

DOCKET NUMBER

PETITION RULE PRM 30-63

(65 FR 40548)

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NUCLEAR ENERGY INSTITUTE

OFFICE OF
Robert Willis Bishop
Vice President &
General Counsel

September 13, 2000

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: Request for Comments on Petition for Rulemaking Filed by the Natural Resources Defense Council (65 Fed. Reg. 40548; June 30, 2000)

Dear Ms. Vietti-Cook:

On behalf of the nuclear energy industry, the Nuclear Energy Institute¹ is pleased to provide comments on the Petition for Rulemaking filed by the Natural Resources Defense Council (NRDC). The rulemaking proposal was published in the Federal Register June 30, 2000 (65 Fed. Reg. 40548).

NRDC's petition requests that the NRC institute a rulemaking proceeding to promulgate a regulation to address specific circumstances which the petitioner believes should compel the NRC to withhold issuing or revoking a license. The proposed regulation would require NRC to take such action if any of the following criteria are met:

- An individual or organization whose principal owner, officer, or senior manager participates in, or has knowledge of, but does not report, bribery of a federal, state or other regulatory official involved in the review or approval of a license application or continuing oversight of licensed

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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- activities;
- An individual or organization whose principal owner, officer, or senior manager participates in, or has knowledge of, but does not report, extortion by a regulatory official involved in the review or approval of a license application or continuing oversight of licensed activities; or
- An individual or organization whose principal owner, officer, or senior manager has acted in any manner that flagrantly undermines the integrity of the regulatory process of the NRC or that of an Agreement State.

The petition is predicated on NRDC's dissatisfaction with the NRC's determination not to pursue enforcement action against Mr. Khosrow B. Semnani. Mr. Semnani pled guilty to a tax misdemeanor relating to payments to a State of Utah official responsible for issuance of licenses for the disposition of certain radioactive materials. Mr. Semnani's company, Envirocare of Utah, Inc., is licensed by the NRC to receive, store and dispose of uranium and thorium byproduct material in Utah. The NRC subsequently issued a Demand for Information (DFI) to Mr. Semnani, as owner of Envirocare, to determine whether the agency should modify, suspend, revoke, or take other appropriate action regarding the Envirocare license, or to prohibit Mr. Semnani's involvement in NRC-licensed activities. Upon conclusion of the DFI process, the NRC determined that no further enforcement action was warranted.²

The commercial nuclear industry takes no position on the matter regarding Mr. Semnani and Envirocare or the NRC's enforcement decision on that matter. As a fundamental principle, the commercial nuclear industry does not condone any illegal action to obtain a license or influence a regulator's decision regarding a license or licensee. Similarly, the industry does not condone any illegal action by a government official with regulatory responsibilities for licensed activities who misuses his or her office through extortion or any other prohibited behavior.

Notwithstanding the industry's unequivocal position on those fundamental principles, for the following reasons we believe that the proposed rule should not be promulgated.

First, the NRC already has the authority to take action, including license denial or revocation, if public health and safety are at issue or if there is a violation of an NRC regulation or the statutes that govern NRC regulatory actions. The NRC's decision not to take enforcement action against Mr. Semnani should not be construed to mean that the NRC does not have the authority to issue an order or take other action if it

² Letter, R.W. Borchardt to Khosrow B. Semnani, dated March 27, 2000.

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concludes that an individual's actions are likely to endanger public health and safety. The NRC has broad authority to take enforcement action for a violation of the Atomic Energy Act, as amended, and the Energy Reorganization Act of 1974, and any regulation promulgated pursuant to either of those statutes.

In particular, the Commission has ruled that it has the authority under the Atomic Energy Act to consider the "character" of an applicant or licensee in determining whether to issue, modify or revoke a license. As the Commission has stated:

A generally applicable standard for integrity is whether there is reasonable assurance that the Licensee has sufficient character to operate a plant in a manner consistent with the public health and safety and applicable NRC requirements. The Commission in making this determination may consider evidence regarding licensee behavior having a rational connection to the safe operation of a nuclear power plant.³

Under existing law, the NRC also has the essential flexibility to consider all relevant circumstances on a case-by-case basis in determining whether character or integrity issues warrant denial, modification or revocation of a license. As the Commission has stated:

[A]cts bearing on character generally should not be considered in isolation. The pattern of licensee's relevant behavior, including corrective actions, should be considered.⁴

The instant rulemaking proposal would prevent the agency from considering all relevant circumstances, both positive and negative, in making a determination on whether a licensee's behavior demonstrates that it lacks the character or integrity to hold an NRC license. By singling out certain specific acts⁵ that trigger denial or revocation of a license without regard to the particular circumstances, the proposed rule would be

³ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

⁴ Id. at 1137.

⁵ While the specific acts identified in the proposed rule may have relevance to character, the proposed rule does not provide an exhaustive, or even comprehensive listing. We note however, that even if the rulemaking included such a list, it would fail because it would inappropriately eliminate NRC's discretion to consider the totality of the circumstances in a situation where potentially very severe regulatory action is contemplated. We would also note, in this context, that the circumstances that gave rise to the rulemaking petition are highly unusual and do not pose the kind of generic problem appropriate for rulemaking.

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inconsistent with past Commission policy. The petition has not provided any basis for eliminating the NRC staff's discretion to make character determinations on the basis of all relevant circumstances. For these reasons, the rulemaking petition is ill-advised.

Second, the proposed regulation fails to account for the distinction between enforcement action against an NRC licensee (i.e., a corporate entity) and enforcement action against an individual. The proposed regulation would require the NRC to deny a license application or revoke an existing license if a single senior manager engaged in bribery, extortion or flagrantly undermined the integrity of the regulatory process. This portion of the proposed regulation does not appropriately account for the fact that, in most cases, the licensee – usually a corporate entity with many managers – holds the license. Sound public policy does not support mandating that the NRC mechanically revoke a license held by a corporate entity based on the actions of any one individual. Sound public policy also would argue against such a result in circumstances in which the individual's actions can not be imputed to the corporation. Almost two decades ago, an Atomic Safety and Licensing Board made precisely this point:

It is clear to us . . . that the failure of one or more individuals to demonstrate adequate . . . character does not *per se* indicate a lack of organizational character For example, if an individual employee were found . . . to have demonstrated a character defect and were removed from a project, the organization would not *per se* be deemed to lack . . . character – indeed, it might then be viewed as possessing [the requisite character]⁶.

Finally, the proposed regulation would have the NRC take the drastic step of denying a license application or revoking a current license for "flagrantly undermin[ing] the integrity of the regulatory process" of the NRC or an Agreement State. Because it is so vague, this criterion would not seem to provide a legally sufficient basis upon which to predicate a federal regulation. A court may determine that "flagrantly undermin[ing] the integrity of the regulatory process" would not withstand judicial scrutiny were a suit to be brought under the Hobbs Act on the basis of being unacceptably vague.

In sum, we believe the legal bases and policy considerations set out above mandate that the NRC should not implement the rule proposed by petitioner NRDC. We appreciate the opportunity to provide our views and would be pleased to discuss them further with the NRC staff.

⁶ Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 678 (1984).

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Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Bishop". The signature is fluid and cursive, with the first name "Robert" being the most prominent part.

Robert W. Bishop

c: Karen Cyr

[Submitted by e-mail. Hard copy to follow by regular mail.]