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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555

October 20, 1988

MEMORANDUM FOR: William C. Parier  
General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - SECY-88-269  
PROMULGATION OF WITNESS/LAWYER  
SEQUESTRATION RULE FOR OI INVESTIGATIONS

This is to inform you that the Commission, with all commissioners agreeing, has approved publication in the Federal Register of the subject proposed rule, as modified by Commissioners Roberts and Carr (attached). Accordingly, please provide the Federal Register for signature and publication.

(OGC) (SECY Suspense: 11/7/88)

Attachment:  
As stated

cc: Chairman Zech  
Commissioner Roberts  
Commissioner Carr  
Commissioner Rogers

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NUCLEAR REGULATORY COMMISSION  
10 CFR Part 19

Sequestration of Witnesses Interviewed Under Subpoena

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations to provide that all persons compelled to appear before NRC representatives (and their counsel, if any) under subpoena in connection with an agency investigation shall, unless otherwise authorized by the NRC official conducting the investigation, be sequestered from other interviewees in the same investigation.

DATES: Comment period expires 60 days after publication. Comments received after this expiration date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before that date.

ADDRESSES: Interested persons are invited to submit written comments and suggestions on the proposed amendment to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of comments received by the Commission may be examined and copied for a fee in the Commission's Public Document Room located at 2120 L Street, N.W., Washington, D.C.

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FOR FURTHER INFORMATION: Carolyn F. Evans, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone: (301) 492-1632.

SUPPLEMENTARY INFORMATION: The Commission is aware of the confusion that has arisen regarding who can attend investigative interviews of individuals which are conducted by NRC inspectors or investigators. See, eg., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-82-34B, 15 NRC 918, 990-93 (1982) (discusses the question of whether an interviewee may have a representative of company management present during investi-

gative interview). As a general matter, a no person has a right to be accompanied by counsel or any other individual the-person desires during a voluntary interview, by NRC representatives. The investigator may either accept the person's condition for submitting to the voluntary interview or decline the interview. Id. However, absent a subpoena, no person is required to submit to an NRC interview. Thus, to the extent the existence and scope of one's right to be accompanied by counsel or other representative becomes an issue, it is in the context of an interview compelled by administrative subpoena issued pursuant to 42 U.S.C. • 2201(c). In these cases, Section 6(a) of the Administrative Procedure Act, 5 U.S.C. • 555(b), provides that the interviewee is entitled "to be accompanied, represented, and advised by counsel...u or, if permitted by the agency, other qualified representative."

Questions concerning the scope of an interviewee's right to be accompanied by counsel or others, born out of the absence of clear Commission policy on the issue and the lack of clearly developed judicial guidelines, have been raised in essentially three ways. First, in several

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instances, an interviewee's employer has sought to arrange for a management representative to attend NRC interviews of its employees.

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to ensure the public health and safety, the Commission believes it

appropriate to announce general guidance to be followed in this area.

The Commission believes as a matter of policy that investigative interviews should be conducted in an atmosphere free of outside influences.

The Commission is aware that management has a legitimate interest in NRC inspections and investigations in order to detect and correct any violations of NRC regulations. Moreover, since the policy of the Commission is to hold the licensee or applicant liable for the acts and omissions of its employees and contractors, the licensee or applicant normally has a corporate and/or financial interest in the outcome of the investigation. Nevertheless, the Commission believes that the purpose of its inspections and investigations (to protect the public health and safety by identifying unsafe practices and violations of Commission regulations and the Atomic Energy Act), and its interest in ensuring the integrity of the agency's factual findings and regulatory conclusions from such efforts would be better served by excluding all persons from the interview except for the interviewee's counsel.

