UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

May 7, 2003

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0199

TITLE: DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)

The Commission (with all Commissioners agreeing in part and disagreeing in part) responded to the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 7, 2003.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

/for/ Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner Dicus
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

SECY NOTE: THIS VOTING RECORD WILL BE RELEASED TO THE PUBLIC 5 WORKING DAYS AFTER THE LETTER HAS BEEN SENT TO THE PETITIONER.

VOTING SUMMARY - SECY-02-0199

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X	X			X	4/23/03
COMR. DICUS	X	X			X	3/28/03
COMR. McGAFFIGAN	X	X			X	4/22/03
COMR. MERRIFIELD	X	X			X	4/7/03

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved in and disapproved in part and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 7, 2003.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-02-0199 - DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)**

Approved XX in part Disapproved XX in part Abstain _____

Not Participating _____

COMMENTS:

I approve the staff's proposal to deny the Petition for Rulemaking. I note that an applicant for an early site permit or combined license may already incorporate by reference previously-filed information and that the staff's proposed revisions to Part 52 would make this more clear. Based on the staff's analysis, it also is not clear that the proposal set forth in the petition would produce actual efficiencies that would justify the costs and complexities of granting the petition. However, I disapprove the proposed Federal Register notice as drafted. As suggested by my fellow Commissioners, the staff should revise the notice to reduce or eliminate repetitive discussion and to expound on the practical efficiencies that may occur through incorporation of previously-filed information or reference in some instances to prior adjudicatory determinations.

SIGNATURE

April 23, 2003
DATE

Entered on "STARS" Yes X No ____

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER DICUS

SUBJECT: **SECY-02-0199 - DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)**

Approved In part X Disapproved In part X Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Greta Joy Dicus
SIGNATURE

March 28, 2003
DATE

2 NOV 22 5:33

Entered on "STARS" Yes X No ____

Comments of Commissioner Dicus on SECY-02-0199

I approve the staff's decision to deny the NEI Rulemaking Petition, but I disapprove the Federal Register Notice, as currently drafted.

There are several issues that are not adequately addressed in the Federal Register Notice, as well as some problems with the current language in the Notice. I found the Federal Register Notice to be unnecessarily repetitive in some sections, and some discussions that were included in the Notice did not appear to be relevant (or the relevance was not explained). I have attached edited pages addressing some of these concerns.

On a more generic basis, the Federal Register Notice is currently focused almost entirely on the NEI request concerning the scope of the staff's review of an Early Site Permit application. However, the petition also raises questions concerning the impact of prior licensing decisions or prior approved programs on NRC hearings. This aspect of the request needs to be addressed more directly within the Federal Register Notice. Prior NRC adjudicatory decisions do have some impact on future adjudications. Prior adjudicatory hearing decisions, particularly concerning application of the regulations to specific unchanged factual circumstances at a site, may have precedential value in a future licensing hearing. OGC should assist the staff in drafting language that properly describes what precedential value prior decisions may have on future applications.

For reasons that are not clear, the Federal Register Notice in several places discusses the NRC authority to take the action NEI requests **after** the Notice has rejected the NEI proposal for policy reasons. Having rejected the NEI proposal on policy grounds, there is no need for these discussions of NRC authority.

The Federal Register Notice would be improved if there were a discussion of the practical efficiencies that will exist even without the changes requested by NEI. While the current draft discusses why there may be technical issues for review even in such seemingly stable areas as geology and meteorology, it does not acknowledge practical efficiencies that may still exist from having conducted previous reviews. For example, where a site-wide emergency plan exists, has been exercised, and reviewed by FEMA and NRC, the staff will be able to more efficiently review, for future applications involving the same site, many Emergency Planning issues, such as methods for contacting offsite authorities, siren notifications of surrounding populations, and potential evacuation routes. Even without the changes NEI requests, there will be efficiencies when previously reviewed sites or programs are part of a future application. NRC should not, in rejecting the NEI proposal, imply that we will ignore all that has gone on before at that site or with an applicant who is now filing an Early Site Permit application.

