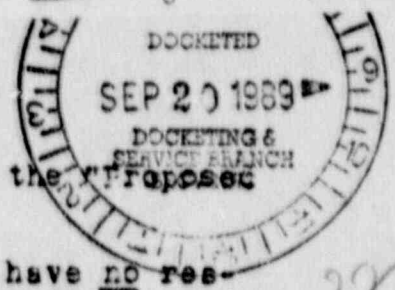
DOCKET NUMBER
PROPOSED RULE PR 30 40 50 60,70, AD21-2 (public)
(54FR 30049 6.
Corder to Breaux, 9/14/89 1st att



My specific comments to the NRC requests on the "Proposed Rule" Issues 1 and 2 are:

ISSUE NO.1 The "Proposed Rule" should have no restrictions on individuals providing any information to the Commission. As long as there are any restrictions and individuals can or can not be confused/aware of 'other avenues' the Commission is going to be manipulated by Commission Licensees, license applicants, and their contractors or subcontractors. Any Commission adjudicatory board that finds it's self confronted by the nuclear industry management resorces, is going to continue to be concerned about subpoena(s) maneuvers/strategy, unles the "Rule" applies to all equally.

ISSUE NO.2 The answer to issue no. 2 is:: yes; impose an (the) additional requirements. By now the NRC does not need to ask that question - it needs to get involved in all regulation numbered parts.

My Comments in General on the "Proposed Rule" are:

GENERAL COMMENT NO. 1 If the NRC really wants to prevent a "chilling effect on communications about nuclear safety matters", then have the Commission licensees and license applicants and their contractors or subcontractors impose full and candid disclosure to each employee the Rule of Preserving the Free Flow of Information to the Commission in a manditory training program - with both instructors and employees signing for verification of the understanding of the "Rule". This 'ol NRC "Commission license shall assure ..... and bla bla" is no longer functional. The NRC has to began to utilize both the industry management and worker resources, and get out there and 'check it out'.

General Comment No. 2 The NRC needs to get away from it's "any avenues of Access to the NRC". What is wrong with just the plain up-front truth - everyone is really responsible for the safety of the plant - that is the RULE. The problem is not that just some whistleblower cares about plant safety/cost, and pays a dear price for a courage that C E C's lack - its the fact that nuclear plants can remain unsafe and all employees can not suffer the same price because of retalliation

Rt. 4, Box 4158
Brazoria, Texas
(409) 798-7293

8909290282 1pp

General Comment No. 3 I have worked under the AEC and NRC Rules and now it is time to reorganize. Why? The NRC just is not getting the safety assurance job done. We in the field think the NRC is a joke. How many whistleblowers, 3-mi. Islands and nuclear defense plants mismanagement/errors does it take to realize that the NRC has to go? Anyone want to hear of my NRC experiences? The NRC has so many sore spots that more band aids will not help any lame duck.

General Comment No. 4 When the NRC is reorganized, let OSHA be a viable safety and functional part of the regulatory Program. OSHA is sitting on the sideline with the experience and we need their fresh troops. As it is now, OSHA has to be invited on to the project. Guess how many requests OSHA has received for assistance last year? How about the last five (5) years? The public deserves better. The workers do too.

General Comment No. 5 The (new) NRC should seek public involvement in the nuclear plants. All the answers are fifteen (15) to twenty (20) years old now. What about the new generation of nuclear power plants - any questions? After all, isn't the name of the industry "Public Utility"? I have a bunch of good questions.

General Comment No. 6 I believe that the NRC has determined that a Backfit Analysis would expose too much. Would they find out that the agency has not been listening to the worker's whistles? Would the Chairman find out that more staff was needed years ago, or is the "if you (utilities) do good we do good" still a cop-out? Would it mean that hundreds of workers deserve compensation, restoration of pride and a chance to build America the Great, again? I say Backfit.

In conclusion, I pray with all my heart that truth, safety and employment shall not be jeopardized by:

FRIENDS IN HIGH PLACES

EMINENT POSITION STATUS

INVESTMENT/PROFIT PRIORITIES

May God bless you for seeking the truth.

Respectfully submitted,

John A. Corder

Distb: Att.

September 14, 1989
Rt. 4, Box 4158
Brazoria, Texas 77422
(409) 798-7293

S. Duly
B. Jones
It seems to me that this should be handled as a comment on the proposed rule
WDA 9/19

The Honorable John Breaux
Chairman, Subcommittee on Nuclear Regulation
Committee on Enviornment and Public Works
United States Senate
Washington, D.C. 20510

RE: CORDER vs. BECHTEL, DOL CASE No. 88-ERA-9 - NRC "Proposed Rule"; Preserving the Free Flow of Information to the United States Nuclear Regulatory Commission

Dear Senator Breaux:

I humbly pray for your attention and response to my comments on the NRC "Proposed Rule" of Preserving the Free Flow of Information to the Commission, as identified in the Federal Register, Vol. 54., No. 136, dated Tuesday, 7/18/89.

It is with integrity and sincerity that I submitt my comments, and as I submitt my comments, I pray that I shall not be found at financial risk due to the Secret Agreement that my employer, BECHTEL, obtained from the U.S. Department Administrative Law Judge in my Whistleblower case. But firstly, the following is a summary of the true experiencies that I have endured as I have tried to correct errors at the South Texas Nuclear Plant (STNP):

Alden Yates, Presicent of the Bechtel Group of Companies, excused himself and sent me to the Client, concerning plant errors

Leo Davis, Bechtel Bito Construction Manager, excused himself and sent me to Jim Hurley concocerning plant errors

Jim Hurley, Bechtel Site Engineering Manager, excused himself and went home, and later excused himself from site inspections with me by reporting to the Project Engineering Manager concerding plant errors we listed

Adrian Zaccaria, Bechtel Project Manager, excused himself from going with me to inspect the plant errors, after reviewing the facts with Hurley and myself

OGC
9/18...To ~~EDO~~ for Appropriate Action....Cpys to: RF...89-1019

Leo Davis, Bechtel Site Construction Manager, excused himself from making inspections with me and turned the findings of plant errors, by Hurley, O'Hair and myself, over to the Houston Lighting & Power Quality Assurance Manager and by direction prohibited me from inspecting the plant further

Donald D. Driskill, Director Office of Investigations Field Office; NRC- Region IV, excused himself from making inspections with me on the plant errors, but sent Dan Carpenter and Terrance Reese, Site NRC Operations personnel, to investigate the errors with me

Dan Carpenter and Terrance Reese, NRC Site Operations, excused themselves to get back to their regular duties, and to call Region IV about the errors found after a short period in the plant with me, but made arrangements to meet on another inspection trip

Dan Carpenter and Terrance Reese, NRC Site Operations, excused themselves to inspect the plant errors on the planned inspection trip; which was to follow up the first inspection trip, because they stated that they were too busy with their own work, but Dan Carpenter contacted George L. "Les" Constable, Chief, Reactor Project Section C, Region IV, by telephone at that time instead of inspecting - I talked to Mr. Constable

George Constable, NRC - Region IV, Chief, excused himself from coming to the site and making an inspection that Dan and Terrance would not make, because he was short of manpower and that he was too busy himself, But he was to keep in touch - He did not

George Constable, NRC - Region IV, Chief, <u>one year later</u> excused himself from not having made investivative inspections and subsiquent contact with me concerning the plant erros because Donald D. Driskill, NRC - Director of Investgations, had <u>not</u> started his investigation on my complaints. It was through my senator, The Honorable Lloyd Bentsen and my attorney, Billie P. Garde, of the Government Accountability Project, that Mr. Counstable and Mr. Driskill was forced to meet with me and report to me of their non-existant investigation of my findings that I had reported to the NRC a year earlier. Attorney Garde made arrangements with NRC, Washington, to get Driskill to report to me, and to

have Constable there for the report on his technical review of my findings. It's three (3) years now and I have never heard from them since

Meanwhile, still in 1988, Jim Calliger and his assistant, Doug, of the Houston Lighting and Power SAFETEAM inspectors, excused themselves after two (2) inspection trips with me because they stated that I was taking up all their time writing and photographing the errors that I was identifying to them, and that they had to get to others who were finding errors

Having been terminated since I reported my concerns to Alden Yates, President of the Bechtel Group of Companies, I contacted Chuck Halligan, Bechtel Vice President, who had oversite of the Houston Office and STNP for Bechtel, and he excused himself from going on an inspection trip with me after I got him to promise to go with me. He said he had to meet with the client and had no time to investigate

On my last day of employment, both HL&P and the NRC wanted me to make inspection trips with them. It takes four (4) hours of paper work and then quite a while of manual checkout time to get terminated with Bechtel, but I went with each group seperately and tried to point out very detailed errors and have them list the findings as they grumbled that that they had to go with me - they said it was a procedural exersize

After being terminated by Bechtel, Chuck Halligan, Bechtel Vice President, called me at home and wanted me to make a tour with him. I gladly agreed. I was at the jobsite early. It was about mid-morning when the vice president showed up. He had invited the Bechtel Project Manager, Adrin Zaccaria, and Engineering Manager, Mr. Hess to go with us.

I was instructed to conduct the tour with the Bechtel Executives and within a short period of time after the inspection began the Vice President, Project Manager and Engineering Manager excused themselves to go to a meeting and declairing they had seen enough - they dismissed me, but I pleaded for the errors to be recorded and I asked for someone to continue with me to inspect my findings. I was assigned Ernie Raumbaugh.

Ernie Raumbaugh, Bechtel Chief Retrofit Engineer, went with me into the plant and within an hour Mr. Raumbaugh excused himself to catch a chopper to return to Houston, Texas. He never took any notes on the trip with me. He left.

There I was; unemployed, unescorted and errors to discuss.

What did I do? I continued to inspect and write up errors alone as I went freely through out the units. No one really cared.

Mr. Gilisppi, HL&P SAFETEAM Manager excused himself from informing me of the status of correction of the errors that were written up with his inspectors and myself because he had turned his listings over to HL&P.

Mr. Don Jordan, Chairman of the HL&P Company, excused himself from going with me to the site to inspect the errors be cause he listened to the site engineers

Mr. Ed Molnar, Bechtel Construction Manager for Bechtel Energy, wished me a Merry Christmas, but excused himself from responding to my letter when I offered to correct the plant errors

Mr. Steve Bechtel, Jr., Chaiman of the Board and Owner, did not even respond to his veteran (27 yrs.) employee's concern about the plant errors when I wrote to him.

Jim Boyle was head of the Texas Office of Public Utility Counsel in Austin, Texas, so I went to see him, but he excused himself because the Govenor, Bill Clements, had let him go - it was his last day

Godffery (Jeff) Gay was to act as the Head Counsel, so I discussed the plant errors with him. Mr Gay excused himself as not being able to respond to my concerns, but he introduced me to two (2) organizations which are interested in people who are concerned about nuclear plant safety and the people who report errors. One of the organizations was the Government Accountability Project

Peggy Rosson, Chairman of the Texas Utility Commission, said that she would meet me, but she sent a lawyer out to tell me that she would not listen to my concerns or discuss the errors I had found, so she excused herself when I tried to drop a few facts

Waldon A. Boecker, Public Utility Commission Manager - Power Plant Engineering, let me discuss some of the electrical problems with him, but he excused himself from being able to get on the project; without a

written invitation from HL&P, so I could not show him any errors at the plant

Mr. Mike Hunter, U.S. Department of Labor - OSHA, filed on Mr. Jerry Goldburg, Vice President - Nuclear, with HL&P, about my concerns at the plant, but Mr. Hunter excused himself for not being able to assist me because the NRC took the filed claim from him

Mr. Cooke, Mayor of Austin, Texas, met with me, but excused himself from hearing any specifics of the errors at the STNP, because he was trying to get HL&P to buy the City's share of the nuclear plant back

I sent letters to the Attorney General, Edwin Meese, of the U.S. Justice Department and to the Attorney General, Jim Maddox, of the Texas Attorney General's Office, but they excused themselves from answering my pleas for help

Mr. Calvo, NRC - Washington, D.C., met me at the site for me to identify ten (10) deficencies (errors) we had discussed on the telephone with Attorney Billie Garde, but when we met at the site of the South Texas Nuclear Project, he excused himself from being <u>able</u> to let me in the unit where I knew of the errors because, even as the number one NRC Manager of the investigation of about six hundred (600) Whistleblower's items of concern, he was given orders to not let Corder in the Number 1 Unit, but even so, I discovered fourteen (14) errors/violations in a fourty-five (45) minute inspection trip into Unit No. 2. I wrote the unsafe errors/violations up and sent the report to the U.S. Department of Labor and the NRC. I was instructed by Mr. Calvo to show him about one (1) reported deficiency/error pertaining to fasteners - I walked up to the electrical equipment and put my finger on the problem (area of) his inquary. I was told not to look for the other nine (9) agreed upon errors - even in Unit 2. The Utility must have more athority than the NRC

These are only a few of the problems I have experienced ----- do you know of anyone who wants to hear them all? Further, just days before the Bechtel "Secret Agreement" was sealed by the Department of Labor Administrative Law Judge, I was on an inspection trip at the South Texas Nuclear Project (STNP) jobsite and observed even more safety concerns, but I am compeled by the DOL "Secret Agreement" ruling to be silent.

My specific comments to the NRC requests on the "Proposed Rule" Issues 1 and 2 are:

ISSUE NO.1 The "Proposed Rule" should have no restrictions on individuals providing any information to the Commission. As long as there are any restrictions and individuals can or can not be confused/aware of 'other avenues' the Commission is going to be manipulated by Commission Licensees, license applicants, and their contractors or subcontractors. Any Commission adjudicatory board that finds it's self confronted by the nuclear industry management resorces, is going to continue to be concerned about subpoena(s) maneuvers/strategy, unles the "Rule" applies to all equally.

