

## POLICY ISSUE (Notation Vote)

December 6, 2004

SECY-04-0229

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations /RA/

SUBJECT: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS'  
10 CFR 26.6 EXEMPTION REQUEST

PURPOSE:

To request Commission approval for the staff to deny the International Brotherhood of Electrical Workers' (IBEW) 10 CFR 26.6 exemption request.

SUMMARY:

By letter dated January 26, 1993, IBEW requested that the U.S. Nuclear Regulatory Commission (NRC or Commission) exempt from random drug testing certain clerical employees at Diablo Canyon Nuclear Power Plant (Diablo Canyon) who have unescorted access to the protected area (PA) only, but not the vital areas (VAs) of the plant, do not have access to radiologically controlled areas (RCAs), and who are not required to staff the plant's emergency response center (ERC). The criteria for granting exemptions to 10 CFR 26.6 include a determination of whether an exemption request, (1) is authorized by law, (2) will not endanger life or property or the common defense and security, and (3) is otherwise in the public interest. IBEW's request did not meet criteria (2) or (3) and, as written, would not prevent clerical workers exempt from random drug testing from performing safety-related work. The staff requests Commission approval to deny IBEW's request. A proposed letter to be sent to the IBEW denying its exemption request is provided in Attachment 1.

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301-415-0211

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BACKGROUND:

On March 13, 1990, IBEW Local 1245, requested an exemption from 10 CFR Part 26 random drug testing requirements for members of IBEW Local 1245 at Diablo Canyon based on factors such as the safety record of Diablo Canyon, and the lack of evidence of drug use or alcohol abuse by employees. IBEW later withdrew its request to exempt reactor operators from random drug testing, thereby limiting its request to exempt clerical workers from random drug testing.

On October 2, 1990, the NRC denied this request and IBEW Local 1245 subsequently filed a petition for judicial review. On June 11, 1992, the Ninth Circuit Court of Appeals denied the petition for review in *IBEW, Local 1245 v. NRC*, 966 F.2d 521 (9<sup>th</sup> Cir. 1992). The court stated that although random drug testing may well be impermissible for clerical workers at Diablo Canyon who perform no safety-related work and who have no access to VAs, IBEW Local 1245 had not established that such a group existed (in the record before the court at that time). The court also indicated that it would be predisposed to reversing a decision on the part of NRC to deny a future exemption request that was limited to clerical workers that did not perform safety-related work. In a staff requirements memorandum (SRM) dated August 18, 1992 (COMSECY-92-018), the Commission directed the staff to examine the justification for imposing random drug testing on workers with no direct safety functions, particularly for clerks, secretaries, or other employees who have unrestricted access to a nuclear plant's PA, but whose own jobs are not directly safety-related.

On January 26, 1993, IBEW Local 1245 filed a modified exemption request specifically asking that the NRC exempt from random drug testing at Diablo Canyon clerical employees who are members of Local 1245 of the IBEW; who have unescorted access to the PA only, but not to VAs; who do not have access to the RCAs of the plant; and who are not required to staff the plant's ERC. IBEW supplemented this request by letter dated December 6, 1993, noting the licensee's plans to implement substantial changes in its security system at Diablo Canyon in early 1994. IBEW stated that PG&E planned to expand the boundaries of the VAs and control entry by card-keyed turnstile rather than card-keyed doors. According to IBEW, these changes would further limit access to the VAs by preventing personnel from "tailgating" through the card-keyed doors. The NRC staff determined that these changes were completed in early to mid-1994.

In an SRM dated April 24, 2000, the Commission directed the staff to proceed with rulemaking to amend the scope of random drug testing as discussed in SECY-00-0022, "Rulemaking Plan, 'Decrease in the Scope of Random Fitness-for -Duty Testing Requirements for Nuclear Power Reactor Licensees,' for Amendments to 10 CFR Part 26." The Commission also directed the staff to seek detailed comments and undertake a careful analysis of the balance of public and private interests as the rulemaking proceeds. In particular, the SRM directed the staff to carefully assess the risks associated with unescorted access to PAs if the scope of random drug testing is changed, in light of the fact that some safety-significant equipment may be found in the PAs but outside of the VAs. In the same SRM, the Commission disapproved the staff's recommendation to grant the modified IBEW petition. The Commission stated that the underlying rulemaking issues should be resolved before making a decision on the exemption request. The Commission linked the resolution of the exemption request to submission of a proposed rule because the exemption could be granted as part of a rulemaking. On September 24, 2002, the NRC updated the IBEW on the status of its earlier exemption request

dated January 26, 1993, as supplemented December 6, 1993, stating the NRC had decided to address it in the larger revision to 10 CFR Part 26.

