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PETITION RULE PRM 2-12
(64FR59669)

BY HAND

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Rulemakings and
Adjudication Staff

Re: Rulemaking Petition of Michael Stein to Add Individual Safeguards to the NRC's Deliberate Misconduct, Employee Protection and Notice of Violation Regulations (64 Fed. Reg. 59669)

Dear Secretary:

Enclosed are the comments of Winston & Strawn on the Petition for Rulemaking filed by Michael Stein, as noticed in the *Federal Register* on November 3, 1999. Michael Stein petitions for an amendment to the NRC regulations to provide additional safeguards to individuals charged with violations of the deliberate misconduct and employee protection provisions, and charged with a Notice of Violation. For the reasons set forth in the enclosed comments, we support the rulemaking petition.

Thank you for your attention to this matter.

Respectfully submitted,

Christine C. Stein

Enclosure

**COMMENTS CONCERNING MICHAEL STEIN'S PETITION FOR
RULEMAKING TO ADD PROCEDURAL SAFEGUARDS FOR
INDIVIDUALS ACCUSED OF VIOLATING THE REGULATIONS**

January 18, 2000

Winston & Strawn submits the following comments on the petition for rulemaking filed with the NRC by NRC employee Michael Stein, in his capacity as a member of the public. 64 *Fed. Reg.* 59669 (Nov. 3, 1999). The petition requests that the NRC amend its regulations to provide additional safeguards to individuals charged with violations of the NRC's deliberate misconduct provisions or employee protection provisions, and for individuals charged with a Notice of Violation. For the reasons that follow, Winston & Strawn fully supports the petition. In addition, we believe these proposed regulatory enhancements should be extended to licensees as well as individuals.

BACKGROUND

As the regulations are currently written and have been interpreted, the NRC has the power to take adverse action against an individual or a licensee in the form of a Notice of Violation (NOV) without allowing for significant input from the individual or licensee prior to the action. Specifically, under 10 C.F.R. § 2.201, the NRC may issue an NOV to an individual or licensee, without any prior input whatsoever. Thereafter, the NRC "may" require the respondent to file a written explanation within 20 days after the NOV. Presumably, the NRC can then retract or affirm the NOV. However, in contrast to the NRC's regulations regarding the imposition of Orders and Civil Penalties (10 C.F.R. §§ 2.202, 2.205), there is no provision for an individual or licensee to request a hearing on an NOV.

The NRC does currently and typically offer both individuals and licensees an opportunity for a "predecisional enforcement conference" prior to an escalated enforcement action against a licensee or an individual. The opportunity for a predecisional enforcement conference flows as a matter of policy from the NRC's Enforcement Policy (NUREG-1600), not from the regulations. See 64 *Fed. Reg.* 61,142 at 61,148, col. 3 (1999). Although the NRC's Enforcement Policy clearly favors predecisional enforcement conferences, as pointed out by Mr. Stein the NRC has not always provided individuals charged with wrongdoing an opportunity to participate in such a conference. As alluded to in the NRC's notice, the NRC recently

failed to afford a former Northeast Utilities executive the right to a predecisional enforcement conference prior to the issuance and imposition of an NOV against him.

Mr. Stein's rulemaking petition focuses on individual rights, in cases involving alleged violations of the deliberate misconduct rules (*e.g.*, 10 C.F.R. § 50.5) and the employee protection rules (*e.g.*, 10 C.F.R. § 50.7). The proposed change would allow individuals charged with a violation of the NRC's deliberate misconduct rules to respond to the NOV through written correspondence. 64 *Fed. Reg.* at 59670. In addition, Mr. Stein's proposed change to the NRC's rules would allow individuals charged with an NOV to request a hearing on the NOV. In sum, the proposed amendment would make the process for imposition of NOVs involving individuals similar to the process for imposition of Orders and Civil Penalties under 10 C.F.R. § 2.202 and § 2.205.¹ Sections 2.202 and 2.205 allow licensees and other persons to request a hearing following Staff issuance/imposition of either an Order or Civil Penalty. A hearing opportunity on an NOV would provide an individual with the same opportunity to respond and confront the evidence before him prior to final agency action on the adverse NOV.

COMMENTS

I. An Opportunity for a Predecisional Enforcement Conference Prior to a Notice of Violation of the Deliberate Misconduct and Employee Protection Rules Should be Guaranteed.

First, the NRC Enforcement Policy clearly recognizes the importance of an opportunity to be heard prior to issuance of an enforcement sanction, including an escalated NOV. The importance of this policy is only increased for a sanction against an individual or involving the employee protection rules.