ISSUE NO.2 The answer to issue no. 2 is:: yes; impose an (the) additional requirements. By now the NRC does not need to ask that question - it needs to get involved in all regulation numbered parts.

My Comments in General on the "Proposed Rule" are:

GENERAL COMMENT NO. 1 If the NRC really wants to prevent a "chilling effect on communications about nuclear safety matters", then have the Commission licensees and license applicants and their contractors or subcontractors impose full and candid disclosure to each employee the Rule of Preserving the Free Flow of Information to the Commission in a manditory training program - with both instructors and employees signing for verification of the understanding of the "Rule". This 'ol NRC "Commission license shall assure ..... and bla bla" is no longer functional. The NRC has to began to utilize both the industry management and worker resourses, and get out there and 'check it out'.

General Comment No. 2 The NRC needs to get away from it's "any avenues of Access to the NRC". What is wrong with just the plain up-front truth - everyone is really responsible for the safety of the plant - that is the RULE. The problem is not that just some whistleblower cares about plant safety/cost, and pays a dear price for a courage that C E C's lack - its the fact that nuclear plants can remain unsafe and all employees can not suffer the same price because of retalliation

General Comment No. 3 I have worked under the AEC and NRC Rules and now it is time to reorganize. Why? The NRC just is not getting the safety assurance job done. We in the field think the NRC is a joke. How many whistleblowers, 3-mi. Islands and nuclear defense plants mismanagement/errors does it take to realize that the NRC has to go? Anyone want to hear of my NRC experiences? The NRC has so many sore spots that more band aids will not help any lame duck.

General Comment No. 4 When the NRC is reorganized, let OSHA be a viable safety and functional part of the regulatory Program. OSHA is sitting on the sideline with the experience and we need their fresh troops. As it is now, OSHA has to be invited on to the project. Guess how many requests OSHA has received for assistance last year? How about the last five (5) years? The public deserves better. The workers do too.

General Comment No. 5 The (new) NRC should seek public involvement in the nuclear plants. All the answers are fifteen (15) to twenty (20) years old now. What about the new generation of nuclear power plants - any questions? After all, isn't the name of the industry "Public Utility"? I have a bunch of good questions.

General Comment No. 6 I believe that the NRC has determined that a Backfit Analysis would expose too much. Would they find out that the agency has not been listening to the worker's whistles? Would the Chairman find out that more staff was needed years ago, or is the "if you (utilities) do good we do good" still a cop-out? Would it mean that hundreds of workers deserve compensation, restoration of pride and a chance to build America the Great, again? I say Backfit.

In conclusion, I pray with all my heart that truth, safety and employment shall not be jeopardized by:

FRIENDS IN HIGH PLACES

EMINENT POSITION STATUS

INVESTMENT/PROFIT PRIORITIES

May God bless you for seeking the truth.

Respectfully submitted,

John A. Corder

Distb: Att.

Corder to Breaux, 9/14/89

Distribution:

FEDERAL EXPRESS:

The Honorable John Breaux

Secretary, U.S. Nuclear Regulatory Commission

Billie P. Garde, Esq.

First Class U.S. Mail:

The Honorable Lloyd Bentsen

The Honorable Elezabeth Dole

DOCKET NUMBER
PROPOSED RULE PR 30, 40, 50, 60, (54FR30049)

AD21-2 (public)

(28)

LAW OFFICES
CONNER & WETTERHAHN, P.C.
1747 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

TROY B. CONNER, JR.
MARK J. WETTERHAHN
ROBERT M. RADER
NILS N. NICHOLS
BERNHARD G. BECHHOEFER
OF COUNSEL

(202) 833-3500

CABLE ADDRESS: ATOMLAW

DOCKETED USNRC

'89 SEP 20 P2:19

33

September 18, 1989

Samuel J. Chilk, Secretary
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Proposed Amendment to 10 C.F.R. §50.7, etc.
Regarding Conditions in Settlement Agreements,
54 Fed. Reg. 30049 (July 18, 1989)

Dear Mr. Chilk:

The Nuclear Regulatory Commission ("Commission" or "NRC") has requested comments on a proposed revision to its rules which would require, inter alia, reactor licensees and applicants to assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement to settle an employee's complaint under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851, any provision which would prohibit, restrict or otherwise discourage the employee from voluntarily providing to the NRC information about possible violations of law, NRC regulations, orders and licenses. See 54 Fed. Reg. 30049 (July 18, 1989).

On behalf of itself and its clients, the firm of Conner & Wetterhahn, P.C. recommends that the Commission not adopt the proposed revision for the reasons discussed below. As a practical matter, the proposed revision mainly affects reactor licensees under revised 10 C.F.R. §50.7(f) and our comments bear upon that impact.

From a broader perspective, the proposed amendment must be viewed as part of the Commission's increased efforts to exercise indirect authority over nuclear power plant contractors by imposing new requirements on licensees and levying civil penalties against licensees. In our opinion, this is an unwarranted extension of authority. Section 210 puts contractors and licensees on an equal footing. Licensees and contractors alike are prohibited from acts of discrimination on account of an employee's having engaged in

~~8909290156~~ 6pp

protected activity. Both are liable to the employee for damages and other relief before the Secretary of Labor.

Although licensees and contractors are on an equal footing before the Secretary, neither Section 210 nor the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 et seq. gives the NRC jurisdiction over the employment actions of contractors as such. Nor does either statute make licensees vicariously liable for the wrongful employment decisions of their contractors. Nothing in the text of the Act, its legislative history or interpretation by any court suggests that a licensee may be held accountable for acts of discrimination by its contractor. Yet, this is the present Staff enforcement policy and the unmistakeable direction of Section 50.7.1/ There is simply no statutory authority for this extension of NRC enforcement policy.

If the Commission believes that discrimination by contractors is a safety problem, it should ask Congress for authority under the Atomic Energy Act to regulate their onsite employment activities directly rather than indirectly through licensees. Unlike a licensee's well-known, non-delegable responsibility for the contractor's work on the plant site under quality assurance requirements,2/ a contractor's employment decisions are its own. Section 210

1/ The NRC Staff has, especially in the last few years, attempted to regulate contractors indirectly by enforcement actions against licensees. Without any stated justification, the NRC Staff has flatly stated that its licensees "will be held responsible in enforcement actions for the discriminatory actions of its contractors." NRC Enforcement Guidelines Manual, 88-01 at 2 n.1 (February 10, 1988).

2/ Under NRC regulations, a licensee "may delegate to others, such as contractors, agents or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility therefor." 10 C.F.R. Part 50, App. B(I). There is a vast difference between holding a licensee accountable for a contractor's work, which the licensee can supervise and inspect under its Quality Assurance Program, and holding a licensee accountable for the subjective mental processes of contractors who are illegally motivated against their own employees.

places responsibility for compliance squarely on the shoulders of licensees and contractors alike. We are unaware of any court decision or NRC adjudication which has reached any contrary interpretation of the law.

Even if the proposed amendment did not suffer from this vice of overextension, its adoption has not been justified. The prohibition against discrimination by licensee or contractor employers against their employees under Section 210 has, of course, existed for some 15 years. Literally hundreds of cases filed with the Department of Labor have been settled since that time, thus avoiding the need for hearings before the Secretary of Labor and investigation by the NRC. As the Commission notes in its explanation of the proposed rule, such voluntary resolution should be encouraged.

The proposed rule, however, would make resolution more difficult. First, the revised rule would require contractors to submit private settlements with their own employees to licensees or applicants for review. Although the licensee would presumably review the proposed settlement for one limited purpose, in practice the scope of the review would become blurred. It would only be a matter of time before licensees, at the urging or insistence of NRC enforcement Staff, became involved in the substance of such settlements. And it is only natural that the contractor would be apprehensive about involving the licensee's management and lawyers in drafting an agreement binding on the contractor alone. Further, the requirement for licensee review will delay settlement at the most crucial time - when the momentum to settle is strong.

Second, the proposed rule is so broad ("any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations . . .") as to create problems of interpretation. For example, if the employee voluntarily agrees to forego reinstatement as a quid pro quo for a lump sum back pay award, does the agreement illegally "restrict" or "discourage" the providing of further information the employee might have transmitted had he remained on the job?

If there had been a history of abusive practices by licensees or contractors in settling Section 210 discrimination cases, the Commission's proposal would be understandable. From the background information given, however, it appears that the proposed rule responds to a single settlement in a Section 210 case involving Comanche Peak.

Yet, according to the Commission's own reading of that agreement, it did in fact "allow the individual involved to bring any safety concerns he has directly to the NRC, either on his own behalf or on the behalf of organizations not referenced in the agreement, and to respond to an administrative subpoena if that subpoena is not quashed by the issuing officer."3/

The Commission further stated that the agreement in Comanche Peak "only restricts the individual's right to appear voluntarily as a witness or a party in certain NRC proceedings (and then only on behalf of the organizations and individuals listed in the agreement) and obligates the individual to take 'reasonable' steps to resist a subpoena in such proceedings."4/ On this basis, the Commission flatly stated: "As long as the individual's right to bring matters to the NRC in a reasonably convenient manner is not curtailed, we do not see a violation of federal law or NRC regulation."5/ Accordingly, the "problem" contemplated by the proposed rule has not been shown to exist even in the single case cited.

It should also be borne in mind that the Secretary of Labor has authority to approve or disapprove settlement agreements in Section 210 hearings. The Secretary has stated his commitment to construe Section 210, like similar employee protection statutes, so as to promote safety as well as the reporting of safety violations, "the ultimate goal of the Act."6/ In a recent order dated July 18, 1989, as evidence of that commitment, the Secretary of Labor

---

3/ Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 612 (1988).

4/ Id. (emphasis in original).

5/ Id. at 612-613. Because a proposed NRC intervenor challenged the validity of this agreement in a separate Department of Labor proceeding, the Commission later clarified that it was not making any definitive statement of the agreement's "acceptability or legality." Comanche Peak, CLI-89-6, 29 NRC 348, 355 (1989).

6/ Mackowiack v. University Nuclear Systems, Inc., Case No. 82-ERA-8 (April 29, 1983) (slip op. at 10).

rejected as against public policy, part of a settlement agreement which prohibited the complainant from providing information or assisting or cooperating with the Department of Labor or other agencies.7/ Thus, the Secretary would be receptive to the NRC's position, as communicated in the past.8/

We concur in the views of Commissioner Roberts that the proposed rule imposes broad, unnecessary restrictions on employers' options in negotiating settlement agreements and constitutes governmental interference in the contractual relations between licensees and their contractors. Years of experience demonstrate no need for such intrusive provisions. Requiring contractors to report each Section 210 claim to the licensee and requiring the licensee to become immersed in the settling of such claims will only inhibit voluntary resolution of those cases and impose yet further regulatory burdens -- another tier of legal review and recordkeeping -- upon licensees.

Moreover, the Commission has already dealt with any concern supposedly redressed by the proposed rule. By letter dated April 27, 1989 from the Executive Director for Operations, the NRC required each licensee to review all settlements by either itself or its contractors to ensure that restrictive clauses have not been included. The NRC instructed licensees to report any restrictive clauses so identified to the NRC no later than July 31, 1989. Given the timing of this rulemaking, we do not know whether any evidence of a real problem has surfaced. But even if the responses to the NRC show a problem, it should be resolved

---

7/ NRC Weekly Information Report (Enclosure A) (August 2, 1989).

8/ Such an inter-agency communication was used, for example, to express the NRC's view that reinstatement ordered by the Secretary in Section 210 cases should not override nuclear plant security clearance procedures imposed by the NRC. See Letter from NRC Chairman Lando W. Zech, Jr. to Secretary of Labor William E. Brock, III (January 20, 1987), re James E. Wells, Jr. v. Kansas Gas & Electric Company, Case No. 85-ERA-0022.

in the simplest way possible by reminding licensees of their responsibility to avoid such provisions and coordinating NRC policy with the Secretary of Labor.

Sincerely,

Robert M. Rader

Robert M. Rader

AD21-2 (public)

YANKEE ATOMIC ELECTRIC COMPANY

DOCKET NUMBER
PROPOSED RULE PR 30 40 50 60 70 72 150
(54 FR 30049)

580 Main Street, Bolton, Massachusetts 01740-1398

(29)

'89 SEP 20 P2:25

September 19, 1989
FYC 89-015
GLA 89-070

34

Mr. Samuel J. Chilk
Secretary
United States Nuclear Regulatory Commission
Washington, DC 20555

Attention: Docketing and Service Branch

Subject: Proposed Rule - Preserving the Free Flow of Information to the Commission

Dear Mr. Chilk:

Yankee Atomic Electric Company (YAEC) appreciates the opportunity to comment on the subject proposed rule. YAEC owns and operates a nuclear power plant in Rowe, Massachusetts. Our Nuclear Services Division also provides engineering and licensing services for other nuclear power plants in the Northeast, including Vermont Yankee, Maine Yankee, and Seabrook.

All Yankee companies stress the importance of 10CFR, Part 21, as part of corporate and plant cultures. Safety is paramount. We agree with the Commission that any agreements which restrict the freedom or even the perceived freedom of an employee or former employee to freely and fully communicate with the Commission on matters regarding nuclear safety matters is entirely incongruous with the objectives of Section 210 of the Energy Reorganization Act and 10CFR, Part 21. We further believe however, 10CFR, Parts 19 and 21, are quite clear in their meaning and an additional rule is therefore unnecessary. A new rule might even cloud an issue that seems eminently clear. The recent Department of Labor ruling invalidating any contract inhibiting full participation and disclosure by employees supports the contention that further rules are not needed. If clarification is deemed necessary then, as in the past, a letter from the Executive Director for Operations could achieve that purpose.

