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October 23, 2024

U.S. Nuclear Regulatory Commission
Office of the Secretary
ATTN: Rulemakings and Adjudications Staff
Washington, DC 20555

Subject: Proposed Rulemaking Alternative Physical Security Requirements for Advanced Reactors (NRC-2017-0227)

To all concerned:

The New York State Energy Research and Development Authority (NYSERDA), the New York State Department of Public Service (DPS), and the New York State Department of Homeland Security and Emergency Services (DHSES) (the “New York agencies”) have reviewed the U.S. Nuclear Regulatory Commission’s (NRC or the Commission) proposed rulemaking “Alternative Physical Security for Advanced Reactors” (NRC-2017-0227) published for comment in the Federal Register on August 9, 2024 as shared with the State by the Notice of Request for Comment: Alternative Physical Security Requirements for Advanced Reactors – Proposed Rulemaking” (STC-24-045) published on August 12, 2024, which proposed rule would amend NRC’s regulations to provide alternative, risk-informed, performance-based physical security requirements for advanced reactors licensed under 10 CFR Part 50 or 52 and bound by the physical security requirements in 10 CFR Part 73. We offer comments herein.

We note that the proposed rulemaking references concurrent issuance of a draft supporting regulatory guide “Guidance for Alternative Physical Security Requirements for Small Modular Reactors and Non-Light-Water Reactors” (DG-5072). However, that draft regulatory guide was not included in NRC’s STC-24-045 request for comments to states and is not included in NRC’s listing of draft regulatory guides for public comment <https://www.nrc.gov/public-involve/doc-comment.html#rg>. It is unclear when/whether the NRC will open a comment period on the draft supporting regulatory guide.

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The potential for nuclear energy to serve as a potential dispatchable emissions free resource is currently under consideration in New York as the State moves to a deeply renewable electric grid. NYSERDA's draft Blueprint for Consideration of Advanced Nuclear Technologies is a first step in examining advanced nuclear's potential benefits to New York. This initial outline profiles issues for New York to consider with regard to advanced nuclear energy, including technological readiness, disadvantaged community concerns, environmental justice, siting, costs and financing, waste profiles, as well as safety and security. New York places a strong focus on nuclear safety and security and appreciates all opportunities to provide input to the NRC on initiatives affecting nuclear power plants in the state.

Public Openness and Clarity

The NRC notes in the Federal Register notice (p. 65230) that the proposed rulemaking is being used to establish voluntary alternatives to some of the prescriptive requirements of Section 73.55, in part, to preclude the use of license exemptions. NRC further notes, correctly, that regulating by site-specific exemption provides less opportunity for public engagement and can lead to less regulatory certainty. However, it is unclear how the state will be afforded site-specific engagement on alternative requirements as presented in this proposed rulemaking.

Site security plans submitted to the NRC by an applicant or licensee are considered Safeguards Information and the State is not afforded the opportunity to review that information during the application process. Thus, the resulting process is no more open to state review than the license exemption process that the NRC professes to be inadequate as regards openness. **The Commission should require applicants to provide host states with access to all Safeguards Information pertinent to development and implementation of site security plans.**

It is unclear whether the use of alternative approaches is restricted to the initial application for a new reactor or can be applied after operations begin. The scenario of a new reactor application being granted with a full, traditional physical security plan in place that is then converted to an alternative approach is concerning. **The Commission should clarify that an applicant may not submit an initial combined operating license with full traditional physical security (that is, one subject to public review) and then later switch to alternative without public input using this alternative.**

It is also unclear how the identified alternatives for sites licensed under Part 50 or 52 will fit in with the Part 53 proposed rulemaking that is targeted specifically at licensing for advanced nuclear reactors. **The Commission should clarify whether alternatives incorporated into Part 50 and 52 become a part of the Part 53 rulemaking.**

In the Federal Register notice (p. 65229), NRC lists the public interaction in which it engaged during development of the proposed rule, including various public meetings and interaction with the Nuclear Energy Institute (NEI). **To the extent it did not already do so, and to the extent that the proposed rule offers licensees the option to rely on law enforcement agencies for armed security interdiction and neutralization functions, the New York agencies encourage the Commission to engage directly with law enforcement stakeholders prior to finalizing the rule.**

Functionality

In the proposed rule, 73.55(s)(1)(iii) requires demonstration of how the requirements of 73.55 will be met by the proposed alternative plan, but in 73.55(s)(1)(iv) NRC states that technical analyses would not be submitted to NRC for review and approval. This allows an applicant to employ the offered alternatives via broad description only, without submitting supporting analyses for NRC review and approval. Additionally, given the Safeguards nature of the Security Plan, it is unclear how the State will be informed of an applicant or licensee's election to employ alternative requirements.

