



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

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June 20, 1980

OFFICE OF THE  
SECRETARY

MEMORANDUM FOR: ✓ William J. Dircks, Acting 110  
FROM: Samuel J. Chilk, Secretary  
SUBJECT: SECY-80-212 - PUBLICATION OF FINAL RULE, AMENDMENT TO  
10 CFR 2.732 ON BURDEN OF PROOF (CONSENT CALENDAR ITEM)

This is to advise you that the Commission (with four Commissioners concurring) has disapproved the staff's recommendation in the subject paper. Commissioner Kennedy approved the staff's recommendation, and noted:

"The action taken by the majority in disapproving the proposed rule change set forth in the subject paper reflects a continuing and unfortunate insensitivity on the part of this Commission to the rights of those who have been granted construction permits or operating licenses. The applicant in either case most certainly bears the responsibility for establishing that all applicable requirements have been satisfied prior to issuance of a construction permit or operating license. But once this Commission decides that the applicant has carried its burden in this respect, it is simply unconscionable, if not illegal, to subject the licensee to the interminable task of responding to staff-initiated enforcement actions by establishing the absence of permit violations. This is a burden which properly belongs to the staff, with its extensive data-gathering capability, not the licensee. Indeed, it is precisely this sort of approach to enforcement which diverts the time and resources of licensees from those tasks most central to maintenance of a high level of safety and instead leads to a result precisely the opposite of that intended."

cc:  
Chairman Ahearne  
Commissioner Gilinsky  
Commissioner Kennedy  
Commissioner Hendrie  
Commissioner Bradford  
Commission Staff Offices  
Chairman, ASLAP  
Executive Legal Director

CONTACT  
SJSParry (SECY)  
4-1410

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ENCLOSURE B

NUCLEAR REGULATORY COMMISSION

[10 CFR Part 2]

Burden of Proof in Enforcement Proceedings

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Withdrawal of Proposed Rulemaking.

SUMMARY: The Nuclear Regulatory Commission is withdrawing a notice of proposed rulemaking that would have provided that the proponent of an order in Commission enforcement proceedings has the burden of proof, including the burden of going forward with the evidence and the ultimate burden of persuasion.

EFFECTIVE DATE: (The date of publication in the Federal Register.)

FOR FURTHER INFORMATION CONTACT: Bruce A. Berson, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: (301) 492-7678.

SUPPLEMENTARY INFORMATION: On July 21, 1977, the Nuclear Regulatory Commission (Commission) published in the Federal Register (42 FR 37406) a proposed amendment to its regulations, 10 CFR Part 2 - "Rules of Practice for Domestic Licensing Proceedings," regarding the burden of proof in Commission adjudications. Under the proposed amendment to 10 CFR § 2.732 the proponent of an

ENCLOSURE C

order to amend, suspend, or revoke a license or to impose a civil penalty in an enforcement proceeding against a licensee would have both the burden of going forward with evidence (producing enough evidence to make a case) and the ultimate burden of persuasion (the need to establish the validity of a contention, or overcome opposing evidence), unless otherwise ordered by the presiding officer in a given case.<sup>1/</sup>

Thirteen letters of comment were received on the proposed rule. Ten commenters favored the proposed rule change without reservation, one commenter generally favored the proposed rule, one commenter objected to shifting the ultimate burden of persuasion from the licensee to the proponent of an order and one commenter addressed a matter beyond the scope of the proposed rule.

After careful consideration of the proposed rule change and the letters of comment, the Commission has decided that the holding of the Appeal Board in the Consumers Power Company case should not be modified by Commission rule. Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), and relevant judicial interpretations of the APA require that, except as otherwise provided by statute, the proponent of an order has the burden of going forward with evidence. See Environmental Defense Fund v. EPA, 548 F.2d 998 (D.C. Cir. 1977). However, the proposed rule would have gone beyond

<sup>1/</sup> The proposed rule would have had the effect of reversing the decision of the Commission's Atomic Safety and Licensing Appeal Board in Consumers Power Company (Midland Plant, Unit Nos. 1 and 2), ALAB-283, 2 NRC 11 (1975), ALAB-315, 3 NRC 101 (1976). That decision held that the holder of a construction permit has the ultimate burden of persuasion in a Commission enforcement proceeding seeking revocation, suspension or modification of the permit.

the requirements of the APA and generally required the proponent of an order in enforcement proceedings (usually the NRC staff) to also carry the ultimate burden of persuasion. Having determined that the proposed rule change to 10 CFR § 2.732 is unwarranted, the Commission hereby withdraws the July 21, 1977 notice of proposed rulemaking on the burden of proof in enforcement proceedings and terminates this proceeding.

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk  
Secretary of the Commission

Dated at Washington, D.C.  
this      day of      , 1981.