Following the events of September 11, 2001, the staff reconsidered the risks associated with unescorted access to PAs and now recommends that the scope of random drug testing remain unchanged. Therefore, the staff proposes to deny the IBEW exemption request in advance of the overall revision to 10 CFR Part 26.

Further detailed background information is provided in Attachment 2.

#### DISCUSSION:

Section 26.6 of 10 CFR contains three criteria for determining whether to grant an exemption request; all three criteria must be met before an exemption can be granted. The three criteria are that the exemption must be (1) authorized by law, (2) must not endanger life or property or the common defense and security, and (3) must be otherwise in the public interest. The staff's analysis of each of the three criteria, as applied to the IBEW's modified exemption request is provided below.

1. Is the request authorized by law?

The Commission has the authority to grant such an exemption request and there are no known statutory, judicial or regulatory prohibitions on granting such an exemption.

2. Will granting the request endanger life or property or the common defense and security?

a. The Scope of IBEW's Exemption Request

Although IBEW's modified exemption request for clerical workers is more limited than its initial exemption request, IBEW did not limit its modified exemption request to clerical workers performing only non-safety-related work. If IBEW had sought an exemption for clerical workers lacking access to the VA who do not perform safety-related work, the court in the 1992 decision noted that the NRC's asserted interest in public safety would not rise to a sufficient level to justify random testing of these clerical workers. IBEW has the burden of establishing which clerical workers do not engage in any safety-related work.

b. Insider Threat From Clerical Workers with Access to the Protected Area

In the post September 11, 2001, threat environment, to reduce the risk of an insider threat and maintain the public health and safety and the common defense and security, the NRC has placed an increased emphasis on assuring the reliability and trustworthiness of nuclear power plant (NPP) workers who have unescorted access to the PA, including clerical workers who perform safety-related tasks. Clerical workers' trustworthiness and reliability are important because of the safety-related work they perform, the safety equipment they may have access to in the PA, and the close proximity to files located in this area which may contain safeguards or other sensitive information. For example, at Diablo Canyon, clerical workers who perform safety-related work update procedures, regulatory files of the plant, and personnel information for processing security clearances and access authorizations, including correspondence with the NRC and the FBI. In addition, these clerical workers who have unescorted access to the PA

maintain important technical drawings and design files and generally have access to plant design and layout information.

Random drug testing helps provide assurance that clerical workers who perform safety-related work and who have access to the PA are trustworthy and reliable. The use of illegal drugs raises questions of the worker's trustworthiness and reliability in terms of scrupulously following the NPP's requirements, such as the safeguards requirements, that ensure the protection of public health and safety. Substance abuse may make a clerical worker who performs safety-related work more susceptible to coercion by a terrorist to commit acts of radiological sabotage than are other individuals. A clerical worker who performs safety-related work who is a substance abuser may be more easily persuaded due to substance abuse to cooperate, actively or passively, as an insider with a terrorist in an attempted sabotage of a NPP.

c. Substance Abuse Decreases Performance Reliability and Increases the Risk of Accidents

To ensure that nuclear power plants are operated safely and to maintain public health and safety and the common defense and security, the reliability and trustworthiness of clerical workers with unescorted access to the PA who perform safety-related tasks are of importance. The Commission stated in SECY-00-0159, "Final Rule Amending the Fitness-for-duty Rule," dated July 26, 2000, regarding the rulemaking to revise 10 CFR Part 26, that

. . . the NRC's statutory mission [is] to assure that civilian uses of nuclear materials in the U.S. are conducted in such a manner that ensures public health and safety, environmental protection, and national security. Specifically, the safety concern is that the use of drugs and alcohol and any other causes of impairment or questionable reliability or trustworthiness can increase the probability of safety-significant accidents.

