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Comments of Wells Eddleman

First, the proposed rule appears to be unnecessary. The Staff can always move for a protective order to shield the identity of a confidential informant or to protect other information which could reveal an informant's identity or compromise an investigation. A rule requiring Commission review and approval of any release of a confidential informant's name or other identifying information could be of use, but the best policy would simply be not to reveal the identity of confidential informants.

Of course, if the NRC really wants to protect those who give it information, it could be much more supportive of whistleblowers. The Staff's typical attitude now does not tend to give confidential informants much confidence in the investigation or their concerns. The Staff seems to do as much as it possibly can to classify concerns "non-safety" related, to find exculpatory evidence for a utility or plant builder, and, e.g. in the case of Chan Van Vo, apparently does not follow up with interviews of persons identified by an informant as being able to confirm allegations.

Another problem is that this rule allows the staff and presiding officer to take action off the record without a record being preserved. Conversations, oral motions, and arguments other than a formal presentation are not required to be transcribed. Thus, even board members (other than the presiding officer) won't know what is going on. And there will not be any record to review later, or there will be an inadequate record.

The rule also compromises the right ot the public to a full hearing on safety-related issues and other issues material to a licensing decision. That right is guaranteed by the Atomic Energy Act, Section 189a, and the NRC does not have the authority to change that. Nothing in the proposal exempts intervenors from the extra burdens associated with late-filed contentions, even if the information resulting from an informant or confidential investigation is later made available in the record. Thus, intervenors get a "Catch-22" situation in which a decision made e x parte can prevent their access to facts, but they still bear the burden of lateness duex to that decision.

Obviously, the purpose of Board Notifications is to let licensing boards know about material issues. It is therefore unreasonable to prevent boards from acting on those issues. A better solution here is to preclude a licensing action until such issues have been made public and there has been a full opportunity to litigate them. This can be done while protecting confidentiality of informants.

The attempt in this rule to shield information without an ongoing investigation seems to indicate administrative laxity by NRC in its investigations. Obviously, any allegation by a confidential informant or anyone else, that would reasonably require a Board Notification, should be worthy of investigation (and a request for a protective order).

Certainly there should not be disclosure to licensees or applicants, and not to other parties. By not requiring all NRC offices to hold information confidential when a protective order is applied for, this rule invites abuse, errors, and a lack of confidence by informants. This rule should be backfitted or scrapped.

to meet the above objections

Wells Eddleman





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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| Proposed Rule: 10 CFR Part 2<br><br>Adjudications; Special Prodecures for Resolving Conflicts Concerning the Disclosure or Nondisclosure of Information<br><br>50 Fed. Reg. 21072 (May 22, 1985) |

COMMENTS BY THE UNION OF CONCERNED SCIENTISTS AND NUCLEAR INFORMATION AND RESOURCE SERVICE

The NRC has published a proposed rule designed to protect the identity of confidential informants and the contents of certain inspections and investigations during licensing hearings. The proposed rule would allow the NRC staff to make special, confidential requests to Licensing Boards for protective orders where disclosure of the information would "prejudice an inspection or investigation" or "reveal the identity or otherwise compromise a confidential informant." Proposed § 2.795b. The other parties to the hearing would receive notice that such a request had been made, but would not be allowed to review the motion or to attend any sessions with the Licensing Board.

The proposed rule addresses a legitimate need to protect certain NRC investigations and the identity of whistleblowers. As it is currently written, however, it seriously infringes on the public's right to be informed of and to litigate safety issues that bear on whether a license or amendment should be granted. The rule should strikes a better balance between

maintaining the confidentiality of investigations and protecting the public's right to participate in licensing proceedings. At a minimum, the rule should provide for disclosure of all information material to the issuance of a license before the license is granted.

The proposed rule contains the following serious defects:

I. The proposed rule would allow the NRC to license nuclear plants without offering an opportunity for a hearing on all material safety issues.

The right to an adjudicatory hearing on all issues material to a licensing decision is guaranteed by Section 189a of the Atomic Energy Act. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444-5 (D.C. Cir. 1934), cert. denied, 105 S.Ct. 815 (1985). In effect, this proposal would allow the NRC to foreclose intervenors from litigating some relevant and potentially serious safety issues by denying access to the information during the pendency of licensing hearings. The information potentially subject to nondisclosure encompasses virtually all issues relevant to licensing, ranging from manangement competence to the quality of individual safety systems.

Moreover, the proposed rule's loose standard for determining what constitutes inspections and investigations makes it easy for the NRC staff to avoid disclosure of troublesome or embarrassing information. The staff may obtain a protective order simply by initiating an inspection, or even by stating to the Licensing

Board its intention to investigate a problem.[1] Intervenors would have no opportunity to challenge such assertions.

While the Commission may have a legitimate need for confidentiality during an inspection or an investigation, that need does not override the Commission's obligation to offer an opportunity for a hearing on "protected" issues if they are material to the issuance of a license. Whether the Commission releases information publicly or discloses it under a protective agreement to the parties, it must provide some opportunity to litigate the issues before a license is granted. "The Commission is entitled to great freedom in its efforts to structure its proceedings so as to maintain meaningful participation, but one of its goals must be to assure that there is meaningful public participation." Union of Concerned Scientists v. NRC, supra, 735 F.2d at 1446, quoting Bellotti v. NRC, 725 F.2d 1380, 1389 (Wright, J., dissenting) (emphasis in original).

