

December 31, 1997

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: RESPONSE TO STAFF REQUIREMENTS MEMORANDUM: SECY-97-144, "POTENTIAL POLICY ISSUES RAISED BY NON-OWNER OPERATORS"

The purpose of this paper is to present the staff's plans for the issues raised by the Commission in its staff requirements memorandum (SRM) of August 29, 1997, on SECY-97-144.

BACKGROUND

In an SRM of August 14, 1996, the Commission asked the staff to examine how the industry's increased interest in using non-owner companies to operate plants would affect licenses and to identify policy issues for the Commission's consideration. In SECY-97-144, dated July 11, 1997, the staff responded that 10 CFR 50.80 review, and associated licensing actions may be called for when a service company is contracted to provide operations support, depending on the extent of control being transferred to the operating company. The staff concluded that continued case-by-case reviews of these situations are warranted since there has been very limited experience with independent non-owner operators to date, and a wide variety of potential operational and contractual arrangements are possible.

In the SRM dated August 29, 1997, concerning SECY-97-144, the Commission directed that the staff notify licensees that they should seek early NRC threshold review of proposed service company operational support agreements to determine if 10 CFR 50.80 review will be required. The SRM also directed the staff to ensure that specific criteria used to evaluate the extent of control being transferred to the non-owner operator in directing day-to-day operations of the facility are incorporated in the Standard Review Plan (SRP). The SRM also directed the staff to provide a discussion, with specific examples, of the criteria the staff would use in making a determination on whether 10 CFR 50.80 review is necessary.

SUMMARY

Administrative Letter 96-02 meets the short-term requirements regarding licensee notification. In the longer term, the staff plans to issue a generic communication concerning the criteria for evaluating to what extent control is transferred and the criteria used by the staff to determine whether a 50.80 review is necessary. Preliminary criteria are presented in the list on pages 4 and 5 of this paper.

The staff will continue to perform case-by-case reviews of future organizational changes and, with additional experience, will finalize threshold criteria for triggering a 50.80 review and publish such criteria in regulatory guidance, if appropriate. The staff is proposing an action plan (see page 7) for completion of this issue.

The Office of Nuclear Material Safety and Safeguards (NMSS) is currently reviewing organizational issues involved in the Part 72 license transfer request for the proposed transfer of the Fort St. Vrain independent spent fuel storage installation license to the Department of Energy (DOE). Similar issues are being considered for the initial licensing of the DOE Three Mile Island Unit 2 spent fuel storage facility. NMSS is also evaluating the review process for transferring a Part 72 Certificate of Compliance for a fuel storage system from one vendor to another.

CURRENT STATUS

NUCLEAR POWER PLANTS

The numbered sections which follow correspond to the individual elements of Commission direction contained in the SRM of August 29, 1997.

- 1. Notify licensees that in cases where service companies are contracted to provide operations management support, the licensee should seek early NRC threshold review of the proposed agreement to determine whether a formal NRC review and consent under 10 CFR 50.80 will be required.**

NRC Administrative Letter 96-02, "Licensee Responsibilities Related to Financial Qualifications," was issued on June 21, 1996, to all holders of operating licenses or construction permits for nuclear power reactors. The letter reminded licensees of their responsibility to inform and obtain advance approval from the NRC for any changes that would constitute a transfer of the license, directly or indirectly, through transfer of control of the NRC license to any person pursuant to 10 CFR 50.80. The letter explained that increasing competition may cause disaggregation of integrated power systems which "may involve utility restructuring, mergers, and corporate spinoffs that lead to changes in owners or operators of licensed power reactors and other material changes." The letter also pointed out "the desirability of providing the NRC advance notice of any plans for such changes so that staff review resources can be allocated and NRC decisions are not delayed."

The staff believes that Administrative Letter 96-02 meets the short-term requirements of Item 1 regarding licensee notification. As a longer term item, the staff plans to issue a generic communication and regulatory guidance, as appropriate, concerning the criteria for evaluating the extent of control transferred to a service company and the criteria used by the staff to determine whether a 10 CFR 50.80 review is necessary. The generic communication and regulatory guidance will be issued when the criteria are finalized in accordance with the action plan discussed below.

2. **Ensure that specific criteria used to evaluate the extent of control transferred to the non-owner operator in directing day-to-day operations of the facility are, to the extent practicable, incorporated in the Standard Review Plan.**

The specific criteria when finished will be incorporated into appropriate regulatory guidance in accordance with the action plan discussed below.

3. **Provide a discussion, with specific examples, of the criteria the staff would use in making a determination of whether a Section 50.80 review is necessary. In developing these specific criteria, the staff should ensure coordination of and consistency between criteria to be applied by NRR [Office of Nuclear Reactor Regulation] in evaluating nuclear power plants and those to be applied by NMSS [Office of Nuclear Material Safety and Safeguards] to materials licensees, the gaseous diffusion plant operators, and any contractors operating DOE [Department of Energy] facilities that may be subject to NRC regulatory oversight. This discussion could be included in the paper being developed regarding NRC's financial qualifications review process or may be developed in conjunction with the Standard Review Plan Update.**

Item 3 in the SRM relates to "threshold criteria" by which licensees and staff recognize that changes in the licensee's organizational structure and business relationships constitute a transfer of the license, or rights under the license, or transfer of control of the license, which, pursuant to 10 CFR 50.80, requires prior Commission approval.