It is my view that the Federal Register Notice should be redrafted and resubmitted to the Commission after consideration of the above comments and attached edits.

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3-28-02

resolved, unless the NRC met the Backfit Rule, (10 CFR 50.109). See proposed §52.16(d). Regulatory requirements and information incorporated by reference which must be supplemented under paragraph (b) would be subject to NRC review and approval, and the Backfit Rule would not apply. A similar approach would be used for environmental information. See proposed §52.16(c) and (f) [*sic*].

Incorporation by Reference of Existing Information

Paragraph (a) of petitioner's proposed §52.16 would allow an ESP applicant to incorporate by reference all or part of the "current licensing basis" for a site to the extent that it "pertains to" the siting issues specified in the current §52.17. However, under §50.32, "Elimination of Repetition," an applicant may incorporate by reference information already filed with the Commission. This regulatory provision may be used by an ESP applicant to reference information from existing sources, including the safety analysis report and the environmental report on the facility which is near the location that the applicant proposes to obtain an ESP. Although the current Part 52 does not contain a provision that explicitly allows ESP applicants to take advantage of §50.32, the proposed new §52.5 being considered separately from this petition, would make the existing general provisions in Part 50 applicable to the licensing processes in Part 52.[2] See p.10 of the *Federal Register* Notice attached to SECY-02-0077, dated May 8, 2002. Therefore, the NRC concludes that the petitioner's proposed §52.16(a) need not be adopted.

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[2]In the draft of the new proposed §52.5, the NRC staff inadvertently omitted §§50.31 and 50.32. The NRC staff plans to include these provisions in the final Federal Register Notice for the proposed Part 52 update rulemaking.

Misapplication of "Current Licensing Basis" Concept and the Backfit Rule

Paragraphs (b) through (f) of proposed §52.16 constitute the heart of petitioner's proposal, viz., resolution of issues in an ESP proceeding. However, the NRC regards the proposal as a misapplication of the "current licensing basis" concept and the Backfit Rule. The petitioner's proposal uses the term "current licensing basis" in the context of a site for which a construction permit or license has been issued. The NRC developed this concept for renewing nuclear power plant operating licenses under 10 CFR Part 54. The NRC uses the concept to determine the scope of the NRC safety review necessary to support the NRC's decision to renew a nuclear power plant's operating license. The NRC limited the scope of the NRC safety review for license renewal partly because the NRC has already made a licensing finding for the facility. Furthermore, as part of the Part 54 rulemaking, the NRC completed a comprehensive examination of NRC's post-licensing regulatory activities and determined that for all facilities the current licensing bases have been subject to continuing NRC oversight and have been appropriately updated. Thus, a broad-scope safety review against current requirements is ~~therefore~~ unnecessary at license renewal. The renewed license is issued to the same facility for which the NRC previously granted operating authority, and except for aging management programs, the operating authority for the facility under the renewed license is identical to the authority under the previous operating license. By contrast, there is no "current licensing basis" for a facility not yet granted a license, even if it is located at a site for which a construction permit or operating license has been issued to another facility.

More importantly, information for an existing facility, even if updated in accordance with the NRC's regulatory requirements and oversight activities, may not be applicable from a technical basis to a new facility to be located on the same site as an existing licensed facility.

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The NRC considered two areas ~~which constitute a representative sampling of siting and environmental matters which must be addressed in an ESP~~, to determine if the NRC's findings on these subjects could be used for a new facility to be constructed at the same site without substantial change or supplementation, in order to avoid duplicative NRC review and approval. These areas are geotechnical information and meteorology. ~~In both areas, the NRC believes that the scenario where existing information and findings with respect to an existing facility are most likely applicable without need for significant change and updating is where the ESP is to be located on the footprint of a proposed facility which was previously granted a construction permit but was never built. However, in~~ both of these areas, the NRC concluded that simple application of the updated information would be insufficient to demonstrate compliance with regulatory requirements in effect at the time of the ESP application (which petitioner's proposal would require, see §52.16(d)), and accordingly there would be little basis for avoiding necessary NRC review and approval.