The intended new rule, apparently driven by a single instance of misinterpretation, proposes to place an entire new legal obligation on licensees to police conformance by any and all direct and lower tier subcontractors to their own Part 21 obligations. This is, at best, extremely inefficient and, we feel, a waste of licensee resources. It merely creates another obligation on licensees to enforce NRC regulations.

8909290113 2pp

Finally, the determination that a backfit analysis is not required for this proposed rule appears flawed. This is clearly a change to requirements imposed on licensees. Additionally, there is a significant impact on licensees and certainly no commensurate increase in public protection that justifies the costs involved in vigorously implementing the proposed rule. We urge that this proposed action be reconsidered and rejected.

Sincerely yours,

D W. Edwards

Donald W. Edwards
Director, Industry Affairs

DWE/dhm/0646x

DOCKET NUMBER
PROPOSED RULE PR 30,40,50,60, (54FR30049) AD21-2 (public)

General Electric Company
175 Curtner Avenue, San Jose, CA 95125

September 15, 1989
PWM-89139
MFN 069-89

'89 SEP 22 A11:11

Mr. Samuel J. Chilk
Office of the Secretary
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Subject: Proposed Rule on Preserving the Free Flow of Information to the Commission

Reference: Letter from Victor Stello (NRC) to John F. Welch, Jr. (GE) dated April 27, 1989

Dear Mr. Chilk:

General Electric Nuclear Energy (GENE) has reviewed the proposed changes to 10CFR Parts 30, 40, 50, 60, 70, 72, and 150 which appeared in 54FR136 pages 30049 through 30054. This proposal has a direct bearing on GENE as we function both as a licensee and as a contractor for licensees. While we endorse the free flow of information relating to safety concerns to the NRC we find the scope and wording of the proposal to go far beyond what is needed to achieve the purpose. (See attached comments.) We believe that the scope and content of the recent letter to industry from the Executive Director for Operations (Reference letter) is far more appropriate. We urge the NRC to reconsider this proposed rule in this light.

Should you have any questions about our comments please do not hesitate to contact either me or Mr. Noel Shirley (408-925-1192) of my staff.

Very truly yours,

P.W. Marriott, Manager
Licensing and Consulting Services

cc: L.S. Gifford (GE)

8909290160 3pp

ATTACHMENT

General Electric Nuclear Energy (GENE) fully supports the need and right of any individual to bring nuclear safety concerns to the attention of the NRC. That need must be respected. But it is also clear that provisions currently exist which ensure this. This makes the proposed rule unnecessary. Further, the proposed rule unnecessarily restricts licensees in the conduct of their business and, worse still, requires that they interpose themselves into the conduct of the business of their contractors and subcontractors. This type of regulation would be hopelessly impractical to enforce and does not contribute anything to the goal of safe operation of nuclear power plants. Therefore, it is felt that the proposed rule is inappropriate and should be withdrawn.

The scope of the proposed rule is too broad to be manageable, but there are two major concerns that we have with the proposed rule. The first is that the rule would require inappropriate infringement into the internal workings of a company by a separate third party firm. This is a poor way to utilize the limited resources of a licensee. The second concern is that the proposed rule is not limited to interactions between the licensee and his contractors or subcontractors which are involved in licensed activities. This means that the licensee or applicant would have to deal, for example, with the local car repairman as if he were conducting a licensed activity. This is inappropriate. These concerns will be expanded in our discussion of the two questions that the Commission posed.

Beyond the proposed rule changes, the Commission has requested comments on the following issues:

1. Should the rule prohibit all restrictions on providing information to the Commission, or should limitations on an individual appearing before a Commission adjudicatory board be permissible as long as other avenues for providing information to the Commission be available?

Although whistleblowers must remain free to provide relevant information to the NRC relating to safety concerns, licensees and applicants settling Department of Labor (DOL) charges or reaching agreement with employees in other contexts should be free to seek and obtain whistleblower agreement to do such things as withdraw from further active pursuit of a 2.206 petition.

2. Should the rule impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission?

In response to both the proposed rule and the second additional request for comments, we consider any requirement to provide affirmative statements in every agreement that potentially affects employment to be an unjustified interference with an employer's right to manage its own business and workforce. There is only a minimal basis, i.e., a single reported case, for formalizing any new requirements, even on DOL settlement agreements. There is absolutely no justification for going further and imposing such pervasive interferences in

expanding the restriction to all employee agreements; or requiring licensee notice and settlement approval, regarding any contractor employee charges to the DOL. In short, there is an inadequate regulatory basis in the proposed regulation and no rational basis in sound business practice to require this type of infringement by a third party on the internal workings of another company.

An additional concern is the difference in relationships between large companies, such as utilities, and their contractors and small licensees and small companies who may not be normally engaging in licensed activities. Often, such small firms may tend to deal on the basis of verbal rather than written contracts. The proposed rule does not appear to recognize this approach to business, and it will unduly burden many small contractors. In fact, the imposition of a requirement for a written contract, or for particular contract provisions, for all work performed for, or on behalf of, a licensee may well result in the further erosion of the already limited number of businesses willing to provide services for the nuclear industry.

In summary, it is felt that current regulations adequately assure the free flow of information regarding safety concerns to the NRC. No further regulations are required to ensure this important right and obligation of the individual. The proposed regulation,if promulgated, would have a major negative and unjustified impact on the industry.

DOCKET NUMBER
PROPOSED RULE PR 30,40,50,60,70 22,
(54 FR 30049)

AD21-2 (public)

CP&L

Carolina Power & Light Company

SERIAL: NLS-89-267

SEP 18 1989

'89 SEP 22 A11:11

Mr. Samuel J. Chilk
Secretary
United States Nuclear Regulatory Commission
Washington, DC 20555

ATTENTION: Docketing and Service Branch

COMMENTS ON PROPOSED RULE - PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION
54 FR 30049 (JULY 18, 1989)

Dear Mr. Chilk:

On July 18, 1989 the Nuclear Regulatory Commission (NRC) published in the Federal Register (54 FR 30049) a notice of proposed rulemaking regarding the free flow of information to the Commission. Carolina Power & Light Company (CP&L) hereby submits the following comments on the proposed rule.

The Nuclear Management and Resources Council (NUMARC) has conducted a careful review of the potential effects of the proposed rule and is providing detailed comments on behalf of the nuclear industry. CP&L endorses the NUMARC position. Further, we would like to reiterate a major point addressed in the NUMARC comments. We believe the proposed rule would impose an unreasonable and unworkable burden on licensees to police the labor relations of their contractors and subcontractors. CP&L has a large number of contractors that provide goods and services for CP&L facilities, and those contractors have many more subcontractors. We believe it is unreasonable to expect licensees to assure that every labor and employment agreement entered into by these contractors and subcontractors contains no clauses that may later be deemed restrictive.

CP&L appreciates the opportunity to provide comments regarding the proposed rule. If you have any questions, please contact me at (919) 546-6242 or Mr. Lewis Rowell at (919) 546-2770.

Yours very truly,

L. I. Loflin
Manager
Nuclear Licensing Section

LSR/crs (489CRS)

cc: Mr. R. A. Becker
Mr. W. H. Bradford
Mr. S. D. Ebneter
Mr. L. Garner (NRC - HBR)
Mr. R. Lo
Mr. W. H. Ruland
Mr. E. G. Tourigny

411 Fayetteville Street • P. O. Box 1551 • Raleigh, N. C. 27602

8909290165 1p

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
P.O. BOX 97 ☐ PERRY, OHIO 44081 ☐ TELEPHONE (216) 259-3737 ■ ADDRESS-10 CENTER ROAD
FROM CLEVELAND: 241-1650
Serving The Best Location in the Nation
PERRY NUCLEAR POWER PLANT

Al Kaplan
VICE PRESIDENT
NUCLEAR GROUP

September 18, 1989
PY-CEI/NRR-1064 L

Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Perry Nuclear Power Plant
Docket No. 50-440
Comments on NRC Proposed Rule,
Preserving the Free Flow of
Information to the Commission
54 Fed. Reg - 30049 - July 18, 1989

Dear Sir:

The Nuclear Regulatory Commission (NRC) recently published, at 54 Fed. Reg. 30049 (July 18, 1989), notice of a proposed rule which would require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements under section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential safety violations.

We are pleased to provide the following comments for the NRC's consideration:

I. Summary

CEI is fully committed to ensuring that every individual involved in the operation of its operating nuclear power reactors understands his rights and responsibilities to promptly report any safety concerns. The company has diligently worked to create an atmosphere which encourages all employees to freely communicate and to pursue those concerns until satisfactorily resolved. CEI does not tolerate acts of intimidation or harassment or threats against those who report safety concerns.

As more fully described below, we believe that there is no compelling need for this rule-making. The current regulatory framework provided by the Energy Reorganization Act, together with existing NRC Rules and Regulations, is more than adequate to ensure that employees and former employees feel free to bring safety concerns to the NRC. The Department of Labor has already announced that it will not accept any settlement agreement in a section 210 proceeding which restricts access by government agencies to information of the kind that the proposed rule would cover. In any egregious cases, existing federal criminal law would most likely apply.

Existing NRC regulations assure that individuals are aware of their rights to communicate safety concerns to the NRC. Because of these laws, policies and programs, the current situation works. The NRC points to only one case of arguable relevance as a basis for this rule. This single case does not provide a reasonable basis for the proposed rule in light of the high cost and scope of the effort which would result from the rule.

Finally, the proposed rule is vague and overbroad. It could be construed to prohibit any settlement agreements concerning employment litigation -- a situation which contravenes public policy and the NRC's own policy.

II. The Proposed Rule is Not Needed

Section 210 of the Energy Reorganization Act of 1974, as amended, and the NRC's regulations promulgated to implement that section (10 CFR 50.7) prohibit discrimination against any employee for engaging in certain protected activities. Those activities include:

- o providing NRC information on possible violations of requirements under the Atomic Energy Act or the Energy Reorganization Act;
- o requesting the NRC initiate action against the employee for the administration or enforcement of these requirements;
- o testifying in any Commission proceeding.

Any employee who believes that there has been such discrimination may seek a remedy before the Department of Labor. The remedy may include reinstatement, back pay and compensatory damages. Such discrimination may also be grounds for NRC enforcement action (including civil penalties and license revocation or suspension) against the employers.

The NRC bases the proposed rule on its expressed concern that in the settlement of Section 210 proceedings before the Department of Labor, the potential exists for "restrict[ing] the freedom of an employee or former employee who is subject to its provisions, to freely and fully communicate with the Nuclear Regulatory Commission about nuclear safety matters." 54 Fed. Reg. 30049.

In support of this concern, the NRC cites a single case involving a worker at the Comanche Peak Steam Electric Station as its basis for this proposed rule. A single case of at least arguable relevance [1] would not appear to constitute a reasonable basis for a rulemaking of this magnitude. The Commission's December 12, 1988 decision specifically discussing the

---

1 In fact, the former employee had numerous opportunities, prior to entering into the settlement agreement, to identify all of his safety concerns to the NRC.

settlement agreements involved in this one case, construed the agreement to allow the former employee to bring his safety concerns directly to the NRC, and stated that "[as] long as the individual's right to bring matters to the NRC, in a reasonably convenient manner is not curtailed, we do not see a violation of federal law or NRC regulation." Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2) CLI-88-12, 28 N.R.C at 612-13 [2].

The Department of Labor has already taken the position that it will not approve settlement agreements with the types of provisions of which the NRC seems to disapprove. In Polizzi v. Gibbs & Hill, Case No. 87-ERA-38, Secretary's Order Rejecting in Part and Approving in Part Settlement Submitted by the parties and Dismissing Case issued July 18, 1989, the Secretary restated the Department's holding that a Section 210 case cannot be dismissed without a finding by the Secretary that the settlement is fair, adequate and reasonable. The Order reviewed a settlement agreement and determined that one of its provisions was unenforceable as against public policy. That provision would have prohibited the complainant from voluntarily testifying in NRC proceedings involving the particular nuclear plant at which he had worked. The Department is therefore already reviewing all Section 210 settlement agreements to assure that they do not include the types of clauses that concern the NRC and is voiding such clauses when they are found.

There also exists a comprehensive set of criminal statutes which would apply to any egregious attempts to corruptly influence a person's testimony before a federal agency, corruptly persuade a person not to testify or to delay or prevent his testimony, or corruptly obstruct a pending agency proceeding. See, e.g. 18 U.S.C Section 201, 1506, 1512.

In addition, requirements on reporting of safety concerns to NRC are already an integral part of existing NRC regulations, for example 10 CFR Parts 19 and 21. NRC Form 3, which NRC regulations require to be posted in all NRC-licensed facilities, reminds employees that they can confidentially report safety-related problems to NRC. So too does Part 21. 10 CFR 21.2, n.1. The Commission even invites collect telephone calls for this purpose. Id.

Finally, the April 27, 1989 letters sent by the Executive Director of Operations to all nuclear power plant licensees (and apparently many other entities involved in the nuclear power industry) have made the NRC's position crystal clear. Since the NRC published the proposed rule before the responses to the April 27 letter were due, the proposed rule cannot be based on any sense that a real problem exists. Nor has the Commission made any attempt to determine whether the letter's explicit announcement of NRC's position would not be sufficient to correct the potential problem which the proposed rule seeks to solve.

---

2 On April 20, 1989 the Commission withdrew any comment on this particular settlement agreement because the settlement agreement was the subject of a pending Department of Labor Case. Texas Util. Elec. Co., (Comanche Peak Steam Electric Station, Units 1 and 2) CLI:-89-06, 29 NRC 348, 355 (1989).

For all of these reasons, we respectfully submit that the proposed rule is not needed, at least not at the present time.