It has been widely recognized that substance abuse can impair workplace behavior and reduce cognitive and physical task performance reliability while increasing the likelihood of accidents. If a clerical worker with unescorted access to the PA who performs safety-related work is impaired or suffering from withdrawal or hangover effects, it is less likely that he or she will perform predictably and in accordance with required procedures. The NRC cannot be confident of a clerical worker's ability to limit the use of addictive substances to situations that do not adversely affect plant safety. Random drug testing is intended to detect and deter substance abuse, thus creating a safety barrier that reduces the risk that operations are not performed in accordance with prescribed safety procedures. Therefore, the staff believes random drug testing of clerical workers who perform safety-related work with access to the PA is appropriate.

3. Is the request in the public interest?

Granting the request would not be in the public interest for the reasons stated above. The staff believes that random drug testing is a major deterrent to drug abuse. Drug abuse by clerical workers with access to the PA and who perform safety-related work could only increase the likelihood of an insider threat, or unsafe and unpredictable acts, as described above.

RELATED PROGRAMS:

The staff expects that the proposed rule to amend 10 CFR Part 26 that will be transmitted to the Commission in the near future will maintain the scope of the requirements for random drug testing. This paper provides the bases for the staff's recommendation to deny the modified IBEW exemption request. This denial is consistent with the staff's approach in the development of the proposed rule. The staff believes action on the exemption request should not be further delayed to await submittal of a proposed 10 CFR Part 26 rule.

RESOURCES:

The resources to complete the response to IBEW regarding the exemption request are 0.30 FTE for both the Office of Nuclear Security and Incident Response (NSIR) and Office of the General Counsel (OGC) and are included in the FY 2005 budget. The staff does not expect that additional resources will be needed to complete this effort.

RECOMMENDATION:

That the Commission approve the staff's denial of IBEW's 10 CFR 26.6 modified exemption request and the letter transmitting the staff's response to IBEW.

COORDINATION:

OGC has no legal objection to the recommended action.

**/RA/ Ellis W. Merschoff Acting For/**

Luis A. Reyes  
Executive Director  
for Operations

Attachments:

1. Letter to the IBEW denying its exemption request
2. Background on IBEW request

**Attachment 1**  
**Letter to IBEW Denying Their**  
**Exemption Request**

Mr. Tom Dalzell, Esq.  
International Brotherhood of Electrical Workers  
AFL-CIO, Local 1245  
PO Box 4790  
3063 Citrus Circle  
Walnut Grove, CA 94596

SUBJECT: DENIAL OF EXEMPTION REQUEST

Dear Mr. Dalzell:

In a letter dated September 24, 2002, the U.S. Nuclear Regulatory Commission (NRC) updated the International Brotherhood of Electrical Workers (IBEW) on the status of its earlier exemption request dated January 26, 1993, as supplemented December 6, 1993, stating the NRC had decided to address it in the larger revision to 10 CFR Part 26.

By letter dated January 26, 1993, IBEW requested that the NRC exempt from random drug testing certain clerical employees at Diablo Canyon Nuclear Power Plant (Diablo Canyon) who have unescorted access to the protected area (PA) only, but not the vital areas (VAs) of the plant, do not have access to radiologically controlled areas (RCAs), and who are not required to staff the plant's emergency response center (ERC).

On December 6, 1993, IBEW supplemented this modified request by letter, noting that it incorporated by reference the record submitted in its initial exemption request of March 13, 1990. IBEW also noted the licensee's plans to implement substantial changes in its security system at Diablo Canyon in early 1994. IBEW stated that PG&E planned to expand the boundaries of the VAs and control entry by card-keyed turnstiles rather than card-keyed doors. According to IBEW, these changes would further limit access to the VAs by preventing personnel from "tailgating" through the card-keyed doors. The staff determined that these changes were completed in early to mid-1994.

After careful review of IBEW's modified exemption request and the applicable criteria in 10 CFR 26.6 for acting on exemption requests, the NRC is denying the request for the reasons set forth below.

