

April 21, 1982

NOTE TO: John R. Cook, FCMC
FROM: John F. Klucsik, ELD *JFK*
SUBJECT: DRAFT STATEMENT OF CONSIDERATIONS, REVISED PART 35

In my note to you of April 6, 1982, on the same subject, I urged you to incorporate in your next draft a full discussion of all major features of the proposed revision of Part 35. As a followup to that note, I thought you would be interested in some of the court's observation's in the recent case of Connecticut Light and Power Co. v. NRC, in the Court of Appeals for the District of Columbia Circuit. (No. 81-1050, March 16, 1982). If you wish, I will send you a copy of the decision, however, I think the following material captures the sense of the decision as it is relevant to the Part 35 revision.

In the Connecticut Light and Power Co. case, the utility challenged an NRC rule on the ground (among others) that the Commission's notice of proposed rulemaking was inadequate. The notice allegedly gave no indication of the technical basis on which the Commission had relied in formulating the proposed rule and had failed to offer an adequate technical justification for the rule. In reaching its decision upholding the rule, the Court did not conceal its concern that NRC barely complied with the procedures mandated by the Administrative Procedure Act for rulemaking.

The court stated that rulemaking is to be a process of reasoned decision-making, a particularly important component of which is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules. The court found equally important the agency's own explanation for the rules it adopts. The court noted that:

If the notice of proposed rulemaking fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. . . .

To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

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The notice of proposed rulemaking which prompted this response made little reference to technical material. It referred to a single report and to guidelines laid down in a branch technical position and employed in case by case safety evaluations. The court was unimpressed by the Commission's assertion that the position of the staff and the licensees regarding the provisions of this rule was documented and well known.

Like the notice in Connecticut Light, the March 22 draft statement of consideration for the Part 35 revision makes little reference to technical material which might justify the proposal. As in the Connecticut Light situation, the proposed Part 35 refers to guidelines and requirements established on a license specific basis. Finally, as in Connecticut Light, some task force members seem to believe that the licensee's familiarity with the staff's position on these guidelines and requirements will excuse the obligation to explain their technical basis in the notice of proposed rulemaking.

In light of the court's concern with NRC rulemaking procedure, I hope you will continue to seriously consider our conversations on providing a clear statement of the technical basis for the major features of the proposed Part 35.