

August 23, 1985

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USNRC

Comments of Ohio Citizens for Responsible Energy, Inc. ("OCRE") on the proposed rule "Adjudications: Special Procedures for Resolving Conflicts Concerning the Disclosure or Nondisclosure of Information" 50 FR 21072 (May 22, 1985)

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This proposal is basically unfair in that it gives special privileges for withholding information to the NRC Staff and to other parties. Intervenor, who may have confidential informants or investigations of their own, will be required to disclose them while the Staff may make ex parte in camera submittals and presentations just to request that information not be released.

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While the need for protection of such matters is important, it may not more important than a fair and complete adjudication of issues material to licensing actions, as required by Section 189 of the Atomic Energy Act, as interpreted by Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984). There needs to be a better balance between these two factors.

This could be accomplished by having all information deemed as needing protection from general disclosure made available to the parties under a protective order, and holding any hearings concerning the protected information in camera, with only the signators to the protective order present. To discourage violations of protective orders, strict penalties should be available and enforced, if it is proven beyond a reasonable doubt that a person or party was responsible for disclosure and the disclosure resulted in harm to an investigation or confidential informant. The penalties should include denial of a license, dismissal of a party, and disbarment of attorneys.

The NRC's own policies and actual personnel behavior indicate that the proposed measures will selectively block the flow of information. Intervenor will be denied access to information, while licensees are routinely informed of allegations and investigations. This is actually NRC policy as written in "Proposed NRC Manual, Chapter 0517, Management of Allegations." It is further known to OCRE that an individual formerly working out of NRC's Region III made it his personal policy to disclose the identity of informants to the licensees for whom they worked. Unless and until the NRC has proven its ability to conduct fair and thorough investigations, it should not be given privileges.

It obviously makes no sense to withhold information from intervenors that has been released to licensees or to the public. The Staff in its inspection reports does not identify individuals by name even when they have made public statements to the media. This proposal would give the Staff too much power to withhold information already released through other means from the adjudicatory process by merely claiming that the information is the subject of an investigation. This would prevent intervenors from identifying witnesses or linking persons already publicly known to specific allegations, investigations, or enforcement actions.

The provisions of the proposal do not give other parties a

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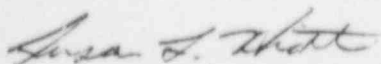
real opportunity to respond to the Staff's claims for the need for confidentiality as ex parte in camera proceedings are contemplated. No one will be able to refute the Staff's motions and arguments as their content will be unknown. This gives the Staff unwarranted power to chart the course of a proceeding, and possibly to determine its outcome, by declaring information exempt from disclosure as it may be the subject of an inspection or investigation. The potential for abuse here is extreme. Information harmful to a licensee may never be revealed if the Staff chooses to claim exemption on this basis. The rule should prohibit

licensing boards from reaching a final decision until all information material to the issuance of the license has been disclosed to the parties. A new contention based on recently-released material previously held to be confidential should be judged according to the standards for filing initial contentions, even if reopening of the record is involved. Intervenors should not have to meet heavy burdens for consideration of contentions based upon material previously unavailable to them.

Finally, the proposed rule is inconsistent with the Freedom of Information Act. The NRC may not have regulations granting the public less access to information than does FOIA. General Electric Co. v. NRC, (7th Cir. 1984, Case No. 84-2066), slip op. at 4. The proposed rule would shield information "on the basis of which the NRC may determine whether to initiate an inspection or investigation." 50 FR 21073. This is inconsistent with judicial interpretation of FOIA Exemption 7 (investigatory records), which applies only to information concerning a concrete prospective law enforcement proceeding. Carson v. DOJ, 631 F.2d 1008, 1018 (D.C. Cir. 1980). The present proposal would shield virtually any information which the Staff feels might be the subject of an inspection or investigation. Almost any matter could fall into that category, thus creating the potential for abuse.

The proposal, having serious deficiencies, should not be approved.

Respectfully submitted,



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