III. The Rule is Unreasonably Broad and Unreasonably Vague

The proposed role is broad beyond all reasonable bounds. It is also sufficiently vague that is would be impossible for anyone subject to it to know whether or not they were in compliance.

a. The proposed rule requires that NRC licensees "assure" that their contractors and subcontractors do not impose the types of conditions that would be prohibited, that licensees adopt procedures that "assure" that their contractors and subcontractors are informed of the rule's prohibition, and that licensees "assure" that they are informed by their contractors and subcontractors. It is unreasonable to require licensees to provide assurance with respect to contractors and subcontractors. This type of guarantee over third party behavior sets an impossibly restrictive standard.

b. The proposed rule applies to contractors and subcontractors of NRC licensees, whether or not the scope of the contract or subcontract has anything to do with the NRC-licensed activity. Thus, every contractor of a utility, and every contractor's contractor, becomes subject to the regulation, even if they perform no safety-related work. The unreasonable breadth of the rule can be appreciated if one postulates a multi-billion dollar company whose only connection with NRC is a single radioactive source licensed under 10 CFR Part 30. Under the proposed rule, the company would have to apply the requirements of proposed subpart (g)(1) to every contractor and every subcontractor, notwithstanding the total lack of connection to nuclear safety.

c. The prohibition against any condition that would "prohibit, restrict or otherwise discourage" an employee from voluntarily providing information to the NRC is so vague that it would be impossible to determine what terms and conditions could be in violation. For example, would NRC consider that a licensee's requirements to protect trade secrets, safeguards information, proprietary information, etc. might "otherwise discourage" an employee from voluntarily providing information to NRC? [3] Would

---

3 The Commission's regulations concerning the protection of Safeguards Information prohibit any person from providing access to such information unless the recipient has "an established 'need to know'" 10 CFR 73.21(c)(1). The "established 'need to know'" requirement applies even if the recipient is an NRC employee. See 10 CFR 73.21(c)(1)(i). It is not inconceivable that someone could argue that a licensee's procedure restating the "established 'need to know'" requirements would "otherwise discourage" an employee from providing information to the NRC.

NRC consider guidance to an employee that communications outside the company normally go through administrative channels to "otherwise discourage" the employee from voluntarily providing information to "any person within the Commission?"

d. The scope of the rule extends far beyond settlement agreements in Section 210 proceedings. It reaches each contract for employment and each collective bargaining agreement. It could even be construed to reach every contract for goods and services that contains a provision relating in any way to "compensation, terms, conditions and privileges of employment." The proposed rule requires no connection whatsoever with nuclear safety or NRC-licensed facilities.

e. The proposed rule's failure to define the terms "contractor" and "subcontractor" leaves open for question the scope of the proposed rule's coverage. Is a contractor any person with whom the licensee enters into a contract? If so, does that mean that the proposed rule reaches every organization for whom the licensee purchases any good or services? Does it cover every procurement? If, for example, a licensee buys a light bulb from General Electric, must he then "assure" that General Electric does not "impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment . . . any provision that would . . . otherwise discourage an employee from voluntarily providing to any person within the Commission information about possible violations of" NRC requirements?

f. The proposed rule would create confusion and complexity by apparently requiring that contractors performing safety-related work for multiple licensees submit to all the licensees for "prior review" any Section 210 settlement agreement. For example, a nuclear steam supply system vendor or an architect-engineering firm under the literal words of the proposed rule would seemingly have to provide to each licensee for whom it performs work any Section 210 settlement agreement for prior review, even if the underlying Section 210 complaint was unrelated to work performed for the licensee.[4]

---

4 Although proposed subsection (g)(2)(ii) limits a contractor or subcontractor's obligation to inform licensees and applicants of Section 210 complaints to those complaints "related to work peformed for the licensee or license applicant," the prior review requirement in proposed subsection (g)(2)(iii) contains no such limits. The latter section applies to "settlement agreements negotiated under Section 210 of the Energy Reorganization Act of 1974 by [the licensee/license applicant's] contractors and subcontractors," without the restriction in subsection (g)(2)(ii) that the work be performed for the licensee/applicant.

g. Notwithstanding the NRC's statement that it "supports settlements as they provide remedies to employees without the need for litigation," 54 Fed. Reg. at 30049, the effect of the proposed rule will be to create a strong disincentive to settlements. It could well be argued that any agreement which settles an action between an employee and his employer will "discourage" the employee from bringing safety complaints to the NRC because the employee no longer has any self-interested motive to do so. An employee who has been compensated (or otherwise satisfied) in exchange for dropping a claim against his employer will naturally be less likely to pursue complaints against his employer through the NRC. Accordingly, the proposed rule could be interpreted to prohibit[5] virtually all settlement agreements of employment disputes.

IV. Conclusion

For all these reasons, CEI respectfully submits that the proposed rule is both unneeded and unwise.

Very truly yours,

Al Kaplan
Vice President
Nuclear Group

AK:njc

cc: Document Control Desk
P. Hiland
T. Colburn
Region III

---

5 The published NRC comments also indicate that the "discourage" language could be read broadly. The NRC states, "the proposed rule applies to all provisions which might discourage an employee from providing safety information . . ." 54 Fed. Reg. 30049, 30050 (emphasis added). The NRC further states that it intends "to prohibit provisions in these agreements that in any way restrict the flow of information to the Commission, the Commission's adjudicatory boards, or the NRC staff." Id. at 30050 (emphasis added).

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

P.O. Box 968 • 3000 George Washington Way • Richland, Washington 99352

September 18, 1989
Docket No. 50-397
G02-89-171

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Subject: **PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION**

The Nuclear Regulatory Commission is proposing a revision to its rules to require licensees to ensure that neither they, nor their contractors or subcontractors, impose conditions on settlement agreements under section 210 of the Energy Reorganization Act or in other agreements affecting employment that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential safety issues. The Supply System has reviewed in detail this proposed rule and has concluded that its net effect on increased safety to the general public is so remote, and the capability of any licensee to truly ensure its total compliance is so unrealistic, that we are compelled to express our complete dissatisfaction and hereby request that the Commission proceed with the withdrawal of the subject proposed rule.

First, the proposed rule provides an unnecessary burden on the industry with very questionable results. The additional administrative programs that would have to be levied against the continually decreasing number of contractors willing to support the nuclear industry is counter productive. Contractors and subcontractors serve many customers. Some are "nuclear suppliers," but most are not. Each nuclear utility contracts individually with each contractor. To require contractors to revise their corporate policies and establish new administrative controls in reaction to isolated instances of questionable personnel practices is an overreaction by NRC and will hinder our efforts to retain and solicit new qualified nuclear plant contractors. The proposed rule arises out of the buying-off of complaining employees of the architect/engineer on the Comanche Peak Nuclear Station. This rule would in no way have prevented that from happening. In fact, it would probably do just the opposite because the incentive for contractors and subcontractors to buy the silence of unhappy employees is increased by the proposed rule. More effort ought to be expended in programs which would increase the number of qualified nuclear suppliers rather than further restrict it. Competition is hard enough to achieve as more and more companies opt out of the ever-increasingly regulated nuclear industry.

Secondly, the entire philosophy underlying this proposed rule also is directly contrary to fundamental principles of human behavior. This rule attempts to make the licensee the policeman for purposes of monitoring the employment relations of contractors and subcontractors beyond its control. In the event that the contractor/subcontractor should commit a crime, the rule anticipates that he will take the counter productive step of confessing to the policeman. That is not the way human nature works. The contractor/subcontractor has no incentive to bring his embarrassments to the owner's attention -- reality is just the opposite. Moreover, the fact that the rule makes the policeman (licensee) the party to be punished only adds disincentive to the contractor/subcontractor to report a safety-related problem. No contractor wants to be responsible for penalizing his customer, the owner. Yet, this proposed rule requires that the contractor's customer "assure" that the contractor will do just that.

In addition to the general comments on the proposed rule, the following comments are provided in direct response to specific questions posed by the Commission. The questions and our responses are as follows:

1) Should the rule prohibit all restrictions on providing information to the Commission or should limitations on an individual appearing before a Commission adjudicatory board (e.g., requiring an individual to resist a subpoena) be permissible as long as other avenues for providing information to the Commission are available?

   Regulatory changes should not be pursued reflecting language of a potential prohibition, such as the above, that may be something less than absolute. To try and draw fine distinctions such as whether a violation could turn, or whether an employee was permitted to testify at an adjudicatory board voluntarily or only upon subpoena would make any rule hopelessly subjective and serve only to breed litigation. Any rule in this regard should be as black and white as possible with as little grey as possible. There is already enough uncertainty with the use of undefined terms such as "contractor" and "subcontractor." No further ambiguity is needed.

2) Should the rule impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission?

PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION

Potential regulatory changes on this subject should consider the above intent in order to be effective. In this regard, we disagree with the conclusion being expressed in the current proposed rule which states that, "The alternative of imposing an additional requirement on licensees and license applicants to require any agreement affecting employment to include a provision stating that the agreement in no way restricts the employee from providing information to the Commission was rejected as unnecessary to achieve objectives of the rule." It would be much to the advantage of the licensee if any future rule requires putting specified language in a settlement agreement because it would then provide a concrete, understandable, "safe harbor" guarantee of compliance with the rule.

The most serious problem with the current proposed rule is that it would require licensees to "assure" that ill-defined entities beyond the control of the licensee behave in a specific manner with regard with certain, and often disgruntled employees; yet it provides absolutely no direction as to how the licensee is to accomplish that guarantee. At least if there were a requirement that certain specified language appearing in an employee dispute settlement agreement would, in fact, satisfy the rule, a licensee would be able to have some assurance that it was in compliance. It is a very common feature of regulatory law to provide that specific conduct will be deemed to be in compliance with a particular rule or regulation. This is the "safe harbor" concept that is found in all kinds of federal regulations. At the very least, any such new rule should provide that if a licensee does require specified Section 210 language in all of its settlement agreements, and contractually imposes the same language requirements into the settlement agreements of its contractors and subcontractors, such action would constitute compliance with the rule.

In summary, we do not believe that the proposed rule would be effective in satisfying the basic concerns of the Commission. As written, it has elements of unreasonableness and practically unachievable goals with no apparent benefit or increased safety to the public. We urge the NRC to reconsider the issues and to withdraw this proposed rule.

Very truly yours,

G. C. Sorensen

G. C. Sorensen, Manager
Regulatory Programs (MD 280)

RL/tlr

cc: Mr. N. S. Reynolds, Bishop, Cook, Purcell & Reynolds

DOCKET NUMBER
PROPOSED RULE PR 30,40,50,60; AD21-2 (public)
(54FR30049)

(34)

Arizona Public Service Company
P.O. BOX 53999 • PHOENIX, ARIZONA 85072-3999

'89 SEP 22 A11:11

WILLIAM F. CONWAY
EXECUTIVE VICE PRESIDENT
NUCLEAR

161-02334-WFC/GS
September 18, 1989

39

Mr. Samuel J. Chilk, Secretary
Docketing and Service Branch
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Chilk:

Subject: Proposed Rule - Preserving the Free Flow of Information to the Commission
54 Fed. Reg. 30049 (July 18, 1989)
Request for Comments
File: 89-056-026

In response to the request of the U. S. Nuclear Regulatory Commission (NRC) for comments on the proposed rule entitled "Preserving the Free Flow of Information to the Commission" (54 Fed. Reg. 30049 - July 18, 1989), Arizona Public Service Company (APS) is hereby submitting the comments attached to this letter.

If you have any questions, please do not hesitate to contact Mr. A. C. Rogers of my staff at (602) 371-4041.

Sincerely,

WFC/GS/jle

Attachment

cc: T. L. Chan
M. J. Davis
T. J. Polich
A. C. Gehr

8909290123 2pp

ATTACHMENT

These comments respond to the U. S. Nuclear Regulatory Commission (the "NRC" or the "Commission") request for public comment on the NRC's proposed rule entitled "Preserving the Free Flow of Information to the Commission," which was published in the Federal Register on July 18, 1989 (54 Fed. Reg. 30049), and are submitted on behalf of Arizona Public Service Company, the Department of Water and Power of the City of Los Angeles, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Southern California Public Power Authority, who are Participants in the Arizona Nuclear Power Project ("ANPP") and licensees of Palo Verde Nuclear Generating Station ("Palo Verde") Units 1, 2 and 3.

We, along with the rest of the nuclear industry, certainly share the Commission's concern that there be full and timely disclosure of safety-related matters to the NRC. We believe, however, that the statutory and regulatory requirements currently in place provide the necessary assurance that safety concerns of all types are brought to the attention of licensees or the NRC for evaluation and resolution. Therefore, the Participants in Palo Verde believe that the imposition of any additional regulations in this area would be unnecessary and unwarranted. Moreover, we believe that the proposed rule is drafted with such imprecision that it would neither further the stated objectives of the Commission nor be capable of reasonable implementation by licensees.

The views expressed herein by the Palo Verde Participants are in accord with the position stated in the comments of the Nuclear Management and Resources Council, Inc. ("NUMARC"), of which the Participants are members, on this matter. We therefore endorse those comments and urge the Commission to give due consideration to the thoughtful and detailed analysis of the proposed rule set forth in the submission by NUMARC. In particular, we recommend to the Commission's attention NUMARC's discussion of the significant flaws in the nature and scope of the proposed rule as currently formulated and the substantial and costly administrative burden that the proposed rule would impose on licensees. As NUMARC points out, the proposed rule -- unlimited as it is to nuclear safety-related activities and the identification of nuclear safety concerns and levying requirements on licensees to police their contractors and subcontractors, ostensibly all the way back to the suppliers of the raw materials used in any product purchased by the licensee -- sets an impossible task to complete. Moreover, the substantial costs of attempting to comply with that rule would far outweigh any supposed benefit to the public health and safety that the rule could possibly achieve.

For these reasons, we urge the NRC not to adopt any rule concerning the free flow of information or, alternatively, to modify the proposed rule in accordance with NUMARC's comments in order to yield a reasonable and workable regulation.