In the geotechnical area, the NRC accepted the suitability of the site for construction and operation of a specific facility design. The NRC's findings were based upon the applicant's subsurface investigations to obtain the necessary geologic and seismic data, and the applicant's evaluations of the data to determine the suitability of the site for that facility's reactor design. Even if the proposed ESP is to be located precisely on the footprint of a previously-approved facility that has not been constructed, the NRC believes that substantial additional information must be submitted by the applicant and evaluated by the NRC to demonstrate that the site is suitable.

The applicant would need to demonstrate and the NRC must find that the data originally collected to determine the suitability of a specific reactor type to be constructed and operated at

a specific location supports the suitability of the site for some as-yet-unspecified design. The certified designs and contemplated designs provide a range of depths of embedment and implications for hydrological radionuclide transport. In addition, the applicant needs to demonstrate ~~and the NRC must find~~ that the data collected more than 20 years ago is still relevant, given the current knowledge of regional seismic activity, current data collection and analytical methods, and that the acceptance criteria of the previous licensing action are still relevant. There have been advances in the knowledge of seismic activity in the United States and how ground motion propagates from the seismic source to the site, particularly in seismic source zones such as the New Madrid and the Wabash Valley regions in the Midwest. There have been changes in the state-of-the-art techniques for performing subsurface investigations, (e.g., cone penetrometer testing and suspension logging inside one of the deep boreholes rather than across two boreholes). Furthermore, the reactor site criteria in 10 CFR Part 100 were significantly revised in December 1996. The applicant would have to supplement the geotechnic information as necessary to meet the current requirements of the revised Part 100.

~~Regardless of whether the applicant determined that the information needed to be supplemented,~~ The NRC would need to evaluate the geotechnical and seismic information against the current knowledge of regional seismic activity, the current data collection and analytical methods, and the current acceptance criteria to make its safety determination against the revised Part 100. Thus, even in the most favorable case, the NRC believes that substantial additional information, analyses and evaluation is necessary to determine whether existing findings on geotechnical data are applicable to a proposed facility which may be constructed on the same footprint as a previously-approved but unconstructed facility.

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These concerns about ~~technical~~ applicability of the data for the existing facility and review effort would only increase if the ESP was for an alternate location on the site. The distance between the existing licensed facility (or footprint for a facility that was authorized but not constructed) and the proposed facility may result in differences in site suitability. Localized subsurface faults which were not adequately characterized during the previous licensing action could bring representativeness of the incorporated geotechnical information into question. There may be other differences in the characteristics of local subsurface materials (e.g., depth of bedrock and soil types) between the existing licensed facility (or footprint for a facility that was authorized but not constructed) and the proposed facility, which may render inapplicable the original data and findings with respect to geotechnical characteristics (or at least require substantial supplementation of the original data and findings).

In the area of meteorology, ~~the applicant has~~ the existing licensee will have collected data that the NRC previously determined was sufficiently representative of the meteorological environment for the (then proposed) facility. While this data ~~has~~ will have been supplemented to a certain extent by data collected throughout the period of operation of the facility, the type of data that has been collected in many cases has been reduced to a limited set necessary to support emergency action determinations. Also, as a technical matter, data collected to support the original findings may not be representative of ~~the~~ current meteorological conditions ~~of~~ at the proposed site. Localized changes such as changes in land use, the erection of new structures and the removal of existing structures, have the capability to significantly alter the previous characterization of the site's meteorology. These changes in local conditions may not be reflected in the licensing basis for the plant, inasmuch as they are unnecessary to support emergency action determinations. Furthermore, the meteorological data previously collected to support the existing facility's design may be insufficient to characterize the release characteristics unique to the specific