The predecisional enforcement conference is the last, best opportunity for an individual or a licensee to confront evidence and to assure that the NRC has a full record on which to base an enforcement action. Predecisional enforcement conferences have long been recognized by licensees as the most effective way in which to respond to an allegation, prior to the sanction and adverse publicity. Although the issuance of an NOV is not final action by the NRC, it can still carry negative

¹ The language for 10 C.F.R. § 2.201(c)(2) as proposed is unclear regarding the precise timing of the hearing opportunity. If the rule is intended to be consistent with 10 C.F.R. § 2.205, as the rule proposed in the petition in some respects appears to be, paragraph (c)(2) should specify that the hearing request is to be made within 20 days of the date of the order imposing the NOV, not 20 days of the date of the NOV. However, we do not believe an extra step of requiring imposition of an NOV prior to a hearing request is necessary. Where the subject of the NOV disagrees and will request a hearing, that process should proceed expeditiously.

repercussions for individuals and licensees alike. An individual in particular may suffer adverse job action with his current employer or be hampered in finding future employment based on the negative implications surrounding the issuance of an NOV.

Despite the importance of predecisional enforcement conferences to the licensee and individuals, and the Enforcement Policy's recognition of such a measure, the NRC has not always held such conferences. The example cited by the petitioner was an egregious procedural deficiency, adversely impacting those involved. Regardless of any action on Mr. Stein's petition, the NRC's regulations and/or Enforcement Policy should unequivocally ensure that the NRC always allows individuals and licensees alike an opportunity to be heard prior to the issuance of an NOV or Order. For alleged violations of the deliberate misconduct rules and the employee protection rules, this opportunity should not be limited to NOV's of a certain severity level, but should apply in any case where the NRC proposed to issue more than a Non-cited Violation.

II. Due Process Dictates That Individuals and Licensees Should Have An Opportunity To Be Heard Before Adverse Action is Taken.

Once an NOV has been issued, basic notions of due process dictate that either an individual or a licensee should have a meaningful opportunity to respond in writing before the imposition of an NOV that could adversely affect their interests. Moreover, in the case of an NOV, where there is no Order or Civil Penalty, there is still no reason to deny either an individual or a licensee an opportunity for an administrative hearing before an impartial tribunal, just as that right now exists for Orders and Civil Penalties. The right to this type of process is especially paramount when an individual is involved. An adverse finding against an individual may result in negative job action, including termination and difficulty in being hired by other licensees. For this reason, individuals and licensees should have an opportunity to be fully heard, to examine the evidence against them, and to confront the persons recommending the adverse action prior to final agency action.

Accordingly, we support Mr. Stein's recommended amendment to Section 2.201. Allowing individuals to request a hearing would make Section 2.201 generally consistent with Sections 2.202 and 2.205, the provisions regarding Orders and Civil Penalties. Mr. Stein's petition is also reasonable when compared to similar processes in place in the judicial courts and other administrative proceedings. It is axiomatic that persons and entities are generally given a meaningful opportunity to respond and confront their accusers before adverse action is taken. Presumably, the NRC already recognized this principal when it provided for the right to hearing under Sections

2.202 and 2.205. An amendment to Section 2.201 would simply bring that provision into general conformity with Sections 2.202 and 2.205, while adequately securing an important right for individuals.

III. Individuals and Licensees Should be Treated Consistently Under the Regulations

Although Mr. Stein's petition addresses individual rights, as opposed to licensee rights, we believe the same protections as proposed should be extended to licensees as well. In cases involving alleged deliberate misconduct or violations of the employee protection rules, a licensee may have an interest in protecting its own reputation as well as the interests of the managers or other employees. An NOV in these types of cases, even in the absence of an Order or a Civil Penalty, may involve important questions of law or fact.² Accordingly, both licensees and individuals should have the same right to respond in writing to an NOV and then, subsequent to the NRC Staff's issuance of the sanction, to request an administrative hearing. The latter could involve an important check or balance on the NRC Staff's enforcement decisionmaking. Moreover, extending the proposed amendments to licensees would make the affected provisions consistent with Sections 2.202 and 2.205, which give both a licensee and "other person" the same rights to respond and request a hearing.

— *WINSTON & STRAWN*

² In this regard, it is not at all clear that the proposed rule change should be limited to alleged violations of the deliberate misconduct rule or the employee protection rule. An NOV is a sanction, regardless of the regulation involved. An alleged violation of 10 C.F.R. § 50.9, or a violation of Technical Specifications, for example, may also involve important issues of fact or law. We recommend extending the proposed changes to all escalated NOV's of regulations other than 10 C.F.R. §§ 50.5 and 50.7.