

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER JACZKO

SUBJECT: SECY-09-0042 – FINAL RULE: DECOMMISSIONING
PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72;
RIN-3150-A155)

Approved X Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached X None ___



SIGNATURE

05
03 / 08 / 2009

DATE

Entered on "STARS" Yes X No _____

Commissioner Jaczko's Comments on SECY-09-0042
Final Rule: Decommissioning Planning (10 CFR Parts 20, 30, 40, 50, 70, and 72)

While I approve of the substance of the final rule for decommissioning planning in many respects, I disapprove of the process that has been used to modify this final rule and thus disapprove of the removal of the joint and several liability provision without first re-noticing this change for public comment.

This proposed rule was published on January 22, 2008, and during the comment period, the agency received 35 comment letters, including comments from the Nuclear Energy Institute (NEI) dated May 8, 2008. The staff responded to the comments and prepared a draft final rule for Commission consideration on October 1, 2008. But then on October 9, 2008, and November 5, 2008, after the public comment period closed and when the final rule was already before the Commission for consideration, staff held meetings with NEI to discuss the comments provided in its May letter.

In my November 18, 2008 vote, I approved of the draft final rule, with some clarifying comments. Shortly after my vote, however, on November 28, 2008, the staff requested that the final rule be withdrawn from Commission consideration due to the staff's need to "evaluate removal of final rule language in 10 CFR Part 30, Appendix A (III)(E) which would impose a joint and severally liable requirement on the guarantor of a parent guarantee." Although I approved of the withdrawal of the draft final rule, I did so with the understanding that the agency would use the additional time to develop an expanded discussion of the proposed requirement by re-noticing this limited provision in order to determine whether to propose the removal or retention of that provision.

Instead, the decision was made by the staff to simply remove the joint and several liability provision and resubmit the draft final rule to the Commission. Although removal of this provision may have been the correct thing to do with respect to reactor licensees, considerations could be different for materials licensees than for reactor licensees. The purpose of the public rulemaking process is to have these kinds of discussions in a fair and equitable setting so that each stakeholder has a chance to comment and potentially influence the final decision. Although the meetings with NEI were open to the public, I think it is likely that other interested stakeholders may have concluded that, since the comment period was over and the draft final rule was before the Commission, no further changes in the rule were going to result from the meetings and therefore no participation on their part was needed. I understand that the staff does not want to delay the issuance of this entire rule due to this one change, but re-noticing a limited portion of the rule and engaging the entire stakeholder community would be a minor effort that would yield big rewards, including increased public confidence in our process.

Therefore, consistent with my vote on November 18, 2008, I approve the contents of the rule with the exception of the removal of the joint and several liability provision proposed in the version in SECY-09-0042. Staff should re-notice the parent guarantee provision for public comment and return to the Commission with a more thoroughly vetted recommendation regarding that provision.



Gregory B. Jaczko

5/8/09

Date