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design (or the envelope of designs) that may be built under the ESP. For example, the NRC guidance contains different consequence analyses, viz., elevated release versus ground-level release (and therefore the meteorological data necessary to support such analyses), depending upon whether the facility is a boiling water reactor or a pressurized water reactor. The application and review effort would only increase if the ESP was for an alternate location on the site. The distance between the existing licensed facility (or footprint for a facility that was authorized but not constructed) and the proposed facility may result in sufficient terrain differences or orientation differences that call into question the applicability of the meteorological data collected at the existing facility to a facility that may be constructed under the proposed ESP.

In summary, prior NRC findings with respect to the characteristics of a site and compliance with then-current regulatory requirements with respect to an existing facility, updated in accordance with exiting requirements and practices, does not ensure that the data is sufficiently accurate and comprehensive to support a current ESP siting determination. Thus, the petitioner's proposal to extend the concept of a "current licensing basis" in the manner contemplated by its proposed §52.16 is technically inappropriate.

This is not to say that the NRC is foreclosed from adopting a rule which limits the scope of an NRC review of an ESP application (and, consequently, limit the scope of a hearing on the ESP application) based upon prior NRC regulatory determinations and oversight activities. On the contrary, the NRC has authority under Section 161.i. and 182.a. of the Atomic Energy Act of 1954, as amended (AEA), to promulgate such regulations, as witnessed by the NRC's adoption of the original ESP requirements in 10 CFR Part 52 (54 FR 15372, April 16, 1989), and the requirements for nuclear power plant license renewal in 10 CFR Part 54. These two

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rulemakings represent different regulatory approaches for achieving "issue resolution," i.e., limiting the scope of matters which: (i) an applicant must address in an application; (ii) the NRC must evaluate and make findings in order to provide the regulatory approval; and (iii) an interested member of the public may seek to litigate in a hearing associated with the NRC's regulatory approval. However, the NRC does not believe that the petitioner's proposal provides a sufficient basis for instituting rulemaking under either of these regulatory approaches for achieving issue resolution.

In Part 52, the Commission indicated that issue resolution would be justifiable for a period of 10 to 20 years—the term of an ESP (54 FR at 35378, second column). However, as part of this discussion the Commission indicated:

> The Commission is confident that there will be information adequate to support site approvals lasting up to 20 years. After all, the Commission licenses plants and their sites for operation for periods of up to twice twenty years. *Where adequate information is not available, early site permits will not be issued.*

Id. (emphasis added). Thus, the Commission expressed its expectation that information submitted for an ESP would be evaluated to determine if it is "adequate" to support findings over the duration of an ESP. By contrast, petitioner's proposal would rely upon siting determinations that were intended to support a contemporaneous licensing action. Therefore, the NRC gave no consideration to whether its determinations with respect to the adequacy of the information and compliance with applicable regulations would remain viable to support other siting determinations for as long as the site had a licensed facility. ~~Moreover, the petitioner's~~

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proposal appears to provide for issuance of the ESP without NRC consideration on whether the previously-determined siting information is adequate to support siting findings over the duration of the ESP.

The NRC took a different approach for achieving issue resolution in license renewal. Each nuclear power plant had already been subject to comprehensive safety evaluations as part of the issuance of the construction permit and the operating license, and is subject to continuing oversight and consequent changes to the licensing basis to keep it up-to-date. Accordingly, the Statements of Consideration for both the original Part 54 rulemaking (56 FR 64943, December 13, 1991) and the revised rule (60 FR 22461, May 8, 1995) included extensive discussion of the bases for limiting the scope of the license renewal review, including the principles and technical findings with respect to the regulatory processes for ensuring that the licensing bases of nuclear power plants are maintained, such that a NRC re-review of safety matters is not necessary at the time of license renewal. Furthermore, the 1991 rulemaking was supported by a comprehensive review of NRC regulatory practices and activities for the purpose of demonstrating that the "current licensing basis" of operating plants evolves over time such that an acceptable level of safety will continue to be provided during any renewal term. See NUREG-1412, "Foundation for the Adequacy of the Licensing Bases." The 1991 rulemaking was also supported by a separate study evaluating unresolved generic safety issues and unresolved safety issues. See NUREG/CR-5382, "Screening of Generic Safety Issues for License Renewal Consideration." In the 1995 rulemaking, the NRC expanded its findings with respect to the regulatory process to take into account the recently-adopted Maintenance Rule, 10 CFR 50.65, to further limit the scope of the NRC's review of the renewal application. See 60 FR at 22469-73. Thus, the Part 54 rulemaking involved a comprehensive, subject matter-specific consideration and finding with respect to the adequacy of the regulatory process

