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WRITER'S DIRECT DIAL
(202)

July 22, 1985

Mr. Samuel J. Chilk
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Re: Comments on Proposed Rule Regarding Ex Parte In Camera Presentations: Special Procedures for Resolving Conflicts Concerning the Disclosure or Nondisclosure of Information (50 Fed. Reg. 21072, May 22, 1985).

Dear Mr. Chilk:

On Wednesday, May 22, 1985, the Nuclear Regulatory Commission ("NRC") published in the Federal Register a proposed rule that would amend 10 C.F.R. Part 2 by adding new sections 2.795a through 2.795k, as well as making conforming modifications to 10 C.F.R. §§2.730, 2.740(b)(1), and 2.780(a). See 50 Fed. Reg. 21072 (May 22, 1985). On behalf of Duke Power Co., Mississippi Power & Light Co., Northeast Utilities, Pacific Gas & Electric Co., Southern California Edison Company, and Washington Public Power Supply System, we respectfully submit the following comments.

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add: Jane Mapes, 9604MNBB

I. Introduction

A. Background

On August 10, 1983, the NRC published a Statement of Policy on Investigations and Adjudicatory Proceedings. See 48 Fed. Reg. 36358 (1983). This policy statement outlined a process which forms the backbone for the current proposed rule: the use of ex parte in camera presentations to the Board[1] that is presiding over the licensing hearings for a particular facility whenever the Staff or OI has confidential information that they believe to be relevant to a material issue in the licensing proceeding, but that they assert cannot be presently revealed to the public or the other parties without prejudice to an ongoing investigation or inspection. See 48 Fed. Reg. 36359. At that time, the NRC sought public comment on the advisability of using this procedure or some alternative to resolve the conflict between a presiding officer's need to be informed of material developments relevant to the pending adjudication and the need for OI and the Staff to maintain what was described as the integrity of ongoing inspections or investigations. See id.

The 1983 policy statement noted that an NRC task force ("Task Force") was currently considering this matter. See 48

1/ The terms "Board" and "presiding officer" are used interchangeably in these comments.

Fed. Reg. 36358. On December 30, 1983, the Task Force issued its report, entitled "Report of the Task Force on Investigations, Inspections and Adjudicatory Proceedings" ("Task Force Report"). The final recommendations of the Task Force were subsequently embraced by the Commission in its September 13, 1984 Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings (49 Fed. Reg. 36032 (1984)), as well as the current proposed rule which is the subject of these comments. Compare Task Force Report at 3 with 49 Fed. Reg. 36033-34, and 50 Fed. Reg. 21073-74, 21075-77. The recommendations and observations of the Task Force, which were adopted in the 1984 policy statement and the current proposed rule were as follows:

1. Full disclosure of material information to adjudicatory boards is the general rule.

2. Some disclosure conflicts will be inevitable.

3. Disclosure issues should initially be determined by the adjudicatory boards.

4. Procedures for the resolution of disclosure conflicts should be established by rule.

5. Appellate review of Licensing Board decisions should be available on an expedited basis.

6. Current Board Notification procedures should not be changed in this rulemaking.

7. The disclosure/nondisclosure procedure should apply to information in the possession of all NRC offices.

See Task Force Report at 3, 4-14.

The proposed rule was published for comment on May 22, 1985. See 50 Fed. Reg. 21072 (1985). The proposed procedures themselves, utilizing ex parte in camera presentations to the presiding officer (be it Licensing Board, Appeal Board, or Administrative Law Judge), are contained in the proposed 10 C.F.R. §§2.795a through 2.795k. See 50 Fed. Reg. 21075-77. Additionally, conforming amendments are proposed to 10 C.F.R. §2.730 (motions), §2.740(b) (scope of discovery), and § 2.780 (ex parte communications). See 50 Fed. Reg. 21075. These comments do not address in detail each section contained in the proposed rule; rather, they focus on the underlying infirmities with the use of ex parte in camera presentations to a decision maker in an ongoing adjudicatory proceeding and propose a different approach.