DOCKET NUMBER
PROPOSED RULE PR 34, 40 s AD21-2 (public)

9-25-89 (54FR30049)

Emile Julian, SECY —
This comment on a proposed rule was sent to us by mistake. Please docket and record accordingly. Thanks, DAVID Meyer, ADM: DFIPS: RPB x 28924

Log # TXX-89696
File # 10186

September 18, 1989

W. J. Cahill
Executive Vice President

'89 SEP 25 P1:18

U. S. Nuclear Regulatory Commission
Regulatory Publications Branch
Division of Freedom of Information
and Publication Services
Office of Administration
Washington, D. C. 20555

SUBJECT: COMANCHE PEAK STEAM STATION (CPSES)
DOCKETT NOS. 50-445 AND 50-446
PROPOSED RULE, PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION

Gentlemen :

The Nuclear Regulatory Commission, has on July 18, 1989 issued for public comment a proposed rule entitled "Preserving the Free Flow of Information to the Commission". The following comments are made regarding the proposed rule.

The proposed rule seeks to ensure the free flow of information to the NRC by excluding any language or conditions, which might be construed as restricting the employee from bringing forth any possible safety violations to the NRC. The rule targets settlement agreements affecting the employee's compensation, terms of, conditions of, and privileges of employment including those filed under section 210 of the energy reorganization act.

The rule would make the licensee or applicant primarily responsible for insuring their contractors or subcontractors do not impede the free flow of information to the NRC. The rule would require licensees to establish procedures in order to inform its contractors and subcontractors of the requirements of the rule, assure it is informed by its contractors and subcontractors of each complaint related to work performed and filed by an employee of the contractors pursuant to section 210, and provide for prior review by the licensee of any settlement agreements negotiated by the contractor or subcontractor and resulting from a section 210 complaint.

The rule does not seem to limit the subcontractor tier at which the licensee's responsibilities end. Conceivably the licensee would be held responsible at all tiers down to the most basic supplier.

8901290054 3pp

Paragraph (f)(1) states "...including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the..." this implies that the section 210 settlement agreements are a subset of the agreements to which this rule applies. The rule then is not limited to the section 210 agreements.

The extensive and far-reaching oversight responsibility for labor agreements that the licensee is being asked to undertake and the lack of definition of the type of agreement that this rule applies to make the rule impracticable and unworkable.

The supplementary information accompanying the rule states "...following the filing of a complaint, the Department of Labor performs an investigation. If either the employee or the employer are not satisfied with the outcome..." The rule then requires the licensee to review, approve, and report on labor dispute settlement agreements between a contractor and its employees after a section 210 complaint has been filed, investigated and the DOL has made available its findings. More appropriate and efficient would be holding the individual contractors responsible for reporting on the settlement agreements into which they enter with their employees.

In precedent, 10CFR21 imposes reporting requirements on "...Any individual director or responsible officer of a firm constructing, owning, operating, or supplying the components of any facility or activity licensed or regulated pursuant to the Atomic Energy Act of 1954." Amending 10CFR21 to encompass services as well as components would place responsibility for labor settlement agreements at the employer-employee level.

The supplementary information accompanying the rule requests comments on a specific question. The supplementary information solicits comments on whether the rule should prohibit all restrictions on providing information to the commission or should limitations on an individual appearing before an adjudicatory board be permissible as long as other avenues for providing information to the Commission are available.

The purpose or objective of the rule is to safeguard the free flow of information to the commission. The rule seeks to uncover those labor dispute settlement agreements brought under section 210 of the Energy reorganization act which are settled out of court and outside of the review of an administrative law judge. Those agreements may affect an employee's compensation, terms of, conditions of, and privileges of employment and may imperil the free flow of information to the commission, and thus are a threat to the health and safety of the public.

In response, to the question then, as long as other avenues of providing information to the commission are available and protected then limited restrictions on providing information to the commission should be permissible.

TU Electric supports full and timely disclosure to the NRC of any safety concerns. TU Electric supports the NUMARC comments to the proposed rule as contained on pages 6-13 of the NUMARC letter dated September 18, 1989.

Sincerely,

William J. Cahill, Jr.

JDR/jdr

c - Mr. R. D. Martin, Region IV
Resident Inspectors, CPSES (3)

DOCKET NUMBER
PROPOSED RULE PR 30 40 50 60 70 7., AD21-2 (public)
(54FR 30049)

DOCKETED
USNRC

'89 SEP 25 P3:59

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Westinghouse Electric Corporation
Energy Systems
Box 355
Pittsburgh Pennsylvania 15230-0355

41

September 20, 1989

NS-NRC-89-3458

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Subject: Proposed Rule - Preserving the Free Flow of Information to the Commission, 54 Fed. Reg. 30049 (July 18, 1989)

Dear Mr. Chilk:

These comments are submitted on behalf of Westinghouse Electric Corporation ("Westinghouse") in response to the Nuclear Regulatory Commission request for comments on a proposed rule entitled "Preserving the Free Flow of Information to the Commission".

Westinghouse believes it is important for the Commission to be fully advised in a timely manner of safety concerns. Current Commission regulations, in our judgement, are appropriate and sufficient to assure that such concerns are brought to the attention of the Commission and/or its licensees, and we do not believe there has been any pervasive breakdown in the Commission's ability to promptly obtain safety information. Thus, Westinghouse believes that no new regulations are required.

Further. the regulations proposed by the Commission in the above-referenced rulemaking are unreasonable and unworkable. Westinghouse supports the comments submitted on the proposed rule by the Nuclear Management and Resource Council, Inc. ("NUMARC") and, in particular, the comments by NUMARC with respect to the broad scope of the rule and the lack of justification for it.

Westinghouse would add the following comments. As we read the proposed regulations, they would apply to all contractors and subcontractors who provide goods or services to a licensee, whether or not such goods or services are safety-related. Moreover, the proposed rule would apply to the contractual relationships a contractor such as Westinghouse might have with both its nuclear and non-nuclear suppliers or customers, even if such relationships have nothing whatever to do with a licensee, the goods and services provided to such licensee, or safety-related goods or services involving such licensee. Furthermore, the proposed rule extends to "any agreement affecting the compensation, terms, conditions and privileges of employment" of any licensee,

8909290269 3pp

contractor or subcontractor. Thus, the rule by its terms is not limited to settlements involving issues related to nuclear safety but, rather, would reach settlement of disputes of all types relating to fundamental employer-employee relationships. It would appear to require review review by each and every nuclear utility customer of Westinghouse of every employment agreement, union agreement, agreement for the settlement of employee disputes (including workman's compensation cases) and other employee-related contracts and dispute settlements. Westinghouse has thousands of agreement with suppliers, contractors, subcontractors and vendors, as well as thousands of agreements with employees both within and outside of its nuclear operations. The proposed regulations thus present an unmanageable and unreasonable task, and constitute an invasion of the rights of Westinghouse, its employees, and its customers.

Additionally, the proposed rule would strike at the very heart of proprietary information agreements and the ability to maintain such information as proprietary. As presently drafted, the proposed rule lacks safeguards for the preservation of proprietary agreements and could negate those proprietary agreements which, for example, require certain procedures to be undertaken by employees so as to maintain the confidentiality of information. Moreover, it would involve review by licensees of Westinghouse proprietary agreements with its employees and others - a task clearly not appropriate for licensees to undertake. If a rule is promulgated, it must provide procedures binding on the Commission which assure that safety information submitted to the Commission remains confidential until such time as it is either returned to its rightful owner or said owner is afforded an opportunity to establish that the information is entitled to proprietary protection under current Commission regulations. Otherwise, the proposed rule could be confiscatory of proprietary information.

The genesis of the proposed rule seems to be a concern of the Commission with the provisions of a settlement agreement reached under Section 210 of the Energy Reorganization Act. Westinghouse suggests that, if Commission action is necessary with respect to Section 210 settlement agreements (which appears to be the sole justification for the rule), the proposed rule should be limited in scope to such Section 210 settlement agreements. Further, there is a much more direct approach available in this regard. We respectfully recommend that the Commission re-review its agreements with the Department of Labor, so as to provide for better communications with the Commission regarding proposed Section 210 settlement agreements and to involve the Commission in the review process for such agreements so that the Commission can make certain that they do not obstruct the free flow of information to the Commission. The rule should not establish licensees as policemen over the contractual and employee relations of their contractors and subcontractors.

Westinghouse appreciates the opportunity to comment on the proposed rule. If desired by the Commission, we would be pleased to present additional information to the Commission on the onerous burdens and the potential threat to proprietary information embodied in the proposed rule.

Very truly yours,
WESTINGHOUSE ELECTRIC CORPORATION

William J. Johnson, Manager
Nuclear Safety Department

RAW/hs

AD21-2 (public)

DOCKET NUMBER
PROPOSED RULE PR 50,70,72 (54FR30049)

NORTHEAST UTILITIES

THE CONNECTICUT LIGHT AND POWER COMPANY
WESTERN MASSACHUSETTS ELECTRIC COMPANY
HOLYOKE WATER POWER COMPANY
NORTHEAST UTILITIES SERVICE COMPANY
NORTHEAST NUCLEAR ENERGY COMPANY

General Offices • Selden Street, Berlin, Connecticut

P.O. BOX 270
HARTFORD, CONNECTICUT 06141-0270
(203) 665-5000

DOCKETED
USNRC

'89 SEP 25 P4:18

a copy of the original was received on 9-25-89 dk

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

September 20, 1989

Docket Nos. 50-213
50-245
50-336
50-423
B13367

42

Re: 54FR30049

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Haddam Neck Plant
Millstone Nuclear Power Station, Unit Nos. 1, 2, and 3
Comments on Proposed Rulemaking--Preserving the
Free Flow of Information to the Commission

Dear Mr. Chilk:

In accordance with the Commission's request for comments in the above-captioned notice, Northeast Utilities (NU) on behalf of the Haddam Neck Plant and Millstone Nuclear Power Station, Unit Nos. 1, 2, and 3 hereby submits the following comments on the proposed regulation. We would like to say at the outset, that we, like NUMARC, support the concept of full and timely disclosure to the Commission of safety concerns. And, we fully agree that the Commission must zealously guard against impediments to the "full and candid disclosure to the Nuclear Regulatory Commission about nuclear safety matters." We understand the Commission's specific concern that contracts not impede the free flow of information to the Commission. We suggest that any rule directed to the issues now confronting the Commission take into account certain competing concerns and additional objectives, and to that end we provide the following comments.(1)

---

(1) NUMARC has advanced reasons as to why the proposed rule is not necessary, in addition to suggesting ways in which a rule on this subject could be crafted to address its concerns. We offer these comments in the event a rule is promulgated.

8909290278 5pp

I. Ensuring Free and Open Access to the Commission While Ensuring Finality to Settlement Agreements

The goal of the proposed rule is to ensure the free flow to the Commission of information regarding matters of nuclear safety. This goal does not necessarily conflict with the objectives of employment agreements generally, and Section 210 settlement agreements specifically. Most employment agreements (e.g., contracts of hire, collective bargaining agreements) historically have not incorporated, and have no reason to incorporate, any provision regarding either party's ability to raise nuclear safety concerns with any person or entity. Employers entering Section 210 settlement agreements, on the other hand, have a legitimate interest in ensuring that the case they are settling is indeed over. Employers have a valid interest in obtaining some guarantee that an employee, having once reported nuclear safety concerns to the Commission and having based a Section 210 action before the Department of Labor on that activity, does not attempt to employ those concerns to obtain some sort of "leverage" over the employer. But we have no objection to a complainant, having once settled a Section 210 action, bringing additional safety concerns to the Commission's attention. Once a matter is reported, however, then settlement agreements should be able to limit further treatment of the issue in prescribed circumstances.

Any rule should also make clear that a settlement agreement may limit avenues of communication to forums other than the Commission, such as the media.(2)

Thus, in answer to the Commission's question as to whether a rule should prohibit all restrictions on providing information to the Commission, or whether some restrictions might be appropriate, we believe that a rule should allow the limited restrictions discussed above.

II. Need for An Affirmative Statement in Employment Agreements

The Commission also poses the question whether the proposed rule should "impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission." We note that the Commission itself has deemed that such a provision is unnecessary to achieve the objectives of the rule, and we agree with that assessment. However, while this may not necessarily be an appropriate part of a rule, individual utilities may, of course, choose to put such affirmative statements into settlement agreements.

---

(2) We recognize that nonnuclear safety concerns can arise, and we in no way imply that a settlement agreement may limit an employee's ability to raise such concerns to the appropriate governmental agency (e.g. OSHA).

The proposed affirmative statement is unnecessary for the following reasons. First, employees already are fully notified of their right to bring safety concerns to the attention of the Commission (e.g., Form NRC-3).

Second, the suggested affirmative statement would apply to "all agreements affecting employment." Presumably, this provision would apply only to written contracts, not oral agreements regarding wages, hours, or other terms and conditions of employment. Nevertheless, we agree with NUMARC that the suggested statement is too broad, as it would literally encompass agreements (such as collective bargaining agreements, bids by contractors and subcontractors, and pension plans) in which neither party would, in the usual course of events, have any reason to include such a statement, or to think applicable to the raising of safety concerns.

In summary, we believe the Commission has made the wiser choice to not impose any obligation on private parties to include an affirmative statement in employment agreements.

III. Detailed Analysis of the Proposed Rule's Provisions

The proposed rule would add language to 10 CFR Sections 30.7, 40.7, 50.7, 60.9, 70.7, and 72.10 providing:

> Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions, and privileges of employment, including an agreement to settle a complaint filed by an employee pursuant to Section 210 ...any provision that would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

A. "Any agreement affecting the terms, conditions, and privileges of employment."

We agree with NUMARC that the proposed rule's application to all agreements "affecting the terms, conditions, and privileges of employment" is too broad. There is little reason why the rule should not be limited to agreements between employer and employee resulting from a dispute that in some way directly concerns nuclear safety matters. Section 210 settlement agreements, the type of contract that is the impetus for the proposed rule, fall within this category.