In apparent recognition of this principle, proposed § 2.795i requires the Licensing Board to place protected information (excluding names of confidential informants) in the public record of a "pending adjudication" once an investigation or inspection has concluded or the NRC staff withdraws its objection to disclosure. However, this provision does not

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[1] As the Commission states in the preamble, the rule would apply not only to pending investigations and inspections, "but may also include information on the basis of which the NRC may determine whether to initiate an inspection or investigation." 50 Fed. Reg. at 21075, Col. 1 (emphasis added).

adequately guarantee that an investigation will actually be concluded before a hearing record closes or even before a license is issued. Moreover, it doesn't assure that intervenors will not be precluded or discouraged from litigating the issues by having to meet heavy burdens for reopening the record or filing late contentions. The rule should state specifically that no licensing decision will be made, nor will the hearing record be closed, before all material information has been made available to the parties.[2] Because intervenors are not responsible for the late availability of the information, the rule should also state that contentions on these issues will be judged according to the Commission's standards for initial filing of contentions.

II. The proposed rule prevents Licensing Boards from considering issues that are subject to protective orders.

We understand that one of the purposes of this proposal is to allow the staff to brief Licensing Boards on serious safety problems affecting licensing decisions without jeopardizing the confidentiality of the staff's investigations of the problems. However, the proposed rule defeats this purpose by preventing the Licensing Board from doing anything with the information. The proposal provides that once a protective order has been issued,

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[2] In most cases, the identity of a confidential informant would not need to be disclosed in order to litigate technical issues bearing on the safety finding required for issuance of a license or amendment. In the event that the identity of an informant was determined to be material to a licensing decision, however, the Board would be required to disclose the identity of the informant under a protective agreement.

no information subject to the order can be used by the Licensing Board in making any decisions in the pending adjudication unless all parties have been given access to the information. Proposed § 2.795k. Under this provision, a Licensing Board would have no authority over the safety issues covered by a protective order until the inspection or investigation had concluded or the NRC staff had consented to disclosure. Thus, the Licensing Board could not evaluate the adequacy of an NRC staff investigation during its progress, or even decide to postpone a decision on an issue related to the investigation.

While this provision would protect an intervenor from illegal ex parte decisions by a Licensing Board, it would also hamper the Board's ability to make fully informed decisions. If, for example, the license was scheduled for issuance prior to completion of an investigation, the Board might never have the opportunity to weigh serious safety allegations in its decision. And, no matter how relevant a pending, protected investigation might be to issues under litigation in a licensing hearing, the Board would have no authority to consider the investigatory evidence as part of the whole case. The rule should preclude the Licensing Board from making any final decisions until all information material to the issuance of the license has been disclosed for consideration by the Board and the parties.

III. The proposed rule conflicts with the Freedom of Information Act.

The Commission states that it does not intend to use these proposed procedures to shield information properly subject to disclosure under the Freedom of Information Act (FOIA). 50 Fed. Reg. at 21074, Col. 1. However, the proposed rule provides much broader protection for information relating to inspections and investigations than is conferrred by the FOIA.

The Freedom of Information Act, 5 U.S.C. 552(b)(7)(A), exempts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would interfere with enforcement proceedings." In interpreting this section, the courts have held that the government must demonstrate that the information relates to a "concrete prospective law enforcement proceeding." Carson v. U.S. Department of Justice, 631 F.2d 1008, 1018 (D.C. Cir. 1980). (emphasis added).

In stark opposition to these holdings the Commission states that, in order to qualify for a protective order under the proposed rule, the information "need not relate solely to an ongoing inspection or investigation but may also include information on the basis of which the NRC may determine whether to initiate an inspection or investigation." 50 Fed. Reg. at 21073, Col. 1 (emphasis added). This language would allow the Commission to shield virtually any allegations based only on the speculation that they might lead to an inspection or an investigation. The proposed rule should require the NRC office

requesting a protective order to demonstrate that allegations are being reviewed actively under the Commission's procedures for management of allegations.

The proposed rule also contains a confusing provision which implies that the Licensing Board need not make the maximum disclosure required by the FOIA unless a FOIA request is made. Proposed sec. 2.795j(b) provides that when a FOIA request is received for information that has been withheld under a protective order, the presiding officer must review the record "and determine, in the light of any exemptions that may validly be claimed under the provisions of the FOIA and the Commission's regulations, whether the information in whole or in part continues to be protected or whether and under what conditions it may be released." The rule should state clearly that from the outset, the Licensing Board's standard for disclosure of information is at least as broad as the FOIA.

IV. The proposed rule does not provide adequate assurance that inconsistent disclosures will not take place.

In the past, the NRC often has made inconsistent decisions regarding disclosure of information. Requestors have been denied documents under the Freedom of Information Act, only to find that the withheld documents were released previously to the licensee or some other party. The problem seems to lie in a lack of procedures for communication of disclosure decisions between various NRC offices.

This proposed rule has the potential to compound the problem of inconsistent disclosures. Allegations may be in the custody of several different NRC offices at once, including the offices of Nuclear Reactor Regulation, Inspection and Enforcement, and Investigations. These offices operate under a policy that all allegations should be disclosed to licensees and applicants unless the disclosure would jeopardize an inspection or investigation or compromise a confidential witness. "Proposed NRC Manual, Chapter 0517, Management of Allegations," § 058. Hence, these offices may disclose allegations to a licensee or applicant long before they become relevant to a licensing adjudication. Similarly, information may be released under the FOIA before it is raised in an adjudication. In order to ensure that Licensing Boards are not asked to shield information that is already in the possession of the licensee or applicant, the rule should require that any NRC office seeking a protective order must certify to the Licensing Board that it has consulted all other offices that have custody of the information, and determined that none of it has been disclosed to the licensee or any other party.

Respectfully submitted,

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