

POLICY ISSUE NOTATION VOTE

May 4, 2012

SECY-12-0069

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROCESS FOR ADDRESSING LATE-BREAKING ISSUES
DURING A COMBINED LICENSE APPLICATION REVIEW

PURPOSE:

The purpose of this paper is to provide the Commission with recommendations regarding the U.S. Nuclear Regulatory Commission's (NRC's) process for addressing post-Fukushima or other late-breaking issues that could impact the findings in Title 10 of the *Code of Federal Regulations* (10 CFR) 52.97, "Issuance of combined licenses" during a combined license (COL) application review. This paper does not address any new commitments or resource implications.

SUMMARY:

Within the current COL licensing process, there are three approaches for issuing a COL when addressing post-Fukushima or other late-breaking issues that could impact the findings in 10 CFR 52.97. Approach 1 is the current COL licensing process, Approach 2 is the license condition process, and Approach 3 is the post-COL order issuance process, which amends an already issued COL. The staff recommends following Approach 1 (the current COL licensing process – status quo) for addressing issues that arise prior to the staff issuing its Commission paper (SECY) providing the staff's testimony for the uncontested hearing.¹ This approach is predictable, follows Commission procedures, provides a clear basis to make findings necessary for decisions on the COL, and is proven through the staff's use in similar situations when issues

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¹ Under the Commission's Internal Procedures, the staff's SECY paper is to be issued "concurrently" with the issuance of the latter of the FSER or FEIS.

arise late in the licensing process. For issues that arise after issuance of the SECY, the staff recommends addressing those issues on a case-by-case basis. The staff will provide specific recommendations to the Commission on how to treat those issues via a Commission notification as part of the uncontested hearing.

This paper also addresses the legal and policy implications of using a general license condition to require future compliance with all applicable regulations and orders promulgated after the date of issuance of the COL related to Fukushima. Such a condition would be in addition to Approaches 1 through 3 and would not be an alternative to them. While Commission precedent does allow such a condition, there are difficulties. Specifically a sufficient basis must be supplied for such a condition, the condition must be specific enough so that the determination whether it is met is ministerial, and the staff must be able to make the findings in 10 CFR 52.97 prior to issuance of the COL.

Staff will continue to request COL applicants to provide the information required by the issued orders and request for information letters through the review process. In addition, the staff will proceed with the review of the Levy County COL application. Upon receipt of the Commission's direction in response to this paper, the staff will notify the Commission of any needed changes to the Levy schedule. The staff intends to implement the Commission-directed approach when addressing future late-breaking issues.

BACKGROUND:

As of March 2011, the NRC had several COL applications under various stages of review although no COLs had yet been issued. The COL application most advanced in the licensing process was Southern Company's application for the proposed addition of two new units at its Vogtle site in Georgia. The staff's advanced safety evaluation report (SER) for the Vogtle COL application was issued in December 2010. Finalization of this advanced SER (i.e., the Final Safety Evaluation Report (FSER)) awaited only staff approval of an amendment of the AP1000 certified design, which Southern Company referenced in its Vogtle COL application. An amendment of the AP1000 certified design was also under review at that time, with the FSER for the Vogtle COL application expected in late fall 2011. The next most advanced COL application in the licensing process was South Carolina Electric & Gas Company's (SCE&G) application for the proposed addition of two new units at its V.C. Summer site in South Carolina. The Summer COL application also referenced the amended AP1000 certified design. Following the Vogtle and Summer COL applications in the licensing schedule was the Levy County COL application to build two AP1000 units at a new site in Levy County, Florida, which also referenced the amended AP1000 certified design.

On March 11, 2011, a magnitude 9.0 earthquake struck off the coast of the Japanese island of Honshu. The earthquake resulted in a large tsunami that is estimated to have exceeded 14 meters (45 feet) in height, which inundated the Fukushima Dai-ichi Nuclear Power Plant site. The earthquake and tsunami produced widespread devastation across northeastern Japan, and significantly affected the infrastructure and industry in the northeastern coastal areas of Japan.