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for maintaining the adequacy of the current licensing bases of plants for purposes of license renewal. By contrast, petitioner's ESP proposal did not identify discrete siting matters (e.g., ground motion amplitude and frequency) for which review could be foreclosed by rule, together with a statement of bases showing why it would be technically acceptable to rely upon such findings.

The NRC also believes that the petitioner's proposal would essentially extend the Backfit Rule to situations for which the policies underlying the Backfit Rule are not applicable. The Backfit Rule was intended to address a licensee's expectation of regulatory stability. That is, a licensee expects that the terms and conditions of the licensee's authority under a license will not be changed after the NRC has issued the license, except as permitted in the Backfit Rule. The Backfit Rule established regulatory criteria to be used by the NRC in evaluating proposed new and changed regulatory requirements and changes in NRC interpretations and findings with respect to compliance with those requirements.

An ESP applicant, albeit one that already possesses a construction permit or operating license at the site for which an ESP is being sought, ~~under the existing regulatory regime~~ has no regulatory expectation that the NRC's determination of whether the application complies with applicable regulatory standards would be constrained by the "current licensing basis" for the earlier-issued construction permit or operating license at the site. ~~The ESP applicant's regulatory expectations would extend, at most, to licensing associated with the facility for which the NRC previously granted a construction permit or operating license~~. An ESP application, submitted years after the issuance of the construction permit or license for an existing facility on the site, cannot reasonably be viewed as implicating the "regulatory stability" concept underlying the current Backfit Rule. The NRC further notes that the petitioner's proposal would also permit

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an ESP applicant that does not have a construction permit or license at the site to reference the "current licensing basis" of another licensee's facility located at the proposed ESP site. Again, under current regulatory practice the ESP applicant does not have any reasonable expectation of regulatory stability with respect to *its* new application, inasmuch as the NRC has not taken any licensing action *for the ESP applicant* with respect to a facility located at that site. ~~The NRC has the authority to modify its regulatory system to effectively extend the licensee's regulatory stability expectations to encompass subsequent ESP applications to be located at the same site as an existing licensed facility. However, the implications of such an approach are significant and wide-ranging, and NRC does not believe that the petitioner's proposal is the appropriate opportunity for considering such a substantial expansion of backfit concepts.~~

Regulatory Efficiency and Effectiveness, and Reducing Unnecessary Regulatory Burden

Even if the NRC were to adopt the petitioner's proposal, the NRC does not believe there would be a significant increase in regulatory efficiency and effectiveness, or a significant reduction in unnecessary regulatory burden, ~~two of the NRC's performance goals.~~ The petitioner claims the proposed regulations will enhance the efficiency of the regulatory process by eliminating duplicate reviews of matters resolved in previous proceedings. However, §52.16(b) and (c) apparently concede that backfitting protection and "issue resolution" are not appropriate in circumstances where—after issuance of a construction permit or license for a facility at a specific site—either significant new information relevant to siting becomes known or new regulatory requirements relevant to the siting decision are adopted by the NRC. Thus, paragraphs (b) and (c) would require that the application be supplemented to address significant new information, ~~as well as~~ and to include information on ~~how the~~ compliance w/ new regulations, ~~would be satisfied to the extent that the existing incorporated information does not address compliance~~

