

RULEMAKING ISSUE NOTATION VOTE

January 21, 2010

SECY-10-0007

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: DENIAL OF PETITION FOR RULEMAKING REQUESTING AN EXPEDITED
RULEMAKING TO REVISE THE 10 CFR SECTION 73.55 COMPLIANCE
DATE (PRM-73-14)

PURPOSE:

To obtain Commission approval to deny a petition for rulemaking (PRM) submitted by the Nuclear Energy Institute (NEI) (the petitioner). The petitioner requested that the U.S. Nuclear Regulatory Commission (NRC) amend the implementation date for specific requirements of 10 CFR Part 73.

SUMMARY:

In a letter to Chairman Gregory B. Jaczko dated September 25, 2009, NEI requested that the NRC undertake an expedited rulemaking to revise the compliance date for specific requirements within Title 10 of the *Code of Federal Regulations* (10 CFR) 73.55, "Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors Against Radiological Sabotage." NEI requested that the NRC change the compliance date from March 31, 2010, to December 31, 2010. The staff reviewed the request for rulemaking and determined that the request meets the minimum sufficiency requirements of 10 CFR 2.802, "Petition for Rulemaking" and, therefore, could be considered as a petition for rulemaking. Accordingly, the staff docketed the request as PRM-73-14 and notified the petitioner of this decision by letter dated October 1, 2009. Due to the exigent circumstances associated with the request, the staff

CONTACT: Timothy A. Reed, NRR/DPR
301-415-1462

**SECY NOTE: THIS SECY PAPER TO BE RELEASED TO THE PUBLIC 5 WORKING DAYS
AFTER DISPATCH OF THE LETTER TO THE PETITIONER.**

did not prepare a notice of receipt and request for comment; instead staff gave immediate consideration to the request, convening a petition review board (PRB) on November 9, 2009.

After careful consideration of the request, the PRB concluded that the request for rulemaking should be denied. This conclusion was principally based on reasons of practicality. Based on the limited data in NEI's request, the PRB concluded that it did not have enough information to support the staff assembling a proposed rule that would contain a sufficiently robust regulatory basis to extend the compliance date. As such, the NRC staff would need to interact with external stakeholders to develop the additional supporting information necessary for completing an adequate notice and comment rulemaking. The current Power Reactor Security rule compliance date of March 31, 2010, leaves insufficient time for the NRC to collect and analyze the necessary data and complete an adequate notice and comment rulemaking. This is largely due to the process requirements associated with a rulemaking (i.e., development, approval, and issuance of a proposed rule; adequate public comment period; processing and analysis of stakeholder comments; development, approval, and issuance of a final rule; and approval of the final rule by the Office of Management and Budget (OMB) if there are paperwork provisions).

The PRB further concluded that revising the 10 CFR 73.55 compliance date was not the most effective regulatory process for licensees to address this particular issue. A simple revision to the compliance date would effectively relieve all licensees from implementing all the new 10 CFR 73.55 requirements by March 31, 2010, but the current situation seems to indicate that (1) fewer than half of the licensees intend to request relief, and (2) the requirements in the new rule that seem particularly problematic represent a very small percentage of the total number of requirements in the rule. If the staff were to pursue a more narrow revision to the compliance provisions of 10 CFR 73.55, this would require the staff to tailor rule provisions to specific facilities and situations. Developing this more complex and specific compliance language with the supporting regulatory basis would, at a minimum, necessitate additional interactions with external stakeholders. Because the identified problem appears to affect a subset of licensees who need schedule relief from a very small subset of the overall requirements in 10 CFR 73.55, the specific exemption process appears to be a better regulatory process by which licensees can address the situation.