In the days following the Fukushima Dai-ichi nuclear accident in Japan, the NRC Chairman directed the staff to establish a senior-level agency task force to conduct a methodical and systematic review of the NRC's processes and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction. This direction was provided in a tasking memorandum dated March 23, 2011, from the NRC Chairman to the NRC Executive Director for Operations

(COMGBJ-11-0002). The following provides a timeline for how the significant policy and technical issues from the Fukushima accident relevant to the COLs under review were addressed.

The Fukushima Near-Term Task Force (NTTF) completed the near-term review required by the Chairman's tasking memorandum of March 23, 2011 (COMGBJ-11-0002) and documented its recommendations for agency actions in SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," dated July 12, 2011. Included in this report was the NTTF's consideration of the applicability and implementation strategy of these recommendations for new reactors. The approaches recommended by the NTTF were issue specific, timing dependent, and subject to the maturity of the issue and the detail available regarding its resolution.

With regard to near-term COL reviews, the staff discussed options in SECY-11-0110, "Staff Statement in Support of the Uncontested Hearing for Issuance of Combined Licenses and Limited Work Authorizations for Vogtle Electric Generating Plant (Vogtle), Units 3 and 4 (Docket Nos. 52-025 and 52-026)," dated August 9, 2011, and SECY-11-0115, "Staff Statement in Support of the Uncontested Hearing for Issuance of Combined Licenses for the Virgil C. Summer Nuclear Station (Summer), Units 2 and 3 (Docket Nos. 52-027 and 52-028)," dated August 19, 2011. In these papers, the staff stated that the Commission has options associated with a decision to proceed with licensing Summer and Vogtle in light of the recommendations from the NTTF. In SECY-11-0110, the staff stated the following:

Prior to issuance of the COLs, the Commission could choose to adopt some or all of these recommendations and implement them in the COLs through license conditions. Alternatively, the Commission could issue the COLs and later modify, add, or delete any terms or conditions of the COLs to reflect any new Commission requirements in accordance with the regulatory provisions found in 10 CFR 52.83, 52.98, and 50.109, depending on whether the conditions address matters within the scope of the referenced ESP [early site permit] or certified design. Under this approach, the criteria for implementation of any Commission decisions on the Task Force recommendations generally would be comparable for both the near-term COLs and for operating reactors.

A similar statement was included in SECY-11-0115.

In SECY-11-0124, "Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report," dated September 9, 2011, the staff reviewed the NTTF recommendations within the context of the NRC's existing framework and considered the various regulatory approaches available to the NRC to implement the recommendations. The staff also endorsed the NTTF recommended approach that should be taken for construction permit holders (including construction permits in active or deferred status such as Watts Bar Unit 2 and Bellefonte Units 1 and 2). The staff stated in SECY-11-0124 that "those operating license reviews and the licensing itself [new license reviews] should include all of the recommended regulatory actions and rule changes that have been completed at the time of licensing. Any additional rule changes would be imposed on the plants in the same manner as for other operating reactors."

The staff's approach is to resolve issues as early as possible in the license review process. With respect to design certifications, in SECY-11-0137, "Prioritization of Recommended Actions

To Be Taken in Response to Fukushima Lessons Learned,” dated October 3, 2011, the staff stated the following:

For new reactor designs currently under review, safety issues should be resolved at the design stage, to the extent practical. Consistent with the Commission policy encouraging standardization, it would be prudent to implement safety enhancements prior to certification or design certification renewal. As such, the staff intends to begin interactions with new reactor stakeholders in the near term to allow sufficient opportunity for design certification applicants and design certification renewal applicants to address recommended design-related safety enhancements prior to completion of the staff’s review. It should be noted that imposition of new requirements as part of a design certification renewal is governed by 10 CFR 52.59. The staff [has encouraged] reactor vendors to provide enhanced safety features and safety margins consistent with the Commission policy on advanced reactors.

The NRC has held public meetings with new reactor stakeholders to discuss their proposals².