In the post September 11, 2001, threat environment, to reduce the risk of an insider threat and maintain the public health and safety and the common defense and security, the NRC has placed an increased emphasis on the reliability and trustworthiness of nuclear power plant (NPP) workers who have unescorted access to the PA, including clerical workers who perform safety-related tasks. Clerical workers' trustworthiness and reliability are crucial because of the safety-related work they perform, the safety equipment they may have access to in the PA, and

the close proximity to files located in this area which may contain safeguards or other sensitive information. For example, at Diablo Canyon, clerical workers who perform safety-related work and who have access to the PA update procedures, regulatory files of the plant, and personnel information for processing security clearances and access authorizations, including correspondence with the NRC and the FBI. In addition, these clerical workers who have unescorted access to the PA also maintain important technical drawings and design files and generally have access to plant design and layout information.

Random drug testing helps provide assurance that clerical workers who perform safety-related work and who have access to the PA are trustworthy and reliable. Substance abuse may make a clerical worker who performs safety-related work and has unescorted access to the PA more susceptible to coercion by a terrorist to commit acts of radiological sabotage than are other individuals. A clerical worker who performs safety-related work who is a substance abuser may be more easily persuaded due to substance abuse to cooperate, actively or passively, as an insider with a terrorist in an attempted sabotage of a NPP.

Second, granting your request would not be in the public interest. To assure that nuclear power plants are operated safely and to maintain public health and safety and the common defense and security, the reliability and trustworthiness of clerical workers with unescorted access to the PA who perform safety-related tasks are of paramount importance. It has been widely recognized that substance abuse can impair workplace behavior and reduce cognitive and physical task performance reliability while increasing the likelihood of accidents.

For these reasons, IBEW's request is being denied. If you have any questions regarding this matter, please contact Dr. Garmon West, Jr., Section Chief, Licensee Personnel Security Section, Division on Nuclear Security, Office of Nuclear Security and Incident Response. Dr. West can be reached at 301-415-0211.

Sincerely,

Roy P. Zimmerman, Director  
Office of Nuclear Security Incident Response

## BACKGROUND ON IBEW REQUEST

On March 13, 1990, IBEW Local 1245 requested an exemption from 10 CFR Part 26 random drug testing requirements for members of IBEW Local 1245 at Diablo Canyon, based on factors such as the safety record of Diablo Canyon, and the lack of evidence of drug use or alcohol abuse by employees. Subsequently, IBEW withdrew the request to exempt reactor operators from random drug testing.

On October 2, 1990, the NRC denied this request and IBEW Local 1245 filed a petition for judicial review. On June 11, 1992, the Ninth Circuit Court of Appeals denied the petition for review in *IBEW, Local 1245 v. NRC*, 966 F.2d 521 (9<sup>th</sup> Cir. 1992). The court stated that although random drug testing may well be impermissible for clerical workers at Diablo Canyon who perform no safety-related work and have no access to vital areas (VAs), IBEW Local 1245 had not established that such a group existed (in the record before the court at that time). The court also indicated that it would be predisposed to reversing an NRC decision to deny a future exemption request that was limited to clerical workers that did not perform safety-related work.

In a staff requirements memorandum (SRM) dated August 18, 1992 (COMSECY-92-018), the Commission directed the staff to examine the justification for imposing random drug testing on workers with no direct safety functions, particularly for clerks, secretaries, or other employees who have unrestricted access to a nuclear plant's protected area (PA) but whose own jobs are not directly safety-related. The Commission also instructed the staff to consider the impact of such testing on licensees, including the legal and economic impact considerations of changes in the scope of established Fitness-for-Duty (FFD) testing programs.

On January 26, 1993, IBEW Local 1245 filed a modified exemption request specifically asking that the NRC exempt from random drug testing clerical employees at Diablo Canyon who are members of Local 1245 of the IBEW and who have unescorted access to the PA only, but not to the VAs of the plant, do not have access to the radiologically controlled areas (RCAs), and who are not required to staff the plant's emergency response center (ERC). IBEW supplemented this request by letter dated December 6, 1993, incorporating by reference the record in support of its earlier exemption request. The letter also noted the licensee's plans to implement substantial changes in its security system at Diablo Canyon in early 1994. IBEW stated that the licensee planned to expand the boundaries of the VAs and control entry by card-keyed turnstile rather than card-keyed doors. According to IBEW, these changes would further limit access to the VAs by preventing personnel from "tailgating" through the card-keyed doors. On January 27, 1994, at the staff's request, the Office of the General Counsel advised the IBEW that the exemption request would be held in abeyance pending a Commission decision in response to COMSECY-92-018.