B. "Any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations..."

We believe that the language quoted should be revised for consistency with the suggestions outlined in Section I of our comments.

C. Application to Contractors and Subcontractors

We support the concept that licensees need to be informed of Section 210 complaints filed against contractors or subcontractors [and indeed have taken steps to bring this matter to their attention]. However, we agree with NUMARC that this is too onerous an obligation to place on licensees via rulemaking. Regarding the obligation of licensees to ensure that its contractors or subcontractors are informed of the rule's requirements, we share NUMARC's concern that compliance with this requirement, and the other requirements suggested by subsection (2) of the proposed rule, is unduly burdensome by virtue of the fact that licensees may engage thousands of contractors and subcontractors.

Similarly, with respect to imposing an obligation on licensees to perform prior review of settlement agreements proposed by contractors or subcontractors, we agree with NUMARC that this provision goes too far. The obligation would be overly burdensome in the case of licensees that employ large numbers of contractors and subcontractors. In addition, contractors and subcontractors have a legitimate interest in maintaining the confidentiality of all employment agreements, particularly settlement agreements.

IV. Conclusion

In conclusion, NU believes that, if a rule is promulgated, it can be crafted to support the Commission's goal of full and open access, without undermining the appropriateness of settlement agreements. As the Commission notes, public policy favors such agreements, since they "provide remedies to employees without the need for litigation." As a practical matter, however, settlement agreements are not attractive if, beyond the public policy goals of regulatory pursuit of safety, they cannot preserve a company's right to take reasonable measures toward protecting itself from repetitive legal actions and unwarranted denigration of the company and its employees in the public media.

We trust that the Staff finds these comments combined with those of NUMARC are useful in the finalization of the proposed rule.

Very truly yours,

CONNECTICUT YANKEE ATOMIC POWER COMPANY
NORTHEAST NUCLEAR ENERGY COMPANY

E. J. Mroczka
Senior Vice President

cc: Document Control Desk
W. T. Russell, Region I Administrator
M. L. Boyle, NRC Project Manager, Millstone Unit No. 1
G. S. Vissing, NRC Project Manager, Millstone Unit No. 2
D. H. Jaffe, NRC Project Manager, Millstone Unit No. 3
A. B. Wang, NRC Project Manager, Haddam Neck Plant
W. J. Raymond, Senior Resident Inspector, Millstone Unit Nos. 1, 2, and 3
J. T. Shedlosky, Senior Resident Inspector, Haddam Neck Plant

DOCKET NUMBER
PROPOSED RULE PR 30 40 50 60 70 72 15 (54FR30049)

AD21-2 (public)

DOCKETED USNRC

'89 SEP 28 P3:37

Robinson, Robinson, Peterson, Berk, Rudolph, Cross & Garde

Mary Lou Robinson
Nila Jean Robinson
John C. Peterson
Avram D. Berk
Michael Rudolph
Dan Cross
Billie Pirner Garde

Attorneys at Law
108 East College Avenue
Appleton, Wisconsin 54911
(414) 731-1817
Green Bay 494-9600
Fax 730-8841

September 25, 1989

43

Secretary,
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

ATTN: Docketing and Service Branch

RE: Proposed Rule; "Preserving the Free Flow of Information to the Commission."
Fed. Register Vol. 54, No. 136, July 18, 1989

Dear Secretary,

Please consider the following comments in response to the Proposed Rule issued in Federal Register 30049, Vol. 54, No. 36, Tuesday, July 18, 1989 regarding "Preserving the Free Flow of Information to the Commission." [1]

1. PROPOSED RULE

The Nuclear Regulatory Commission ("NRC") has proposed a rule that would "require licensees and license applicants to ensure that neither they nor their contractors or subcontractors, impose conditions in settlement agreements under Section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise

---

[1] These comments are being submitted late with specific permission of the NRC pursuant to a telephone conversation of September 18, 1989.

8910030110 26pp

discourage an employee from providing the Commission with information on potential safety violation." (See Proposed Rule, Summary.)

Under the language of the proposed rule each licensee (or applicant) will be required to adopt procedures to assure that all of its contractors and subcontractors are informed of the new requirements; assure that each licensee (or applicant) is informed of all complaints filed under Section 210 of the Energy Reorganization Act, as amended, and provide for prior licensee (or applicant) review of any Section 210 settlements to assure that the agreements contain no secrecy provisions.

The Commission sought general comments to the proposed rule as well as specific responses to the following questions:

1. Should the rule prohibit all restrictions on providing information to the Commission, or should limitations on an individual appearing before a Commission adjudicatory board (e.g., requiring an individual to resist a subpoena) be permissible as long as other avenues for providing information to the Commission are available?

2. Should the rule impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission?

In addition to these questions Commissioner Roberts offered the following issues for consideration and comment:

3. Would a rule to prevent employees from bargaining away some avenues of access to the NRC promote unnecessary litigation before the NRC and the DOL?

4. Does the proposed rule constitute government interference in the contractual relations between licensees and their contractors that is not needed to

assure adequate protection of public health and safety or of whistleblowers' freedom to bring their safety concerns to the NRC?

II. STATEMENT OF INTEREST

The comments offered in this letter are my own personal views. They do not reflect the opinions or views of any of the individuals or organizations that I do now or have represented or do now or have been employed by. As a plaintiff's attorney specializing in wrongful discharge cases I have represented numerous "whistleblowers" before the Nuclear Regulatory Commission ("NRC") and the Department of Labor ("DOL"), and in state and federal courts. I have also represented and worked with a large number of citizen and public interest organizations that have pursued worker concerns and safety issues about nuclear power reactors through the NRC.

This rule, if adopted, will have a significant impact on the role of nuclear whistleblowers, and antiretaliation litigation under Section 210 which is not fully addressed or considered by the agency in its issuance of this proposed rule.

It is noteworthy for the purpose of consideration of my comments that this proposed rule stems, at least in part, from the public debate and controversy surrounding the settlement of the DOL claim of a worker whom I represented. However, since the issues surrounding the facts and circumstances of that specific settlement are still a matter pending before the Secretary of Labor, (Macktal vs. Brown & Root, 86-ERA-23), and are now also the subject of civil action, (Macktal vs. Garde, et. al., Case

No. 89-2533 U.S. District Court for D.C.), these comments do not address any of the specific of that case.

III. GENERAL COMMENTS

It is my opinion that the proposed rule is far too narrow. The proposed rule falls short of increasing any protection for employees availing themselves of the Employee Protection Provision of the Energy Reorganization Act, as amended, or bringing cases in state or federal courts for retaliatory treatment. It does not address secrecy between contractors and licensees and does little to increase public health and safety. Instead of increasing protection of the public health and safety, I am concerned that the proposed rule will extend employee litigation under the Act, force employees into alternative avenues to remedy their grievances, remove the possibility of settlements, and excuse the NRC's neglect of enforcing the Employee Protection Provision. (10 C.F.R. 50.7)

At the outset I agree with the premise behind the proposed rule that no one, including employees, should ever be restricted from disclosing safety concerns to the NRC as a condition of a settlement of any litigation. Employees, whether involved in lawsuits or not, should be able to pursue their safety concerns about a nuclear facility with the NRC. Employees should also be able to insist that the NRC honor its obligation under 10 CFR 50.7 and respond to situations where harassment, intimidation, and discrimination exist, without compromising any remedy they may be entitled to under various statutes or common law.

However, it is my opinion that the proposed rule does not clarify the NRC's obligations to employees who find themselves in this situation, and thus makes the proposed rule a two edged sword. The proposed rule cuts against employees because it eliminates the possibility that a worker can be satisfied with a resolution of his complaint and fade into the background, while giving the licensee no incentive to do anything but litigate the worker to exhaustion. This dynamic would not be so ominous if the NRC perform in the role of a shield to protect workers from illegal retaliation or exhaustive litigation, however, the NRC has completely failed in its obligation in employee protection and until the NRC is prepared to reexamine its role in the regulatory scheme it will not increase public health and safety to insist, as this proposed rule does, that a worker become a martyr.

In addition the rule, although addressing secrecy in litigation or settlements as evil, doesn't even address the secrecy in major litigation. The proposed rule demonstrates regulatory naivete and a 'knee jerk' response to a long standing problem recently raised in a Senate hearing. The proposed rule doesn't ban all secrecy agreements between subcontractors and licensees, doesn't prevent lawsuits over disclosure of information licensees may classify as proprietary in order to keep something secret, doesn't require major litigation replete with safety information be open to public or regulatory scrutiny, and provides no guidance to the regulatory staff on

which types of secrecy agreements are acceptable and which are not.

It is simply ridiculous for an agency which tolerates a total secrecy agreement in litigation between licensees and their contractors over issues that go to the heart of public health and safety (i.e., Houston Lighting and Power vs. Brown & Root) to find offensive and prohibitive secrecy provisions between workers and licensees.

I find the whole specter of "secrecy agreements" personally offensive to the notion of open government and full disclosure of information that could affect public health and safety, but I am not persuaded that this proposed rule solves any problems in this regard.

IV. THE REGULATORY FRAMEWORK

The Employee Protection Provision of the Energy Reorganization Act, as amended, insists that work environments are free from the potentially disastrous consequences of workers afraid to disclose safety problems. This "chilling effect" results from the successful harassment, intimidation and threats to employees raising concerns. The law states that:

> ...no employer subject to the provisions of [the Act]...may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, ... engaged in any of the activities specified in subsection (b) below:
>
> > (b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has

> (1) commenced, or caused to be commences a proceeding under [the Act] or a proceeding for the administration or enforcement of any requirement imposed under such federal statute;
>
> (2) testified or is about to testify in any such proceeding; or
>
> (3) assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of [the Act]. [2]

In passing the ERA Employee Protection provision, Congress was looking to the employees of the industry to help enforce regulations and protect public health and safety.

In his concurring opinion in Rose vs. Secretary of Dept. of Labor, 800 F.2d 563, 565 (6th Cir. 1986) (J. Edwards concurring), Justice George C. Edwards, Jr. wrote that Congress's intent in passing the nuclear whistleblower protection provision, 42 U.S.C. 5851, was to "encourage employees" to report "unsafe practices in one of the most dangerous technologies mankind has invented." Justice Edwards articulately identified the broad remedial purpose behind the whistleblower protection provisions:

> If employees are coerced and intimidated into remaining silent when they should speak out, the results can be catastrophic. Recent events here and around the world underscore the realization that such complicated and dangerous technology can never be safe without constant human vigilance. The employee protection provision involved in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances.

---

[2] The relevant federal statute to this case is the Atomic Energy Act of 1954, as amended, 42 U.S.C. ss.2011, et.seq.

800 F.2d at 565.

In interpreting and enforcing the Employee Protection Provision of the Energy Reorganization Act, as well as other provisions for protection of employees in industries affecting the public health and safety, the Secretary has developed a specific body of case law to apply. (The other statutes are the Safe Drinking Water Act, 42 U.S.C. 300-9j; the Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; and the Clean Air Act, 42 U.S.C. 7622.)

These laws do not address the impact of harassment and intimidation in a work force, or a licensees obligations under 10 CFR 50.7.

In order for the nuclear worker to establish a prima facie case of discrimination he must prove, by a preponderance of the evidence, that:

(1) the party charged with discrimination is an employer subject to the Act;

(2) that the complainant was an employee under the Act;

(3) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment;

(4) that the employee engaged in protected activity;

(5) that the employer knew or had knowledge that the employee engaged in protected activity; and

(6) that the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.

Deford v Secretary of Labor, 700 F.2d. 281, at 286; Mackowiak vs.

University of Nuclear System Inc., 735 F.2d 1159, at 1162 (9th Cir. 1984); Ledford vs. Baltimore Gas and Electric Co., 83-ERA-9, slip op. of ALJ at 9 (Nov. 29, 1983), adopted by SOL.

After discriminatory motive, and other elements are established in the employee's prima facie case the Respondent must then proffer its legitimate nondiscriminatory business reasons in an attempt to demonstrate that the same decision would have been made even if the employee had not engaged in protected activity. Ashcraft vs. Univ. of Cincinnati, 83-ERA-7, slip op. of SOL at 12-13 (Nov. 1, 1984); Mackowiak, at 1164; Consolidated Edison of N.Y. Inc., vs. Donovan, 673 F.2d 61, 62 (2nd Cir. 1982).

Nothing requires the employer or the licence to address what the effect of an action was on the work force in general.

The complainant then may argue that the proffered reasons were either a pretext or that a dual motive of retaliation existed in addition to a legitimate nonretaliatory business reason.

If the legitimate business reason asserted by management did not in fact exist, or was not relied upon, the purported reason for termination will be found to be "pretextual."

> Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstances advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reasons advanced by the employer may be termed pretextual.

Wright Line, a Division of Wright Line Inc., 251 NLRB 1083, 1980, aff'd sub nom. NLRB vs. Wright Line 662 F.2d 899 (1st Cir.

1981), cert. den. on other grounds, 455 U.S. 989 (1982)

If management attempts to meet this burden and demonstrate a "legitimate" non-discriminatory reason for terminating or disciplining the employee, an employee can then put forward evidence of "disparate treatment." The concept of disparate treatment was defined in McDonnell Douglas Corp. vs. Green, 411 U.S. 792, 804 (1973); in an NLRB context in NLRB vs. Wright Line, 662 F.2d 899 (1st Cir. 1981); and in a First Amendment context in Mt. Healthy City School District vs. Doyle, 429 U.S. 274, 287 (1977).