The COLs for Vogtle were issued on February 10, 2012. Subsequently, in 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,” dated February 17, 2012, the staff recommended issuing orders to the Vogtle licensees, and in the staff requirements memorandum (SRM) to SECY-12-0025, the Commission approved issuance of these orders with some modifications. On March 12, 2012, the NRC issued orders to modify the Vogtle COLs (Nuclear Power Facility (NPF)-91 and -92) with regard to reliable spent fuel pool instrumentation (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12054A679) and requirements for mitigation strategies for beyond-design-basis external events (ADAMS Accession No. ML12054A735). As also discussed in SECY-12-0025 and the related SRM, requests for information pursuant to 10 CFR 50.54(f), regarding Recommendation 9.3 of the NTTF review of insights from the Fukushima Dai-ichi accident, were submitted to Vogtle Units 3 and 4 on March 12, 2012 (ADAMS Accession No. ML12073A348).

Concurrent with SECY-12-0025, the staff filed with the Commission in the uncontested hearing proceeding for the Summer COL a notification stating that if the Commission agreed that the orders in SECY-12-0025 were necessary to ensure adequate protection of the public health and safety, then those orders should be included as license conditions in the Summer Units 2 and 3 COLs. In the Commission’s Memorandum and Order authorizing the issuance of the Summer COLs (CLI-12-09), the Commission directed the staff to include in the Summer COLs a license condition requiring the development of mitigation strategies for beyond-design-basis external events. This license condition is based on Order EA-12-049, “Issuance of Order To Modify Licenses With Regard To Requirements For Mitigation Strategies For Beyond-Design-Basis External Events,” issued to the Vogtle COL licensee following the Commission’s SRM to SECY-12-0025 and was necessary for adequate protection. The Commission directed the Director of the Office of New Reactors to issue Order EA-12-063, “Order Modifying Licenses

² Public meetings were held on December 7, 2011 (U.S. Evolutionary Power Reactor); February 7, 2012 (U.S. Advanced Pressurized-Water Reactor); and March 28, 2012 (South Texas Project 3 & 4 Advanced Boiling-Water Reactor).

with Regard to Reliable Spent Fuel Pool Instrumentation,” to SCE&G concurrent with the COL. Order EA-12-063 was issued pursuant to an administrative exemption from the Backfit Rule and the issue finality requirements in 10 CFR 52.63 and 10 CFR Part 52, Appendix D, paragraph VIII. In addition, the Commission directed the staff to issue a 10 CFR 50.54(f) request for information letter to SCE&G relative to NTTF Recommendation 9.3 regarding emergency preparedness, similar to that sent to the Vogtle COL licensee.

In SECY-12-0025 the staff stated that it would “request all COL applicants to provide the information required by the orders and request for information letters ...through the review process.” Accordingly, for COL applications under active review, the staff has begun issuing requests for additional information (RAIs) to COL applicants asking them to address the recommendations in SECY-12-0025 that were approved by SRM-SECY-12-0025. The first of these RAI letters was submitted to Progress Energy Florida, Inc. (PEF) regarding the COL application for the Levy County Nuclear Power Plant, dated March 15, 2012 (ADAMS Accession No. ML120550146).

This paper discusses three approaches that could be used by the staff when reviewing or amending a COL that addresses post-Fukushima or other late-breaking issues that impact the 10 CFR 52.97 findings. The staff intends to implement the Commission-directed approach when addressing future late-breaking issues.

DISCUSSION:

As stated in 10 CFR 52.97(c), a COL “shall contain the terms and conditions...as the Commission deems necessary and appropriate.” Although the ability to impose license conditions on COLs to address newly arising issues can provide a mechanism for possible issuance of a COL, such license conditions cannot replace necessary safety findings and they must be specific and concrete.

The staff stated the following in its response to posthearing questions in the Vogtle and Summer uncontested hearings:

While Commission precedent does allow for reliance on license conditions, such conditions must be “precisely drawn so that the verification of compliance becomes a largely ministerial rather than an adjudicatory act.” See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 34 (2000). The Commission has further stated that “the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license—including a reasonable assurance that the facility can be operated without endangering the health and safety of the public.” Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947 (1974). Thus, any license condition must be drafted in such a way that the means of compliance with it can be objectively determined at the time the license is issued. [Staff Post Hearing Responses, “NRC Staff’s Supplemental Responses and Post-Hearing Questions to the October 6, 2011 Commission Order (Oct. 17, 2011) (ADAMS Accession No. ML11290A298)].