B. An Alternative to the Proposed Rule

We conclude that a more traditional solution to this problem, as proposed herein, should be adopted. A preferable scheme would consist of essentially two alternative courses of action that may be pursued when an NRC office has information, which it wishes to keep confidential, but that may be relevant to an ongoing adjudication:

1. Subject to an appropriate protective order prohibiting further dissemination of the information, allow the Board and selected representatives of all parties to the adjudication to have access to the information and allow them to be present at any in camera hearing before the Board; or

2. Publicly inform the Board and all parties that an inspection or investigation is ongoing, but without revealing any details that could compromise that undertaking or unnecessarily reveal confidential sources. In the absence of a showing warranting a stay, a suspension, or a deferral of further proceedings, the Board would proceed. The inspection or investigation would then be completed in parallel and appropriate public reports issued. Based on any outcome-determinative new information contained in the NRC reports, the parties could then follow the conventional provisions of the NRC's Rules of Practice and move for summary disposition on contentions, submit late-filed contentions, request additional hearings (if the record is not yet closed), move to reopen the record (if the record has already been closed), or, in the event that final agency action has been taken on the license application, file a petition pursuant to 10 C.F.R. §2.206 or intervene in an enforcement proceeding that has been instituted as a result of the inspection or investigation results.[2]

As described below, use of this manner of proceeding instead of the procedures outlined in the proposed rule is more consistent with established NRC precedent, the Atomic Energy Act, and basic considerations of due process.

2/ Naturally, even though the NRC office in possession of the undisclosed material information may have initially decided to continue an investigation without informing the board and parties of its substance, it may later chose to reveal to the board and all parties any interim findings under a suitable protective order. In accordance with the suggested procedure outlined above, the parties would then file appropriate motions for reopening, stays, or other relief, or (in the case of information meeting the Catawba standard) late-filed contentions as allowed under the Rules of Practice. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 470, 470 n.17 (1982), as modified, CLI-83-19, 17 NRC 1041 (1983).

The NRC's proposed rule ignores the fact that the disclosure requirement requires disclosure not only to the presiding board, but to the other parties to the proceeding as well. See id.[3] Because the disclosure requirement emanates from "the very heart of the adjudicatory process," permitting disclosure to the board alone does not satisfy that disclosure requirement. See ALAB-143, 6 AEC at 626. That is because "the adjudicatory process" is at its heart an adversary process, which cannot function properly when the decision-making board, but not all of the adversary parties, is made aware of information relevant to a material issue being adjudicated. This requirement to inform the Board and the parties can be satisfied by disclosure to selected party representatives under an appropriate protective order when the circumstances justify a departure from the Commission's general policy in favor of public disclosure.

Other decisional precedent from the Commission justifies the approach suggested in these comments. Simply because new information relevant to an adjudicatory proceeding has arisen,

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3/ Although the proposed rule and the most recent statement of policy quote the need for disclosure as applying to the other parties as well as the Board (see 50 Fed. Reg. 21072, col. 3 (1985); 49 Fed. Reg. 36032, col. 3 (1984)), the need for disclosure to the other parties is not treated in the same way as disclosure to the Board. Perhaps this is an artifact from the NRC's original 1983 Statement of Policy, which spoke only in terms of a duty to inform the Board. See, e.g., 48 Fed. Reg. 36358, col. 3 (1983).

II. Discussion

A. The Duty to Disclose

The primary source of the conflict concerning disclosure or nondisclosure of information, which the proposed rule seeks to resolve, is the case law doctrine that each party has a duty to inform the Board and other parties of material developments relevant to a pending adjudicatory proceeding. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-26 (1973). As explained by the Appeal Board:

> In all future proceedings, parties must inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated.
>
> . . ..[T]his does not mean that the staff or applicant can be permitted to leave the presiding body and the other parties to the proceeding in the dark about any change which is relevant and material to the adjudication. Changes may take place but they must be disclosed.
>
> If the presiding board and other parties are not informed in a timely manner of such changes, the inescapable result will be that reasoned decision-making would suffer. Indeed, the adjudication could become meaningless, for adjudicatory boards would be passing upon evidence which would not accurately reflect existing facts. The disclosure requirement we impose is not the product of any overly procedural formalism on our part -- it goes to the very heart of the adjudicatory process. Its sacrifice for the sake of expediency cannot be justified and will not be tolerated.

