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PROPOSED RULE PR-2 (4)  
(50 FR 21072)

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Docketing and Service Branch

Dear Sir:

On May 22, 1985, the Commission published for comment a proposed rule entitled "Adjudications; Special Procedures for Resolving Conflicts Concerning the Disclosure or Nondisclosure of Information." (50 F.R. 21072-77, May 22, 1985; corrected 50 F.R. 23138-39, May 31, 1985). The Atomic Industrial Forum's Lawyers Committee submits the following comments for the Commission's consideration.

In August of 1983, the Commission took the first regulatory step in this subject matter area when it issued an interim Statement of Policy (48 F.R. 36358-59, August 10, 1983) which permitted in camera presentations to licensing boards by NRC staff of matters relating to pending investigations. Such presentations were to occur with notice to other parties but without disclosure of the substance of the ongoing investigation. Subsequently, the Commission received the report of its internal Task Force on the use of in camera proceedings and promulgated a revised Statement of Policy. (49 F.R. 36032-34, September 13, 1984). The May 22, 1985 proposal is intended to implement the latter policy.

The Commission's Statement of Policy and proposed rule attempt to strike a balance between two, sometimes conflicting, goals. One goal is to assure that every party to an adjudicatory proceeding is provided an opportunity to participate fully in the litigation of matters which may affect that party's interests. The second is based on the recognized need to protect certain investigatory information from disclosure, where disclosure could hamper the regulatory responsibilities of the Commission and its staff. The Lawyers Committee believes that the balance struck by the Commission in the proposed rule gives far too much weight to protecting investigatory information. The proposal does not appear to be consistent with basic principles of fairness and due process.

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It is our position that, as a matter of general policy, ex parte in camera procedures should be utilized only when a board concludes that it must do so. The Commission should expressly instruct its boards that, to the maximum extent practicable, boards are to authorize representatives of other parties to participate meaningfully in the decision regarding whether investigatory information should be disclosed and under what conditions.

When investigatory information is in documentary form, essentially the same procedures as found in 10 CFR 2.744 should apply. The NRC Staff may seek a licensing board order that documents need not be disclosed, or that disclosure should be restricted. In making its decision, the board must consider whether the document is relevant and material, properly exempt from disclosure, necessary to a proper decision in the proceeding, and reasonably obtainable from another source. If the document is not relevant and material, it obviously need not be disclosed. On the other hand, if the document is relevant and material, and not exempt from disclosure, it should be disclosed. Finally, if the document is relevant and material and exempt from disclosure, but its disclosure is necessary to a proper decision in the proceeding, the document should ordinarily be disclosed. Of course, disclosure may be subject to an appropriate protective order which restricts its disclosure to avoid, or at least lessen, any adverse consequences which might flow from such disclosure.

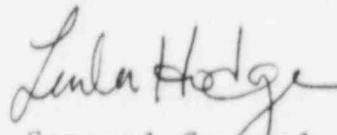
Section 2.744 does not require that the licensing board review the documents in question without the benefit of the views and arguments of all of the parties to the proceeding. Rather, the regulation grants the board discretion to review the document in camera without disclosing its contents to the other parties. Given the importance of protecting the right of a party to participate in all aspects of the adjudicatory process, it seems clear that if there is a close question regarding whether the document should properly be disclosed, a board should request the views of all parties to the proceeding who may be affected by the board's decision. Obviously, any procedure selected by the board which permits such participation should ensure, to the maximum extent possible, that the information will not be disclosed to the general public.

July 23, 1985

It is also possible that NRC employees may wish to furnish to a board investigatory information which has not yet been reduced to writing. Such information would almost certainly be preliminary and incomplete and consequently, in our view, is unlikely to be relevant and material to the issues before the licensing board. Boards should be instructed that, except under the most extraordinary circumstances, representatives of the other parties should be permitted access to the information. This type of guidance from the Commission would be consistent with the general policies underlying the Commission's Rules of Practice and would eliminate serious questions of fairness inherent in permitting NRC employees to communicate privately with a licensing board.

The Committee agrees that there may be extraordinary circumstances which would justify preventing a party from attending in camera sessions. For example, if there is a reasonable basis for believing a party may not abide by a protective order and the disclosure of investigatory information would seriously hamper the Commission's regulatory responsibilities, it would be appropriate to refuse attendance by the party in question. If there are sufficient grounds for refusing to permit attendance by one or more parties, the boards should be instructed to have the session transcribed. In addition, the board should be careful to limit its inquiry to those facts which are necessary for the board to decide whether the information is relevant and material and whether it should be disclosed under appropriate conditions.

Sincerely,

  
General Counsel

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