John D. O'Toole
Vice President

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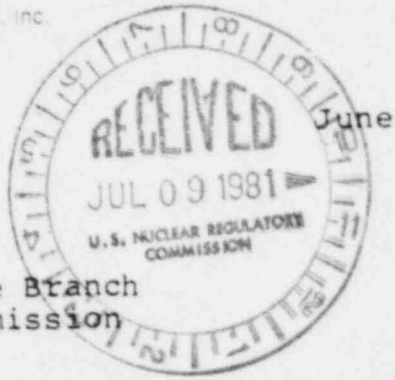
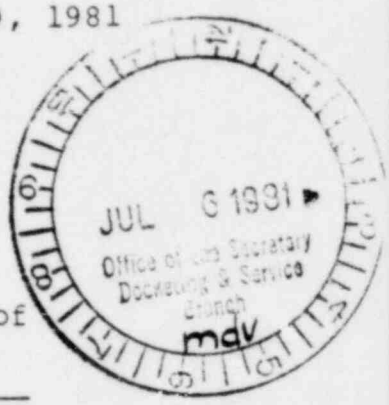
DOCKET NUMBER
PROPOSED RULE PR-2 (54)
(46 FR 30349)



June 29, 1981



Secretary of the Commission
Attn.: Docketing and Service Branch
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Subject: Proposed Amendments to Rules of Practice for NRC Adjudicatory Proceedings

Dear Sirs:

Consolidated Edison Company of New York, Inc. ("Consolidated Edison"), submits herewith its comments upon proposed amendments to the Nuclear Regulatory Commission's Rules of Practice relating to adjudicatory proceedings as published on June 8, 1981 (46 Federal Register 30349). The proposed amendments relate to intervention in NRC adjudicatory proceedings, new requirements for the use of interrogatories in such proceedings, and new provisions for service of documents and motions to compel discovery.

Consolidated Edison supplies electricity, gas and steam to customers in New York City and Westchester County, New York, and is the holder of NRC operating license No. DPR-26 for Indian Point Unit 2 nuclear electric generating plant located in Buchanan, New York. Consolidated Edison is a potential party to a number of proceedings which would be conducted pursuant to Part 2 of the NRC's Rules of Practice, and as such is affected by the proposed amendments.

1. Intervention in NRC Proceedings

Consolidated Edison supports the proposed amendment to 10 CFR § 2.714(b), but for the reasons stated below expresses no preference between Option A and B. Recent experience has demonstrated that some heightened threshold showing of the existence of material factual disputes at the outset of an NRC adjudicatory proceeding is desirable and appropriate, and indeed essential if such proceedings are to be conducted in an efficient manner. Present NRC practice fails to adequately distinguish between legal and factual controversies, and permits the prolongation of adjudicatory proceedings by the intrusion of issues which should be resolved

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Acknowledged by card 7/6/81 mdv

on the basis of briefs and oral argument. Also, present NRC practice has often had the effect of delaying the consideration of meritorious issues because purported matters of factual dispute which have an inadequate evidentiary basis may not be identified until much later in the hearing process than is desirable.

The currently proposed amendments to the Rules of Practice will help overcome these difficulties. It is entirely appropriate for the Commission to require notice of the facts upon which an intervenor's contention is based, and the references which will be used to establish those facts, since such factual matter is invariably in the public domain and readily available through licensee docket filings, and in NRC Public Document Rooms. NRC adjudicatory proceedings are not ones where a party opposed to the position of an intervenor is in sole possession of the facts through which the intervenor's claims might be established. Such factual material is as readily available to a conscientious intervenor as to any other party, and there is accordingly no prejudice associated with requiring the intervenor to explicitly disclose the relevant information at the time of his initial participation.

Consolidated Edison understands Option B to be a codification of the procedures followed by Atomic Safety and Licensing Boards in determining motions for summary disposition. This being so, the principal change in procedure which would occur under Option B would be a routine, sua sponte consideration of adequacy by the Licensing Board. However, so long as the Option A portion of the proposed amendment to 10 CFR § 2.714(b) is in effect, other parties could apprise the sufficiency of an intervenor's factual contentions and trigger the analysis contemplated by Option B through a motion for summary disposition. There is some advantage to having this threshold adequacy review occur automatically, however the Commission could as easily rely on the self interest of other parties to move against unsupported claims, so long as the information which will be provided under Option A is revealed.

2. Limit on Interrogatories

Consolidated Edison supports the proposed amendment to 10 CFR § 2.740(b) which would limit the use of interrogatories without the prior consent of a Licensing Board. The compliance with requests for interrogatories has occasionally been burdensome under present practice. The proposed limitation would require participants to refine their interrogatory

requests to cover information which is truly material and germane, while providing Licensing Boards with sufficient flexibility to permit further discovery upon a proper showing.

3. Motions to Compel Discovery

Consolidated Edison opposes the proposed amendment which would permit Licensing Boards to rule upon discovery motions after hearing only oral opposition. The significance of excessive and burdensome discovery requests in terms of resource requirements and delay to the proceedings is such that less formality is not desirable, and will not in the long run serve to expedite the hearing process. There are substantial benefits associated with written responses to written motions to compel discovery, in that the issues may be more clearly expressed for the Licensing Board.

4. Service

Consolidated Edison supports the proposed amendment relating to service of documents by express mail on those occasions when, in the discretion of the presiding officer, it is desirable.

Very truly yours,

John D. O'Toole

John D. O'Toole
Vice President

JDO:cz

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*ADMITTED IN N.Y. & FLA.
**ADMITTED IN DISTRICT OF COLUMBIA

June 29, 1981

DOCKET NUMBER
PROPOSED RULE PR-2 (56)
(46 FR 30349)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing & Service Branch

COMMENTS OF SHOREHAM OPPONENTS
COALITION TO PROPOSED MODIFICATIONS
TO THE NRC HEARING PROCESS REGARDING RULES
OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

On behalf of the Shoreham Opponents Coalition (SOC), the following comments are submitted in response to the above proposed NRC rule. As explained in greater detail below, SOC objects strenuously to each of the four proposed rule changes and urges the NRC to reject the proposed rule in its entirety.

SOC is an intervenor in Docket No. 50-322 (LILCO's Shoreham Nuclear Power Station, Unit No. 1). SOC consists of some twenty separate civic and environmental organizations with a collective membership of approximately 10,000 people who live within sixty miles of the Shoreham nuclear station.

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Intervention in NRC Proceedings

SOC has reviewed the NRC's proposal to restructure intervention in NRC proceedings with a mixture of disbelief and alarm. We had hoped that, in the wake of the accident at Three Mile Island and the strong criticisms of the NRC issued by the Kemeny and Rogovin Commissions, among others, that the NRC would have appreciated the serious deficiencies in its licensing process and made some effort to develop a more effective licensing orientation. Instead, it appears that the Commission is intending to reassert with a vengeance its disregard and, perhaps, dislike for the entire intervention process by turning an already restricted hearing process into a charade of due process.

In proposing the most recent modifications to the hearing process, the Commission states that it is concerned that the present intervention process is not "satisfactorily serving the public interest in efficient resolution of nuclear plant licensing issues." The NRC further suggests that its proposed modifications will lead to "more efficient decision-making" without unduly affecting the rights and opportunities of serious, legitimate intervenors. However, a review of the proposals advocated by the Commission indicates that the Commission intends to effectively dismantle the intervention process and that it has little, if any, understanding of the hearing process as it currently exists.

The most offensive proposed modifications are those which would require an interested person petitioning to intervene in an NRC licensing proceeding to provide "a concise statement of the facts supporting each contention together with references to the specific sources and documents which have been or will be relied on to establish such facts." In essence, the Commission would require a prospective intervenor to plead and prove its case before it could be admitted to the proceeding at some point prior to the convening of the first pre-hearing conference.