Id. (emphasis added).

that does not necessarily mean that the information must be litigated before the Board. See Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Plant, Unit No. 1), CLI-82-20, 16 NRC 109 (1982). Indeed, the Zimmer case provides ample precedent for following the NRC's accepted procedural rules, e.g. involving reopening the record, when new information becomes available through ongoing NRC investigations. See id. at 110-11; see also Catawba, ALAB-687, 16 NRC 460, 470, as modified, CLI-83-19, 17 NRC 1041. These traditional procedural rules of the Commission have been enacted properly and applied fairly for a significant period of time; they are entitled to respect and deference on judicial review. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524-25 (1978); BPI v. AEC, 502 F.2d 424, 428-29 (D.C. Cir. 1974); see also Easton Utilities Commission v. AEC, 424 F.2d 847, 850-51 (D.C. Cir. 1970) (en banc) (late intervention rules in 10 C.F.R. §2.714 are a proper exercise of rulemaking power under the Atomic Energy Act). The Zimmer and Catawba cases recognize that simply because an issue is not litigated in hearings, the public health and safety is still amply protected through the inspection, investigation, and other regulatory functions of

the NRC. Vermont Yankee and BPI establish that §189a of the Atomic Energy Act does not require otherwise.[4]

Thus, the first major source of difficulty with the NRC's proposed rule stems from the fact that the Commission has unnecessarily chosen to place a higher priority on following one half of the doctrine of ALAB-143 (by requiring only that the Board, but not the other parties, be informed of relevant and material new information), while placing a lower priority on (or disregarding) the other half of the doctrine of ALAB-143 (which requires that the other parties, as well as the Board, be informed of relevant and material new information).[5]

4/ The recent Court of Appeals decision Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), ___ U.S. ___, 105 S. Ct. 815 (1985) does not limit the Commission's power to define what issues are material to the licensing decision, but it does require that once a particular issue is material to the licensing decision, then, under §189a of the Atomic Energy Act, that issue must be available for litigation as part of the licensing hearings. Once it is apparent that the results of an NRC inspection or investigation will be material to the licensing decision, then §189a, as interpreted in UCS, requires that the parties be made aware of the information, subject to a protective order if appropriate, and the matters are then available for litigation in accordance with the rules of practice concerning, e.g., reopening the record and late-filed contentions. See 735 F.2d at 1448-49.

5/ The proposed rule quotes the disclosure requirement as being applicable to the Board and all the parties, but does not articulate a justification for excluding parties other than one the conclusory assertion that this is necessary "to avoid compromising an NRC inspection or investigation or to protect a confidential informant." See 50 Fed. Reg. 21072, col. 3.

This the Commission has chosen to do because of the countervailing interest in preserving the integrity of ongoing inspections or investigations and protecting the identity of confidential sources. Depending on the facts of each case, these may or may not be legitimate interests, but because the Commission's licensing process is governed by the Atomic Energy Act, the Administrative Procedure Act, and considerations of due process, the Commission is risking judicial reversal when it allows these policy interests in confidentiality of investigatory activities to take precedence over the rights of parties to the adjudicatory process. This is particularly true when there is an alternative set of procedures, such as is proposed in these comments, which can protect any legitimate confidentiality interests as well as the rights of the parties to licensing proceedings.

B. Legal Prohibitions Against Ex Parte In Camera Proceedings

The most fundamental problem with the NRC's proposed rule is that it allows ex parte presentations of information to the presiding officer, presumably only to allow the Board somehow to satisfy itself that the decision it will be reaching is not incorrect, or to allow the Board to reschedule hearings on particular issues or otherwise delay issuance of a decision until all of the information has been collected (so as to allow subsequent litigation of the

withheld information once the investigation is complete). See 50 Fed. Reg. 21072, col. 3. As discussed below, this can have the same effect as granting an ex parte stay of substantial duration without observing the accepted safeguards codified in 10 C.F.R. §2.788.

