

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: REQUEST FOR RECONSIDERATION OF THE
WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS
AFFIRMED ON APRIL 17, 2007

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Edward M. Gaffigan Jr.

SIGNATURE

July 5, 2007

DATE


Entered on "STARS" Yes No

Commissioner McGaffigan's Comments on COMDEK-07-0004

I approve the Chairman's request for reconsideration of the wording of 10 CFR § 26.205(d)(4) as affirmed on April 17, 2007.

Clearly the Commission did not understand the implications of item 15 of the attachment to the April 17, 2007 Staff Requirements Memorandum. Now that I do, I believe that going back to the original proposed rule language and handling interpretation of that language through guidance is the appropriate course.

The Commission has been attempting to amend Part 26 for more than a decade. We need to make this change and get this rule to OMB as soon as possible because the new rule will be a substantial improvement over the existing Part 26.



Edward McGaffigan, Jr.

7/5/07
(Date)

Commissioner McGaffigan's Additional Comments on COMDEK-07-0004

I appreciate Commissioner Jaczko's frustration over the change in rule text which the Chairman is proposing. As I mentioned in my previous vote, clearly the Commission did not understand the implications of the change in question. What I learned from this incident is the danger in "clarifying" proposed rule text without fully understanding the consequences. If we go back to the staff's proposed final rule text as a majority of the Commission has now voted to do, and then leave this potential issue to the guidance process, something done after every rule is finalized, I would expect some adverb such as "predominantly" to emerge in the guidance document. The flexibility that we are restoring as a result of the majority's actions is likely to be very limited in scope and should not in any way threaten the safe operation of the operating unit(s). With the Chairman's rule language change, I believe the Part 26 rule should move more smoothly in the OMB clearance process under the Paperwork Reduction Act and in its implementation. That is important to me because the staff has been working on this rule change since before my arrival on the Commission eleven years ago. This long and fitful process has to have an end.

I do appreciate that the whole rule could have been opened up if the Chairman had chosen to do so in a broader request for reconsideration, and many other provisions might have been changed with Commissioner Merrifield's vote no longer counting. I served together with Commissioner Merrifield for almost nine years on this Commission. I have too much respect for him to nullify his vote and to take advantage of his absence on matters on which we differed in our April round of voting on this rule as a whole. The Chairman's initiative to reconsider the late change in wording of one provision is appropriate, and I support it.



Edward McGaffigan, Jr.

7/19/07

(Date)

NOTATION VOTE

RESPONSE SHEET

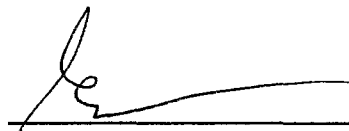
TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER JACZKO
SUBJECT: **REQUEST FOR RECONSIDERATION OF THE
WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS
AFFIRMED ON APRIL 17, 2007**

Approved _____ Disapproved Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached None ___

See attached comments



SIGNATURE
7/16/07

DATE

Entered on "STARS" Yes No ___

**Commissioner Jaczko's Comments on COMDEK-07-0004
Request for Reconsideration of the Wording of 10 CFR § 26.205(d)(4)
as Affirmed on April 17, 2007**

I disapprove of this request to reconsider the language of 10 CFR § 26.205(d)(4) in order to remove the word "solely". Eliminating this important distinction creates a loophole that eases worker fatigue requirements for key staff maintaining reactor safety on the operating unit. The common industry practice of treating all site personnel at a multi-unit site as being in outage status is a practice that is contrary to the intent of the rule and the current technical specifications licensing basis. Changing the rule would allow operators and maintenance workers on operating units to be exempt from work hour limits. Therefore, the words were appropriately changed by the Commission to ensure clarity in the final rule language and to defend the intent of the regulations and licensing basis. The Commission voted on the final rule for Part 26 and affirmed that final rule three months ago, after much discussion and debate, and I have been provided with no persuasive reason to reopen this closed record, especially as it relates to this provision.

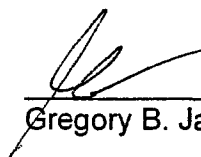
Part 26 is an important regulation approved by the Commission to enact provisions that are aimed at guarding against worker fatigue by setting limitations on the number of hours workers at nuclear power plants can work before being provided some break in their schedule. The intent of the provision in section 26.205(d)(4) was to provide some relief to the work-hour limitations for those employees who work on an outage unit rather than on an operating unit. By eliminating the word "solely" and allowing those "working on unit outage activities" to be exempt from the work hour limitations, employees working on both the operating and outage unit at a site would fall within this exemption.

Although the Nuclear Energy Institute (NEI) expressed concerns about this provision in letters dated April 24, 2007 (ML071150291), and May 8, 2007 (ML071360033), I believe it is too early to make a decision to change the rule until the staff has had sufficient time to complete the regulatory analysis, including determining the cost of the rule, which NEI estimates to be \$190 million per year. I am unconvinced by NEI's conclusion that additional requirements implemented by this provision to reduce worker fatigue will result in additional and significant negative impacts on plant resources. NEI appears to include costs attributed to security forces which are not affected by this provision as well as costs for being in compliance with current technical specifications. Even if their cost estimates are accurate, I believe the safety benefit of the provision would be severely degraded if the word "solely" was taken out. Furthermore, this effort was the culmination of a public rulemaking effort. If the Commission is going to make a change based upon letters from one source, then we should elicit comments from all public stakeholders and give them equal consideration and deliberation.

If the Commission approves the request to reconsider, it is clear that a majority of the Commissioners will have to approve the rule with any revisions agreed to at an affirmation session. Because the composition of the Commission has changed since this rule was previously affirmed, a newly affirmed final rule could appear quite different from the existing final rule. Three months ago this rule was approved and affirmed by five Commissioners and only four of those five Commissioners now remain. The absence of a vote could, in fact, shift the outcome on several controversial decisions which were originally decided with a slim 3-2 voting margin. Additional questions could also arise as to any provisions that result in a split 2-2 vote. Because there has been no discussion about these potential complications, it appears that other Commissioners have, at least implicitly, agreed to approve the final rule as previously affirmed by the prior Commission, except for the change noted in section 26.205(d)(4),

regardless of their positions in their prior votes. I strongly believe that if the Chairman's request for reconsideration prevails, the entire Part 26 rule should be reaffirmed in order to preserve the integrity of the Commission's procedures.

Additionally, I believe that, even if a majority of Commissioners support changing Part 26 to allow this loophole, proceeding in the manner requested could result in stakeholders legitimately questioning the validity of any changes ultimately made to Part 26. I fail to see how our stakeholders could have confidence in a decision made on a not-yet-public paper in not-yet-public votes without any additional public engagement on a rule which has, until now, proceeded through the public rulemaking process and has already been publicly affirmed. If the Commission is truly concerned that sufficient questions were raised by late changes in the rule language to warrant reconsideration and an eventual reaffirmation of Part 26, I believe any re-voting on substantive changes to Part 26 should necessarily be preceded by re-noticing the rule and following the rulemaking process, including seeking public comments prior to its reaffirmation.


Gregory B. Jaczko

7/16/07
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER LYONS
SUBJECT: **REQUEST FOR RECONSIDERATION OF THE
WORDING OF 10 C.F.R. SEC. 26.205(d)(4) AS
AFFIRMED ON APRIL 17, 2007**

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below Attached _____ None _____

I concur with the comments of Commissioner McGaffigan.



SIGNATURE

7/6/07

DATE

Entered on "STARS" Yes No _____