As required by 10 CFR 52.97, “Issuance of Combined Licenses,” when considering whether to authorize issuance of a COL, the NRC is required to determine, among other things, that (1) the applicable regulations have been met, (2) there is reasonable assurance that these new

reactors will be constructed and will operate in conformity with NRC regulations, and (3) issuance of these licenses will not be inimical to the health and safety of the public.

Further, the results of the staff's review should be documented in the SER prior to providing the SECY paper in support of the mandatory hearing. Internal Commission Procedures dated May 12, 2011 (see <http://www.nrc.gov/about-nrc/policy-making/internal.html>), "Conduct of Mandatory Hearings on Applications for Combined Licenses," state that the staff in its prefiled information paper, "(1) Address each of the findings in §§ 52.97(a) and 51.107(a), and provide an adequate basis for the Commission to conclude whether each of these findings can be made." In order to meet this requirement the staff must have sufficient information to allow it to make the findings at the time it issues the SECY paper. The Commission procedures also state that the staff's SECY paper in support of the uncontested hearing should summarize the staff's review, and focus on non-routine matters or unique features of the facility. Therefore, to meet the plain language of the Internal Commission Procedures, the staff's SECY paper should not introduce new review items, but should be a summary of the already completed staff review.

APPROACHES:

The approaches described below discuss the benefits and disadvantages of various licensing processes for addressing post-Fukushima or other late-breaking issues that could impact the findings in 10 CFR 52.97. The staff concludes that the approaches are consistent with the agency's public health and safety objectives, and are all legally defensible. The staff expects that all licensees will comply with all applicable post-Fukushima requirements in a timely fashion independent of the regulatory vehicle (including imposition of a specific order or license condition, or promulgation of a generally applicable rule) chosen to implement new requirements arising from the review of the Fukushima accident. The mechanisms used have no bearing on the intended result—the imposition of binding requirements upon the affected licensees to provide reasonable assurance of adequate protection of the public health and safety.

The approaches differ with respect to the openness, transparency, and predictability; the degree of stakeholder participation; the degree to which the staff's evaluation is documented before the uncontested hearing; and the impact on licensing schedules.

Approach 1—COL Licensing Process (Status Quo)

This is the current review process and is most readily supported from a legal and policy perspective. This approach would observe all of the agency's procedures thereby resulting in documented staff findings in a safety evaluation report (SER) based on a transparent and predictable process. When new issues arise during a COL review, prior to issuance of the FSER, the staff engages with the applicant, which may include submitting an RAI to the applicant, based on the new information. Specifically for the NTTF recommendations, the staff would include the applicable requests for information addressed by the previously issued orders and 10 CFR 50.54(f) letters. In other situations, this is the approach the staff follows when reviewing late-breaking information prior to issuing the SER. For example, during the review of the Vogtle COLs, the staff issued RAIs very close to the scheduled SER issuance date regarding questions that arose during review of the licenses being issued under 10 CFR Parts 30, 40 and 70. Despite this information arising late in the review, the staff followed its normal process by issuing the RAIs, the applicant made changes to its final safety analysis report (FSAR), the staff reviewed these changes and documented its safety conclusions in its

FSER, and the staff was able to describe the resolution of these issues in detail in the SECY paper supporting the uncontested hearing. The resolution of some of these issues resulted in proposed license conditions following the normal review process. The basis for imposing these license conditions was documented in the FSER.