In cases where dual representation is an issue, the Commission believes that exclusion of the particular counsel chosen by or for the interviewee might be warranted. Where the person being interviewed chooses to be represented by counsel for the licensee or applicant, an inherent potential for a conflict of interest and impairment of the NRC's investigation exists. The Commission recognizes, however, that the attorney can ethically represent multiple clients if he or she fully discloses the potential conflict to the clients and they individually assent to the multiple representation. Such disclosure between counsel

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and client does not always eliminate or reduce the inherent potential that the multiple representation could impair or impede the Commission's investigation. Dual representation of both the interviewee and the licensee or applicant could permit the subject of the investigation to learn throu

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counsel, the direction and scope of the investigation. The subject could then take steps to structure the flow of information to the NRC or otherwise impede the investigation. Indeed, in three recent cases where the company offered its own attorney to potential witnesses, the attorney stated prior to any interview that he would relate to the company all that took place in the interview. This produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer. Moreover, should the agency official conducting the investigation determine that an offer of confidentiality to an interviewee is warranted, the purpose for confidentiality could be undermined simply by the presence of counsel who represents other interviewees or the subject of the investigation.

For these reasons, the Commission believes that such dual representation could prove detrimental to NRC investigations. Accordingly, the proposed rule provides that where the agency official conducting the investigation determines after consultation with the Office of the General Counsel that there is a reasonable basis to believe

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that the attendance of a particular attorney might prejudice, impair or impair the investigation by reason of that attorney's dual representation of other interests, the particular attorney may be excluded from the interview. The rule further provides that where an interviewee's counsel is excluded and the interviewee is not given reasonable prior notice of an intent to exclude counsel, the interview may be delayed at the interviewee's option for a reasonable period to permit the retention of other counsel. The "reasonable prior notice" standard contemplates affording the witness

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sufficient time in advance of his/her interview to retain new counsel, e.g., one week. The Commission believes that the interest in ensuring the health and safety of the public through vigorous probing of possible regulatory

violations justifies the somewhat minor burden on an individual's right to be accompanied by a particular counsel.

Several district courts have upheld an agency's power to exclude a witness' attorney from an investigative interview where that attorney also represented the person under investigation. See *United States v. Steel*, 238 F. Supp. 575 (S.D.N.Y. 1965); *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). One circuit court considering this issue however, reversed a district court decision that held the Internal Revenue Service could deny a third party witness the right to be accompanied by counsel for the taxpayer under investigation. *Backer v. Commissioners of Internal Revenue*, 275 F.2d 141 (5th Cir. 1960). That court, however, which indicated that a witness has a right to the counsel of his choice, did not decide whether that right could be limited or otherwise qualified

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pursuant to formal rule-making procedures. Two other circuit court decisions involving the Securities and Exchange Commission's sequestration rule, have also indicated that the terminology of 5 U.S.C. • 555(a) means counsel of one's choice. *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976); *SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966). Both of those courts, however, indicated that there could be circumstances where an attorney could be barred from the interview, although it could not be done under the facts of those cases.

With this guidance in mind, the Commission realizes that no absolute

criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee or applicant or other organizations under investigation. The Commission believes however, that dual representation of interviewees and licensees should be prevented wherever possible. Thus, under these circumstances, an appropriate rule would grant the NRC office conducting the interview the discretion to determine whether the attorney should be allowed to attend the interview. The factors to consider in favor of exclusion include: (1) whether the company under investigation suggested that the witness employ the particular counsel and is paying the fee; (2) whether there might be a divergence of interest between the witness and the company unknown to the witness such that the witness might not want the attorney to be present if he were aware of the divergency of interest; (3) whether the investigation could be prejudiced if the attorney is allowed to attend the interview, the greater the potential prejudice the greater the case for excluding. The factors to consider in favor of allowing the attorney to be present include: (1) whether there is little

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or no diversity of interest between the witness and the entity being investigated such that an interview of the witness would in effect practically be an interview of the person or company under investigation; (2) whether the nature of the case makes it unreasonable to insist that the witness have separate counsel; and (3) whether there has been any showing of potential prejudice to the investigation by allowing the attorney to be present.

