

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-12-0025 – PROPOSED ORDERS AND
REQUESTS FOR INFORMATION IN RESPONSE TO
LESSONS LEARNED FROM JAPAN'S MARCH 11,
2011, GREAT TOHOKU EARTHQUAKE AND TSUNAMI

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___



SIGNATURE

03/ 2 /12

DATE

Entered on "STARS" Yes No ___

**Commissioner Svinicki's Comments on SECY-12-0025
Proposed Orders and Request for Information in Response to Lessons Learned
from Japan's March 11, 2011, Great Tōhoku Earthquake and Tsunami**

I approve the issuance of the three proposed orders (Enclosures 4, 5, and 6 to SECY-12-0025), subject to these comments. A tremendous amount of work has been achieved by the NRC staff and substantial efforts have been put forward by the NRC's stakeholders in the few months between the submittal to the Commission of SECY-11-0137, "Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned," and today. In this short period, our staff and stakeholders have engaged in more than fifteen public meetings to continue to develop the agency's path forward. As a result, the Commission has before it a very thoroughly examined and considered set of regulatory actions.

I vote from the vantage of having seen my colleagues' votes on SECY-12-0025, so I would also note that the Commission's unanimity in supporting the issuance of this set of regulatory actions (both the proposed orders and draft 50.54(f) request for information letter) likely stands as a testimony to the deliberateness of the NRC's work on these matters. The only substantive divergence appears to center on the selection of a basis for issuance of the orders; a policy determination that has no effect on the implementation of actions compelled under the orders. As Commissioner Apostolakis noted in his vote, "Practically speaking, the requirements imposed by the orders should be the same regardless of whether such proposals are characterized as ensuring adequate protection, redefining adequate protection, or exercising an administrative exemption to the backfit rule." Which of these labels is to be hung on any of the three orders comes down to a policy judgment of whether the staff has sufficiently made the case that "regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety of the public" or, failing that, whether the circumstances merit the Commission availing itself of a rare, but available, administrative exception to its own backfit rule. For my part, I would invoke the administrative exception for each of the three proposed orders laid before the Commission here and direct the staff to issue the orders – compelling the same actions of licensees – but upon this revised basis.

Various of my colleagues have put forward the case in their votes for utilizing an administrative exception as the basis for issuing one or more of the three orders. There appears to be a majority, at this stage of the deliberation, for issuing the order on spent fuel pool instrumentation under an administrative exception to backfit. I agree. I would extend the same logic, however, to the other two orders, as well. Although I believe strongly that the act of agencies "exempting" themselves from their own rules should be a rare act, and that it may appear to fly in the face of fair play, agencies possess inherent authority to grant exemptions from their own regulations in the face of unique and compelling circumstances.¹ Such circumstances present themselves here. The exigencies and policy imperatives of moving forward with dispatch on this set of prudent and well-reasoned regulatory actions present, in my view, sufficient bases for invoking an administrative exception. There is greater infirmity, I believe, in premature conclusions on the Japan Near-Term Task Force's Recommendation 1 on revisiting the risk-informed defense-

¹ "It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-786 (1968).

in-depth framework for ensuring adequate protection, regarding which the Commission has already directed a holistic review in a notation vote paper to be submitted to the Commission later this year or early next year. I believe the Commission had a sound basis for choosing this course and has been presented with no basis in the intervening months to depart from it.

I am perplexed by the ocean of difference dividing the staff and licensee resource estimates for performing the assessment phase of the seismic re-evaluations. This agency has a wealth of hard-earned knowledge regarding the peril of underestimating the complexity or lack of maturity in certain risk assessment techniques, such as fire probabilistic risk assessment. For example, as a result of these miscalculations, our review of license amendment requests for -- and licensees' transitions to -- NFPA 805 are substantially delayed from NRC's early goals. We will not advance the cause of enhancing seismic safety at nuclear power plants if we repeat that lesson here. If the industry submits an alternative, practical engineering approach that could result in the quicker implementation of plant safety enhancements while enabling plants to complete the assessment within the schedule defined in the 50.54(f) request for information letter (as indicated in their letter of February 28, 2012), the staff should provide an information paper to the Commission containing a determination of whether this approach is acceptable to the staff, or, if not, explaining how continuing with the staff's approach of seismic probabilistic risk assessment provides superior safety benefits on a reasonable timetable.

I also question the completeness of the "justification" statement for the 50.54(f) request for information. Under NRC regulations and guidance, generic information requests issued under 50.54(f) require only a justification statement and a review by the Committee to Review Generic Requirements, rather than a full regulatory analysis. I acknowledge that the 50.54(f) letter addresses these elements. However, this is no ordinary request for information; what we are asking of our licensees will require significant time and resources. In general, we have been well-served by our disciplined approach to regulatory analysis, and we would benefit from a more comprehensive analysis of the benefits to be gained from the information request versus the burdens from its imposition. Furthermore, the Commission's actions regarding the consideration of cumulative effects of regulation and President Obama's Executive Orders on regulatory reform remind us that we should not, in cases like this one, lose sight of the relative benefits and burdens of our regulatory actions. The exigencies and policy imperatives described above may overcome any shortfalls in this particular case, but I encourage the staff in future evaluation phases of the Fukushima lessons-learned effort to maintain a rigorous regulatory analysis process.

Regarding the request for information on emergency preparedness, the NRC's Executive Director for Operations has testified to the Commission, and the Director of the Office of Nuclear Security and Incident Response has emphasized to me in our communications, that the implementation of the Emergency Preparedness rule that was issued last year remains a higher priority than activities associated with Recommendation 9.3. Completing implementation activities associated with the rule we have already promulgated has greater safety significance and also involves the coordinated actions of our partners in State and local governments. Substantial public credibility benefits accrue from continuing these activities as a priority. The staff should follow through on these commitments.

The staff's paper also includes recommendations on applying orders and information requests to the Vogtle combined operating license (COL). However, as Commissioner Magwood notes, the staff does not address the posture of these actions for future COL holders. I agree with Commissioner Magwood, that for COLs issued from this point forward, the orders described in this paper (as applicable) should be issued concurrent with issuance of the COL.

Finally, I join Chairman Jaczko in noting that development of the applicable guidance documents referred to in each order will be key. The NRC staff and managers have assured me, in multiple engagements on the issue, that they are moving forward with the development and completion of this guidance with an urgency equivalent to that used in the development of the proposed orders and request for information. I urge them on in these efforts, as the implementing actions compelled under the orders cannot be carried out efficiently or with certitude in the absence of the shared understanding that finalized guidance documents will provide.



Kristine L. Svinicki 03/2/12