Disparate treatment simply means that an employee who engages in protected activity was treated differently, or disciplined more harshly, than an employee who did not engage in protected activity. Donovan on Behalf of Chacon vs. Phelps Dodge Corp., 709 F.2d 86, 93 (D.C. Cir. 1983). For example, in an NLRA context, where a union organizer and another employee were both caught drinking on the job and the company fired only the union organizer, the court found disparate treatment. Borel Restaurant Corp. vs. NLRB, 676 F.2d 190, 192-93 (6th Cir. 1982). See NLRB vs. Faulkner Hospital, 691 F.2d 51, 56 (1st Cir. 1982); NLRB vs. Clark Manor Nursing Home Corp., 671 F.2d 657, 661-63 (1st Cir. 1982).

If the ALJ finds no legitimate business justification existed for discriminatory or retaliatory action of the Respondent, the employee does not need to prove disparate treatment. Deford, at 286.

The Secretary has held repeatedly under the various antiretaliation statutes that the correct standard for deciding the merits of dual motive employee discrimination complaints in articulated in the case of Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), 1980 CCH NLRB ¶17, 356 (1980), affirmed sub. nom. NLRB vs. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982).

The Secretary has explained the shifting burdens of proof as applied in dual motive cases under the Act as follows:

> The correct rule is that the employee must prove 'by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action' for the burden of proof or persuasion to shift to the employer' to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

The Secretary has held that in a dual motive case the burden shifts to the employer to show that it was motivated by a legitimate, non-discriminatory reason and not the plaintiff's whistleblowing activities. Gulam Shaffi Uddin vs. Baldwin Associates, 85-ERA-25, slip op., 1985. Ashcraft vs. University of Cincinnati, 83-ERA-7, slip op., November 1, 1984.

The shifting burden of proof can be extremely important. If the ALJ determines there were both legitimate and illegitimate motives, but cannot determine whether the employer took discriminatory action against the worker out of the legitimate or illegitimate motives, the worker prevails. The employer bears the risk that "the influence of legal and illegal motives cannot be separated." Mackowiak, quoting the Supreme Court in NLRB vs.

Transportation Management, 462 U.S. at 403. In Transportation Management, the court spelled out the policy reasons for shifting the burden:

> the employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated because ... the risk was created by his own wrongdoing.
>
> Transportation Management Corp., at 403.

Nothing in this complicated maze addresses the effect of retaliatory action, even if not provable under the case law, has in a work force.

V. THE REGULATORY FRAMEWORK IMPOSES AN INDEPENDENT DUTY ON THE NRC CASES OF ALLEGED RETALIATION FOR WHISTLEBLOWING.

The NRC and the DOL have a memorandum of understanding which provides the regulatory framework for distribution of responsibilities between the DOL and the NRC. Fed. Reg. Vol. 47, No. 233, Dec. 3, 1982 p. 54585.

Under the Memorandum of Understanding the NRC's Executive Director for operations is responsible for implementing the agreement.

> The NRC, though without direct authority to provide a remedy to an employee, has independent authority under the Atomic Energy Act to take appropriate enforcement action against Commission licensees that violate the Atomic Energy Act, the Reorganization Act, or Commission requirements. Enforcement action may include license denial, suspension or revocation or the imposition of civil penalties.

There is nothing in the agreement that suggests a DOL finding or ruling is a prerequisite to the agency taking action in a case. To the contrary, the NRC's action is mandated by their independent responsibilities under the law.

In 1985 the staff spelled out the policy of the NRC in regards to discrimination and/or retaliation against employees for voicing safety concerns. In a June, 1985, decision by James Taylor, then Director of the Office of Inspection and Enforcement the NRC explained it position in response to a request by the Government Accountability Project and the Palmetto Alliance for the issuance of a civil penalty because of the actions of Duke Power Company to a QC Supervisor, 'Beau' Ross. I have included the relevant section of the decision in its entirety below because it articulates the policy that should be implemented:

> I find that discrimination against employees for voicing safety concerns internally is prohibited under 10 CFR 50.7(a) and subjects the licensee employer to the sanctions identified in 10 CFR 50.7(c).
>
> In its response to GAP;s "Enforcement Action Request," Duke Power Company suggests that "the Commission never intended to place itself I the position of determining in the first instance' whether a violation of §50.7 has occurred and, thus, the Commission would find a violation of § 50.7 "only in consequence of findings adverse to an employer initially made by the Department of Labor." DPC Response at 17, 18. Duke Power Company bases it s view on isolated sentences from the Statement of Considerations that accompanied issuance of §50.7 and on remarks in a staff paper to the Commission supporting provisions in legislation that ultimately evolved in Section 210 of the Energy Reorganization Act. If I were to adopt Duke Power Company's view and apply it to this case, I could not find a violation of 10 CFR 50.7 because the Department of Labor did not receive and then act favorably on a complaint from Mr. Ross under Section 210 of the Energy Reorganization Act.
>
> Duke Power Company misperceives the complementary, yet independent, authorities and responsibilities of the Department of Labor and the Nuclear Regulatory Commission in protecting employees from discrimination and retaliation for raising matters pertaining to nuclear safety. Although Section 210 assigns authority to grant employee remedies to the Department of Labor, enactment

of that statute did not limit the Commission's pre-existing authority under the Atomic Energy Act to investigate alleged discrimination and take appropriate action against its licensees to combat it. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-527, 9 NRC 126, 132-39 (1979). In urging his colleagues to adopt Section 210, Senator Hart, the Senate floor manager, said

[Section 210] is not intended to in any way abridge the Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendencey of a proceeding before the Department of Labor pursuant to new Section 210 need not delay any action by the Commission to carry out the purpose of the Atomic Energy Act of 1954.

124 Cong. Rec. S15318 (daily ed. Sept. 18, 1978). When the Commission amended its regulations in 1982 to expand the scope of its employee protection regulations (regulations which pre-dated enactment of Section 210) the regulations did not specify that findings by the Department of Labor were a prerequisite to finding a violation of §50.7.

The comments cited by Duke Power Company from the Statement of considerations were made only in the context of (1) Emphasizing that employee discrimination could result in commission sanctions as well as the Department of Labor's award of a direct remedy to an employee and (2) rejecting a proposal that the Commission provide in its rules for imposition of civil penalties against individuals who made frivolous complaints to harass an employer. To be sure, the Department of Labor and the Commission are aware of the need to coordinate their efforts and cooperate in the effective administration of employee protection provisions under Section 210 and the Commission's regulations and to this end the Department and Commission have entered into a Memorandum of Understanding. 47 Fed. Reg. 54585 (dec. 3, 1982). To limit the Commission's power in the fashion Duke Power Company suggests overlooks the reality that an aggrieved employee may decline to file a complaint or any settle a complaint for personal reasons. The Commission's responsibility goes beyond immediate remedial action to the person affected. The Commission must ensure that licensees correct conditions that have resulted in improper discrimination that could affect other employees and prevent the recurrence of such discrimination. This power must be available to the Commission whether or not a

particular employee has exercised his or her rights under Section 210.

VI. THE NRC MUST UPGRADE ITS REGULATORY RESPONSE TO ALLEGED VIOLATION OF 10 CFR 50.7.

Notwithstanding my strong fears that this rule will be misinterpreted by licensees and their contractors as a mandate to legally frustrate the whistleblower protection laws by exhaustively litigating claims, I support adoption of a rule that will insure that employees disclose all their safety concerns to the NRC, and do not use those concerns as bargaining chips in a lawsuit.

However, in order to ensure that the public health and safety is actually enhanced and not harmed, by the passage of this rule it will be necessary for the NRC to greatly improve its response to workers who complain of harassment and intimidation.

The NRC took over four years to develop and implement a manual chapter on dealing with allegers, their safety allegations, and the issues of confidentiality. (See, NRC Manual Chapter 0517.) The manual chapter does not address the response by the NRC to allegations of retaliatory harassment and intimidation, or discriminatory action under Section 210. Further the manual chapter does nothing to insure and preserve the free flow of information from workers to the NRC through other means, i.e., SAFETEAM programs /[3], security departments

---

[3] Safe Energy Coalition of Michigan, and Sisters, Servants of the Immaculate Heart Of Mary Congregation v. United States Nuclear Regulatory Commission, and the United states of America, No. 88-1184.

/[4], or in non-related civil litigation in which citizens and their lawyers are "gagged" about safety concerns at the demand of the licensee /[5], or other situations in which proprietary agreements are misused to gag employees absent any litigation.

In fact, it is difficult for me to understand the agency's proposed rule which finds prohibitive language which might be construed as a secrecy clause which endangers public health and safety by withholding information from the NRC, when the agency has done nothing to protect citizens and workers who are being sued or threatened to be sued by licensees to prohibit them from disclosing safety concerns.

For example, in the case of Kansas Gas & Electric vs. Nuclear Awareness Network, et. al., Kansas Supreme Court case No. 88-63127-AS, the licensee has successfully sued the citizens group, and forcibly, by court order, has prohibited them and their lawyers from disclosing safety information it received from dozens of workers years ago. (The case is currently on appeal and the Defendant's are contesting the legality of the non-disclosure order.) The NRC has taken no action in that case, albeit the citizens group sought assistance for years.

In another case, a major contractor threatened an employee with a lawsuit for breach of an alleged proprietary agreement that kept him from disclosing safety concerns for years until an

---

[4] Ronald Goldstein vs. EBASCO, 86-ERA-36.

[5] Kansas Gas & Electric vs. Nuclear Awareness Network, et. al., 88-63127-AS.

agreement was negotiated by the Government Accountability Project (GAP) to allow him to pursue his concerns.

The NRC is supposed to insure that the licensees maintain an atmosphere at facilities under their jurisdiction in which individual employees, and the work force in general, feel free to raise any safety related concerns that they may have without fear of reprisals. In passing that law Congress intervened in the normal employee-employer relationship and imposed a duty on the NRC to intervene in that relationship when intimidation became a problem.

However, the NRC is not doing its job in this regard. It has no internal policy, procedure, or standards for evaluating worker harassment for enforcement action or violations of 10 CFR 50.7. Instead, facilities that have problems with harassment and intimidation are allowed to continue for years without being responsive to the impact of harassment and intimidation on the work force in general. Regulatory action, if it comes at all, is too late to stop the "chilling effect" by managers, and is too little to encourage utility management to take seriously their responsibilities toward maintaining an atmosphere free from harassment and intimidation under 10 C.F.R. 50.7.

Since the NRC is, at best, neutral in this debate, and frequently aids and abets the licensee (or applicant) in harming the whistleblower's case, employees and their attorneys, are forced to litigate their claims in a public arena. Thus, "whistleblower" cases get in the newspapers, in front of

legislators and responsible committees, and on investigative journalist programs. The public demands answers to safety related allegations the NRC hasn't looked at, or has not looked at adequately, and the problem of harassment and intimidation gets bifurcated and delegated to the Secretary of Labor.

Licensees legitimately want to get off the front pages and out of the public eye, and are frequently willing to settle cases for that reason alone. That does not necessarily equate money for silence about safety concerns. If the NRC was doing its job in the first place workers wouldn't feel compelled to seek publicity for their causes or in order to get pressure on the NRC to pursue their concerns.

However, the NRC's consistent refusal to get involved in the business of protecting employees leads to confusion and a regulatory vacuum. The agency has no program to determine severity of harassment and intimidation concerns, and they have not provided any specialized training to inspectors or investigators on recognizing or determining whether work environments have been "chilled" by harassment and intimidation. To the best of my knowledge, the agency does not have one person on its entire staff with a background or training in ethical resistance, whistleblower psychology, or managing dissent in a work force. The agency, by default, has all but conceded its responsibility for protecting public health and safety in this area to the Department of Labor (DOL) and has equated its regulatory responses on harassment and intimidation to whether or

not the DOL finds that a particular worker was discriminated against according to a legal standard based in Title VII laws. This is unacceptable. The Secretary of Labor does not know, cannot judge, and doesn't have the issue before her as to whether the termination or disciplinary action of an individual complainant "chilled" a work force or "chilled" a department. That is the NRC's responsibility, it cannot be responsibly delegated to the DOL.

It is not possible to equate resolution of an individual case before the DOL with the consequences to a work force. All too frequently a case will fail for procedural reasons, i.e., timeliness. The 30 day statute of limitations for Section 210 complainants precludes numerous otherwise legitimate complaints. Further, Section 210 isn't an all inclusive net. Workers are free to file internal complaints through unions, ombudsman, or SAFETEAM programs, or decide not to pursue litigation at all. These complaints are not required to be reported to the NRC staff, and are not reported on any type of systematic basis. Further, some workers may choose to pursue their wrongful discharge claims in state or federal court under other wrongful discharge theories. Those cases may go on for years without the knowledge of the NRC, and can be resolved without the knowledge of the NRC regardless of the terms of the settlement.

Several examples of these problems are included in these comments to demonstrate the regulatory loophole that exists, and why this proposed rule will not close it.

One good example is the case of Sam Thompson. (Sam Thompson vs. Detroit Edison, 87-ERA-2). In 1986 Mr. Thompson was a manager for Security at the FERMI II plant who alleged he was transferred to a 'do nothing' job after raising concerns. He filed a Section 210 complaint in 1986. He also raised concerns with the NRC about his substantive safety/security related concerns. The NRC did virtually nothing on his safety issues, and even less on his claims of harassment and intimidation. Several years after Mr. Thompson and Detroit Edison resolved their dispute, Mr. Thompson inquired about what the NRC had done or was doing about his harassment and intimidation concerns. The NRC (Region III) wrote and advised that they were waiting for the SOL to issue a decision. This decision, of course, is never going to be forthcoming. See, letter from the NRC, February 28, 1989, which states in part:

> Mr. Thompson's issue regarding Detroit Edison Company's termination of his employment was considered by the U.S.Department of Labor. That matter is pending before the Secretary of Labor. Upon completion of the Labor Department's deliberations on that matter the NRC will consider appropriate enforcement action.

