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

SECRETARY

March 30, 2011

COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0137

TITLE: PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT CONSTRUCTION (RIN 3150-A165)

The Commission (with Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of March 30, 2011. Chairman Jaczko approved the paper.

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

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-10-0137

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	11/22/10
COMR. SVINICKI		X			X	3/7/11
COMR. APOSTOLAKIS		X			X	3/11/11
COMR. MAGWOOD		X			X	3/1/11
COMR. OSTENDORFF		X			X	3/4/11

COMMENT RESOLUTION

In their vote sheets, Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff disapproved the staff's recommendation and provided some additional comments. Chairman Jaczko approved the paper. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on March 30, 2011.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-10-0137 – PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT CONSTRUCTION (RIN 3150-A165)

Approved __X___ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _X__ None ___

SIGNATURE

12/22/10

DATE

Entered on "STARS" Yes _X__ No ___

Chairman Jaczko's Comments on SECY-10-0137 Proposed Rule: Requirements for Access Authorization and Physical Protection during Nuclear Power Plant Construction

The staff has provided the Commission a clear and well developed proposed rulemaking package describing the potential new requirements for access authorization and physical protection during construction of new nuclear power plants. Ensuring that plants are securely and safely constructed is fundamental to ultimately ensuring they are safe to operate. This proposed rulemaking will provide the proper regulatory framework to ensure adequate protection of the public health and safety, promote the common defense and security, and protect the environment. As directed by the Commission in the SRM for SECY-07-0211 dated January 23, 2008, the proposed rulemaking has asked for public comments specifically related to fingerprinting of construction personnel which I continue to strongly support as necessary. As I explained in my vote in 2007, fingerprinting is essential in the determination of an individual's true identity. I look forward to hearing from stakeholders on this and other aspects of the proposed rule.

I approve the publication of the proposed rulemaking in the Federal Register. Prior to its publication, the staff should ensure that the proposed access authorization requirements for new construction are reflective of the recent staff responses to the Office of the Inspector General audit of the NRC's Oversight of the Access Authorization Program for Nuclear Power Plants as reflected in the memorandum from Martin J. Virgilio, DEDO to Stephen D. Dingbaum, AIG, dated October 20, 2010. The staff should also review Section J, Reporting of Detected Malicious Acts for any additional insights from revisions of Appendix G of 10 CFR 73 that could be included in the new rule. In particular reporting of suspicious activity at construction sites may be useful in identifying potential threats not only to the site under construction but also to existing nuclear power plants. In addition the staff should clearly state why Limited Work Authorization considerations do not exist as part of the proposed rule. I understand that the proposed rulemaking was initiated under common defense and security. The discussion, therefore, about backfit analysis would benefit from a clearer discussion about why backfit was not necessary. Finally as part of the discussion in Section A (1) (iii) regarding Pre-access Screening Checks, the staff should clarify the process that will be used by licensees to verify personnel who already have unescorted access at an operating plant.

Gregory B. Jaczko 11/22/10

Gregory B. Jaczko Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER SVINICKI

SUBJECT: SECY-10-0137 – PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT CONSTRUCTION (RIN 3150-A165)

Approved _____ Disapproved __XX__ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached __XX__ None ___

SIGNATURE

03/7/11

DATE

Entered on "STARS" Yes ✓ No ___

Commissioner Svinicki's Comments on SECY-10-0137
Proposed Rule: Requirements for Access Authorization and Physical Protection During Nuclear Power Plant Construction (RIN 3150 – AI65)

I disapprove the recommendation to publish for public comment the proposed rule to add requirements related to access authorization and physical protection during the construction of new nuclear power plants. In sending this proposed rule to the Commission, the NRC staff was fulfilling prior Commission direction. Like my colleagues, I have studied this proposal closely and assessed the events that have occurred since that prior Commission direction. I conclude that the proposed rulemaking is not needed at this stage and should not be further pursued.

The essential elements of the staffs proposal are reflected in the industry initiative contained in "Security Measures During New Reactor Construction," Nuclear Energy Institute (NEI) 03-12, Appendix F. Additionally, NRC regulations and inspections already address quality assurance during construction of plant structures, the fabrication of components, the installation of hardware, the testing of systems, the qualification of personnel, as well as provide for a construction reactor oversight program and the successful demonstration of all inspections, tests, analyses, and acceptance criteria.

I agree with Commissioner Ostendorffs conclusions, as outlined in his vote, regarding the remote and speculative nature of the staffs threat basis. Prior to the introduction of nuclear fuel to the site, licensees are already required under our regulations to establish a fully operational security program under the requirements of 10 CFR 73.55 and comply with the items listed above. Prior to fuel being onsite, the staffs postulated scenarios – should they occur – would result in industrial losses, as opposed to radiological events over which NRC has statutory authority. Such industrial losses would be events against which the licensee itself has compelling business incentives to protect.

