April 24, 2000

COMMISSION VOTING RECORD

DECISION SECY-00-0022
ITEM:

TITLE: RULEMAKING PLAN, "DECREASE IN THE SCOPE OF RANDOM FITNESS-FOR-DUTY TESTING REQUIREMENTS FOR NUCLEAR POWER REACTOR LICENSEES," FOR AMENDMENTS TO 10 CFR PART 26

The Commission (with Chairman Meserve and Commissioners Diaz and Merrifield agreeing) approved the staff's rulemaking plan described in the subject paper, as recorded in the Staff Requirements Memorandum (SRM) of April 24, 2000. The Commission (with Chairman Meserve and Commissioners Dicus, McGaffigan, and Merrifield agreeing) disapproved the staff's recommendation to grant in part the IBEW union's request for an exemption from random drug testing for the subset of clerical workers at Diablo Canyon, described in the subject paper, as recorded in the SRM of April 24, 2000.

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

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Annette Vietti-Cook
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets

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

VOTING SUMMARY - SECY-00-0022

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X	X			X	4/11/00
COMR. DICUS		X			X	4/10/00
COMR. DIAZ	X					3/27/00
COMR. McGAFFIGAN		X			X	4/5/00
COMR. MERRIFIELD	X	X			X	3/30/00

COMMENT RESOLUTION

In their vote sheets, Chairman Meserve and Commissioners Diaz and Merrifield approved the staff's rulemaking plan. Commissioners Dicus and McGaffigan disapproved going forward with this rulemaking because they believed the safety case for the current scope of random testing is unchanged from when Part 26 was first promulgated.

Chairman Meserve and Commissioners Dicus, McGaffigan, and Merrifield also disapproved the staff's recommendation to grant in part the IBEW union's request for an exemption from random drug testing for the subset of clerical workers at Diablo Canyon. Chairman Meserve and Commissioner Merrifield recommended continuing to hold this petition in abeyance. Commissioners Dicus and McGaffigan recommended denying the IBEW petition. Commissioner Diaz approved the staff recommendation to approve in part the IBEW petition.

Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on April 24, 2000.

Commissioner Comments on SECY-00-0022

Chairman Meserve

I approve the staff's rulemaking plan. In order for me to approve a final rule along the lines proposed by the staff, however, various factual issues that are central to the decision should be far more fully explored than has occurred to date.

The staff proposes to relax the scope of random fitness-for-duty (FFD) testing from the current requirements, which impose such testing on all persons granted unescorted access to nuclear power plant protected areas or to certain personnel required to report a licensee's Technical Support Center or Emergency Operations Facility in an emergency. 10 CFR. 26.2(a), 26.24(a)(2). The staff proposes to undertake a rulemaking to require such testing only for those individuals who have unescorted access to vital areas, portions of the plant within the protected areas which contain equipment vital to plant safety.

The Supreme Court has made clear that a drug-testing requirement, like that imposed by 10 CFR 26.24(a)(2), effects a search within the meaning of the Fourth and Fourteenth Amendments. See Chandler v. Miller, 520 U.S. 305, 313 (1997); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989). As a result, such a search must be shown to be "reasonable" if it is to pass constitutional muster. Although such searches usually are justified based on an individualized suspicion of wrong-doing, the Court has allowed searches, such as those imposed by the FFD testing requirement, in various other contexts based on "special needs." See Chandler, 520 U.S. at 314. The Court has explained that "`[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of . . . suspicion.'" Id. quoting Skinner, 589 U.S. at 624. The Court further observed that "the proferred special need for drug testing must be substantial -- important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Id. at 318. As a result of this guidance, any Commission action in connection with its examination of the FFD rules must observe the constitutional constraints that arise in this sensitive area. Further, the Commission should undertake this task by applying a concrete and context-specific inquiry of the competing private and public interests. See id. at 314.

Given the staff's conclusion that our existing FFD testing requirements may intrude too deeply on privacy interests, I conclude that we should proceed with the rulemaking. However, the factual inquiry that should guide the balancing of interests must be carefully explored in the process. It is clear that the risks associated with the operation of a nuclear power plant are sufficiently serious that it is appropriate to impose FFD testing on persons who, if given unescorted access to portions of the plant under the influence of drugs or alcohol, could cause grave public harm. What is unclear is the definition of the portions of the plant for which the "special need" for such testing exists. The Commission, in promulgating the currently effective rule, obviously concluded that the testing should encompass all those with unescorted access to the protected areas as well as certain others involved in emergency activities. Now the staff proposes to narrow FFD testing to those with unescorted access to vital areas -- perhaps appropriately -- but it does so in the face of important comments by many licensees to the effect that risk or vulnerability will increase if the scope of random drug testing is changed. In order for the Commission to regulate in this area consistently with constitutional requirements, it is important for the Commission to understand the risks perceived by our licensees. Accordingly, I urge that the staff seek detailed comment on this matter and, as the rulemaking proceeds, to undertake a careful analysis of the balance of public and private interests.[(1)]

The staff has also suggested that the Commission approve in part a petition filed by the IBEW so as to grant an exemption from Part 26 for certain clerical workers at Diablo Canyon. I conclude that this petition should continue to be held in abeyance in light of the fact that important factual issues relating to the exemption remain to be resolved. I would rule on the petition at the conclusion of the rulemaking.