This inaction is particularly outrageous in the face of another DOL complaint from the same department against the same supervisor in which a DOL Administrative Law Judge ruled that there had been discrimination against the employee for contacting the NRC. The utility appealed. That was in 1987. (Carolyn Larry vs. Detroit Edison, 86-ERA-32) Briefs were completed in the summer of 1987, and no decision has yet been issued by the SOL.

The chilling effect in the security department at Fermi was a problem in 1987. The message that 'going to the NRC could get a person fired' was stamped in the minds of other security employees in 1987. Whatever action the NRC takes now it is too late to help Mr. Thompson, Ms. Larry, or have any effect at the Security Department at Fermi.

Another example is the case of Ronald Goldstein vs. EBASCO, 86-ERA-36. In that case the ALJ ruled that Goldstein had been discriminated against for engaging in protected activity at the South Texas Plant. The hearing record was complete with evidence of the chilling effect on the other employees at South Texas, including Goldstein's supervisor making an example of Goldstein by blackboard effigy. Evidence of wrongdoing and harassment and intimidation was given to the NRC Office of Investigations in April 1987. No NRC action has ever been taken in that case which is pending before the SOL on an appeal from EBASCO.

In each of those cases the workers went to the NRC first for help, were led into believing help was forthcoming, and then left by the NRC to fight a lengthy, expensive battle to prove not only their own case of retaliation, but to protect their colleagues from the chilling effect caused by their discharge and retaliation.

Other recent cases follow the same pattern. John Corder, an STP engineer, repeatedly tried to get the NRC to respond to his complaints of wrongful termination for raising safety concerns internally. No investigation into this issue has yet been

commenced into his concerns, notwithstanding his Section 210 complaint filing and disposition. See, Corder vs. Bechtel, 87-ERA-38.

Noah Jerry Artrip an STP QC inspector, filed a Section 210 complaint after being laid off from STP in December, 1988. Even prior to being laid off, Mr. Artrip had called the NRC and complained that his inspection activities were being interfered with by his supervision. No action was ever taken to investigate those serious concerns, or probe the atmosphere created by his treatment. More importantly the NRC, by untimely processing of a FOIA request, denied Artrip the proof that he engaged in external protected activity prior to his layoff.

Thomas Saporito, an FP&L I&C Specialist, now has a case pending before the SOL. Saporito was terminated from his employment with FP&L last December for refusing to disclose information that he believed was the subject of an NRC inspection/investigation. To the best of his knowledge, no NRC investigation is ongoing into his contention that his termination was a violation of 10 CFR 50.7, and that his well publicized termination has resulted in a chilled atmosphere among other workers at the plant. See, Saporito v Florida Power and Light, 89-ERA-7, 89-ERA-17.

These are only a few examples of cases and workers in which the NRC has knowledge of employees allegations that they have been subjected to harassment and intimidation, and that no action has been taken to insure that consequences of the discrimination

complained of has resulted in a chilling effect at the site.

The last example of prompt regulatory action in this regard was the 1983 shut down order of the Zimmer plant by then Region III Administrator James G. Keppler. His actions came within hours of craft workers dumping buckets of water and human waste on quality control inspectors. His prompt and drastic actions in requiring a shut down of the facility ensured the 10 C.F.R. 50.7 meant something to that applicant and the work force.

Current regulatory practice would have never responded to that situation unless one of the QC inspectors had filed a complaint, proved his case, won on appeal, never settled, and never gave up. The chances of that would be highly unlikely.

Since the NRC has no programmatic approach to charges of harassment and intimidation it is not surprising that employees caught in the middle of long, expensive litigation following retaliation would consider giving up the fight. The proposed rule, without additional measures, sends the message that they might as well not even start the battle. Such a message does not increase public health and safety.

VI. SPECIFIC RESPONSES

ISSUE ONE

> Should the rule prohibit all restrictions on providing information to the Commission, or should limitations on an individual appearing before a Commission adjudicatory board (e.g., requiring an individual to resist a subpoena) be permissible as long as other avenues for providing information to the commission are Available?

Any rule that prohibits some restrictions on providing information to the NRC, should prohibit all restrictions on

providing information to the Commission or the public in any type of lawsuit in recognition of the checks and balances created within the Commission itself to insure that all issues potentially affecting public health and safety are resolved after review.

A blanket prohibition prevents any negotiation that could ever be construed as 'money for silence,' thus eliminating any subtle misunderstanding between attorneys and their clients about what is up for negotiation and settlement in any type of litigation. This should be a blanket prohibition on any issues affecting public health and safety, regardless of the forum they are raised in, or who the parties to litigation are.

ISSUE TWO

Should the rule impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission?

Yes. If the rule is to be imposed and not misused or misinterpreted by some unspecified understanding between clients and attorneys the inclusion of specific language in an agreement will insure that no unwritten understanding attaches to an agreement that will work to silence employees who have safety concerns about a facility.

ISSUE THREE

Would a rule to prevent employees from bargaining away some avenues of access to the NRC promote unnecessary litigation before the NRC and the DOL?

There is no clear answers to this issue. Since Section 210

does not provide for punitive damages, and the NRC has no investigation or enforcement strategy to respond to harassment and intimidation utility licensees and applicants do not have much to fear by litigating any and all claims of wrongful discharge, harassment and intimidation. This type of litigation strategy and approach is in and of itself a deterrent to workers to come forward and seek protection under Section 210. It is my concern that this rule, if enacted without a coinciding regulatory policy on pursuing worker complaints of retaliation will result in protracted litigation and work to the detriment of the Act.

ISSUE FOUR

Does the proposed rule constitute government interference in the contractual relations between licensees and their contractors that is not needed to assure adequate protection of public health and safety or of whistleblowers' freedom to bring their safety concerns to the NRC?

No. Government intervention between contractors and licensees has already been found to be necessary and prudent to protect the pubic health and safety. See, generally, Flanagan vs. Bechtel Power Company, 81-ERA-7, Hill vs. TVA, 87-ERA-23, 87-ERA-24.

VII. CONCLUSION

Where matters of public health and safety are involved there can be and should be no secrets. Where there are lawsuits that affect the nuclear industry, between workers and their employers or utilities and their contractors, there should be a bright line between the terms of a settlement (i.e., monetary award,

reinstatement, credit for work) which can be private and the safety related information contained within the litigation which should be public. No safety information should be sealed and no settlement should buy any sealing of a public record or silence of a worker about his concerns. However, where a worker or a company has disclosed all safety information, and/or such information is available to the NRC, and to the public through various 'sunshine' laws, parties should be afforded some degree of peace and privacy. The proposed rule must be expanded to include all litigation and include the development of a regulatory position and response to charges of retaliation in order to protect the public from the potentially disastrous results of an uncontrolled work environment.

Sincerely,

Billie Pirner Garde (BP)

Billie Pirner Garde

Hard copy sent by Federal Express
on 9-26-89

A-D21-2 (public)

TENNESSEE VALLEY AUTHORITY
CHATTANOOGA, TENNESSEE 37401
5N 157B Lookout Place

SEP 27 1989

'89 OCT -2 P4:34

DOCKET NUMBER
PROPOSED RULE PR ~~30,40,50~~, 60, 70, 72, 150 (54 FR 30049)

49

Mr. Samuel J. Chilk, Secretary
ATTN: Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Chilk:

U.S. NUCLEAR REGULATORY COMMISSION (NRC) - PROPOSED RULE - 10 CFR PARTS 30, 40, 50, 60, 70, 72 AND 150, "PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION"

The Tennessee Valley Authority (TVA) has reviewed and is pleased to comment on the subject proposed rule noticed in the July 18, 1989, Federal Register (54 FR 30049-30054).

TVA is concerned that the breadth of the rule as drafted would cause an undue burden on TVA and would fail to accomplish its regulatory purpose. TVA holds licenses or license applications for nine nuclear units and has thousands of contracts currently in place related to those units. Although the Supplementary Information to the proposed rule states that it "would only apply to agreements that relate to the compensation, terms, conditions, and privileges of employment, including section 210 settlement agreements, and not to agreements in general," as an agency of the Federal Government, TVA's agreements with its contractors contain clauses as required by law which may be construed as relating to the compensation, terms, conditions, and privileges of employment. For example, most TVA contracts for the purchase of supplies or for construction services must contain, as a matter of law, certain provisions requiring the contractor to pay prevailing wages to its employees. Thus, any perceived limitations on the applicability of the proposed rule would have little or no impact on TVA.

TVA agrees with the Nuclear Management and Resources Council's (NUMARC) position that the scope of the proposed rulemaking makes it unworkable. Requiring licensees and license applicants to assure that neither they nor their subcontractors impose restrictions in such a broad range of agreements covering the wide range of activities to which the proposed rule could conceivably apply, provides the licensee with a virtually impossible task. No matter how elaborate a procedural system it devises, the licensee and license applicant is ultimately held responsible for policing its contractors and subcontractors for activities which may only remotely, if at all, be related to its nuclear operations.

~~8910050217~~ 2pp

SEP 27 1989

Mr. Samuel J. Chilk

We agree with NUMARC's suggestions regarding ways in which the NRC's concerns can be addressed in a reasonable and workable manner.

We appreciate this opportunity to comment.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

M J Ray for

Manager, Nuclear Licensing
and Regulatory Affairs

cc: Mr. Stuart A. Treby
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR -30,40,50,66,...,... (54FR 30049)

AD21-2 (public)

(70)

September 28, 1989

'89 OCT -2 P4:22

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE") ON PROPOSED RULE, "PRESERVING THE FREE FLOW OF INFORMATION TO THE COMMISSION", 54 FED. REG. 30049 (JULY 18, 1989)

45

The Commission is proposing a rule change which would prohibit licensees, their contractors, and subcontractors from imposing conditions in settlement agreements under Section 210 of the Energy Reorganization Act or other agreements affecting employment which would prevent, restrict, or discourage employees from providing information to the NRC regarding potential safety violations. OCRE supports this rulomaking and commends the NRC for proposing this measure.

The Commission has posed two questions for public comment. First, the Commission asks if the rule should prohibit all restrictions on providing information to the NRC, or if limitations on an individual's appearing before an adjudicatory panel are acceptable if there are other avenues for bringing the information to the NRC. OCRE strongly supports an absolute prohibition on all restrictions on providing information to the NRC and its adjudicatory boards. The Commission's adjudicatory boards must make the crucial decision, based upon a full and complete evidentiary record, on whether to authorize issuance of a license. The Appeal Board has made it clear that it wants a full and complete factual record on which to base its decisions, and expects to be kept informed by the parties on all matters which may be relevant to the proceeding. Indeed, the parties are under an affirmative duty to keep boards advised of developments relevant to the proceeding. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 408 (1975); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 at n.26 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1116 at n.15 (1982). Clearly, restrictions on an individual appearing before an adjudicatory board are inconsistent with the expectation that the boards will be kept informed of all matters relevant to the proceeding.

Such restrictions also violate the hearing rights of participants in NRC proceedings. Under Section 189a of the Atomic Energy Act, a hearing must encompass all issues raised by the requester which are material to the licensing decision. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443 (D.C. Cir. 1984) Certainly the quality assurance issues raised by "whistleblowers" are relevant and material to the licensing decision. If a requester raises issues upon which a whistleblower has crucial or even unique knowledge, without the

8910050150 2pp

participation of the whistleblower the contentions either would not be admitted or would not survive summary disposition. Either way the requester would be deprived of the right to a hearing on a material issue.

Such restrictions also deprive the parties of the right to subpoena witnesses under 10 C.F.R. 2.720 and the Administrative Procedure Act, 5 U.S.C. 555(d), and of the right to present their cases by oral or documentary evidence and rebuttal evidence. 5 U.S.C. 556(d).

Second, the Commission asks if the rule should require a provision in all agreements affecting employment that the agreement in no way restricts the employee from providing safety information to the Commission. Such a requirement would be beneficial in that it would serve employees with notice that they are free to provide safety information to the Commission. It would leave no doubt on this matter.

Commissioner Roberts offered separate views for comment. OCRE disagrees with his views, and especially his opinion that the rule constitutes governmental interference in contractual relations. The fact is that Section 210 of the Energy Reorganization Act already limits freedom of contract between licensees and employees, licensees and contractors, and contractors and employees, and rightly so. Licensees and contractors are not free to discriminate against employees who provide information to the NRC. The proposed rule only serves to implement this statutory requirement. Freedom of contract is not absolute. Congress has seen fit, and rightly so, to outlaw discrimination in employment contractual relations on the basis of race, sex, age, and other factors. Congress has seen fit to outlaw the use of polygraphs on employees and job applicants except in special circumstances. Long gone is the day when freedom of contract reigned supreme at the expense of individual rights and the public welfare.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
OCRE Representative
8275 Munson Road
Mentor, OH 44060
(216) 255-3158

AD21-2 (petitioner)

DOCKET NUMBER
PROPOSED RULE PR 30, 40, 50, 60, 70, 72, 150
(54 FR 30049)

Westinghouse Electric Corporation
Commercial Nuclear Fuel Division
Drawer R
Columbia SC 29250
(803) 776 2610

'89 OCT -6 P4:04

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

RE-EKR-89-052

46

September 28, 1989

Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Gentlemen

REFERENCE: Proposed Rule Change to 10CFR Parts 30, 40, 50, 60, 70, 72 and 150, Preserving the Free Flow of Information to the Commission

We believe that this proposed regulation is unnecessary and much too broad in application. Existing regulations in 10CFR21 have been effective in providing a free flow of information to the Commission.

We support Commissioner Roberts separate views on this matter.

Sincerely,

WESTINGHOUSE ELECTRIC CORPORATION

Edward Reitler

E. K. Reitler, Manager
Regulatory Engineering

lm
WP3039E:3p.34

8910130081 1p