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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Criteria for the Treatment of Individual Requirements in a Regulatory Analysis; Meeting

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of public meeting.

SUMMARY: The Nuclear Regulatory Commission (NRC) is announcing a public meeting to discuss criteria for the treatment of individual requirements in a regulatory analysis. The meeting is intended to obtain public input on preliminary proposed guidance that could be incorporated into the Commission's Regulatory Analysis Guidelines.

DATES: March 21, 2002.

ADDRESSES: The public meeting will be held in Room Number T-10A1 in the NRC's headquarters at Two White Flint North, 11545 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Dennis P. Allison, Office of Nuclear Reactor Regulation, Washington DC 20555-0001, telephone (301) 415-1178, e-mail dpa@nrc.gov or Clark W. Prichard, Office of Nuclear Materials Safety and Safeguards, Washington DC 20555-0001, telephone (301) 415-6203, e-mail cwp@nrc.gov.

SUPPLEMENTARY INFORMATION:

Purpose

The purpose of the meeting is to discuss criteria for the treatment of individual requirements in a regulatory analysis. The meeting is intended to obtain public input on preliminary proposed guidance that could be incorporated into the Commission's Regulatory Analysis Guidelines.

Participation

To facilitate orderly conduct of the meeting, members of the public who wish to speak should contact one of the

cognizant NRC staff members listed above under the heading "For Further Information Contact" to register in advance of the meeting. Indicate as specifically as possible the topic(s) of your comment(s) and the length of time you wish to speak. Provide your name and a telephone number where you can be contacted, if necessary, before the meeting. Registration to speak will also be available at the meeting on a first come basis to the extent that time is available.

Background

Normally, in considering a proposed rulemaking action, the NRC performs an aggregate regulatory analysis for the entire rule to determine whether or not the action is justified.¹ The current guidelines in NUREG-BR-0058, Revision 3, July 2000, Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission, do not specifically state when an individual requirement, which is part of the rule, should be analyzed separately to determine whether or not it is justified.² Thus, aggregation of different requirements into a single rulemaking action could theoretically mask an individual requirement that is neither integral to the purpose of the rule nor justified on its own merits. In the case of rules that provide voluntary alternatives to current requirements, the net benefit from relaxation of one requirement could potentially support an unrelated increase in another requirement that is not cost-justified. In the case of rules that are subject to a backfit analysis, the net benefit from one requirement could potentially support

¹ In the case of a rule that is subject to a backfit analysis, it is the intent of the NRC's regulatory analysis guidelines that the regulatory analysis satisfy the documentation requirements of the backfit rule, 10 CFR 50.109. Provided this intent is met the regulatory analysis may serve as the backfit analysis. Thus, for the purpose of simplicity, the single term regulatory analysis is used in this discussion to mean a regulatory analysis and/or a backfit analysis.

² Additional guidelines may be found in other sources such as: 10 CFR 50.109, 70.76, 72.62, and 76.76 which control generic or plant-specific backfitting at nuclear power plants, special nuclear materials facilities, independent spent fuel storage facilities, and gaseous diffusion plants, respectively; the Charter of the Committee to Review Generic Requirements, which controls some generic actions; and Management Directive 8.4, which controls plant-specific backfitting at nuclear power plants.

an unrelated requirement that is not cost-justified.³

In a Commission paper dated September 14, 2000, SECY-00-0198, Status Report on Study of Risk-Informed Changes to the Technical Requirements of 10 CFR Part 50 (Option 3) and Recommendations on Risk-Informed Changes to 10 CFR 50.44 (Combustible Gas Control), the NRC staff discussed development of a voluntary risk-informed alternative rule. The staff recommended against allowing selective implementation of parts of the voluntary alternative and against application of the backfit rule. In a staff requirements memorandum (SRM) dated January 19, 2001, the Commission agreed that selective implementation of individual elements of a risk-informed alternative should not be permitted. The Commission also agreed that since implementation of the risk-informed alternative version of 10 CFR 50.44 is voluntary, a backfit analysis of that version is not required. Furthermore, the Commission stated that

* * * a disciplined, meaningful, and scrutable process needs to be in place to justify any new requirements that are added as a result of the development of risk-informed alternative versions of regulations. Just as any burden reduction must be demonstrated to be of little or no safety significance, any new requirement should be justifiable on some cost-benefit basis. The Commission challenges the staff to establish such a criterion in a manner that adds fairness and equity without adding significant complexity. The staff should develop a proposed resolution for this issue and provide it to the Commission for approval.