In light of all of these existing measures, I do not find that staffs regulatory basis for this proposed rule substantiates a cost-justified, substantial enhancement to our regulatory framework. Instead of pursuing this rulemaking, the staff should review and work towards the formal endorsement of NEI 03-12, Appendix F, which has the additional, potential benefit of being implemented much sooner than a proposed rule.

Kristine L. Svinicki 03/ 7 /11

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Apostolakis

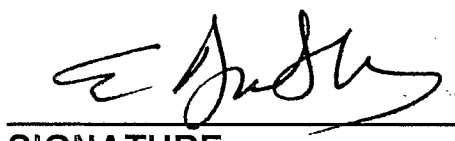
SUBJECT: SECY-10-0137 – PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT CONSTRUCTION (RIN 3150-A165)

Approved _____ **Disapproved** __X__ **Abstain** _____

Not Participating _____

COMMENTS: **Below** _X_ **Attached** ___ **None** ___

I disapprove staff's recommendation to publish for public comment the proposed rule to add requirements for access authorization and physical protection during construction of nuclear power plants. I agree with Commissioner Ostendorff's analysis that we have insufficient basis to impose new requirements regarding access authorization and physical protection during the period of construction. As others have noted, there are many relevant current requirements (e.g, robust designs, safety-related quality assurance programs, pre-operational testing, etc), in addition to NRC oversight and industry plans for industrial security measures, that support the view that the plant will be built as designed and significant adverse actions will either not occur or be identified before impact on the safe operation of the plant.



SIGNATURE

3/11/11

DATE

Entered on "STARS" **Yes** _x_ **No** ___

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: William D. Magwood

SUBJECT: SECY-10-0137 – PROPOSED RULE: REQUIREMENTS FOR ACCESS AUTHORIZATION AND PHYSICAL PROTECTION DURING NUCLEAR POWER PLANT CONSTRUCTION (RIN 3150-A165)

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached X None ___

SIGNATURE

1 March 2011

DATE

Entered on "STARS" Yes X No ___

Commissioner Magwood Comments on SECY-10-0137
Proposed Rule: "Requirements for Access Authorization and Physical Protection During Nuclear Power Plant Construction"

I disapprove staff's recommendation in SECY-10-0137 to publish in the *Federal Register* the notice of proposed rulemaking to amend 10 CFR Part 50 and 10 CFR Part 52. I disapprove the request to amend 10 CFR Part 73 as explained below and reflected in the proposed rule text.

I support the staff's desire to establish physical security and access authorization requirements for new reactor sites under construction. However, I do not believe that the rule needs to be as prescriptive as has been proposed. Many elements of the staff proposal are intended to support an NRC determination that a nuclear power plant has been constructed properly and may be operated safely. NRC regulations and inspections address quality assurance during the construction of plant structures, the fabrication of components, the installation of hardware, the testing of systems, the qualification of personnel, and many other important aspects of construction, maintenance, operation and security. Therefore, I believe that a less prescriptive requirement is appropriate—that is, one that leaves the mechanics of implementation to guidance documents. This approach would allow the agency to formally adopt industry-established standards but also provide NRC staff future flexibility to respond expeditiously to changes in the security environment.

From my review of the proposed rule, I believe it is essentially consistent with the NEI 03-12 Appendix F (Revision 3). It is my understanding that the industry proposes to implement its recommended program earlier than is anticipated in the proposed rule. Early application of NEI's guidance may result in licensee actions that more effectively deter or detect malicious activities that could adversely affect the safe construction and subsequent operation of security and safety-related systems and components than the measures that would be provided later under the proposed rule. The staff's proposal would not require security measures to be in place until safety-related structures and systems are scheduled for onsite placement. Therefore, I believe that there may be benefit to adopting the NEI guidance in its entirety. However, prior to adopting the guidance, the staff should provide an opportunity for the public to comment on the guidance.

With a broadly written rule in Parts 50 and 52 and implementation guidance contained in an appropriate Regulatory Guide, there is no need to add a new section to Part 73. Therefore, I believe the current proposal for new section 73.52(c) should be deleted, and the staff should develop language for the appropriate section(s) in Part 50 and Part 52. This language should require the applicant to include in its license application a security plan that would include physical protection measures, access authorization controls, physical inspections, the performance of security sweeps, and lockdown measures and procedures for securing the security and safety-related SSCs during the construction phase. Appropriate rule language should also be added that would ensure that licensees appropriately transition from the construction phase security plan before the nuclear power plant transitions to its operational

phase. The resulting proposed rule language should be provided to the Commission for review and approval prior to publication in the *Federal Register*.

In addition, while I also support the staff proposal to pose questions for public comment, I believe that staff should ask its proposed questions in an appropriate context. The NRC's fingerprinting authority is limited by Section 652 of the EPAct, amended by Section 149 of the AEA, to individuals who have "unescorted access to...radioactive material or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." Therefore, the staff should explain in the statement of considerations for the proposed rule that the Commission is seeking public input to assist in its determination regarding the security and safety benefits that might be gained from fingerprinting during construction.