The NRC undoubtedly recognizes that this amendment, if adopted, will be certain to drive each and every prospective intervenor out of any future NRC licensing proceedings, either because the intervenor is unable to meet this impossible burden or because the intervenor is simply unwilling to participate in such a regulatory charade. What is most astounding is the extent to which this proposed amendment is so entirely inconsistent with

the conduct of the NRC's safety review and the submission of the FSAR by the applicant, both of which are preconditions for the development of useful contentions by intervenors.

Current practice indicates that a request for an operating license is generally filed by the applicant some three years before the estimated completion date. Shortly thereafter, the NRC publishes a notice of hearing giving prospective intervenors thirty days to intervene and requiring them to identify the specific aspect or aspects of the subject matter on which their intervention is based. Furthermore, current regulations require intervenors to submit particularized contentions at least fifteen days prior to the special pre-hearing conference, stating the contentions which they intend to litigate and requiring that those contentions be supported with reasonable specificity. As the NRC is well aware, its rules of practice currently permit a wide range of opportunities to exclude or dismiss contentions and, indeed, to exclude or restrict non-serious intervenors, simply by filing the obvious discovery requests and subsequent motions for summary disposition if an intervenor cannot support its case.

The NRC's proposed amendment to 10 CFR 2.714(b) fails to recognize that the primary problem in defining contentions and advising the respective parties of the claims of other parties is the fact that meaningful particularization of contentions and statements of facts in support thereof cannot be developed until the applicant has submitted its FSAR (with all of the amendments) and the Staff has issued its Safety Evaluation Report. Most applicants submit a number of FSAR amendments (the Shoreham docket has received more than twenty such amendments) and the SER is generally not completed until many months--or years--after the special pre-hearing conference. Thus, it is literally impossible for an intervenor to provide "a concise statement of the facts supporting each contention..." before the receipt of each of the FSAR amendments and a review of the Staff's SER.

In sum, the NRC's proposed amendment to 2.714(b) not only violates every concept of administrative due process with which we are acquainted, but it also squarely places the cart before the horse. Until the NRC recognizes that contentions cannot be particularized until Staff and the applicant complete their work, the NRC will continue to propose nonsensical amendments to the hearing process such as the current proposed amendment to 2.714(b).

A couple of further points are worth noting. It is well recognized that an enormous imbalance in resources and technical familiarity with the issues exists between intervenors, on the one hand, and Staff and the applicant, on the other. The NRC apparently has little appreciation for the difficulty which confronts an intervenor who proposes to participate in an NRC licensing proceeding. An intervenor, once aware that a proceeding will be instituted, must review voluminous documents to develop contentions; must raise the funds and locate technical consultants with the expertise and available time to participate in the proceeding; and must file lengthy and sophisticated intervention petitions and supporting contentions, all within a very limited period of time. To impose the additional requirement that the intervenor define each and every fact in support of the intervenor's contention when in all likelihood, those facts cannot be known for some time into the future, is an untenable and completely illogical position. It should also be noted that there is a substantial difference between having a contention "accepted" for litigation and actually having a contention admitted for litigation at the time the hearings are ready to begin. We are convinced that the two or more years which routinely exist between the filing of a notice of hearing by the NRC and the actual hearings themselves provide more than ample time for parties to discover and dismiss non-meritorious contentions. The NRC's proposal to add additional burdens on intervenors will only serve to effectively preclude contributions to safety by those intervenors, rather than improving the licensing of prospective plants. We suspect that the NRC would actually prefer to abolish the public hearing process altogether, but that it recognizes such a development would not be tolerated by the public. If the proposed amendments are adopted, the public will nevertheless recognize them for what they are, and the NRC and its already tarnished reputation should be prepared to accept the consequences.

Limitations on Interrogatories

This second proposed modification to the NRC's hearing process is virtually as offensive as the measures discussed above. Undoubtedly, the NRC is aware that the principal means available to an intervenor to prepare its case is through the traditional discovery process. The proposal to limit interrogatories to fifty is ludicrous, for obvious reasons. On the one hand, if

an intervenor is serious about contesting specific technical or other issues in a licensing proceeding, it is essential that the issues be explored in sufficient detail to prepare a credible case for the hearing. This cannot be done without resort to interrogatories and even a small number of contentions will quickly exhaust the limit of fifty proposed by the NRC. For those intervenors whose only concern is to delay the proceeding with frivolous discovery, the NRC's rules of practice provide ample opportunity for an aggrieved party to seek protective orders from the licensing board to preclude such discovery. We fail to see why an arbitrary limit of fifty interrogatories should be established when that limitation has nothing to do with the merits of the case of a particular intervenor and where adequate measures currently exist to restrict unnecessary and improper discovery.

Motion to Compel Discovery

The NRC proposes to permit licensing boards to convene conference calls to make oral rulings on motions to compel discovery. SOC urges the NRC to reject this proposal also, as being unnecessary. We can see no reason why one party, usually an applicant, should be permitted the opportunity to file lengthy or detailed motions to compel discovery while an intervenor should be placed in the position of arguing its case by phone for an immediate decision by one or more board members. In the context of the months or years over which a hearing runs its course, allowing an additional couple of weeks to issue a considered decision on all motions submitted to the board will hardly have a significant impact on the duration of the hearing process.

Service of Papers

The NRC's proposal to require in certain instances service of papers by Express Mail ignores the fact that certain intervenors are located in an area which does not provide Express Mail delivery. Unless the NRC can guarantee that it will reform the practices and procedures of the U.S. Postal Service, it should not burden certain intervenors with a shortened response period simply because they are located in an area not served by Express Mail.

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SOC reiterates its belief that each of the proposed amendments to the NRC's hearing process is objectionable and offensive to the very fundamentals of administrative due process. Should any of these proposed amendments be adopted, particularly the first three of those amendments, SOC is convinced that they could not withstand the inevitable legal challenges that will be brought by intervenors throughout the country. It is time the NRC devoted its resources to resolving important questions of safety and to completing its internal reviews so that the hearing process will begin, rather than constantly bludgeoning intervenors with impossible restrictions.

Very truly yours,

Stephen B. Latham

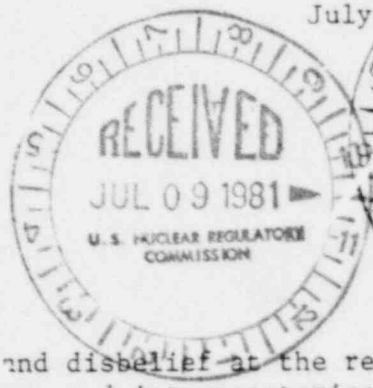
Stephen B. Latham
On Behalf of the
Shoreham Opponents Coalition

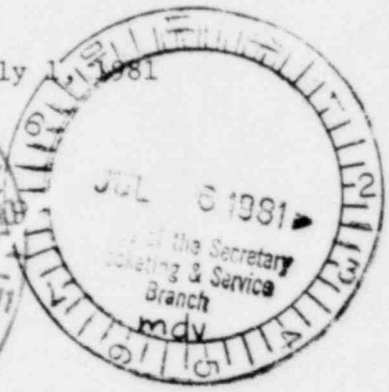
ENVIRONMENTAL POLICY CENTER

317 Pennsylvania Ave., S.E., Washington, D.C. 20003
202/547-5330

DOCKET NUMBER
PROPOSED RULE PR-2 (55)
(46 FR 30349)

July 1, 1981





Secretary of the Commission
U.S. Nuclear Regulatory Commission
Docketing and Services Branch
Washington, D.C. 20555

Dear Secretary,

I am writing to expres both shock and disbelief at the recently proposed rule limiting the contentions and interrogatories in adjudicatory hearings. The Environmental Policy Center strongly opposes the proposed rules.