BACKGROUND:

On March 27, 2009 (74 FR 13926), the NRC issued the Power Reactor Security final rule. The final Power Reactor Security rule was effective on May 26, 2009, with a compliance date of March 31, 2010. This rule resulted in revisions to 10 CFR 73.55; 10 CFR 73.56, "Personnel Access Authorization Requirements for Nuclear Power Plants"; 10 CFR Part 73 Appendix B, "General Criteria for Security Personnel"; and 10 CFR Part 73 Appendix C, "Nuclear Power Plant Safeguards Contingency Plans." Additionally, the Power Reactor Security rule added new requirements as 10 CFR 73.54, "Protection of Digital Computer and Communication Systems and Networks"; 10 CFR 73.58, "Safety/Security Interface Requirements for Nuclear Power Reactors"; and 10 CFR 50.54(hh). In anticipation that some licensees might need additional time to implement several requirements of the new rule, the Commission noted in the final rule that site-specific conditions may warrant consideration of licensee requests for exemption (74 FR 13926, 13935-13936 March 27, 2009).

On April 7, 2009, NEI requested by letter to the Chairman that the NRC establish a revised implementation date of December 31, 2010, for the Power Reactor Security rule. The request indicated that licensees would not have a full understanding of how to implement the new rule provisions until the NRC issued the associated regulatory guides (RGs) in final form. The request argued that a reasonable timeframe for making the modifications required by the new rule, in combination with the high state of security that currently exists (due to the post September 11, 2001, security orders and other related actions) supports an implementation date of December 2010.

In a letter dated June 4, 2009, the staff denied the NEI request. In that denial, the staff indicated that industry has already implemented most of the new requirements as a consequence of the post September 11, 2001, order requirements. Additionally, the staff noted that licensees have a sufficient understanding of the new requirements, stemming from the issuance of the draft RGs and the more than 30 meetings held with industry during the development of the draft RGs. However, the staff did indicate that should the industry provide detailed information that makes a compelling argument for revising the compliance date, the staff would revisit this decision. Further, the letter also noted that “existing regulations provide several mechanisms for licensees with good cause to apply for relief from the compliance date for any part of this rule.”

On September 25, 2009, NEI requested by letter to the Chairman that NRC undertake an expedited rulemaking to revise the compliance date for specific requirements within 10 CFR 73.55 from the current date of March 31, 2010, to a new date of December 31, 2010. Since the NEI letter clearly requested that the NRC pursue rulemaking and therefore is in the spirit of 10 CFR 2.802 “Petition for Rulemaking,” the staff reviewed the request to determine whether it met the sufficiency requirements of 10 CFR 2.802, recognizing that the request did not invoke the specific 10 CFR 2.802 criteria.

In an internal meeting held on September 30, 2009, the staff concluded that the NEI request did meet the minimum 10 CFR 2.802 sufficiency requirements, and as such could be treated as a PRM. Accordingly, the staff processed the request as a PRM, docketed the request, and notified NEI of this decision by letter dated October 1, 2009.

DISCUSSION:

Petitioner’s Request

The petitioner requests the NRC amend its regulations to change the implementation date for specific requirements of 10 CFR Part 73 to December 31, 2010, based on the results of an industry survey conducted by NEI. The request states that 24 sites will seek schedular exemption requests from the March 31, 2010, compliance date, and nine more sites are evaluating the need for exemptions. The request states that two provisions of the new Power Reactor Security rule, namely 10 CFR 73.55 (e) “Physical barriers” and 10 CFR 73.55 (i), “Detection and assessment systems” will be the subject of nearly all the exemption requests.

In support of this request, the petitioner notes that the subject provisions of 10 CFR 73.55 are problematic because these provisions may require physical modifications to the plant and involve engineering analysis, design, equipment procurement, installation, testing, and related

training. The petitioner indicates that absent a rule change to modify the implementation date, both NRC and the industry would be required to divert “vast” resources to review and approve exemption requests for potentially more than half of the power reactor sites. The petitioner notes that these same resources are needed to finalize the remaining regulatory guidance for implementation of the new Power Reactor Security rulemaking.

The petitioner notes that the nuclear energy industry has fully implemented numerous new security provisions and enhancements since the terrorist attacks of September 11, 2001, including NRC orders, an enhanced design basis threat, and numerous threat advisories. Additionally, the petitioner notes that NRC has conducted baseline inspections of industry actions to address large fires and explosions, and has evaluated force-on-force exercises for the past 7 years. The petitioner states that industry has been proactive in many initiatives that strengthen nuclear power reactor security. These initiatives were undertaken with the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and local law enforcement authorities. Finally, the petitioner notes that all these activities have resulted in nuclear power plants being recognized as the most protected and secure of domestic private industrial facilities. As such, the petitioner argued that schedule relief is warranted.