This approach for addressing new requirements, including issuing RAIs, has the advantage of gathering input from the applicant, and allows the applicant to make changes to its licensing basis documents, such as the FSAR. The staff then reviews the applicant's response and any associated FSAR changes. The staff's current process also includes input from the Advisory Committee on Reactor Safeguards (ACRS). After the staff issues its SER, the ACRS in conformance with 10 CFR 52.87, "Referral to the Advisory Committee on Reactor Safeguards," typically reviews the staff's findings on applications for COLs; and the ACRS reports on those portions of the applications to the Commission. After the ACRS report, the SER is complete and the staff statement in support of the uncontested hearing can address each of the findings in 10 CFR 52.97(a) to provide an adequate basis for the Commission to conclude that the staff's review has been sufficient to support each of the findings. Because the basis for the staff's findings is in the SER, the staff's SECY paper can follow the Internal Commission Procedures by summarizing the staff's review. The staff need not introduce new information in the SECY paper that was not considered as part of the review, and the necessary basis to support any license condition will already be clearly specified in the SER.

As the review of the remaining recommended actions associated with lessons learned from the Fukushima events is ongoing, other Fukushima-related requirements could be imposed at any time during the COL licensing process. As such, the timing of and the regulatory basis for a requirement could present a unique circumstance similar to the one presented with the Summer COL issuance and the two applicable Fukushima orders presented to Vogtle. During the period between issuance of the SECY and COL, the resolution of the issue would be addressed on a case-by-case basis. Once the staff has submitted its SECY paper in support of the uncontested hearing, the staff is under an obligation to notify the Commission if any new information arises that affects the staff's findings. In these instances, as in the Summer uncontested hearing, the staff will prepare a Commission notification. In some instances the staff will recommend a license condition or order, but there may be situations where the staff finds a supplemental SER necessary. The staff's final decision on the regulatory vehicle used will depend on the specific issue presented.

The status quo COL licensing process has several benefits:

- It provides a predictable and thorough licensing process that is open and transparent.
- It resolves and documents issues, including new requirements, before the uncontested hearing begins and, for unique circumstances, when new requirements arise during the period between issuance of the SECY and the decision to issue the COL.
- It allows the applicant to describe how it will handle the issue; which is part of the normal process and can provide insight.
- It provides the agency with the ability to use an established process to determine the best suited regulatory tool necessary to support a reasonable assurance finding. For

example, certain design issues may be more appropriately resolved as an inspections, tests, analyses, and acceptance criteria (ITAAC).

- It complies with existing agency procedures and processes including the Commission's uncontested hearing procedures.

The disadvantage of implementing the status quo approach is the following:

- For late-breaking issues, this approach can delay the issuance of the staff's FSER and SECY, and thus delay the start of the uncontested hearing.

In summary, this approach is consistent with the staff's licensing process and has the best alignment with the principles of regulatory consistency and transparency. However, this approach may delay the staff's SER and SECY paper, and thus delay the start of the uncontested hearing and resultant COL decision.

Approach 2—COL License Condition Process

This approach utilizes a process wherein license conditions are placed in the COL to address new issues that were not described in the applicant's FSAR or the staff's FSER. There are two options within Approach 2. One, the staff could provide a basis for implementing a license condition in its SECY paper supporting the uncontested hearing or in response to Commission questions at the uncontested hearing, or two, (as was done for the Summer COL proceeding) the Commission could impose the condition in its decision on the uncontested hearing.

The COL license condition process for addressing new requirements has some benefits:

- Approach 2 achieves an equivalent measure of safety as Approach 1.
- It is expeditious.

There are generally fewer regulatory and administrative requirements to follow in imposing license conditions BEFORE issuing a license versus imposing similar requirements AFTER a license is issued. For example, after the license is issued, any new requirement must meet the backfit and finality requirements in 10 CFR 50.109, 10 CFR 52.63, and 10 CFR 52.98³. However, the COL application references a certified design, elements of the licensing basis have already been established and, as required by 10 CFR 52.63, the NRC would have to establish a regulatory basis for any change to the established design, prior to the COLs being issued.

The disadvantages of implementing the COL license condition process are the following:

- The staff's FSER would not provide an evaluation of those issues before the uncontested hearing begins.

³ In rare situations the Commission has chosen to administratively exempt itself from these backfit issue finality provisions. For more information on this approach, see the February 22, 2012, memorandum from Stephen G. Burns, General Counsel, to the Commissioners, "Post Fukushima Orders Under the Backfit Rule and Issue-Finality Provisions of 10 CFR Part 52."