With the accident at Three Mile Island still so close in all of our lives, it is inconceivable that the NRC is moving so quickly to forget the very important lessons that should have been learned. Certainly you can remember as far back as the recommendations of your own internal investigation into the accident at TMI. Both the President's Kemeny Commission and your own Rogovin investigation called for increased public participation, challenging you as a federal agency to assist the public in meaningful participation. And now, just two short years later, not only have those recommendations been carelessly ignored, but the pendulum has swung to the furthest extreme in efforts to silence the public's concerns.

The proposed rule limiting the contentions of intervenors in unconscionable. By imposing an impossible burden on the public, the rule would virtually eliminate citizen's ability to effectively participate in the licensing process. We urge you to wholeheartedly reject this proposed rule.

The opportunity is at hand for you to move forward, admitting the mistakes and shortcomings of the past and incorporating the lessons of TMI into policies which strengthen the integrity of the NRC. This proposed rule is a very dangerous, giant step backward.

Sincerely,

Keiki Kehoe
Washington Representative

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Acknowledged by 7/6/81 mdv

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

Proposed amendments to the Commission's Rules of Practice 10 CFR Part 2

Mr. Secretary,

Regarding the proposed amendments which would expedite licensing procedures, I must first of all say that I feel the changes are highly inappropriate. The first part of the background information explains that the slowdown in the licensing process is largely due to the placing of safety considerations first. If the post-TMI lessons involve a slower, more cautious licensing process in the future, then this is the most appropriate course of action. The mentioned "delay costs to utilities and, ultimately, rate payers" which "could run into billions of dollars" are completely irrelevent if our primary concern is safety and no more accidents due to regulatory failures. In the two years since Three Mile Island, many large public demonstrations and opinion surveys have clearly stated the public's opinion: if nuclear power generation is to continue, safety must be the first priority. The economics must be settled, then, based on the costs of licensing nuclear plants as safely as possible, not as quickly. Clearly, then, all of the proposed changes are objectionable compromises of safety. It is not the NRC's part to respond to the economic considerations of a new executive administration, in my view.

Specific points of the changes most inappropriate are those which make citizen intervention more difficult, and in reality do reduce the quality and fairness of the hearing, since citizen groups do not have the financial and organizational power that the industry can marshal. The input of citizen groups is crucial to a high quality hearing, which would otherwise reflect largely the priorities of the industry, not necessarily those of the people living in the area. Some of the proposed changes which are most detrimental include:

(1) It is absolutely essential that parties continue to have formal discovery opportunities against NRC staff. The public must have the right to decide what material is important for it to have for its case. The discretion of NRC staff as to what is "practicable" can serve only to prevent information, perhaps vital information, from coming out in public, and is not worth whatever time savings may be possible.

(3) It is important to keep open the possibility of motions requesting the Licensing Board to reconsider prehearing orders. Important mistakes may be prevented at an early stage by this procedure.

(4) One of the greatest flaws in NRC decision making processes is centralizing responsibility on one chairman. Although this may be necessary in times of crisis (major accident, etc.), advance licensing proceedings are the place where the time and care can and must be taken to discuss every major decision. Again it is not enough to leave it to the "discretion of the chairman to consult the other members." At least two Licensing Board members must continue to be required to "participate in each substantive order issued."

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Acknowledged by card. 7/6/81. mdv.

Though I single out these specific points as chief examples of flaws, let me again state that I am opposed to the entire notion of changing licensing proceedings for the sole purpose of speeding up the process. Safety in as complicated a system as a Nuclear Station requires all the time and forethought we can allow and we must accept the costs of safety, not seek shortcuts which allow less room to correct human oversights.

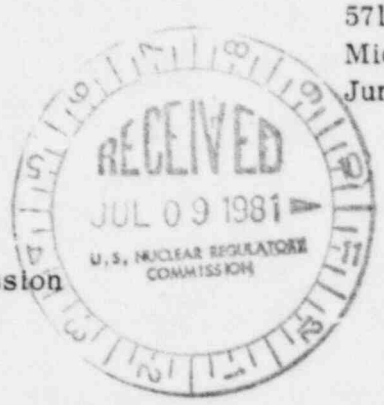
Sincerely yours,

Matthew Bassett

Box 204
Califon NJ
07830

DOCKET NUMBER
PROPOSED RULE PR-2 (59)
(46 FR 30349)

5711 Summerset Drive
Midland, Mich. 48640
June 29, 1981



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

Dear Sir:

In response to the public notice on the modifications to the NRC hearing process and its rules of practice published in the Federal Register on Monday, June 8, 1981, I would like to make the following comments.

The rules appear to apply only to intervenors and not on other parties of a licensing hearing. The presumption appears to be that it is citizens requesting participation are the only ones burdening the record.

The NRC forgets that the citizens are deeply concerned because the welfare of their families, the safety of their homes is directly and profoundly affected by the construction of a nuclear plant.

The Midland n-plants are constructed within the city of Midland with homes and families within a few blocks of the n-plants, within a mile of downtown Main Street, and immediately across from the huge chemical production facilities of the Dow Chemical Co. where thousands of people work around the clock.

Given these kinds of risks, why should the citizens rights be more severely restricted than those of any other party in a hearing?

In the present soil settlement hearings now in progress at the Midland n-plant site, it has been the attorneys for Consumers Power Co. that have demanded the right to depose a host of NRC staff people, while the NRC attorney has tried to hold the number of depositions down. Consumers Power Co. attorneys also asked for extensions of time on both discovery and interrogatories.

When times are slack, a law firm hired by a utility can very well see an NRC hearing as an excellent way to extend its work load at the expense of ratepayers and taxpayers and blame the delays and burdensome record on intervenors. I don't think your modified rules take this into account.

With no funds for either attorneys or expert witnesses, intervenors in this case, and in many others, had not deposed anyone, and the number of documents developed by them and serviced on parties has been minimal.

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Acknowledged by card 7/7/81 mdv

In order to intervene, a citizen already under present rules, has to establish the factual basis of his contentions in order to have them considered at all. So this is not new.

However, to ask a citizen to include all the facts that he wants considered with his contentions and to limit the citizen only to those facts in the hearing itself takes a long step backwards from the rules of discovery developed through Federal legal practice. It would severely limit cross-examination by citizens.

Often times the environmental impact statement, safety analysis report and other documents are not yet available when the notice of hearing is posted. This greatly and unfairly limits the range of pertinent information that will be central to developing the hearing record.

A good case in point is again the Midland OL-OM hearing now in progress.

The staff has asked that any TMI-related contentions should be filed as soon as possible and not wait for their SER which is due to come out in July, 1982. Judge Beckhofer has set a July 31, 1981 date as the final date for filing TMI-related contentions.

Since the Midland n-plants are B & W plants of the same design as the ill-fated TMI-2, one would think a full and careful public review would be initiated here by the NRC itself, given the fact that there are known serious weaknesses in the design and instrumentation of these B & W plants.

Instead, the most restrictive and repressive course possible is being taken. The new modified rules are clearly already being applied. And the Staff even "questions whether good cause could be demonstrated should an intervenor file a TMI-related contention tomorrow". They have prejudged any TMI contention a citizen might submit.

The suggested modified rules also place an extraordinary burden of proof on the citizen whose resources are so much more limited than those of the applicant.

Thus the NRC's proposed rule modifications would make the hearing process even further imbalanced than it already is.

These proposed modification of rules run contrary to the recommendations of both the Kemeny and Rogovin Reports, both of which recommended increased citizen participation, including funding for intervenors.

Sincerely,

Mary Sinclair

Mary Sinclair

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
JOHN W. Mc CORMACK STATE OFFICE BUILDING
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FRANCIS X. BELLOTTI
ATTORNEY GENERAL

DOCKET NUMBER
PROPOSED RULE PR-2 (51)
(46 FR 30349)

June 29, 1981

Secretary of the Commission
Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sir/Madam:

Enclosed please find Comments of the Commonwealth of Massachusetts to the Commission's proposed amendments to its rules of procedure.