The board is explicitly precluded from relying on the information received ex parte in camera "in making any decision in the pending adjudication unless all parties to the pending adjudication have been accorded access to the information." See Proposed §2.795k, 50 Fed. Reg. 21077. However, in hearing an ex parte in camera presentation by the Staff, the Board will necessarily be impermissibly relying on a one-sided view of the situation to the extent that it withholds or otherwise delays issuance of a pending decision because the Staff has informed the Board in an ex parte in camera session of further information which will probably need to be litigated. This is the functional equivalent of allowing the Staff to request an ex parte stay of indeterminate length without consideration of the relevant legal standard incorporated in 10 C.F.R. §2.788. Furthermore, because the stay/delay application is heard ex parte in camera and the record is sealed, the license applicant and the intervenors are not informed of the basis for the stay. They have no opportunity to rebut or propose alternative courses of action, and no record basis on which to argue on appeal. Such

a procedure is foreign to Anglo-American jurisprudence. In federal judicial proceedings, ex parte temporary restraining order ("TRO") applications are only entertained in extraordinary circumstances; the TRO (if granted) is only of a brief duration; the factual basis for any such TRO is immediately revealed to the parties once the order is entered; and further proceedings involving all parties occur within a few days. See Fed. R. Civ. Pro. 65(b).

And what other purpose is there for presenting this information to the Board except to decide whether to delay a decision or hearing session? If the Staff's inquiries will reach a stage where they can be timely litigated without delaying the current hearing schedule, there is no need for any ex parte in camera presentation. It should suffice for the Staff to publicly inform the Board and the other parties that there is an undisclosed investigation or inspection effort currently ongoing and that the Staff will accordingly: supplement at the first possible opportunity the list of witnesses it will call, provide additional prefiled testimony, and update outstanding discovery requests, all in conformity with the NRC's conventional Rules of Practice. If the Staff's developing information cannot be litigated under the current hearing schedule (or if the evidentiary record is already closed), then the Staff should file a motion for a stay or move to reopen the record. If the Staff is not prepared to

reveal publicly the basis for these motions, then the Board should receive briefs on these motions and hear arguments in camera, but allow appropriate representatives[6] of all the other parties to be present to present their positions and any relevant facts under a strict protective order preventing those representatives from in any way revealing the information that the Staff presents in the in camera stay or reopening proceeding. This manner of proceeding has several advantages: 1) it satisfies due process requirements for administrative proceedings while doing a minimum of violence to the current, tested, traditional Rules of Practice; 2) it fully complies with the obligation to inform not only the Board but also the other parties of new, material, relevant information; 3) it actually provides the Board with a better factual and legal basis by allowing all the parties to raise additional facts and arguments, possibly precluding an unnecessary delay in the proceedings because of an easily clarified Staff misperception or error; and 4) it promotes greater public confidence in the NRC, its adjudicatory proceedings, and the ultimate safety of licensed facilities. These advantages are discussed in detail below. First,

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6/ The Board should allow the presence (under protective order) of at least one or two legal and unimplicated technical representatives of each party, perhaps with the Staff's concurrence (in case a party representative is implicated in the investigation).

however, we must address what appears to the only possible objection to the alternate procedure outlined in these comments.

1. The Underlying Assumption of Party Representative Misconduct

The NRC has as yet failed to make explicit in either of its two prior policy statements or in the proposed rule why all parties cannot have access to the information under strict protective orders.[7] Specifically, the NRC would allow ex parte in camera presentations in some (perhaps limited) circumstances, precluding even one representative from each party to be present, even under the most strict protective order. This presumes that the NRC does not trust even one representative of each party, sworn to confidentiality and subject to potentially severe sanctions for any breach of confidence, to be entrusted with material, relevant, new information which if revealed could compromise an inspection or investigation. Such a presumption of misconduct and violation of ethical and moral obligations by limited party representatives is an invalid and unacceptable basis for denying parties their due process rights in an adjudicatory process. See, e.g. Commonwealth Edison Co. (Byron Nuclear

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7/ The proposed rule simply states, "[t]here are, however, certain situations in which any disclosure of information, however restricted, could affect the conduct of an inspection or investigation." 50 Fed. Reg. 21072, col. 3; see Proposed §2.795a, 50 Fed. Reg. 21075.

Power Station, Units 1 & 2), ALAB-735, 18 NRC 19, 23-25 (1983). As explained by the Appeal Board:

> Up to this point at least, licensing and appeal boards have acted on the assumption that protective orders will be obeyed. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979). On that assumption, boards have permitted the disclosure to parties of a wide variety of sensitive information -- including the details of plant security plans. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 746, and ALAB-600, 12 NRC 3 (1980); Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-177, 7 AEC 153 (1974). But see Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 477 (majority), 484-85 (dissent) (1981). To our knowledge, there has never been a breach of an NRC protective order that seriously threatened the confidentiality of the information revealed under that order. If, nevertheless, the staff has some basis for believing that there is an actual, as opposed to purely theoretical, risk of such a breach here, it had the obligation to document that basis.

