automatic triggers.