Very truly yours,

Jo Ann Shotwell
Assistant Attorney General
Environmental Protection Division
(617) 727-2265

JAS/mkj

enc.

Acknowledged by card. 7/6/81 mdv

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS ON PROPOSED AMENDMENTS TO RULES OF PRACTICE

The Commission, in its efforts to expedite the conduct of adjudicatory proceedings, has again proposed certain amendments to its Rules of Practice. These proposed amendments would, at a minimum, require potential intervenors in domestic licensing proceedings to set forth the facts on which their contentions are based, together with references to the sources and documents upon which they will rely to establish the facts, prior to engaging in discovery and as a condition to participation in the proceeding. Under an alternative proposed amendment, a contention would be rejected if the facts asserted were "legally insufficient to support the contention." These latest proposed amendments would also limit the number of interrogatories which could be served on any party, absent special leave by the presiding officer, to 50 during the entire course of a licensing proceeding.

The Commonwealth of Massachusetts believes that these amendments, if adopted, will drastically reduce the quality of NRC adjudicatory proceedings and decision-making. The amendments as proposed are entirely inconsistent with the Commission's primary obligation to protect public health and safety.

If passed, either of the proposed amendments to 10 C.F.R. §2.714 will effectively eliminate public participation in the licensing process. Intervenors seeking to represent the public interest in licensing proceedings already face enormous inequities as they have much less money and expertise available to them than either the applicant or the Staff. For these reasons, intervenors are often unable to garner their own evidence with respect to the matters of concern to them and must be content merely to cross-examine the applicant as to the sufficiency of its evidence. Even then, however, intervenors can and do play an important role in the licensing process, for they often force the applicant to address significant safety issues which might not otherwise receive sufficient attention.

Even when intervenors do have the resources to present their own evidence, they are typically very dependent on the discovery process as their means for obtaining that evidence. Unlike the Staff and applicants, intervenors are not engaged full-time in the operation or regulation of nuclear powerplants. Nor are they generally privy to the negotiations which occur between Staff members and applicants prior to the issuance of the Staff review documents. Therefore, many of the facts essential to an intervenor's case are, at the outset, known only to the applicant and Staff. It is only through the discovery process that intervenors can obtain the information necessary to prepare and present their cases for consideration by the licensing boards.

For these reasons, both proposed amendments to §2.714 impose an impossible burden on intervenors, especially since they require an intervenor to make out its full case before the Staff and applicant have even addressed the matter and before engaging in discovery. To pass either proposed amendment would be to eliminate the only means available to the public for participating in licensing decisions.

This result would fly in the face of the findings of the Commission's own Special Inquiry Group, established in the wake of the Three Mile Island accident. In the "Rogovin Report" that body observed that "[i]nsofar as the licensing process is supposed to provide a publicly accessible forum for the resolution of all safety issues relevant to the construction and operation of a nuclear plant, it is a sham." (TMI: A Report to the Commissioners and to the Public, NRC Special Inquiry Group, Mitchell Rogovin, Director, Vol. I, at 139, April 5, 1979). The Report proceeds to criticze the Commission for making decisions having significant impact on the level of safety provided to the public with "little or no effective input from the public," (Vol. I, at 142), calls for "increased public involvement in the decision-making process," (Vol. I, at 143), notes that intervenors "have made an important impact on safety in some instances" (Vol. I, at 143-44), and recommends the reimbursement of intervenors' expenses and the development of an Office of Public Counsel to involve the public more effectively and at an earlier point in the licensing process.

The amendments the Commission now proposes, far from fulfilling this mandate to increase public involvement in the licensing process, will drastically reduce that involvement by placing an impossible burden on parties seeking to intervene in licensing proceedings on behalf of the public.

The intended meaning of the second alternative amendment to §2.714 is far from clear, since no standard is set forth by which the legal sufficiency of contentions will be assessed. Certain language in the comments which preceded the proposed amendments as issued suggests that the standard would be whether the facts asserted in support of a contention are sufficent to state a prima facie case. That standard would be entirely inappropriate and inconsistent with both the Commission's rules (10 C.F.R. §2.732) and the Administrative Procedure Act (5 U.S.C. §556(d)), for it is the applicant, and not the intervenor, who has the burden of proof and must make out a prima facie case in a licensing proceeding.

The Commonwealth is also seriously disturbed by the Commission's proposal to limit the number of all available interrogatories to 50 per party per proceeding. On the basis of its experience as an intervenor in a number of proceedings, the Commonwealth suggests that the imposition of this limit would greatly reduce the effectiveness of parties intervening in such proceedings on behalf of the public and, in turn, increase the risk that the public interest would not be served.

As we explained above, intervenors, more than the other parties to licensing proceedings, are highly dependent on the discovery process. Limiting intervenors to 50 interrogatories throughout an entire construction permit or operating license proceeding raising many complex and highly technical issues is tantamount to abrogating their discovery rights entirely. Again, intervenors and the citizens they represent will be effectively precluded from the decision-making process, since they will face the impossible task of opposing a virtually united front of Staff and applicant at the hearing with inadequate information. The hearing will become a meaningless exercise, rather than an opportunity for full and fair consideration of opposing viewpoints, and public confidence in the NRC will be eroded.

It is by no means clear that the limitation of discovery in this manner would in any way serve the stated purpose of expediting the licensing process. Unless the Commission is willing to eliminate public participation in the licensing process altogether, it will be obliged to grant endless continuances so that public intervenors can appropriately respond to the highly technical information which they will now be learning for the first time at the hearing stage. Cross-examination will necessarily take much longer, since information which would otherwise have been obtained at an earlier point will now have to be elicited at the hearing itself. Moreover, examination of witnesses will likely be far

less orderly, because new information revealed on cross-examination will prompt the recall of prior witnesss.

It is ironic that the Commission would consider limiting discovery rights in an effort to expedite the licensing process since discovery, when properly used, can in fact substantially reduce hearing time by narrowing the issues and providing simple techniques for producing evidence on points of agreement.

Conclusion

The Commonwealth believes that the proposed rule changes discussed herein would, if adopted, reduce the quality of NRC decision-making on important issues and thereby threaten the public health and safety. The proposed amendments are counterproductive to an efficient hearing process and inconsistent with full and fair consideration of the complex and critical issues involved in the licensing of nuclear powerplants.

By: FRANCIS X. BELLOTTI
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Dated: June 29, 1981

Westinghouse Electric Corporation
Water Reactor Divisions

Nuclear Technology Division
Box 355
Pittsburgh Pennsylvania 15230

DOCKET NUMBER
PROPOSED RULE PR-2 (58)
(46 FR 30349)

June 29, 1981

NS-EPR-2462

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

Attention: Docketing and Service Branch

Subject: Comments on Proposal to Modify 10CFR Part 2; Rules of Practice for Domestic Licensing Proceedings; Modifications to the NRC Hearing Process

Dear Mr. Chilk:

Westinghouse Electric Corporation (Westinghouse) is filing these comments in response to the Commission's request concerning proposed amendments to 10 CFR Part 2 which would:

> . . . require a person seeking intervention in formal NRC hearings to set forth the facts on which the contentions are based and the sources or documents used to establish those facts, limit the number of interrogatories that a party may file on another party in an NRC proceeding, and permit the boards to require oral answers to motions to compel and service of documents by express mail. An alternative formulation of the amendments would also require an increased threshold showing in support of a contention as a prerequisite to admission for hearing.