In a Commission paper dated July 23, 2001, SECY-01-0134, Final Rule Amending the Fitness-for-duty Rule, the staff recommended withdrawing the OMB clearance request for a final rule and developing a new notice of proposed rulemaking. In an SRM, dated October 3, 2001, the Commission approved that recommendation. Furthermore, the Commission provided specific instructions on the backfit analysis as follows.

³ This discussion does not apply to backfits that qualify under one of the exceptions in 10 CFR 50.109(a)(4) (i.e., backfits that are necessary for compliance or adequate protection). Those types of backfits require a documented evaluation rather than a backfit analysis, and cost is not a consideration in deciding whether or not they are justified.

In the new fitness-for-duty rulemaking, the Commission will conduct an aggregate backfit analysis of the entire rulemaking. If there is a reasonable indication that a proposed change imposes costs disproportionate to the safety benefit attributable to that change, as part of the final rule package the Commission will perform an analysis of that proposed change in addition to the aggregate analysis of the entire rulemaking to determine whether this proposed change should be aggregated with the other proposed change for the purposes of the backfit analysis. That analysis will need to show that the individual change is integral to achieving the purpose of the rule, has costs that are justified in view of the benefits that would be provided or qualifies for one of the exceptions in 10 CFR 50.109(a)(4).

In a Commission paper dated August 23, 2001, SECY-01-0162, Staff Plans for Proceeding with the Risk-informed Alternative to the Standards for Combustible Gas Control Systems in Light-water-cooled Power Reactors in 10 CFR 50.44 (WITS 20010003), the staff proposed to identify any revisions that would be needed to existing guidance to put into place a disciplined, meaningful, and scrutable process for assessing any new requirements that could be added by a risk-informed alternative rule. Consistent with past practice and public expectations, the staff indicated that it planned to seek stakeholder input before reporting its recommendations to the Commission. In an SRM dated December 31, 2001, the Commission directed the staff to

* * * provide the Commission with recommendations for revising existing guidance in order to implement a disciplined, meaningful, and scrutable methodology for evaluating the value-impact of any new requirements that could be added by a risk-informed alternative rule.

Two principal considerations have guided the NRC staff in developing preliminary proposed guidance:

(1) If an individual requirement is integral to achieving the purpose of a proposed rule, the requirement should be integrated into an aggregate regulatory analysis of the overall rulemaking. That would be the case if the individual requirement is:

- (a) Necessary to achieve the stated objectives of the rule;
- (b) Needed, in combination with other elements of the rule, to establish a coherent regulatory approach, such as the key principles discussed in Regulatory Guide 1.174;
- (c) Not separable from other elements of the rule; or

(d) Needed to ensure that the rule does not significantly increase risk. As an example of this category, if a rule provides a relaxation in one requirement for the purpose of reducing unnecessary burden, a compensating

increase in another requirement might be needed to support a finding that risk is not significantly increased.

(2) If an individual requirement is not integral to achieving the purpose of a proposed rule, it could theoretically be separated and required to stand on its own. However, that approach would be impractical because it would involve separate regulatory analyses for individual elements of a proposed rule. In the case of a proposed rule subject to a backfit analysis, it would also be unreasonably stringent if it were taken to mean that individual elements of a proposed rule, on their own, must each provide "a substantial increase in the overall protection of the public health and safety or the common defense and security."⁴

The NRC's periodic review and endorsement of new versions of the ASME Codes is a special case. Some aspects of those rulemakings are not addressed in regulatory analyses and thus not subject to the considerations discussed above. However, for those aspects that are addressed in regulatory analyses, the principal considerations discussed above would apply.

The NRC staff has now developed preliminary proposed guidance and wishes to obtain input from interested members of the public. This guidance could be added to Section 4 of the Regulatory Analysis Guidelines, which applies to regulatory and backfit analyses in general, including those for mandatory and voluntary rules. It would state the following:

Normally, in considering a proposed rulemaking action, the NRC performs an aggregate regulatory analysis for the entire rule to determine whether or not it is justified. However, there is a concern that aggregation or bundling of different requirements in a single analysis could potentially mask the inclusion of an inappropriate individual requirement. In the case of a rule that provides a voluntary alternative to current requirements, the net benefit from relaxation of one requirement could potentially support an unrelated requirement that is not cost-justified. In the case of a rule that is subject to a backfit analysis, the net benefit from one requirement could potentially support an unrelated requirement that is not cost-justified.⁵ To address this concern, in presenting a rulemaking alternative that constitutes an aggregation or bundling of requirements, the analyst should include an individual requirement only if it is integral

⁴ 10 CFR 50.109(a)(3).