Review of the Petition

Due to the exigent circumstances associated with this request, the staff elected not to prepare a notice of receipt and request for comment, and instead gave immediate consideration to the request, convening a PRB.

The PRB convened on November 9, 2009, to consider the PRM and reached the following conclusions:

- Revising the compliance date established by the final Power Reactor Security rulemaking would require the NRC to undertake a notice and comment rulemaking. Publication of an immediately effective final rule without notice and comment is not a legally viable option. Rules that amend compliance or effective dates are not considered to be mere administrative changes that would warrant invocation of the “good cause” exception to notice and comment permitted by the Administrative Procedure Act. Courts routinely strike down agency rules amending compliance dates without notice and comment.¹
- The data contained in PRM-73-14 does not provide enough information to support the staff assembling a proposed rule that would contain a sufficiently robust regulatory basis.
- The NRC staff would need to interact with external stakeholders to develop the additional supporting information necessary for completing an adequate notice and comment rulemaking.

¹ In fact, in 1983 an NRC regulation associated with environmental qualification for electrical equipment at nuclear power plants was invalidated for revising a compliance date without providing notice and an opportunity for comment. See *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370 (D.C. Cir. 1983).

- There is not sufficient time, prior to the new Power Reactor Security rule compliance date of March 31, 2010, to allow the NRC to collect and analyze the necessary data and complete an adequate notice and comment rulemaking. This is due, in part, to statutory rulemaking process requirements under the Administrative Procedure Act (i.e., development, approval, and issuance of a proposed rule; adequate public comment period; processing and analysis of stakeholder comments; development, approval, and issuance of a final rule; approval of the final rule by OMB if there are paperwork provisions).
- If the staff were to pursue a more narrow revision to the compliance provisions of 10 CFR 73.55, this rule would require the NRC to tailor rule provisions to specific facilities and situations. Developing this more complex and specific compliance language with the supporting regulatory basis would, at a minimum, require additional, time-consuming interactions with external stakeholders.
- Pursuing a rulemaking would not preclude licensees from developing and submitting 10 CFR 73.5 exemption requests, since those efforts are already underway (in order to provide NRC with sufficient time to review the exemption requests prior to the March 2010 compliance date coming due).
- Revising the 10 CFR 73.55 compliance date is an overly broad solution to the petitioner's problem. A revision to the compliance date would relieve all power reactor licensees from implementing all the new requirements by March 31, 2010. However, it is clear that (1) according to the data provided by the petitioner, fewer than half of the licensees intend to request relief, and (2) the requirements in the new rule that seem particularly problematic represent a very small percentage of the total number of requirements in the rule. Under such circumstances, the exemption process appears to be the best regulatory tool to address the situation.

For the reasons stated above, the PRB concluded that PRM-73-14 should be denied, and that this potential licensee compliance issue should continue to be addressed through the review of site-specific, schedular exemption requests per 10 CFR 73.5.

Exemptions

The staff is currently addressing this potential licensee compliance issue through the review of schedular exemptions. To date, the staff has approved one schedular exemption request, submitted by Southern Nuclear Operating Company for Farley Nuclear Power Plant Units 1 and 2. The NRC has received 31 additional exemption requests.

The use of the 10 CFR 73.5 process enables the staff to give full consideration to the unique set of circumstances applicable to each schedular exemption request, and to review the requests based on their individual merit. In addition, as the staff gains experience with these specific exemption requests, it is incorporating lessons-learned into the future schedular exemption reviews to implement a more efficient exemption review process for this specific 10 CFR 73.55 situation.

RECOMMENDATION:

For the reasons stated above, the NRC staff recommends that the Commission deny PRM-73-14.

RESOURCES:

Denial of this petition will not affect budgeted rulemaking resource needs.