46 Fed. Reg. 30349 (June 8, 1981).

Westinghouse continues to urge the Commission to expedite the conduct of its adjudicatory proceedings and favors the Commission's stated intentions in this regard. Westinghouse believes that these proposed amendments dealing with intervention in NRC proceedings do not go far enough toward achieving this end. Even if the proposed amendments are adopted, parties to NRC domestic licensing

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proceedings may still be forced to relitigate issues already settled in earlier licensing proceedings before the Commission. Often, intervenors are permitted to raise the same issues time and time again, either during the construction permit and operating license proceedings for the same production facility, or, more often, in licensing proceedings involving similar facilities. Westinghouse again urges the Commission to address this repetitive adjudicatory process. It is apparent that the instant Commission proposals will not eliminate such groundless issues from the adjudicatory process. The Commission's proposals should be redrafted with a view of excluding from the adjudicatory process those issues which already have been subjected to the light of the adjudicatory process and have been adequately resolved therein. Issues raised repeatedly, whether by the same or different party, should no longer be allowed to be readjudicated in the NRC's licensing process.

Further comments regarding the four Commission proposals are as follows:

1. Intervention in NRC Proceedings

Under present practice, intervenor status is granted far too easily. We believe that the present requirements of 10 CFR 2.714 are too easily abused because they allow an interested person to submit contentions without material facts necessary for adequate supporting bases, and thereby be admitted as a party, whether or not such persons can go beyond the contention and produce evidence of substance. We also believe that present practice unjustifiably lengthens the licensing process because it is only later in the licensing process, perhaps at the hearing or in response to a motion for summary disposition and supporting affidavits that the weakness of the contentions comes to light. We believe that the burden should not be on the applicant or staff to show contentions to be baseless. Rather, the burden should remain with the persons seeking to modify or deny the license or permit to show that there is some material issue and some factual basis to support their contentions. We do not believe either option goes far enough towards requiring that persons knowledgeable in the area submit facts to support contentions. This shortcoming should be addressed by requiring a prima facie showing, including supporting affidavits by a knowledgeable person, before one is admitted as a party.

Of the two alternatives proposed by the Commission, Westinghouse favors adoption of Option B because it makes it clear that unless there are genuine facts to support the contention, it will not be allowed. Westinghouse also favors requiring supporting affidavits.

Option A, on the other hand, appears to be only an ineffectual extention of the admittedly inadequate present rules. These amendments would still allow a contention to be based on material, published or otherwise, whether or not the material itself or some other showing has any demonstrated relevance to the application at issue. A is too weak. Option B or one more restrictive should be adopted.

2. Limit on Interrogatories

For the reasons recited in the notice, Westinghouse favors the Commission's proposal to limit the number of interrogatories one party may file on another, with discretion in the Board to allow more interrogatories in the appropriate circumstances.

3. Responses to Motions to Compel Discovery

Westinghouse favors the Commission's proposal to permit Licensing Boards to order that responses to motions to compel discovery be made orally. We would make two refinements in 10 CFR 2.730(h). First, while a party might be ordered to respond orally, it should be given some advance notice, orally or otherwise, of when the opportunity will be presented, so that it is not forced to respond extemporaneously. Secondly, the responding party should be required to reduce the essential points of its respone to writing and to serve it on all parties except in the case of a response made at a prehearing conference, where a copy of the transcript pages containing the response should be provided to all parties.

4. Service

Westinghouse favors adoption of the Commission's proposal to permit Licensing Boards to require service of documents by express mail in special circumstances. In the example given by the Commission (in those proceedings where it appears that construction of a facility may be complete prior to completion of the operating license proceedings) the expense associated with delay of operation of a completed plant far exceed the expense of using express mail service.

We appreciate this opportunity to respond to the Commission's proposals to improve the licensing process.

Very truly yours,

for E. P. Rahe, Manager
Nuclear Safety Department

FXD/RAW/keg

DATE: June 29, 1981

DOCKET NUMBER PROPOSED RULE PR-2 (53) (46 FR 30349)

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

COMMENTS OF PEOPLE OF THE STATE OF ILLINOIS
OPPOSING PROPOSED PRACTICE RULES

The People of the State of Illinois, by its attorney, Tyrone C. Fahner, Attorney General, opposes the proposal by the United States Nuclear Regulatory Commission ("NRC") to modify certain practice rules governing public participation in the NRC hearing process, 10 C.F.R. Part 2. The proposed practice rules were set forth in the notification by Samuel J. Chilk, Secretary of the NRC, dated June 3, 1981.

I. Proposed Revisions of Rule 2.714(b): INTERVENTION.

Proposed Rule 2.714(b) requires that, as a condition to admission as an intervenor, one plead all facts on which contentions are based as well as the specific sources and documents by which those facts will be proved. This proposal is objectionable because it is unconstitutional, because it violates the Atomic Energy Act and the Administrative Procedure Act, because it is inconsistent with other provisions of 10 C.F.R. Part 2, and because it constitutes an unjustified and radical change in policy concerning public participation in the hearing process.

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A. The proposed rule applies only to intervenors and not to the other parties in an NRC proceeding--i.e., the applicant and the NRC Staff. The applicant would not be similarly required to plead at the outset the facts and the evidence supporting its application, and the Staff would not be required to plead at the outset

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the facts and the evidence supporting its position on the application. Nor would the applicant and Staff be required at any point to plead the facts and evidence on which they will rely in response to the intervenors' contentions. There is no basis in the Atomic Energy Act, 42 U.S.C. §§2011 et seq. ("AEA"), and the Administrative Procedure Act, 5 U.S.C. §§101 et seq. ("APA"), for distinguishing between parties insofar as procedural requirements are concerned. Indeed, the APA clearly contemplates that all parties to a hearing will be governed in the same manner and to the same extent by the agency's published procedural rules. Moreover, this attempt to place onerous procedural burdens on one category of parties but not on others is arbitrary, unreasonable, and capricious and therefore raises serious questions under the Equal Protection and Due Process Clauses of the United States Constitution.

B. Requiring intervenors to establish their facts and evidence before the other parties do is entirely impractical in view of the particular nature of NRC proceedings. At the time supplemental intervention petitions are required to be filed, the important issues generally have not been framed by the applicant and NRC Staff. The Staff's basic review documents--the Safety Evaluation Report and Final Environmental Impact Statement--have not yet been published and the applicant's documents--the Preliminary and Final Safety Analysis Reports--have not been finalized (frequently, up to two dozen substantial amendments are made to these documents be-

fore the hearing is completed).* Thus, the NRC would have prospective intervenors do the impossible--establish facts at a point in the proceeding when facts are not known and rely on documents and other evidence which, if they exist at all, are in the sole possession of the other parties. Under the present NRC rules, such documents and other evidence may be obtained in discovery by intervenors who have been admitted to the proceeding. But under the proposed rule, would-be intervenors will be excluded at the threshold and will never have the opportunity to make use of discovery.

Thus, given the realities of the NRC hearing process, the proposed intervention rule makes a mockery of the AEA's public hearing requirement, 42 U.S.C. §2239. Furthermore, it raises serious Due Process questions. Under traditional notions of American jurisprudence, one is normally entitled to litigate a matter before an appropriate forum when there exists a good faith basis for believing that one has a right to some relief. By properly pleading that right to relief, one initiates or becomes a party to a legal proceeding and thereby activates the right to discover the other parties' evidence. The AEA has created a forum for litigation of particular matters and proceedings before that forum are, like proceedings elsewhere, governed by the Due Process Clause. The NRC's attempt to regulate the public's access to a congressionally-

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*It should be noted that in license amendment proceedings and license termination proceedings (see In the Matter of U.S. Ecology, Inc. (Sheffield, Illinois Low Level Radioactive Waste Disposal Site), Docket No. 27-39), the applicant is not required to submit any particular documents, thus leaving intervenors no other recourse than the discovery process to learn about facts and documents in the applicant's control.

created forum so as to effectively deny access not only takes away rights that Congress has created but also violates the Due Process Clause.