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~~with the new regulations.~~ Paragraphs (b) and (c) would also require that the application address cumulative impacts of the proposed new facility contemplated by the ESP, and the impacts of the new facility on the existing facility (and vice versa). Section 52.16 (d) and (f) would require the NRC to make the necessary findings with respect to the new information and compliance with the new regulations. The NRC does not believe that the petitioner's proposal would result in any real savings in resources expended by the ESP applicant in preparing the application or by the NRC in reviewing and acting on the application. Nor does the NRC believe that there would be any significant reduction in the time needed for the applicant to prepare the application or for the NRC to review and act on the application.

First, the detailed analysis necessary to establish that there is no significant new information for each relevant ESP subject matter and that the application meets current requirements is likely to consume at least as many resources as would be consumed if the proposed amendments were not adopted. As discussed above, the NRC considered two areas—geotechnical information and meteorology—to assess the applicability of the data and findings made in connection with the original licensing. In both areas, the NRC does not believe that there would be any significant increase in regulatory efficiency and effectiveness, or a reduction in unnecessary regulatory burden.

As discussed earlier with respect to "current licensing basis" and geotechnical information, the applicant must demonstrate ~~and the NRC must find~~ that the data collected some years earlier is still relevant, given the current knowledge of regional seismic activity, current data collection and analytical methods, and the acceptance criteria of the previous licensing action. ~~Regardless of whether the applicant determined that the information needed to be supplemented,~~ The NRC would need to evaluate the geotechnical and seismic information

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against the current knowledge of regional seismic activity, the current data collection and analytical methods, and the current acceptance criteria to make its safety determination against the revised Part 100. Even in the most favorable case, the NRC believes that there would be no real gain in NRC regulatory efficiency or reduction in the applicant's burden. The application and review effort would only increase if the ESP was for an alternate location on the site, inasmuch as the applicant would have to demonstrate that specific characteristics of the local subsurface material for the existing facility apply to a facility located at a different location on the site. Thus, NRC does not believe that substantial regulatory efficiency and effectiveness, or reductions in unnecessary regulatory burdens will result if proposed §52.16 is adopted.

As discussed earlier with respect to "current licensing basis" and meteorology, the applicant must demonstrate and the NRC must find that the data and original findings are representative of current meteorological conditions. The applicant must demonstrate that local changes have not changed the previous characterization of the site's meteorology. The applicant must also demonstrate that the meteorological data previously collected is sufficient to characterize the release characteristics unique to the specific design (or the envelope of designs) that may be built under the ESP. Even in the most favorable case, the NRC believes that there would be no real gain in NRC regulatory efficiency or reduction in the applicant's burden. The application and review effort would only increase if the ESP was for an alternate location on the site. Thus, NRC does not believe that substantial regulatory efficiency or reductions in unnecessary regulatory burdens will result if proposed §52.16 is adopted.[3]

[3]The NRC also believes that current data being collected by licensees under their operational program requirements will be insufficient, in and of itself, to support NRC siting determinations. Current onsite meteorological monitoring programs are intended to ensure that licensees provide representative and reliable data for emergency planning and response purposes. The set of parameters needed to meet operational objectives was narrowly restricted to those necessary to follow the course of an accident (i.e., wind direction and speed,

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In short, the petitioner's proposal would merely change the focus of the application preparation and NRC review to whether (1) the applicant considered and adequately characterized all new and significant information, (2) the referenced information meets current requirements, and (3) the accuracy and completeness of any new information to support the claim that existing information is adequate to meet the new requirements.