William D. Magwood, IV 3/1/11
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER OSTENDORFF

SUBJECT: SECY-10-0137 – Proposed Rule: Requirements for Access Authorization and Physical Protection During Nuclear Power Plant Construction (RIN-3150-A165)

Approved ____ Disapproved __XX__ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached __XX___ None ___

SIGNATURE

3/4/11

DATE

Entered on "STARS" Yes __XX__ No ___

Commissioner Ostendorff's Comments on SECY-10-0137
Proposed Rule: Requirements for Access Authorization and Physical Protection During Nuclear Plant Construction (RIN 3150-A165)

I disapprove for publication in the *Federal Register* the proposed rule to implement requirements for access authorization and physical protection during nuclear power plant construction. Notwithstanding, I commend the staff for their significant efforts in developing this proposed rule. I believe that the rule package that was provided to the Commission was consistent with previous Commission direction from 2008 based on the information that was available to the Commission at that time. However, I have looked closely at the rulemaking package and the regulatory basis supporting the rule, and have concluded that I do not believe that this rule would result in a substantial increase in the overall protection of the health and safety of the public. This conclusion is based on several factors.

First, the rulemaking activities approved by the Commission in 2008 were based on the assumption that these requirements would be founded on an adequate protection of public health and safety basis. However, the proposed rule that the staff has now presented to the Commission is no longer based on adequate protection, but rather on the basis of being a cost-justified, substantial security enhancement because of the staff's reassessment of the rulemaking basis subsequent to the Commission's decision. In addition, the staff has revised the postulated threat scenarios since 2008. In short, the basis for this rulemaking is different than that on which the Commission based its decision in 2008.

Second, I have doubts about the postulated threat basis outlined in the rulemaking package. I am not convinced of the likelihood of the postulated scenarios such as the introduction of undetected defects or pre-positioning of restricted items in the construction site occurring during construction, especially considering current requirements and processes discussed in the following paragraph. Further, even if one of these scenarios were to occur, I am doubtful that there would be any adverse radiological impact. Given that there is no nuclear fuel on site during construction, many of the postulated scenarios would, at worst, result in an industrial security problem that could impact construction costs or timelines. However, these are not radiological safety concerns over which the NRC has any statutory authority, and licensees have a strong incentive to protect their multi-billion dollar investments from industrial sabotage.

Finally, to the extent that there may be a remote chance of malevolent acts that could have an impact on radiological safety, I believe that the current requirements and processes would largely mitigate if not eliminate any chance of an adverse impact on radiological health and safety. These existing requirements and processes include: the licensee's required quality assurance/quality control programs; the required completion of inspections, tests, analyses, and acceptance criteria to ensure the plant is constructed in accordance with the license and the NRC's regulations; the robust startup testing programs that provide reasonable assurance of the quality of safety- and security-related features; and establishment of a full operational security program under the requirements of 10 CFR 73.55 that must be implemented before fuel is allowed into the protected area. Further, proposed revisions to the construction reactor oversight process assessment program described in SECY-10-0140, which is a pending matter

before the Commission, are examples where improvements to the regulatory framework could provide additional assurance that reactor plants are constructed and operated in a manner that adequately protects public health and safety.

Prior to the NRC's initiation of rulemaking on this matter, an effort was underway with the goal of a voluntary construction security program endorsed by the NRC. In this light, I would encourage the NRC staff to work with industry toward NRC endorsement and voluntary implementation of the access authorization controls and physical protection measures during construction as described in NEI 09-01, "Security Measures During New Reactor Construction" (formerly NEI 03-12, Appendix F).

Furthermore, the staff should work with industry to identify the appropriate framework for COL or CP holders to implement the voluntary security program during new reactor construction. Implementation should be managed in accordance with the NRC-endorsed Commitment Management Program as outlined in RIS 2000-17, "Managing Regulatory Commitments Made by Power Reactor Licensees to the NRC Staff." Finally, the staff should continue to focus on the plant's transition from construction into its operational phase, including implementation of the requirements of 10 CFR 73.55, to ensure that the safety- and security-related SSCs are protected. This effort should include updating regulatory guides as needed and appropriate.

It is fundamental to this agency's statutory mandate that we do not regulate to a "zero risk" standard, and that our authority is limited to regulation of the hazards associated with radiological materials. Though I appreciate that the staff has done its due diligence in attempting to identify potential malevolent actions that could possibly occur during construction at a nuclear power plant, this risk of these actions having any impact on radiological health and safety in light of existing requirements and processes is *de minimis* at best. As credible and reliable regulators, we must always endeavor to ensure that the regulations we impose are well justified and consistent with our statutory authority.