- The staff would not be following the Commission's uncontested hearing procedures.
- The approach would provide limited stakeholder engagement.

While the license condition approach is viable, there is a concern that in order to develop robust license conditions, more information from the applicant may be needed and, in some cases, that information may not be available. Depending on the issue, a license condition developed without going through the normal review process described in Approach 1 may not meet the Commission's requirements that license conditions be precisely drawn so that the verification of compliance becomes largely a ministerial act. Further, Approach 2 is less desirable than Approach 1 because it shifts the burden for an acceptable solution from the applicant to the NRC, and the proof of the acceptability of the licensee's implementation to the NRC's inspection and enforcement process.

In summary, this approach will likely proceed more quickly than in Approach 1 assuming that sufficient information is known to draft a legally defensible license condition. The primary drawbacks are that under this approach (1) the staff's basis for recommending issuance of the COL will not be found in any of the staff's review documents, (2) the applicant will not have had a chance to make any changes to its licensing basis, and (3) this approach appears inconsistent with the Internal Commission Procedures because the staff may no longer be summarizing its full review in the SECY paper.

If the Commission chooses this approach, the staff recommends that, at a minimum, COL conditions be included whenever the Commission determines that an order is necessary for issued COLs to meet new requirements. This approach would provide adequate mechanisms to address regulatory changes the Commission directs before COL issuance.

Approach 3—Post-COL Order Issuance Process

In this approach, the NRC would issue the COL without conditions and issue either a concurrent or later order, under the applicable regulations of 10 CFR 50.109, 10 CFR 52.63, or 10 CFR 52.98, to amend the license to modify, add, or delete any terms or conditions of the COLs to reflect any new Commission requirements.

The post-COL issuance order process for addressing new requirements has some benefits:

- Approach 3 achieves an equivalent measure of safety as Approach 1.
- The requirements imposed through orders are equivalent to those imposed on the operating fleet.

As discussed in Approach 2, there are generally fewer regulatory and administrative requirements to follow in imposing new requirements prior to issuing a license than in imposing similar requirements after COL issuance. Therefore, it is more difficult to issue an order after the COL is granted than it is to include a condition at the time of licensing.

The disadvantages to implementing the post-COL order issuance process are the following:

- The staff's FSER would not provide an evaluation of late-breaking issues.
- The approach would provide limited stakeholder engagement.
- The staff would not be following the Commission's uncontested hearing procedures.
- If the basis of an order is "adequate protection" and it is applicable to the applicant, then the NRC would be unable to make the adequate protection findings necessary to issue a COL in the first place.

This situation is similar to Approach 2 in that in the unique circumstance that the Commission directs an order be implemented to resolve a post-Fukushima recommendation, the staff anticipates that preparing an order to be issued concurrently with the COL would be a relatively straightforward process. Further, the benefits and disadvantages for this approach are similar to Approach 2. However, one distinction between this approach and Approach 2 depends on the basis for issuing the orders. The staff does not find this approach viable for "adequate protection" orders because the staff's review would not support the requisite safety findings required under 10 CFR 52.97 to issue a COL. In these circumstances, the staff recommends that a license condition as described in Approach 2 be included in the COL or that the staff follow Approach 1. Another disadvantage to this approach is that it does not include input from the applicant. In addition, orders issued after the date of COL issuance can be more difficult to impose than license conditions because the backfit provisions of 10 CFR 50.109 apply to new requirements imposed on information outside of the scope of any referenced certified design.

General License Condition Requiring Compliance with Fukushima-Related Regulations and Orders

If the Commission wishes to include a condition that requires compliance with all applicable regulations and orders promulgated after the date of issuance of the COL related to Fukushima it could do so. This option could potentially be applied in addition to all the approaches discussed above, but does not replace any of the approaches. Such a condition, as further discussed below, might be used to avoid the need to comply with 10 CFR 50.109 for issues not within the scope of a referenced design certification or early site permit. Such a condition could possibly specify upcoming activities that the NRC is taking, such as rulemakings associated with the NTTF, and state that the licensee must submit a report certifying compliance with any new requirements arising from these activities by a certain date, for example 30 days before fuel load. To the extent the Commission desires, at the time of COL issuance, to avoid applying 10 CFR 50.109 to a set of issues, such as those related to the accident at Fukushima, a condition could be inserted into the license to exempt the COL from 10 CFR 50.109 for these issues.⁴ Similarly, a condition could be written that would require the licensee to respond to any letters issued pursuant to 10 CFR 50.54(f) to that licensee by a certain number of days before fuel load. Under either scenario, a technical justification would need to be established.