C. The NRC justifies proposed Rule 2.714(b) on the ground that it will more directly relate the Commission's intervention rules to the "fact-oriented" character of NRC hearings. (Query: when are evidentiary hearings not "fact-oriented"?). This will be achieved by giving the applicant and Staff "early notice of an intervenor's case so as to afford opportunity for an early motion for summary disposition." (Supplementary Information, page 3)

The NRC's professed concern with notice is needless, because notice to the applicant and Staff of intervenors' factual assertions is adequately afforded under current practice which requires that intervenors set forth the basis of each contention with reasonable specificity. 10 C.F.R. §2.714(b). This rule has always been interpreted by the NRC to require a specific showing of a basis in fact for each contention for which admission is sought. See Offshore Power Systems, LBP-77-48, 6 NRC 249, 251 (1977), and Tennessee Valley Authority, LBP-76-10, 3 NRC 209, 212 (1976). While, as the NRC correctly notes, a petitioner is currently "under no obligation to demonstrate the existence of some factual support for a contention," notice of the issue and the factual basis therefor must be given. (Supplementary Information, page 5; emphasis added)

As for "notice" of the evidentiary basis of a fact put in issue by a contention, such notice is provided by the discovery process. The purpose of discovery in NRC proceedings is no different

from the purpose of discovery in other legal proceedings: to notify the parties about the evidence on which each will rely in support of his position. Proposed Rule 2.714(b) reflects a confusion of the purpose of an intervention petition with the purpose of discovery.

D. Under the APA, 5 U.S.C. §556(d), and under the NRC's own rules, 10 C.F.R. §2.732, the applicant has the burden of proof. See Tennessee Valley Authority (Hartsville Nuclear Plant), ALAB-463, 7 NRC 341, 356, 360 (1978), and Union Electric Co. (Calloway Nuclear Plant), ALAB-348, 4 NRC 225, 227-31, 233 (1976). This means that intervenors need not present an affirmative case opposing the application but may instead defeat it solely by means of cross-examination. The ability of intervenors to cross-examine is particularly important in NRC proceedings, given the typical disparity in resources between applicant and Staff on the one hand and intervenors on the other. Proposed Rule 2.714(b) not only makes it extremely more difficult for an intervenor to enter an NRC proceeding so as to subsequently exercise his right to cross-examine the other parties, but it also, by requiring an evidentiary showing in support of contentions, obligates intervenors to present an affirmative case. Such a requirement violates the APA and is inconsistent with the NRC's own burden of proof rules.

E. While the text of proposed Rule 2.714(b) does not include any such provision, the Supplementary Information states at page 7

that upon a showing of "good cause" an intervenor "would not be limited to the facts, sources, and references identified in his supplement". "Good cause" is not defined in the Supplementary Information, although an example is given: "newly discovered facts, sources, or references not reasonably available when the contention was admitted." (Page 7) The concept of "reasonably available" is no less vague than that of "good cause." Is the information provided by a consultant hired subsequent to rulings on contentions inadmissible because it was "reasonably available" at the time the supplemental petition was filed? After all, the consultant was, presumably, alive at that time. But at the time supplemental petitions were filed the intervenor may have been unacquainted with the consultant or the consultant may not have been sufficiently familiar with the issue to render an opinion. The Supplementary Information does not suggest whether or not in such situations the consultant's testimony would be admissible at the hearing.

Also, should the NRC adopt proposed Rule 2.714(b) and include a good cause provision, additional not fewer delays in the hearing process will result. For intervenors will surely file numerous motions to add contentions and sources based on information acquired in discovery or in the applicants' and Staff's documents and from consultants; applicants and Staff will surely respond to those motions; and licensing boards will be obliged to consider the motions and responses and issue appropriate orders.

F. The alternative proposed Rule 2.714(b) ("Option B") provides

that a contention shall not be admitted until the licensing board determines that it demonstrates "a genuine issue of material fact." In making this determination board members "may use their technical knowledge to judge the merit of the contention." (Supplementary Information, page 8) Option B is objectionable for all the reasons stated above. It is additionally objectionable on constitutional grounds in that it does not establish any standards governing board decisions on what constitutes a "genuine" issue and a "material" fact. Furthermore, allowing the fact-finder to dismiss contentions on the merits before discovery begins could entirely deny the public of the right to a hearing created by the AEA and defined and governed by the APA.* Finally, constitutional and statutory problems aside, Option B is objectionable because it will further delay the course of proceedings: a licensing board will first make an evaluation of the merits of an intervention petition before the applicant and Staff exercise their right to move for summary disposition, thus adding a step to the pre-hearing procedure.

G. Both versions of proposed Rule 2.714(b) run counter to the recommendations of the Kemeny Commission and the NRC's Special Inquiry Group following the accident at TMI-2 that public scrutiny of the NRC and the industry be strengthened through a liberalized and more meaningful public hearing process. Not only has the NRC failed to implement those recommendations but it is now proposing,

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*"A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d).

ironically, to create even greater obstacles to public participation than existed prior to TMI. These proposals are of particular concern to the State of Illinois because state and local governmental involvement in the siting and operation of NRC-licensed facilities and in the use of NRC-licensed materials is already severely restricted by the so-called preemption provisions of the AEA. The effect of the proposed rule changes would be to also limit state and local involvement before the agency allegedly having primary jurisdiction by undercutting the NRC hearing process.

H. The NRC recently expressed its concern that agency reviews of operating license applications are behind schedule.

> Historically, NRC operating license reviews have been completed and the license issued by the time the nuclear plant is ready to operate. Now, for the first time the hearings on a number of operating license applicants may not be concluded before construction is completed. This situation is a consequence of the Three Mile Island (TMI) accident, which required a reexamination of the entire regulatory structure. After TMI, for over a year and a half, the Commission's attention and resources were focused on plants which were already licensed to operate and on the preparation of an action plan which specified changes necessary for reactors as a result of the accident.

46 F.R. 28534, May 27, 1981. The NRC went on to urge that licensing proceedings be expedited to avoid further delays and to ensure that operating license proceedings are completed by the time plants are ready to go on-line.

The proposed revisions to the NRC's intervention rule are apparently one such means of expediting licensing proceedings. As such,

the proposals are an irrational and counterproductive response to the administrative delays occasioned by TMI. By drastically limiting public participation in the hearing process the NRC will indeed "expedite" the hearing process--by making the public pay for the failure of the NRC and the industry to safely and reliably operate nuclear generating facilities. Surely "the public interest in efficient resolution of nuclear plant licensing issues" (Supplementary Information, page 3) does not require less public participation in hearings; the Rogovin and Kemeny Commission reports indicate that it requires just the opposite.

II. Proposed Addition of Rule 2.740(c): INTERROGATORIES TO PARTIES.

The NRC proposes to limit to 50 the number of interrogatories any party may propound to another party during the course of a proceeding unless leave to propound more is granted by the licensing board. The People of the State of Illinois object to this proposal, first, because it is arbitrary. It does not take account of the number of contentions or of the varying complexity of the issues they may raise. Second, if there is concern about strains on the resources of parties, the NRC should keep in mind that interrogatories are the least expensive form of discovery available. Information in the possession of other parties which may not be obtained by use of interrogatories will have to be discovered through depositions, which place a vastly greater burden on the financial resources of all parties to the proceeding. Third, licensing boards already have the ability to control strains on resources by limiting the time during which discovery may be pursued and by entering protective orders to avoid undue

burden or expense. Because there is no obvious relationship between the number of interrogatories propounded and the time it takes a party to answer them, the NRC may by limiting interrogatories seriously prejudice a party's ability to prove his case without substantially enhancing the boards' existing power to control the course of litigation.