COORDINATION:

This action has been coordinated with staff in the Office of Nuclear Security and Incident Response and the Office of Administration. The Office of the General Counsel has reviewed this package and has no legal objection.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Letter to the petitioner

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM-73-14]

[NRC-2009-0493]

Nuclear Energy Institute;

Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; Denial.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted by the Nuclear Energy Institute (NEI) (the petitioner). The petitioner requested that the NRC amend the implementation date for specific requirements in 10 of the *Code of Federal Regulations* (10 CFR) Part 73. The NRC decided to deny PRM-73-14 for the reasons stated in this document.

ADDRESSES: You can access publicly available documents related to this petition for rulemaking using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-800-397-4209,

301-415-4737, or by e-mail to pdr.resource@nrc.gov.

Federal Rulemaking Website: Supporting materials related to this petition for rulemaking can be found at <http://www.regulations.gov> by searching on Docket ID:

NRC-2009-0493. Address questions about NRC dockets to Carol Gallagher 301-492-3668; e-mail Carol.Gallagher@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Timothy Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-415-1462 or e-mail: Timothy.Reed@NRC.Gov.

SUPPLEMENTARY INFORMATION:

The Petition

In a letter to Chairman Gregory B. Jaczko dated September 25, 2009, NEI, the petitioner, requested that the NRC undertake an expedited rulemaking to revise the compliance date for specific requirements within 10 CFR section 73.55, "Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors Against Radiological Sabotage." The NRC reviewed the request for rulemaking and determined that the request met the minimum sufficiency requirements of 10 CFR 2.802, "Petition for Rulemaking" and therefore was considered as a petition for rulemaking. Accordingly, the NRC docketed the request as PRM-73-14 and notified the petitioner of this decision by letter dated October 1, 2009. Due to the exigent circumstances associated with the request, the NRC did not prepare a notice of receipt and request for comment, and instead gave immediate consideration to the request, convening a petition review board (PRB) on November 9, 2009.

The petitioner requested the NRC amend its regulations to change the implementation date for specific requirements of 10 CFR part 73 to December 31, 2010, based on the results of an industry survey conducted by NEI. The petitioner states that 24 sites will seek schedular

exemption requests from the March 31, 2010, compliance date, and 9 more sites are evaluating the need for exemptions. The petitioner states that two provisions of the new Power Reactor Security rule, namely 10 CFR 73.55 (e) "Physical barriers" and 10 CFR 73.55 (i) "Detection and assessment systems" will be the subject of nearly all the exemption requests.

In support of this request the petitioner notes that the subject provisions of 10 CFR 73.55 are problematic because these provisions may require physical modifications to the plant and involve engineering analysis, design, equipment procurement, installation, testing, and related training. The petitioner indicates that absent a rule change to modify the implementation date, both NRC and industry would be required to divert vast resources to review and approve exemption requests for potentially more than half of the power reactor sites. The petitioner states that these same resources are needed to finalize the remaining regulatory guidance for implementation of the new Power Reactor Security rulemaking.

The petitioner states that the nuclear energy industry has fully implemented numerous new security provisions and enhancements since the terrorist attacks of September 11, 2001, including NRC orders, an enhanced design basis threat, and numerous threat advisories. Additionally, the petitioner notes that NRC has conducted baseline inspections of industry actions to address large fires and explosions, and has evaluated force-on-force exercises for the past 7 years. The petitioner states that industry has been proactive in many initiatives that strengthen nuclear power reactor security. These initiatives were undertaken with the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and local law enforcement authorities. Finally, the petitioner notes that all these activities have resulted in nuclear power plants being recognized as the most protected and secure of domestic private industrial facilities.

NRC Evaluation

The NRC reviewed the petition and reached the following conclusions:

- Revising the compliance date established by the final Power Reactor Security rulemaking would require the NRC to undertake a notice and comment rulemaking.
- The data contained in PRM-73-14 does not provide enough information to currently support the NRC assembling a proposed rule that would contain a sufficiently robust regulatory basis.
- The NRC would need to interact with external stakeholders to develop the additional supporting information necessary for completing an adequate notice and comment rulemaking.
- There is not sufficient time, before the new Power Reactor Security rule compliance date of March 31, 2010, to allow the NRC to collect and analyze the necessary data and complete an adequate notice and comment rulemaking. This is due, in part, to statutory rulemaking process requirements under the Administrative Procedure Act (i.e., development, approval, and issuance of a proposed rule; adequate public comment period; processing and analysis of stakeholder comments; development, approval, and issuance of a final rule; approval of the final rule by OMB if there are paperwork provisions).