Id. at 25.

Indeed, the experience of some of those submitting these comments, who have participated in in camera NRC proceedings subject to protective order, does not justify any such presumption of illegal conduct by any party, whether the applicant, the Staff, or an intervenor. Should any such violation happen, there are full and severe sanctions available, for example: disbarment or suspension of attorney representatives; suspension of a party or its representative

under 10 C.F.R. §2.713; a judgment before the Department of Labor under §210 of the Energy Reorganization Act of 1974, as amended (42 U.S.C. §5851) reinstating and compensating any informant who is discriminated against for providing information to the NRC; and a civil penalty against the licensee pursuant to 10 C.F.R. §50.7 for any such Department of Labor finding of a §210 violation.[8] Accordingly, there is no legitimate reason for requiring the Staff's in camera presentations to be conducted ex parte. If there is a fear that one of the party representatives may be implicated in the investigation, the rules could provide that the NRC Staff would have a veto as to who may be the one or two representatives (legal and technical) of each party who shall be allowed to participate under a protective order in the in camera hearings.

8/ Indeed, the essential purpose evident in the statutory and regulatory language of §210 and 10 C.F.R. §50.7 is to protect from retaliation anyone who provides information to the NRC. See §210(a) of the Energy Reorganization Act, 42 U.S.C. §5851(a); 10 C.F.R. §50.7(a); see also Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1036 (5th Cir. 1984). These provisions offer not only a powerful deterrent against any feared retaliation against confidential informants, but also provide full remedies to anyone who has suffered retaliation for contacting the Commission or participating in a hearing, investigation, or other similar proceeding. Therefore, fear of retaliation provides no basis for excluding party representatives (under a protective order, if necessary) from any in camera hearing.

Perhaps there is an unstated fear that an applicant will correct the defect or defects that are under investigation by the NRC before the investigation is completed. The Commission's inspection rights and strict requirements for maintaining documentation of all safety-related repairs should provide the Staff with ample means for documenting the as-found condition and each step of any repair or replacement. In sum, there seems to be no reasonable basis for the Staff or other NRC offices to insist that no one who represents the applicant or intervenor (even under a protective order) may know what the Board needs to be told about ongoing inspections or investigations. If there is no such reasonable basis, then this penchant for secrecy and this investigatorial mind-set are a wholly inadequate justification for denying the basic rights of parties to adversarial litigation.[9]

As discussed supra, there is no need for the creation of special procedures as novel and elaborate as those in the proposed rule: it is adequate for the Staff to file a motion for a stay of issuance of a decision, a motion to reopen the record, or a motion to delay an evidentiary hearing (any of which may be conducted in camera, as necessary), or simply a

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9/ The former Atomic Energy Commission Staff initially took a similar view of inspection reports, releasing only "sanitized" versions (if any) to the parties. Now, of course, such reports (except for proprietary or security information) are routinely made public.

notification that the Staff will soon be providing further testimony and discovery updates. The advantages of proceeding as described in these comments, and for not adopting the proposed rule, are discussed below.

2. Due Process Limitations.

As demonstrated above, despite the proposed §2.795k (50 Fed. Reg. 21077), unless the Staff ex parte in camera presentation is made so early in the hearing process as to be essentially unnecessary and premature (e.g. in the same time frame as rulings on the admissibility of contentions), the Board could make a decision with the same impact as granting a stay -- a decision to delay hearings, reschedule hearings, or defer issuance of a decision -- based on the Staff's information, and without any of the traditional safeguards involved in a stay application. Accordingly, as described below, fundamental tenets of due process are violated by the proposed use of ex parte in camera presentations by the Staff to the Board.

The courts have often articulated the dangers associated with such ex parte communications. E.g., National Small Shipments Traffic Conference v. ICC, 590 F.2d 345, 350-51 (D.C. Cir. 1978).