III. Proposed Addition of Rule 2.730(h): MOTIONS TO COMPEL DISCOVERY.

Proposed Rule 2.730(h) allows licensing boards at their discretion to order that answers to motions to compel discovery be given orally during a telephone conference rather than in writing. This proposal is objectionable because it will prevent the answering party from making a record of his answers. Without a record, his ability to subsequently appeal an unfavorable board ruling might be adversely affected.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: _____
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CERTIFICATE OF SERVICE

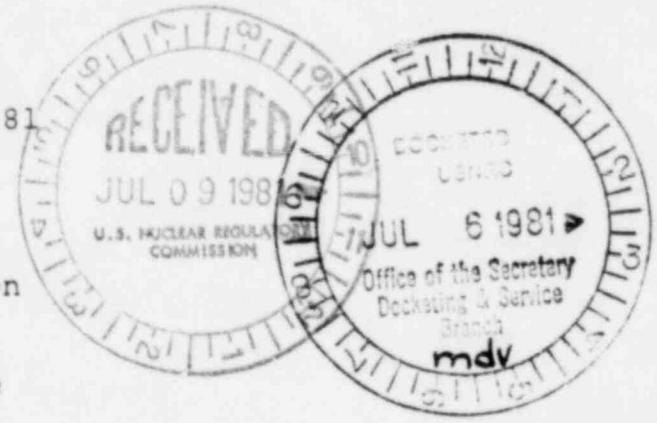
I, ANNE RAPKIN, Assistant Attorney General, certify that I filed a copy of the foregoing Comments Of People Of The State Of Illinois Opposing Proposed Practice Rules with Samuel J. Chilk by mailing same to him at the United States Nuclear Regulatory Commission, in a first class postage paid envelope, by U.S. mail, this 29th day of June 1981.

ANNE RAPKIN

Commonwealth Edison
One First National Plaza, Chicago, Illinois
Address Reply to: Post Office Box 767
Chicago, Illinois 60690

DOCKET NUMBER
PROPOSED RULE PR-2 (52)
(46 FR 30349)

June 29, 1981



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

Attention: Docketing and Service

Dear Sirs:

These comments are submitted on behalf of Commonwealth Edison Company in respect of the proposed modifications to the NRC hearing process published in the Federal Register on June 8, 1981 (46 Fed.Reg. 30349). Commonwealth Edison holds operating licenses for seven nuclear reactors, construction permits for six additional nuclear units, and is an applicant in an early site review proceeding. The Company has extensive experience in NRC licensing proceedings, including participation in seven contested proceedings in the last three years.

Commonwealth Edison applauds the NRC's recognition that expedited conduct of its adjudicatory proceedings is in the public interest. The Company strongly agrees that every effort should be made to improve the efficiency of the licensing process. However, Commonwealth Edison believes that the amendments set forth in the proposed rule in some respects go farther than is necessary to secure prompt adjudication. It is clearly permissible and desirable to require, as the first alternative does, that the basis for a contention must include some alleged facts which, if proven, would support the contention. This, of course, is implicit in the Commission's existing basis requirement which has been upheld in the Federal Courts. See BPI v. AEC, 502 F.2d 424 (1974). In Commonwealth Edison's view the proposed rule goes too far in limiting intervenors to proving only the facts alleged in their contentions. This is because at the time contentions are filed, intervenors have usually not had the opportunity to conduct discovery or to review the Staff's safety evaluation and environmental impact statement or appraisal. If a genuine issue appropriate for adjudication exists, an intervenor should have a reasonable opportunity to develop the facts in support of its position.

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The second alternative in the proposed rule would require an intervenor to establish at the outset through the submission of documents and other information that "a genuine issue of material fact" exists. In making this determination, Licensing Boards would be allowed to use their technical knowledge. Further, the facts submitted in support of a contention would have to be sufficient to raise a prima facie case. Thus, the second alternative for admissibility of contentions resembles the standard for summary disposition. Clearly the technical members of Licensing Boards ought to be able to bring to bear their professional knowledge and judgment in ruling on the adequacy of proferred bases. We also think it is obvious that the technical merit of a proposed contention should not be wholly irrelevant in determining whether to admit the issue into controversy. It is simply unreasonable to waste resources litigating frivolous contentions. But the second alternative seems counter-productive. This is because it would encourage arcane arguments about the materiality of facts with respect to the contentions they are meant to support, whereas attention should rather be given to the materiality and merit of the contentions themselves with respect to the subject matter of the proceeding.

Commonwealth Edison believes that there is an easier standard for admitting contentions than whether "a genuine issue of material fact" exists. The issue should be whether the bases given for the contention, if true, would support the contention and whether the contention itself is material to the subject matter of the proceeding.

The Commission should reverse the Appeal Board's decision in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB 590, 11 NRC 542 (1980), insofar as that decision holds that no inquiry may ever be made into the merits of a contention in determining its admissibility. Licensing Boards ought to be allowed to examine the proferred bases for a contention for the limited purpose of determining whether, if the bases are true, they support the contention. In making this judgment Licensing Boards should be authorized to rely on their technical expertise.

Commonwealth Edison supports the proposed amendments to the Rules of Practice permitting the Boards to require oral answers to motions to compel, and allowing service by Express Mail. The Company can only support the rule limiting the

number of interrogatories to fifty, subject to exceptions for good cause , if effective measures are taken to ensure that only contentions meeting the basis and specificity rules of the Commission's regulations are admitted. This is because Licensing Boards too often admit contentions which are so deficient that applicants have little idea what the issues are that they must address to prove their case. This forces applicants to conduct more extensive discovery than would otherwise be necessary. In Commonwealth Edison's views, reducing the burden of discovery on all parties is a worthwhile objective, but this can only be accomplished if the Boards take the trouble to define more carefully at the outset the issues to be litigated.

Finally, Commonwealth Edison wishes to emphasize that no matter what technical amendments are made to 10 CFR Part 2, they will accomplish nothing unless the Licensing Boards are instructed to enforce those rules, and indeed to perform all their duties in such a fashion that undue delay does not result. In our experience, Licensing Boards have been reluctant to enforce the requirements of the Rules of Practice in ruling on contentions, even when the regulation and the case law are clear. Since the Rules of Practice forbid interlocutory appeals, there usually is no remedy in such situations available to applicants or the Staff. It seems clear that the admission of contentions is an extremely important step in licensing proceedings which ought to be subjected to greater supervision by the Appeal Board and by the Commission. It is not sufficient simply to wait for the decisions which are the end product of the hearing process, if expediting the licensing process is to be achieved.

Commonwealth Edison appreciates the opportunity to submit these comments.

Respectfully submitted,

Louis O. DelGeorge

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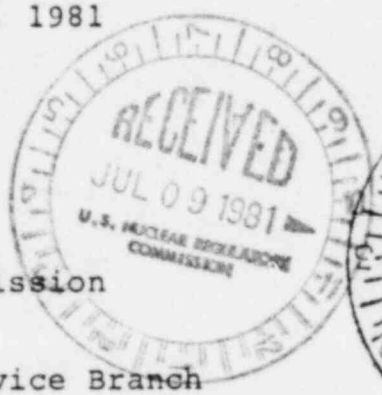
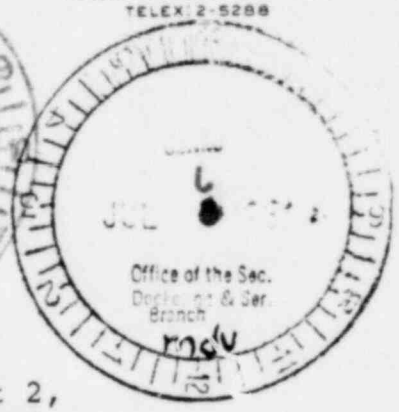
July 8, 1981

DOCKET NUMBER
PROPOSED RULE PR-2 (60)
(46 FR 30349)