The staff has limited experience with the introduction of non-owner operating companies. In most instances to date, an existing operating organization was split off from the owner and transferred to a newly formed operating company in reorganization/merger agreements. Examples include the transfer approval and license amendments for Farley Units 1 and 2, Hatch Units 1 and 2, and Vogtle Units 1 and 2 when Southern Nuclear Operating Company became the licensed operator of the facilities in place of Alabama Power Company and Georgia Power Company. All three companies are subsidiaries of the Southern Company. Another similar example is the transfer approval and license amendment for River Bend Unit 1 when Entergy Operations, Inc., a subsidiary of Entergy Corporation, became the licensed operator at the same time Entergy Corporation acquired Gulf States Utilities, the former operator. In each of these cases, there was no wholesale change of operating personnel, just a transfer of the existing operating organization to a new operating company. In each of these cases, the licensees recognized that a 10 CFR 50.80 review was necessary.

In a separate example, in early 1997, Maine Yankee Atomic Power Company met with the Commissioners and later with NRC staff to explain the details of a management services agreement with Entergy Nuclear, Inc., to provide operations management personnel, including the positions of Maine Yankee President and Vice President, Licensing. The Entergy personnel provided were to become employees of Maine Yankee while at the same time remaining employees of Entergy Nuclear, Inc. and would serve at the pleasure of and take direction from the Maine Yankee Board of Directors. Maine Yankee stated in a letter dated February 6, 1997, to the NRC that it had concluded that neither the management services agreement with Entergy nor the specific management changes would require prior NRC approval or a Technical Specification (TS) change. The staff concurred with this assessment, since Maine Yankee retained ultimate safety-related decision-making authority and Entergy personnel were to become dual employees of Maine Yankee.

As nuclear utilities evolve within a deregulated environment, the staff recognizes that various alternative and potentially complex non-owner operator arrangements may be pursued by licensees. With regard to such new arrangements, the staff recognizes that the decision on whether a 10 CFR 50.80 review is necessary, as discussed in SECY-97-144, depends on the extent to which operating control is being transferred and the degree of autonomy granted to the operating company. The staff also recognizes that more detailed threshold criteria for the submission of new arrangements pursuant to 10 CFR 50.80 could be helpful.

The staff has developed some proposed criteria regarding changes to nuclear plant operating entities by which the need for a review under 10 CFR 50.80 can be measured. The staff has focused these criteria around the concept of final decision making authority: If an operating service company provides advice but does not make the final decision in a particular area, then there has been no transfer of operating authority for that area. The items to be considered include the following:

- decision to shut down for repairs
- decision to start up the plant
- approval of licensee event reports
- decision on whether to make a 10 CFR 50.72 report
- authority to make operability determinations
- authority to change staffing levels
- authority to make organizational changes
- decision to defer repairs
- authority for quality assurance responsibilities (selecting audits, approving audit reports, accepting audit responses)
- budget-setting and spending authority
- decision to continue operation with equipment problems
- authority over the design control of the facility
- decision to continue operations or permanently cease operation

If a new entity is being granted final decision making authority in any of these areas, then the staff would judge that a review under 10 CFR 50.80 should be pursued by the licensee and the transferee would have to become a licensee.⁽¹⁾

In addition to these preliminary criteria, the staff notes that lines of authority and responsibility in the organizational chain of command are specified in the plant's TS in the administrative controls section (Section 5.0 in the Standard TS). When considering the use of service company management talent, the staff expects licensees to look at the licensing basis to see what management structure, authorities, and responsibilities were previously approved. If the lines of authority or responsibilities specified in the TS are being materially changed, the change would need review and approval by NRC as a license

amendment under 10 CFR 50.90. The staff expects that licensees will ensure that service company personnel meet TS-specified educational and experience requirements for the positions they will be taking and will seek approval for any license changes they deem necessary.

It is difficult to catalogue the diverse relationships possible between the responsibility to operate and the owner's authority and responsibility for the safe operation of nuclear facilities. The staff will continue to accumulate experience by performing case-by-case reviews of future organizational changes. With sufficient experience, the staff expects to be able to finalize threshold criteria for triggering a 10 CFR 50.80 review, and publish such criteria in regulatory guidance. Rulemaking will be initiated, if necessary.

Item 2 in the SRM relates to measures the staff will use to judge whether a new operating arrangement, proposed pursuant to 10 CFR 50.80 or as a license amendment, meets regulatory requirements. Currently, NUREG-0800, "Standard Review Plan" (SRP), Section 13.1.1, "Management and Technical Support Organization," and Section 13.1.2-13.1.3, "Operating Organization," are used to evaluate the qualifications of initial applicants for operating licenses. The staff considers these SRP sections adequate for reviewing the qualifications of service companies being brought in to provide operations support.