> Thus although [these particular ICC] hearings are not required to be conducted in accordance with Section 556 and 557 of the APA and the Commission "enjoys substantial flexibility to structure the hearings, it must provide depending on the nature of the case . . .,

> that freedom is not absolute." The statutory requirement of a hearing, like the requirement of comment in notice and comment rulemaking, "imposes certain minimum constraints on the procedure followed by the agency." One of those constraints is the disallowance of recourse to ex parte communications. Such contacts are offensive in two fundamental respects: (1) they violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking, and (2) they foreclose effective judicial review of the agency's final decision.

Id. at 351 (footnote omitted). Although the second concern identified by the court (the need for an adequate record for judicial review) is mitigated under the NRC's proposed rule due to the requirement to keep a verbatim, sealed transcript, the parties cannot argue to the court based on that transcript unless the NRC or the court opens it to them. Even this would in no way alter the fundamental offensiveness of the Commission's proposed rule for violating the basic right to participate in the making of the record. Id.; see also National Wildlife Federation v. Marsh, 568 F. Supp. 985, 993 n.14 (D.D.C. 1983) (availability of record of ex parte contacts for judicial review does not alter the impropriety of the ex parte contacts).

Denial of access to information presented ex parte in camera to the Licensing Board by the Staff or OI regarding issues pending before that tribunal can constitute a denial of administrative due process if and when the information is

relied on by the Board -- as it necessarily would be relied upon if the Board delayed the proceeding or postponed decision and in effect granted an ex parte stay. An applicant would be unable to respond to that information in order to test its reliability or truthfulness or provide rebuttal, explanation, or extenuation, and the applicant is thus prejudiced thereby:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

Greene v. McElroy, 360 U.S. 474, 496-97 (1959) (citations and footnote omitted).

At bottom, in camera ex parte exchanges of information between the NRC Staff and a Licensing Board are inconsistent

with fundamental notions of fairness implicit in due process and with the ideal of reasoned, public decisionmaking on the merits which undergird all of our administrative law. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). The Fifth Circuit has said:

> [T]he parties must generally be allowed an opportunity to know the claims of the opposing party, . . . to present evidence to support their contentions, . . . and to cross-examine witnesses for the other side . . .. Thus, it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party.

Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964) (citations omitted). Ex parte information cannot be relied upon in any manner by a Board. To do so would reduce the hearing to something less than the adversary proceeding that the Atomic Energy Act has been read to require for facility licensing. Fundamental principles of fairness require that all parties be aware of the content of information presented to the Board and be given the opportunity to test its reliability or truthfulness, and be given the opportunity to present rebuttal testimony if deemed necessary. See Greene v. McElroy, 360

U.S. at 496-97. Even delaying adjudicatory hearings or issuance of a decision based on such ex parte information violates due process of law, as even one day's unnecessary delay in a facility's operation can cost the ratepayers and investors as much as a million dollars or even more.

The examples of judicial and administrative precedent cited in the Commission's Task Force Report do not justify the ex parte in camera presentations outlined by the proposed rule. See Task Force Report at 7-8. The Task Force cites in camera ex parte examination of documents as precedent. Such an examination of documents, usually to rule on claims of privilege warranting protection from discovery, is a far cry from hearing an oral presentation of new information which is as yet in a primordeal state, but which is material and relevant to the issues being adjudicated. In camera judicial examination of documents to rule on a claim of privilege involves no determination of the truth and accuracy of the documents' contents. The ex parte in camera testimony or other oral presentation from the Staff, with likely questioning by the Board (and perhaps later the Commission) is quite unlike this cloistered review of discovery documents. The Board will be interested in the basis of the Staff's information, and must necessarily rely on hearsay, Staff impressions, and other human observations and interpretations, particularly in the case of information from confidential

informants. In short, all of the risks identified by the Supreme Court in Greene v. McElroy that necessitate cross-examination in administrative and judicial proceedings are present when the Staff makes an ex parte in camera presentation to the Board. These problems are not present when examining documents in camera to resolve privilege claims or otherwise rule on their discoverability. Indeed, the ultimate issue for determination (discoverability) is altogether different than with the proposed rule (potential safety significance and accuracy of information).[10]

The Federal Communications Commission ("FCC") precedent cited by the Task Force Report (at p.8) similarly provides no support for the Commission's proposed rule. See In Camera Presentation of Classified Information, FCC 78-755, Docket No. 18875 (Oct. 26, 1978), reprinted in 44 Ad.L.2d (Pike & Fischer) 502. That decision allowed ex parte in camera briefing of the FCC by the Department of Defense concerning national security information classified "Top Secret." See id. at 503. The FCC allowed this ex parte in camera briefing because the FCC is specifically authorized by statute to withhold material "containing secret information affecting the national defense." See id. at 505. It is significant that the

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10/ Such in camera judicial review of documents frequently results in providing the other parties with "sanitized" versions with the privileged, propriety, or security information deleted.