Pursuant to COMSECY-92-018, the staff evaluated the scope of random drug testing at power reactors required by 10 CFR Part 26, and considered the impact of implementing any of four possible alternatives to the scope of Part 26 requirements. SECY-94-016, dated January 24, 1994, reported the results of the staff's analysis to the Commission.

On May 11, 1994, the staff published the results of its review of these options in the *Federal Register* (59 FR 24373) to solicit public comment. The staff received 34 letters of comment from the following sources: 20 letters from licensees, 5 from the IBEW, 1 from the Nuclear Energy Institute, 4 from members of the general public, 2 from State government offices, 1 from

a vendor, and 1 from the Ohio Citizens for Responsible Energy. The comments generally favored retaining the current scope of testing. Comments received from licensees, State government offices, public citizens groups, vendors and the NEI support the staff's view that the risk or vulnerability to nuclear power plants will increase if the scope of random drug and alcohol testing is reduced. IBEW's comments reflected its view that the risk or vulnerability will be unchanged if the current random drug and alcohol testing scope is modified to include only workers who have unescorted access to the VAs or RCAs or who staff ERCs. IBEW also believed that changing the current scope of random drug testing posed no increased risk to the plant from any act, whether inadvertent or deliberate, and thus would not increase the possibility of nuclear accidents or the risk of sabotage or vandalism.

In SECY-00-0022, "Rulemaking Plan, 'Decrease in the Scope of Random Fitness-for-Duty Testing Requirements for Nuclear Power Reactor Licensees,' for Amendments to 10 CFR Part 26," February 1, 2000, the staff proposed to initiate rulemaking to reduce the scope of random drug and alcohol testing at nuclear power plants. In the rulemaking plan, the staff recommended requiring random testing at nuclear power plants only for those personnel who have unescorted access to VAs. This proposal would mean that random testing could be discontinued for personnel who have unescorted access to the PA only, including personnel required to physically report to the technical support center (TSC) or emergency operating facility (EOF) if these facilities were outside the VA. Pre-access testing and for-cause testing would continue to apply to all personnel who have unescorted access to the PA or are required to report physically to the TSC or EOF. Since this proposed change would relax the required scope of random testing, the staff stated in the rulemaking plan that it would reduce regulatory burden. However, the legal analysis in the rulemaking plan cautioned against relying upon burden reduction as a rationale for changing the scope of random testing because licensees appeared to be satisfied with the current scope and did not support any of the options for changing it.

In an SRM dated April 24, 2000, the Commission approved the staff's recommendation to initiate rulemaking to amend the required scope of random drug and alcohol testing as discussed in SECY-00-0022. The Commission also directed the staff to seek detailed comment on this matter and, as the rulemaking proceeded, undertake a careful analysis of the balance of public and private interests. In particular, the SRM directed the staff to carefully assess the risks associated with unescorted access to PAs if the scope of random drug testing is changed, in light of the fact that some safety-significant equipment may be found in the PAs, but outside of the VAs. In the same SRM, the Commission disapproved the staff's recommendation to grant the renewed IBEW petition. The Commission stated that the underlying rulemaking issues should be resolved before a decision on the exemption request.

At a March 22, 2001, public workshop where the proposed reduction in scope was discussed, the staff received information indicating that the preferred option might be more burdensome than anticipated. Industry representatives indicated that the change would create a need to track each change in the VA access list and translate it into a corresponding change in the random testing pool. For example, a maintenance technician who seldom works in the VA would typically be removed from the VA access list (but not the PA access list) as part of regular purging to minimize unneeded access to the VA. Then, when the technician needed VA access again, the technician would be added back to the VA access list. Under the proposed change, each occasion would require a corresponding change to the random testing pool. In addition, a draft regulatory analysis indicated a net increase in cost as a result of the reduction in scope.

On September 24, 2002, the staff updated the IBEW on the status of its exemption request stating the NRC had decided to address it in the larger revision to Part 26.