Commissioner Dicus

I disapprove going forward with this rulemaking and I would deny the IBEW's request for an exemption from random drug testing for the subset of clerical workers at Diablo Canyon.

I agree with Commissioner McGaffigan's assertion that the safety case for the current scope of random testing is unchanged from when Part 26 was first promulgated. In 1994 (*IBEW v. NRC*, 966 F. 2d 521) we said that we knew of "numerous cases where reactors have been tripped and safety systems challenged as a result of accidents that occurred in protected areas." 59 Fed. Reg. 24373. In addition, the majority of industry comments, in response to the 1994 request for public comment, indicated that risk or vulnerability will increase if the random drug testing scope is unchanged. Nothing in the SECY paper now before the Commission contradicts these assessments or sheds new light on these concerns.

Therefore, I approve Option 1, which is to retain the current scope of testing.

Commissioner McGaffigan

I disapprove going forward with this rulemaking, and I would deny the IBEW's request for an exemption from random drug

testing for some clerical workers at Diablo Canyon.

The safety case for the current scope of random testing is unchanged from when Part 26 was first promulgated. When, in 1994, we asked for public comment on whether we should reduce the scope of random testing in response to *IBEW v. NRC*, 966 F. 2d 521, we said that we knew of "numerous cases where reactors have been tripped and safety systems challenged as a result of accidents that occurred in protected areas." 59 Fed. Reg. 24373. Moreover, the majority view in the industry, an industry not known for overestimating risk, is that risk or vulnerability will increase if the scope of random drug testing is reduced (see p. 2 of Att. 1 to the SECY paper). Nothing in the SECY paper now before us contradicts these assessments.

After the court's unfavorable remarks in *IBEW*, OGC was right to press for reconsideration of the scope of random testing. The Commission needs to know the litigative risks posed by its policies, and to reconsider those policies in the light of newly revealed risks. However, in this case, I am willing to run those risks. Until a court directly overturns our scope of random testing, I would prefer to maintain it and spend the rulemaking FTE on other safety matters.

Commissioner Merrifield

I approve the staff's rulemaking plan outlined in SECY-00-0022. I encourage the staff to remain open to alternative approaches that they may receive during the public comment period associated with the proposed rule.

I disapprove the staff's recommendation to grant in part the IBEW union's request for exemption from Part 26, so that clerical workers at Diablo Canyon who have unescorted access to the protected area but who (1) do not perform any safety-related duties, and (2) do not have unescorted access to the plant's vital areas, need not be subject to random testing under Part 26. If the rule is changed as contemplated by the rulemaking plan, it will obviate any need for an exemption. If the rule is not changed consistent with the rulemaking plan, that will mean that through the public process, an issue was raised that caused the Commission to question its proposed changes. Since the basis for the exemption will essentially be the same as the basis for the proposed changes to the rule, any matter that would cause us to question the proposed rule changes would also cause us to question the exemption. Therefore, it would be premature to rule on the exemption prior to resolving the underlying rulemaking issues.

I also believe that approving the exemption at this time could adversely affect public confidence. While I support the rulemaking plan, this support should not be misinterpreted to mean that I have pre-judged the merits of the suggested rule change. Granting the exemption at this time appears prejudicial with respect to the proposed rulemaking effort. Specifically, during the rulemaking process, we will solicit insights from our stakeholders regarding the merits of the proposed rule changes and consider them in developing a final rule. If we were to grant the closely related exemption, it would be logical for our stakeholders to conclude that we have already pre-judged the merits of the rule changes and, in essence, reached a conclusion. I believe that granting the exemption before initiation of the rulemaking would undermine the credibility of the rulemaking process.

Another concern relates to how granting the exemption could adversely affect the licensee. If we were to approve the exemption as proposed, and the staff or Commission changes course during the rulemaking process, it could result in an unnecessary regulatory burden on the licensee. Specifically, the licensee would likely make fitness-for-duty (FFD) program changes as a result of the exemption being granted, only to have to undue those changes as a result of subsequent NRC actions taken as a result of the rule. Regulatory consistency and predictability would be compromised. Thus, I simply do not think it is in the best interests of the NRC, the licensee, or our stakeholders to grant the exemption prior to formally assessing the merits of the closely related rulemaking.

I am also concerned that granting the exemption at this time will serve to open the flood gates for similar exemption requests. The staff is silent with respect to how they would handle such requests and the resource implications of related agency review efforts.

Finally, I believe that the staff's argument regarding the length of time associated with the exemption request is less than compelling. We received this exemption request in 1993. I hardly believe that the rulemaking schedule laid out in SECY-00-0022 is relevant to the argument regarding whether agency action has been timely. Even if the staff were to grant the exemption immediately, our action would have to be considered woefully untimely at best.

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1. The staff points to the fact that equipment crucial to safety is segregated in vital areas, thereby justifying its proposal to narrow the testing to those with access to that zone. SECY-00-0022, at 3. I note, however, that in other contexts the staff has observed that equipment not previously deemed essential to safety has been shown to have great safety significance. SECY-99-256, at 4. Presumably such equipment is not necessarily found in a vital area, and its protection might constitute a "special need." I draw no conclusion on this matter, but expect that the staff will fully explore such issues as it undertakes the rulemaking