⁵ This discussion does not apply to backfits that qualify under one of the exceptions in 10 CFR 50.109(a)(4) (i.e., backfits that are necessary for compliance or adequate protection). Those types of backfits require a documented evaluation rather than a backfit analysis, and cost is not a consideration in deciding whether or not they are justified.

to the purpose of the rule or justified on a cost-benefit basis.

In this context, an individual requirement is considered integral to the purpose of the rule if it is:

- (1) Necessary to achieve the stated objectives of the rule;
- (2) Needed, in combination with other elements of the rule, to establish a coherent regulatory approach, such as the key principles discussed in Regulatory Guide 1.174;⁶
- (3) Not separable from other elements of the rule; or
- (4) Needed to ensure that the rule does not significantly increase risk. As an example of this category, if a rule provides a relaxation in one requirement for the purpose of reducing unnecessary burden, a compensating increase in another requirement might be needed to support a finding that risk is not significantly increased.

If an individual requirement is not integral to the purpose of the rule, it must be cost-justified. This means that the individual requirement must add more to the rulemaking action in terms of benefit than it does in terms of cost. It does not mean that the individual requirement, by itself, must provide a substantial increase in the overall protection of the public health and safety or the common defense and security.

As a practical matter, a rulemaking action is generally divided into discrete elements for the purpose of estimating costs and benefits in a regulatory analysis. Thus, it should be apparent to the analyst whether or not there are individual elements that must be excluded because they are neither integral to the purpose of the rule nor cost-justified. The analyst may rely on his or her judgment to make this determination. It is not necessary to provide additional documentation or analysis to explain how the determination was made.

When a draft regulatory analysis is published for comment along with a proposed rule, the NRC may receive a comment to the effect that an individual requirement is neither integral to the purpose of the rule nor cost justified. If the comment provides a reasonable indication that this is the case, the NRC's response in the final rule should either agree with the comment or explain how, notwithstanding the comment, the individual requirement is determined to be integral to the purpose of the rule or cost-

⁶ Regulatory Guide 1.174, An Approach for Using Probabilistic Risk Assessment In Risk-Informed Decisions On Plant-Specific Changes to the Licensing Basis, July 1998, includes five key principles, four of which would be appropriate to consider in connection with a risk-informed voluntary alternative rule:

- (1) The proposed change is consistent with the defense-in-depth philosophy;
- (2) The proposed change maintains sufficient safety margins;
- (3) If there is an increase in core damage frequency or risk, it should be small and consistent with the intent of the NRC's safety goal policy statement, published in the *Federal Register* on August 4, 1986 (51 FR 30028); and
- (4) The impact of the proposed change should be monitored using performance measurement strategies.

justified. To provide a reasonable indication, the comment must:

- (1) Identify the specific regulatory provision that is of concern;
- (2) Explain why the provision is not integral to the purpose of the rule, with supporting information as necessary; and
- (3) Demonstrate, with supporting information, that the regulatory provision is not cost-justified.

Comments that do not provide a reasonable indication need not be addressed in detail.⁷

A special case involves the NRC's periodic review and endorsement of new versions of the ASME Codes. Some aspects of those rulemakings are not addressed in regulatory analyses. However, for those matters that are addressed in regulatory analyses, the same principles as discussed above should be applied. Further details are provided below.

The NRC's longstanding policy has been to incorporate new versions of the ASME Codes into its regulations. Furthermore, the National Technology Transfer and Advancement Act of 1995 (Public Law 104-113) directs Federal agencies to adopt technological standards developed by voluntary consensus standard organizations. The law allows an agency to take exception to specific portions of the standard if those provisions are deemed to be inconsistent with applicable law or otherwise impractical.