Second, regardless of whether the petitioner's rule is adopted, the NRC has to evaluate: (1) the cumulative radiological and environmental impacts of the proposed new facility (the information required by paragraphs (b)(2) and (c)(2)), (2) the potential safety impacts of the existing facility on the proposed facility (information required by paragraph (b)(3)); and (3) the potential safety impacts of the proposed new facility on the existing facility (information required by paragraph (b)(4)). Even if there is no new information and new regulatory requirements (which, as discussed above, the NRC does not believe is a reasonable expectation), the applicant has to address these issues in its application and the NRC has to evaluate these issues and come to a conclusion in acting on the ESP application. The NRC concludes that paragraphs (b)(2)-(4), and (c)(2) simply make explicit what already must be done under existing regulations, and therefore these paragraphs would not increase regulatory efficiency and effectiveness or reduce unnecessary regulatory burden.

Third, the NRC does not believe that there would be any significant reduction in the matters that may be addressed in a hearing associated with the issuance of an ESP under the proposal. The petitioner proposes to limit the scope of the mandatory hearing by adopting, by

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and an indicator of atmospheric stability; see Regulatory Guide 1.97). These parameters are a small subset of the meteorological parameters (delineated in Regulatory Guide 1.23) which are needed to evaluate design basis accidents for a particular design/site combination and for environmental impact evaluation.

gjd 3-28-07

In summary, the NRC does not believe that it is technically possible to apply programs such as physical protection, emergency preparedness, and QA from another facility to a proposed COL without substantial evaluation and consideration of the acceptability of the information with respect to the specific characteristics and location of the proposed facility. This is not to say that the NRC may not adopt a rule which limits the scope of an NRC review of a COL application (and, consequently, limits the scope of a hearing on the COL application) based upon prior NRC regulatory determinations and oversight activities. As discussed earlier with respect to petitioner's ESP proposal, the NRC has authority to promulgate such a regulation as witnessed by the Commission's adoption of both Part 52 and Part 54. However, for the reasons discussed earlier these rulemakings may be distinguished from petitioner's proposal.

The NRC also believes that the petitioner's proposal would essentially extend the Backfit Rule to situations for which the policies underlying the Backfit Rule are not applicable. A COL applicant simply can have no reasonable regulatory expectation that the NRC's determination of whether the application complies with applicable regulatory standards would be constrained by the "current licensing basis" for a previously licensed facility at that site. This is even more true for a COL applicant referencing a previously licensed facility at a *different site*.

The COL applicant's regulatory expectations extend, at most, to licensing associated with the facility for which the NRC previously granted a construction permit or license. An application for a COL, submitted years after the issuance of the construction permit or license for an existing facility on the same site, cannot reasonably be viewed as implicating the regulatory stability concept underlying the current Backfit Rule. This is even more true with

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respect to an application for a COL referencing a construction permit or license issued years earlier for an existing facility at a *different site*.

Regulatory Efficiency and Effectiveness, and Reducing Unnecessary Regulatory Burden

Even if the NRC were to adopt the petitioner's proposal, the NRC does not believe there would be a significant increase in regulatory efficiency and effectiveness, or a significant reduction in unnecessary regulatory burden. Turning first to §52.80(a), which would extend the provisions of proposed §52.16 to the COL application, the NRC believes that the proposal will not result in a significant increase in regulatory efficiency, or a significant reduction in unnecessary regulatory burden, for the reasons stated earlier with respect to §52.16. In addition, proposed §52.80(a) would allow the COL applicant to incorporate siting information from another site owned by the COL applicant. Assuming that the petitioner's proposal implicitly requires the COL applicant to demonstrate how the information on the referenced site is applicable to the proposed site, the NRC's review would be even more complex.