- If the NRC were to pursue a more narrow revision to the compliance provisions of 10 CFR 73.55, this rule would require the NRC to tailor rule provisions to specific facilities and situations. Developing this more complex and specific compliance language with the supporting regulatory basis would, at a minimum, require additional, interactions with external stakeholders.

- Revising the 10 CFR 73.55 compliance date is an overly broad solution to the petitioner's problem. A revision to the compliance date would relieve all power reactor licensees from implementing all the new requirements by March 31, 2010. However, it is clear that (1) according to the data provided by the petitioner, that fewer than half of the licensees intend to request relief, and (2) the requirements in the new rule that seem particularly problematic represent a very small percentage of the total number of requirements in the rule. Under such circumstances, the exemption process appears to be the best regulatory tool to address the situation. The staff is currently addressing this potential license compliance issue through review of scheduler exemptions.

Public Comments on the Petition

Due to the exigent circumstances associated with the request, the NRC did not prepare a notice of receipt and request for comment, and instead gave immediate consideration to the request. Accordingly, there are no public comments on this petition.

Determination of Petition

For reasons cited above, the NRC is denying PRM-73-14.

Dated at Rockville, Maryland, this ____ day of _____ 2010.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.

Mr. Anthony R. Pietrangelo
Senior Vice President and
Chief Nuclear Officer
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20005

Dear Mr. Pietrangelo:

I am responding to your letter of September 25, 2009, to Gregory B. Jaczko, Chairman of the U.S. Nuclear Regulatory Commission (NRC), requesting the NRC to conduct an expedited rulemaking to change the implementation date for specific requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical Protection of Plants and Materials." By letter dated October 1, 2009, the NRC informed you that it treated your submission as a petition for rulemaking (PRM) under 10 CFR 2.802, "Petition for Rulemaking" and assigned it docket number PRM-73-14. Due to the exigent circumstances associated with your request, the agency did not publish a notice of receipt and request for public comment on PRM-73-14 in the *Federal Register*; instead the NRC gave immediate attention to your request and convened a petition review board on November 9, 2009.

As discussed further in the enclosed notice, which will be published in the *Federal Register*, the NRC is denying your request for expedited rulemaking. The NRC has concluded its evaluation of PRM-73-14; therefore, this PRM is considered closed.

Please direct any questions you may have regarding this matter to NRC staff member Timothy Reed, by phone at 301-415-1462 or by e-mail at Timothy.Reed@nrc.gov.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosure:
Federal Register Notice

Mr. Anthony R. Pietrangelo
 Senior Vice President and
 Chief Nuclear Officer
 Nuclear Energy Institute
 1776 I Street, NW. Suite 400
 Washington, DC 20005

Dear Mr. Pietrangelo:

I am responding to your letter of September 25, 2009, to Gregory B. Jaczko, Chairman of the U.S. Nuclear Regulatory Commission (NRC), requesting the NRC to conduct an expedited rulemaking to change the implementation date for specific requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical Protection of Plants and Materials." By letter dated October 1, 2009, the NRC informed you that it treated your submission as a petition for rulemaking (PRM) under 10 CFR 2.802, "Petition for Rulemaking" and assigned it docket number PRM-73-14. Due to the exigent circumstances associated with your request, the agency did not publish a notice of receipt and request for public comment on PRM-73-14 in the *Federal Register*; instead the NRC gave immediate attention to your request and convened a petition review board on November 9, 2009.

As discussed further in the enclosed notice, which will be published in the *Federal Register*, the NRC is denying your request for expedited rulemaking. The NRC has concluded its evaluation of PRM-73-14; therefore, this PRM is considered closed.

Please direct any questions you may have regarding this matter to NRC staff member Timothy Reed, by phone at 301-415-1462 or by e-mail at Timothy.Reed@nrc.gov.

Sincerely,

Annette L. Vietti-Cook
 Secretary of the Commission

Enclosure:
Federal Register Notice

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