At this time, the staff has very limited experience in evaluating the spectrum of control arrangements that could potentially be proposed for independent non-owner operators. To date, very few contracts involving the transfer of operating authority or responsibility to non-licensed organizations have been considered and reviewed by the staff. As described in SECY-97-144, these contracts were reviewed on a case-by-case basis using appropriate elements of the SRP.

Safety evaluations performed by the staff in support of previous transfer and amendment requests examined the following areas: management and technical qualifications, financial and antitrust considerations, plant security and the handling of sensitive data, offsite power availability, emergency planning, quality assurance and personnel training, and environmental protection. The safety evaluations for Hatch and Vogtle also examined the area of foreign ownership and, because of petitions filed by intervenors, the issue of management character.

The staff believes that it needs to develop additional experience in this area in order to develop any changes to Chapter 13 of the SRP that may be needed to evaluate the spectrum of possible arrangements and the extent to which licensees may seek to transfer control to non-owner operators. Such changes would be developed after sufficient additional experience is acquired with future 10 CFR 50.80 reviews that result from the threshold criteria described above.

SPENT FUEL STORAGE ACTIVITIES

The discussion above focused on new operating arrangements for operating commercial power reactors and reviews pursuant to 10 CFR 50.80. The staff is currently addressing the same issues as it considers the transfer of several other NRC-granted authorizations.

NMSS is currently reviewing a request to transfer the 10 CFR Part 72 license for the Fort St. Vrain (FSV) independent spent fuel storage installation (ISFSI) from the Public Service of Colorado Company to DOE. DOE has requested the transfer review pursuant to 10 CFR 72.50, which has requirements similar to 10 CFR 50.80. DOE has proposed to operate the FSV ISFSI by contractually delegating most of the authorities listed above to a contractor. The staff is using SRP guidance similar to Chapter 13 of the SRP described above. However, to the extent that DOE's proposed operating agreement delegates decision making authority to the contractor in most areas of the operation of the facility, the staff is considering issues related to which entity is directly responsible for discharging the obligations set forth in the license and, accordingly, is named as a licensee, as the staff continues its review. Similar organizational issues are also being considered for the initial licensing of the DOE Three Mile Island Unit 2 spent fuel storage facility.

NMSS staff are also currently assessing the transfer of responsibility of the 10 CFR Part 72 Certificate of Compliance (COC) for the NUHOMS storage system currently held by Vectra Technologies, to another company as Vectra seeks protection under Chapter 11 bankruptcy proceedings. Changes needed to the staff's plans for reviews and inspections needed for a resumption of fabrication activities are being examined. NRC regulations in 10 CFR Part 72 and the existing COC for the NUHOMS storage system do not prohibit the transfer of the certificate to another party from the original applicant. Assuming the Certificate is transferred, the new vendor will need to comply with applicable NRC regulations and conditions in the COC. Prior NRC approval of such a transfer is not required; however, the NRC staff will verify through inspection and records review that the new vendor and future NUHOMS casks comply with applicable NRC requirements.

FUTURE PLANS

The staff plans to continue to perform case-by-case reviews of contracts involving non-owner operators using appropriate elements of the SRP. When sufficient data exists, the staff will update the preliminary criteria for evaluating the extent of control transferred and for determining when 10 CFR 50.80 review is necessary. Such criteria will be incorporated into regulatory guidance after sufficient additional operating experience is acquired by the staff. As directed in Item 3 of the SRM, the new reactor criteria will be coordinated with NMSS to assure consistency in agency programs.

The staff proposes the following action plan for completion of this issue. The dates proposed for the last two milestones are estimates and will be dependent on the pace of restructuring and the number of cases evaluated by the staff.

MILESTONES	TARGET DATE
Respond to SRM	12/97

Commission feedback and action plan approval	TBD
Continue case-by-case review	Ongoing
Issue generic correspondence related to preliminary evaluation criteria and solicit comments	6/98
Status report to Commission with evaluation of whether sufficient experience has been gained to issue regulatory guidance	12/98
Publish draft regulatory guidance related to 50.80 screening criteria for comment (provided sufficient experience has been gained)	6/99

RESOURCES PROJECTED

The estimated resources to accomplish the action plan through the 12/98 status report to the Commission are approximately 0.25 FTE. Although resources are not specifically budgeted for this effort, this work can be accomplished within NRR's budgeted resources for regulatory licensing improvements.

COORDINATION

The Office of the General Counsel has reviewed this paper and has no legal objection to the staff's positions.

The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

RECOMMENDATIONS

The staff recommends that the Commission:

Approve the staff's action plan to develop final criteria on the review of non-owner operator scenarios and **provide** feedback on the preliminary criteria for evaluating the extent of control transferred.

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¹ In the specific context of non-owner operating companies, issues regarding transfers of ownership interests (i.e. direct or indirect transfers) are not the subject of this paper.