ASME Codes are updated on an annual basis to reflect improvements in technology and operating experience. The NRC reviews the updated ASME Codes and conducts rulemaking to incorporate the latest versions by reference into 10 CFR 50.55a, subject to any modifications, limitations, or supplementations (i.e., exceptions) that are deemed necessary.⁸ It is generally not necessary to address new provisions of the updated ASME Codes in the regulatory analyses for these rulemakings. However:

(1) When the NRC endorses a new provision of the ASME Code that takes a substantially different direction from the currently existing requirement, the action should be addressed in the regulatory analysis. An example was the NRC's endorsement of new Subsections IWE and IWL, which imposed containment inspection requirements on operating reactors for the first time. Since those requirements involved a substantially different direction, they were considered in the regulatory analysis, treated as backfits, and justified in accordance with the standards of 10 CFR 50.109.

(2) If the NRC takes exception to a new Code provision and imposes a requirement that is a substantial change from the currently existing requirement, the action should be addressed in the regulatory analysis.

(3) When the NRC requires implementation of a new Code provision on an expedited basis, the action should be addressed in the

regulatory analysis. This applies when implementation is required sooner than it would be required if the NRC simply endorsed the Code without any expediting language.

When the NRC takes exception to a new Code provision, but merely maintains the currently existing requirement, it is not necessary to address the action in the regulatory analysis (or to justify maintenance of the status quo on a cost-benefit basis). However, the NRC explains any exceptions to the ASME Code in the Statement of Considerations for the rule.

The NUREG reports, Commission papers, SRMs, and Regulatory Guide discussed above are available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. They are also accessible from the Agencywide Documents Assess and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html> under the following ADAMS accession numbers:

Regulatory Guide 1.174:
ML003740133.

Regulatory Analysis Guidelines,
NUREG/BR-0058, Rev. 3:

ML003738939.

Regulations Handbook, NUREG/BR-0053, Rev. 5: ML011010183.

Commission paper, SECY-00-0198:
ML003747699.

SRM regarding SECY-00-0198:
ML010190405.

Commission paper, SECY-01-0134:
ML011970363.

SRM regarding SECY-01-0134:
ML012760353.

Commission paper, SECY-01-0162:
ML012120024.

SRM regarding SECY-01-0162:
ML013650390.

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference Staff at 1-800-397-4209, 301-415-4737 or by email to pdr@nrc.gov. Single copies of the documents may be obtained from the contacts listed above under the heading **FOR FURTHER INFORMATION CONTACT**.

Agenda for Public Meeting

9 a.m.–9:30 a.m., Introductory Remarks. 9:30 a.m.–10:30 a.m., Discussion of Preliminary Proposed Guidance by the NRC Staff.

10:30 a.m.–12:30 p.m., Public Comments and Statements.

12:30 p.m.–12:45 p.m., Concluding Remarks.

Dated at Rockville, Maryland, this 6th day of February, 2002.

For the Nuclear Regulatory Commission.

Cynthia A. Carpenter,

Program Director, Policy and Rulemaking Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 02-3503 Filed 2-12-02; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Chapter I

[Docket No. RM01-12-000]

Electricity Market Design and Structure; Notice of Availability of Strawman Discussion Paper

February 1, 2002.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Availability of strawman discussion paper.

SUMMARY: On January 24, 2002, the Federal Energy Regulatory Commission issued a Notice of Technical Conference to discuss issues relating to the Commission's consideration of standard market design for wholesale electric power markets. The Commission is making available a strawman discussion paper for discussion by the market power mitigation panel at the technical conference and is inviting comments on this paper. This paper is being placed in the record of this rulemaking docket.

DATES: Comments are invited at anytime.

ADDRESSES: Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Connie Caldwell, Office of General Counsel, (202) 208-2027.

SUPPLEMENTARY INFORMATION: On January 24, 2002, the Commission issued a Notice of Technical Conference. This notice was published in the **Federal Register** on January 31, 2002 (67 FR 4713).

Take notice that Chairman Pat Wood, III has distributed a strawman discussion paper for discussion by the market power mitigation panel at the technical conference scheduled for February 5-7, 2002. The purpose of the paper is to stimulate public discussion that can guide market monitoring efforts and the design of market power mitigation measures. The paper does not necessarily reflect the views of the Commissioners or the Commission staff.

⁷ NUREG/BR-0053, Revision 5, March 2001, *United States Nuclear Regulatory Commission Regulations Handbook*, Section 7.9, provides further discussion of comments that should be treated in detail.

⁸ NRC regulations require licensees to periodically update their inservice inspection and inservice testing programs to the latest ASME Code incorporated by reference in 10 CFR 50.55a(b).