⁴ For purposes of this option, we are only considering a license condition that prospectively does not apply the backfit rule in 10 CFR 50.109. Some requirements may also affect the certified design, which has finality under 10 CFR 52.63. This finality is in place even before the COL is issued, so the analysis on whether it would be possible to exempt a COL from the issue finality provisions in 10 CFR 52.63 is more complex and would have to be analyzed on a case-by-case basis.

However, in all circumstances the findings in 10 CFR 52.97 must be made at the time of COL issuance without the need for future requirements or further evaluation and approval. It would not be appropriate to use a license condition to obviate a finding that is necessary to issue the license. For example, if the staff or Commission finds that the information requested in the license condition is necessary to make the finding that there is adequate protection, then that information should be reviewed and evaluated prior to issuing the COL; the NRC must make all of the findings in 10 CFR 52.97 at the time it issues a COL.

The benefits to such a license condition are that it would make it publicly clear that we are aware of Fukushima-related activities, that those activities may result in new requirements, and that new licensees will have to comply with such requirements. In addition, currently, if a licensee is not able to comply with the implementation timeframe in a new rule, the licensee must seek an exemption to the rule. By making compliance with future rules a condition, if the licensee was not able to comply with the implementation timeframe it would have to seek a license amendment as well as an exemption. Such an amendment would provide an opportunity for members of the public to request a hearing. Exemption requests generally do not provide for such opportunities.

Disadvantages to such a license condition are that it assumes that all new requirements need to be implemented prior to fuel load. However, as new requirements are developed, the NRC will be in a better position to determine the correct implementation period for each individual requirement. Thus, these implementation milestones would be better supported using the technical basis that supports any new order or rule, rather than being set to fuel load in a license condition without complete information on the new requirement.

To the extent the Commission wishes to include a condition at the time of COL issuance that prospectively does not apply 10 CFR 50.109 to future Fukushima-related activities, it would need a sound technical basis. Such a basis may be difficult to develop in the absence of a determination of what the new requirements should be.⁵ One possible approach would be to address each issue from the NTTF that the Commission wishes to prospectively not apply 10 CFR 50.109 for, and provide a basis in the Commission decision on the uncontested hearing for why backfit should prospectively not apply for each issue. A drawback to such a condition is that it appears inconsistent with the Part 52 goal of providing a more predictable licensing process by resolving construction and operational safety issues before COL issuance and according a degree of finality to the issues resolved. A license condition that removes some of this finality by prospectively applying future regulations appears to be inconsistent with this goal.

While there are acceptable ways to write a general license condition, as noted above, there are also difficulties. If the Commission chooses to use this regulatory tool going forward, a proper

⁵ The inclusion of such a license condition is not without legal risk and the degree of the risk will depend, in part, on the robustness of the technical basis.

basis must be supplied for such a condition, the condition must be specific enough so that the determination whether it is met is ministerial, and the staff must be able to make the findings in 10 CFR 52.97 prior to issuance of the COL.

RECOMMENDATION:

The staff recommends that the Commission approve Approach 1.

The NRC has well-established regulatory processes to address newly arising issues that may impact the 10 CFR 52.97 findings. The regulatory tool to be used to address and resolve any new issue is best determined when the staff's justification is fully developed and the Commission evaluates both the issue and the staff's supporting bases. Approach 1 affords greater certainty to the applicant/licensee and the NRC as to what the new requirements are, and it is subject to a well-defined, well-known, and transparent process in the NRC's regulations for identifying the requirements in question.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.

/RA/

R. W. Borchardt
Executive Director
for Operations