Atomic Energy Act similarly protects information which may compromise the national defense and security, but there is no comparable statutory authority protecting information relating to ongoing inspections and investigations or confidential informants. Cf. §§141-48 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2161-68.[11] Absent any such comparable, explicit statutory basis in the Atomic Energy Act for concealing investigatory matter from participants in ongoing hearings, the cited FCC decision provides no additional authority for the NRC's proposed rule, which would disallow even limited party representatives attending certain in camera sessions.[12]

3. Policy Arguments Against the Proposed Rule

We note that the most recent NRC Statement of Policy, the Task Force Report, and the Proposed Rule speak of "the Commission policy favoring full disclosure." See Task Force

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11/ The Freedom of Information Act ("FOIA") limits the release of investigatory information to members of the public who request such documents under the procedures in FOIA (see 5 U.S.C. §552(b)(7)), but FOIA provides that that statute does not authorize any other withholding of information except as specifically provided in FOIA. See 5 U.S.C. §552(c).

12/ The judicial precedent cited by the Task Force is similarly inapplicable, being grounded on protection of the national defense and security and preservation of state secrets. See Task Force Report at 8, citing Bendix Aviation Corp. v. FCC, 272 F.2d 533, 544 (D.C. Cir. 1959), cert. denied, 361 U.S. 965 (1960); Heine v. Raus, 399 F.2d 785 (5th Cir. 1968).

Report at 3, 4-5; 49 Fed. Reg. 36032, col. 2, 36033, col. 3 (1984); 50 Fed. Reg. 21073, col. 3 (1985). Yet the impact and design of the proposed rule obfuscates that general policy, burying it in a provision that provides no more than lip service to the policy favoring full disclosure. See Proposed §2.795e, 50 Fed. Reg. 21706. Proposed Section 2.795e is worded in such a way as to make disclosure of the information seem to be the exception and not the rule:

> (a) After consideration of a motion from an NRC office for a protective order to impose conditions on or to withhold disclosure of information, including an ex parte in camera oral presentation, and after finding that the information subject to the motion is both relevant and material to the pending adjudication, the presiding officer shall determine, in light of the Commission policy favoring full disclosure, whether disclosure of the information without a protective order could adversely affect the ability of the NRC to conduct an investigation or inspection fully and adequately or to protect the identity of a confidential informant and whether and to what extent all or part of the information should be withheld from disclosure or only disclosed subject to conditions.

Proposed §2.795e(a), 50 Fed. Reg. 21706 (emphasis added). The NRC's asserted general policy in favor of full disclosure would be much more effectively implemented if the last portion of the above quoted proposed section were rewritten as follows:

> . . . the presiding officer shall determine, in light of the Commission policy favoring full disclosure, whether restricting disclosure of the information through a protective order is necessary to preserve the

> integrity of an NRC investigation or inspection or to protect the confidentiality of an informant (when it has found ample justification for such has been shown), and to what extent the information should be provided to representatives of the parties to the litigation under an appropriate protective agreement or with identifying details eliminated, if warranted.

Similarly, the Commission's asserted policy in favor of full disclosure is belied by the fact that the proposed rule lays out elaborate appellate procedures involving automatic stays of a licensing board decision disclosing information, with mandatory certification of such a disclosure decision to the Commission, and an accompanying discussion of the appellate procedure involved should the Licensing Board decide to disclose the information. See Proposed §§2.795e-2.795h, 50 Fed. Reg. 21076-77. Yet the proposed rule provides no procedure for the applicant or intervenor to appeal a decision that prevents disclosure of the Staff's new information that is material and relevant to the adjudication. At least a cross-reference to one of the more conventional portions of the Rules of Practice (if not a sentence or two in one of the new proposed sections), explaining how an applicant or intervenor may appeal a Board's nondisclosure decision, would be in better keeping with the Commission's general policy in favor of full disclosure.[13]