With respect to the petitioner's proposal in §52.80(b) to allow COL applicants to incorporate programmatic information by reference, the NRC agrees that the proposal would significantly reduce the COL applicant's regulatory burden. However, the NRC believes that the reduction would be inappropriate. Unlike proposed §52.16(b)(1) and (2), proposed §52.80(b) would not require the COL applicant to demonstrate that the programmatic information from the referenced site and facility is relevant and technically applicable to the proposed COL site and facility. Further, unlike §52.16(b)(3) and (4), §52.80(b) would not require the COL applicant to address the safety impacts of the proposed facility and the existing facility on each other.

gjd
3-28-03

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MCGAFFIGAN

SUBJECT: **SECY-02-0199 - DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)**

Approved X in part w/comment Disapproved X in part Abstain _____

Not Participating _____

COMMENTS: I concur in the votes of Commissioners Merrifield and Diaz

Edward McGaffigan Jr.
SIGNATURE

April 22, 2003
DATE

Entered on "STARS" Yes X No _____

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MERRIFIELD

SUBJECT: **SECY-02-0199 - DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)**

Approved ✓ in part Disapproved ✓ in part Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

SIGNATURE

4/7/03

DATE

Entered on "STARS" Yes ✓ No _____

COMMISSIONER MERRIFIELD'S COMMENTS ON SECY-02-0199

I approve the staff's decision to deny the Petition for Rulemaking, but I disapprove the proposed Federal Register as currently drafted. For the reasons given by Commissioner Dicus and the following comments, I recommend substantial revisions to the Federal Register notice. The Petition for Rulemaking to permit applicants to use information from prior licensing actions raises sensible questions about how to fairly and efficiently take advantage of information and programs previously approved by the NRC and already subject to a public hearing.

I agree with the petitioner that there must be discipline in the review process for new plant licensing applications. The Federal Register notice should be rewritten to make this clear. The Federal Register notice should explain the difference between licensing plants in a mature industry environment, rather than an emerging industry as was the case for the majority of the existing plant licenses, and that relying on already proven programs, to the extent that they are applicable, minimizes the risks of imposing modifications that are based on unproven assumptions. To ensure that future license applicants and the public understand the staff's review process of programs and siting information, in a separate document (e.g., Standard Review Plan), the staff should explain its review process, including specific criteria that the staff will use to make its determination as to whether new siting information or a program modification is necessary. The staff should submit this document to the Commission for approval.

I also agree with the petitioner that the scope of the adjudicatory hearing should be narrowed to preclude litigation of issues that have previously been resolved. The Commission has a long adjudicatory history of precluding re-litigation of issues from one proceeding to the next, taking into consideration fairness to the participants and efficient case management. However, the circumstances for precluding re-litigation of issues are clearly prescribed in judicial and Commission cases and significantly differ from the current criteria proposed in the petition.[1] The agency's discretion to limit litigation of issues in any adjudication is circumscribed by the Atomic Energy Act, Section 189(a) hearing requirements.[2] In addition to issue preclusion doctrines, through rulemaking the Commission has in effect precluded certain issues from litigation, but in contrast to the proposal here, those issues were resolved on their merits. See, e.g., certain license renewal issues addressed in 10 C.F.R. Part 51, Appendix B to Subpart A. Consequently, I agree with the staff to deny the petition with respect to the criteria to be used to determine whether an issue should be precluded from re-litigation.

For these reasons, and those espoused by Commissioner Dicus, the Federal Register notice needs substantial revision.

4/7/03

[1] There are issue preclusion doctrines, which the Courts have developed and which have been applied in NRC proceedings. Cleveland Electric Illumination Co, et al. (Perry Nuclear Power Plnat, Unit 1 and Davis-Besse Nuclear Power Station, Unit 1). For example, the doctrine of collateral estoppel permits exclusion of issues actually litigated, the disposition of which were necessary to the outcome of the first action. Id. at 284.

[2] Although the Commission has broad discretion to establish the scope of a licensing proceeding, "its discretion to limit public participation in resolving the matters it deems relevant is more circumscribed as a result of section 189(a)'s hearing requirements." UCS v. NRC, 435 F.2d at 1437, 1446 (D.C. Cir. 1984). "The agency must generally provide an opportunity for submission of evidence as to any and all issues of material fact." Nuclear Information Resource Service v. NRC, 969 F.2d 1169, 1444 (D.C. Cir. 1992).