This proposed rule does not contain any information collection requirements under the Paperwork Reduction Act of 1980, Pub. L. 95-51

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REGULATORY FLEXIBILITY ACT CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

For the reasons set out in the preamble and pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of Title 5 of the United States Code, notice is hereby given that adoption of the following amendment to 10 CFR Part 19 is contemplated.

PART 19--NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS;  
INSPECTIONS

1. The authority citation for Part 19 continues to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, Pub. L. 83-703, 68 Stat. 930, 933, 935, 936, 937, 948, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201); sec. 401, Pub. L. 93-438, 88 Stat. 1254 (42 U.S.C. 58910, unless otherwise noted.

2. The Title to Part 19 is revised to read as follows:

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PART 19 -- NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS;  
INSPECTIONS AND INVESTIGATIONS

Section 19.1 is revised to read as follows: • 19.1 Purpose

The regulations in this part establish requirements for notices, instructions and reports by licensees to individuals participating in licensed activities and options available to such individuals in connection with Commission inspections of licensees to ascertain compliance with the provisions of the Atomic Energy Act of 1954, as amended, Title II of

the Energy Reorganization Act of 1974, and regulations, orders, and licenses thereunder regarding radiological working conditions. The regulations in this part also establish the rights and responsibilities of the Commission and individuals during interviews compelled as part of agency inspections or investigations pursuant to Section 161c of the Atomic Energy Act of 1954, as amended on any matter within the Commission's jurisdiction.

19.2 is revised to read as follows: 19.2 Scope

The regulations in this part apply to all persons who receive, possess, use, or transfer material licensed by the Nuclear Regulatory Commission pursuant to the regulations in Parts 30 through 35, 40, 60, 61, 70 or Part 72 of this chapter, including persons licensed to operate a production or utilization facility pursuant to Part 50 of this chapter and persons licensed to possess power reactor spent fuel in an independent spent fuel storage installation (ISFSI) pursuant to Part 72 of this chapter. The regulations regarding investigative interviews of individuals apply to all investigations within the jurisdiction of the

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Nuclear Regulatory Commission other than those involving NRC employees or NRC contractors.

• 19.3 Definitions

A new paragraph (f) is added to read as follows:

(f) "Sequestration" means the separation of multiple witnesses from each other during the conduct of investigative interviews, and the exclusion of counsel who (a) represents one witness from the interviews of other witnesses or who, (b) represents the employing entity of the witness or management personnel from the interview of that witness, when such representation obstructs, impairs, or impedes an agency

investigation.

3. A new paragraph -- is added to read as follows:

Sequestration of Witnesses and Counsel.

As used in this part:

(a) Any person compelled to appear in person at an interview during a  
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agency investigation may be accompanied, represented and advised by  
counsel of his or her choice; provided, however, that all witnesses sh  
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be sequestered, and unless permitted in the discretion of the official  
conducting the investigation, no witness or counsel accompanying the  
witness (including counsel who also represents the person or employing  
entity that is the subject of the investigation) shall be permitted to  
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present during the examination of any other witness called in such  
proceeding.

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(b) When the agency official conduct ing the investigation determine  
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after consultation with the Office of the General Counsel , that a  
reasonable basis exists to believe that the investigation may be  
obstructed, impeded or impaired, either directly or indirectly, by an  
attorney's representation of more than one witness or by an attorney I  
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representation of a witness and the employing entity of the witness, t  
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agency official may prohibit that attorney from being present during t  
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interview of any witness other than the witness on whose behalf counse  
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first appeared in the investigatory proceeding. To the extent  
practicable and consistent with the integrity of the investigation, th  
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attorney will be advised of the reasons supporting the decision to  
prohibit his or her representation of more than one interviewee during  
the investigation.

(c) Where a person's counsel is excluded pursuant to subsection (b)  
above from his or her interview and the person is not provided reasona  
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prior notice of an intent to exclude counsel, the interview shall, at the person's request, be delayed for a reasonable period of time to permit the retention of new counsel.

Dated at Rockville, Maryland this    day of    1988.  
For the Nuclear Regulatory Commission

SAMUEL J. CHILK  
Secretary of the Commission