13/ We note that proposed sections 2.795e(d) and 2.795f(b) provide that the applicant and intervenors may file

(Footnote 13 continued on next page)

Finally, we must emphasize the practical and procedural difficulties that would be presented by the proposed rule. When a party is attempting to prepare for a hearing before a decision maker who is already aware of material, relevant information of which that party is unaware, it is very difficult to know how to structure and focus one's case. Certain evidence, presented in good faith, could be unconsciously dismissed by the Board as based on "stale" information. The situation would be not unlike attempting to represent a criminal defendant when the prosecutor has secretly told the judge that the police have an eyewitness who saw the defendant commit the crime, but that the eyewitness is reluctant to testify in public. The potential for an unfair influence on the decision maker (conscious or unconscious) is undeniable.[14]

(Footnote 13 continued from previous page)
briefs before the Commission when the Commission hears an appeal of a decision granting disclosure. See 50 Fed. Reg. 21076-77. This is purely a hollow, formal gesture, because the relevant facts are unknown to the other parties, the prior and subsequent arguments are ex parte in camera, and the Staff need not even serve its brief on the other parties. See Proposed §2.795f(b), 50 Fed. Reg. 21077; cf. Morgan v. United States, 304 U.S. 1, 16-20 (1938); United States Lines v. FMC, 584 F.2d 519, 537-41 (D.C. Cir. 1978).

14/ Indeed, Appeal Panel Chairman Rosenthal has noted on several occasions the unfairness inherent in Board notifications that present largely unscreened allegations.

III. Conclusion

In light of the Commission's ongoing concern with the public's perception of NRC activities, the Commissioners should be loath to engage in ex parte in camera proceedings. Such secret hearings certainly do not promote the public's confidence in the integrity and completeness of NRC licensing proceedings (in which public participation is encouraged under the Atomic Energy Act and the NRC's regulations), nor does it reinforce the public's awareness of the NRC's general policy in favor of full disclosure. Furthermore, public confidence in the safety of licensed facilities or the integrity of the utility applicant is not furthered by the inevitable media publicity surrounding "secret briefings" of NRC Licensing Boards. Accordingly, the NRC should minimize the use of in camera proceedings. When such in camera proceedings must be held, due to concerns, determined to be well founded, about compromising ongoing inspections or investigations or revealing confidential sources, then the NRC should at a minimum allow selected representatives of all parties, subject to an appropriate protective order, to participate in any in camera proceeding. Such a practice would be consistent with that followed when dealing with highly sensitive plant security plans. Even if the public does not presently know the substance of the proceeding, public knowledge that all parties, including interested governmental entities and

"public interest" intervenors, have representatives present, should enhance the public's appreciation of the integrity of the NRC's licensing process.

Most important, however, allowing representatives of all parties to be present for in camera proceedings satisfies the requirements of due process of law that are inherent in Anglo-American jurisprudence. Accordingly, we recommend that the NRC withdraw the proposed rule and enact in its place a much more traditional procedure: (1) recognizing the fact that Commission precedent and due process requires informing not only the Board, but also the other parties of relevant new information; (2) allowing the Staff or other NRC offices to either (a) present preliminary new information in camera with selected representatives of all parties present subject to a protective order; or (b) inform the Board and parties that an investigation is ongoing, but refrain from presenting preliminary new information until the inspection or investigation can be made public, and then supplementing discovery responses, supplying additional prefiled testimony, moving to reopen the record, and moving for a stay, as necessary under the current Rules of Practice; (3) if the new information does not merit reopening the record or introducing new, late-filed contentions, the issues can be resolved through enforcement action or negotiation outside the hearing process in accordance with the Zimmer case and consistent with

cases such as BPI v. AEC. With the increased risk of judicial reversal of lengthy licensing proceedings if the Commission does adopt and employ the proposed rule, the Commissioners would be well advised to follow the more traditional, effective, and credible process outlined in these comments.

We urge that the alternative described herein be given serious consideration as a preferable alternative to the proposed rule. We are grateful for the opportunity to comment on the Commission's proposal.

Sincerely,

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J. Michael McGarry, III
Nicholas S. Reynolds
Mark S. Calvert