73.55(s)(1)(iv) would require the applicant to perform a technical analysis to evaluate offsite dose consequences from a postulated security event, but the NRC wouldn't require the technical analysis to be submitted for review and approval. The New York agencies submit that without the technical analyses being submitted for NRC review and approval, the NRC and the public cannot be certain of the validity of the licensee's technical analysis; similarly, we question whether the NRC could approve the use of alternative physical security requirements without first inspecting the technical analysis, which would be inappropriate. We support NRC review and approval of the technical analysis for these reasons. We question whether there are current examples in other regulations where the NRC already uses this approach, and what the outcomes of such an approach have been.

The proposed alternative in 73.55(s)(2)(i) provides relief from the required minimum number of armed responders and allows for the possibility of a site physical protection program with no armed responders onsite at all. Instead, a licensee may rely on local or state law enforcement for the interdiction and neutralization functions required by §73.55(b)(3)(i). Further, while the 73.55(b) requirements would continue to apply to the licensee, the NRC will have no regulatory jurisdiction over, or requirements for, law enforcement responders.

- A well-trained security staff is to perform as a countermeasure deterrence, detection, delay, deny, and assigned to diminish threats to facilities. On-site armed security officers strengthen response by immediately initiating response actions to interdict and neutralize threats. Reliance on law enforcement or offsite armed response only to interdict and neutralize a threat to nuclear assets will not afford a consistent and repeatable protective strategy.
- Proposed rule changes focus on the Design Basis Threat (DBT) of radiological sabotage for advanced reactors. **The Commission should clarify how other threats, such a theft of radiological material, are addressed and evaluated against the effectiveness of proposed alternative security measures.**
- **The New York agencies question how, if the licensee and the NRC have no dominion over the responders' training requirements, the NRC could conclude with reasonable confidence that there would be consistent performance by the responders.** Applicants and licensees relying on law enforcement responders would be relieved from the majority of the training and qualification requirements in appendix B, "General Criteria for Security Personnel," to 10 CFR part 73, except for the performance evaluation program requirements in section VI.C.3. **We**

suggest that the final rule clarify what the basis is for being able to accept (only) successful performance evaluation in accordance with 10 CFR 73 appendix B section VI.C.3, and how that differs with the basis of why current nuclear facilities are required to meet all the appendix B requirements.

- The site security plan and, in particular, the number and location of armed responders, is considered Safeguards information. Absent a requirement in the rulemaking that applicants and licensees provide host states with access to the security plan, it is unclear how the State will be informed that the site is reliant on law enforcement for interdiction and neutralization functions.

The proposed rule does not require licensees to enter into a Memorandum of Understanding (MOU) or other agreement with law enforcement to provide the interdiction and neutralization services specified the proffered alternative. The guideline of an MOU is included the draft proposed Regulatory Guide 5.90 (section 6.5), but we note that Regulatory Guides represent guidance rather a than a firm, enforceable regulatory requirement. **The New York agencies submit that the Commission should add to the proposed rulemaking a requirement that all applicants seeking to rely on law enforcement services in lieu of onsite armed security:**

- **Enter into and maintain agreements with law enforcement agencies willing and capable or providing armed response.**
- **Submit those agreements to the NRC for review and approval prior to the site license being issued.**
- **Identify contingencies for handling changes in the agreements and the law enforcement agencies involved.**

Unlike the current fleet of large nuclear power reactors, under the NRC's final rule for emergency preparedness for small modular reactors, microreactors, and other advanced technologies, those sites may not be required to have an Emergency Planning Zone (EPZ) or only have an EPZ that is very shallow. Thus, surrounding communities and local law enforcement (including law enforcement further from the site that are engaged for contingency mutual-aid) may not have the benefit of the significant ongoing information exchange, training, and drilling/exercising associated with an EPZ. And unlike dedicated onsite responders, law enforcement agencies may be simultaneously faced with multiple non-nuclear immediate events and ongoing responses (e.g., severe weather) that compete for their limited resources and attention.

- **The Commission should add to the proposed rulemaking a requirement that MOUs with law enforcement agencies include requirements for:**
 - **Training (radiological & non-radiological), planning, preparedness, and response activities**
 - **Resource requirements (staffing and equipment)**
 - **Mitigation of contingencies which might prevent law enforcement from providing the promised services (e.g., budgetary constraints, response to multiple events, potentially diversionary events by malevolent actors)**

Further, in the proposed rule, 73.55(s)(2)(ii)(A)(3) states licensees would “make available” periodic training to law enforcement but also that “neither the NRC nor the licensees can compel law enforcement to participate in training.” **The New York agencies submit that it is unclear what evaluation of the law enforcement agenc(ies) capability, training, staffing, etc, would occur or who would do it, and suggest that the final rule make these elements of accountability clear.**

As stated above, New York places a strong focus on nuclear safety and security and appreciates all opportunities to provide input to the NRC on initiatives affecting nuclear power plants in the State. Thank you for the opportunity to comment. If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Alyse Peterson".

Alyse Peterson, P.E.
State Liaison Officer - Designee
Senior Advisor for Nuclear Coordination & Radioactive
Waste Policy

cc: Doug Tift, State Liaison Officer, NRC