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

Attention: Docketing and Service Branch

RE: Rulemaking Proposal -- 10 C.F.R. Part 2, "Rules of Practice for Domestic Licensing Proceedings; Modifications to the NRC Hearing Process" (46 Fed. Reg. 30349)

Dear Sir:

These comments are submitted on behalf of Public Service Company of Oklahoma ("PSO") in response to the subject rulemaking proposal. PSO has an application pending before NRC for the construction of Black Fox Station (Docket Nos. STN 50-556 and 557) which consists of two 1150 MWe boiling water reactors to be located near Tulsa, Oklahoma. Although the hearing record in this proceeding was closed on February 28, 1979, the record was subsequently reopened by the Licensing Board on October 25, 1979, for the purpose of taking evidence on the lessons learned from the TMI-2 accident as they may apply to the Black Fox construction permit proceeding. However, no progress in the proceeding has occurred because of NRC's failure to identify the post-TMI licensing requirements that would be applied to pending construction permit applications. A majority of the NRC Commissioners were unwilling to approve on May 27, 1981, the recommendation of the NRC Staff to promulgate a rule for near-term construction permit applicants that would have established the post-TMI licensing requirements for near-term construction permit applications. Instead, PSO is awaiting action by the NRC Staff which would at least identify these requirements as the Staff's licensing position. PSO assumes the Staff, in fact, will take this action, and thereafter the hearing process in the Black Fox docket will begin to function once again. Consequently, PSO is

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Acknowledged by card 7/8/81 mdv.

vitally interested in measures such as the subject rule-making proposal that would, should the day ever arrive when the NRC as an agency decides to proceed with the issuance of construction permits, reduce the delay in the issuance of such licenses for nuclear power reactors.

The proposed rule, if enacted, would amend the NRC's Rules of Practice in 10 C.F.R. Part 2 to (i) increase the quality and quantity of information required to satisfy the NRC's threshhold for admitting contentions in contested cases, (ii) limit the number of interrogatories that might be filed against a party, and (iii) authorize licensing boards to require oral answers to motions to compel and service by express mail. The proposal concerning the admissibility of contentions is the most significant, and it will be discussed first.

PSO strongly favors strengthening the process whereby atomic safety and licensing boards determine the admissibility of contentions in licensing proceedings. However, for the reasons explained below, neither the proposed rule nor the alternative should be adopted to achieve this objective. Instead, PSO urges that the existing system be maintained and, in addition, that the Commission supplement its recent "Statement of Policy on Conduct of Licensing Proceedings" (46 Fed. Reg. 28533, May 27, 1981) to include specific instructions to licensing boards on the application of the present "basis" standard in 10 C.F.R. § 2.714(b) for the admission of contentions.

The NRC and its predecessor, the U.S. Atomic Energy Commission ("AEC"), have been struggling with the legal standard for determining the admissibility of contentions under 10 C.F.R. § 2.714 for at least the past nine years. An entirely satisfactory standard has never been achieved. Section 2.714 should require contentions to be stated with sufficient particularity to identify and narrow the issues being placed into controversy by members of the public. This is necessary to provide applicants and licensees, the parties with the burden of going forward, as well as the ultimate burden of proof, with a reasonable understanding of the issues and opportunity to develop responsive testimony. Thus, more than unsupported and conclusory allegations should be required. How much more is the

question. Clearly, in the absence of discovery, a provision requiring the public to support or "prove" their contentions with uncontrovertible and substantive facts as a precondition of attaining party status would contravene all norms of administrative due process. The rulemaking path between these two extremes has proven to be difficult and in many respects unrewarding.

Section 2.714, prior to mid-1972, required that a petition to intervene include an affidavit which would identify "the specific aspect or aspects of the subject matter of the proceeding as to which [an intervenor] wishes to intervene and [set] forth with particularity the matters on which [an intervenor] relies to support [the] petition."[1/] (Emphasis added.) The test for the admissibility of contentions under this version of Section 2.714 became known as the "specificity" standard.

Experience under the "specificity" standard was generally an unhappy one. Licensing boards were continually called upon to decide whether contentions were sufficiently specific and particular. Prospective intervenors were often afforded two or three opportunities to make their contentions more specific and particular, thereby unduly delaying the hearing process. It was not unusual to spend four to six months on the process of identifying and admitting contentions. In addition, licensing boards tended to give prospective intervenors the benefit of the doubt on close questions involving the application of the "specificity" test. Thus, a practice developed of admitting rather than rejecting borderline contentions.

Applicants complained that licensing boards were causing undue delay to the licensing process by failing to render timely decisions on the admissibility of contentions and by not enforcing the "specificity" standard. Members of the public complained that too much was being required, i.e., specificity and particularization were impossible without first obtaining the benefits of discovery and more

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1/ See, e.g., 37 Fed. Reg. 9331, 9335 (May 9, 1972).

time to review PSAR's and FSAR's.[2/] Licensing boards were also frustrated by what was perceived to be an unworkable and totally subjective legal standard for the admissibility of contentions.

On July 28, 1972, AEC amended Section 2.714, as part of a comprehensive revision to 10 C.F.R. Part 2, to provide that the supporting affidavit, in addition to identifying the specific contentions, should include, "with particularity ... the basis" for each and every contention.[3/] The addition of the requirement for "basis" was clearly intended to stress the need and the requirement for the assertion by would-be intervenors of some "factual" information in order to properly pinpoint the focus and thereby narrow the scope of their contentions.

The intensity of complaints from would-be intervenors increased with the advent of the "basis" legal standard because, in their view, the level of factual detail required by the "basis" test could only be satisfied by an adequate opportunity to obtain discovery and to review PSAR's and FSAR's prior to filing contentions. The latter complaint was silenced in 1978, when NRC amended Section 2.714 to delete the requirement for filing contentions with the petition to intervene and to require, instead, that contentions be filed 15 days prior to the first prehearing conference.[4/] The "basis" legal standard was retained; however, interested members of the public now were afforded 90 days before the deadline for filing contentions to review PSAR's and FSAR's and any other related information that might be available at NRC public documents rooms.

The present version of Section 2.714 remains, in pertinent part, unchanged from the 1978 amendment. The

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2/ Generally, PSAR's and FSAR's represented the only information available upon which the public might refer to draft contentions and, in most cases, these documents were available publicly for only about 30 days before the deadline for filing contentions.

3/ 37 Fed. Reg. 15127.

4/ 43 Fed. Reg. 17798 (April 26, 1978).

"basis" legal standard as interpreted by atomic safety and licensing appeal boards has generally worked better than the predecessor "specificity" legal standard. However, as the recent furor over the Allens Creek[5] case attests, dissatisfaction still persists. Nevertheless, the exercise of establishing contentions has become much less vexatious and, more importantly, licensing proceedings are no longer being stalled, as they were in 1970-1972, by protracted wrangling over the admissibility of contentions.

Critics of the "basis" standard stress that it does not permit, at the time contentions are first raised, the ready disposal of contentions which common sense or indisputable and readily available information indicate lack merit. Numerous appeal boards have ruled that lower tribunals may not determine the merits of any factual allegations contained in contentions during the contentions' development phase of the case.[6] Thus, licensing boards may not use their expertise at the initial pleading stage of the proceeding to weed out frivolous contentions. The merits of the contentions can only be determined, after discovery, through either summary disposition or evidentiary presentation.

The alternate to the proposed rule would clearly satisfy this criticism. Licensing boards would be permitted, at the time contentions were first offered, "to judge the merits of the contentions as to whether genuine issues of material fact exist." Any contention that failed to measure up would be rejected, and it would not be the subject of a hearing. This proposal undoubtedly would exclude frivolous contentions from a licensing proceeding. Unfortunately, it is not legally supportable. It simply requires too much evidence too soon in the proceeding and, if adopted, would contravene the administrative due process tenets of the Administrative Procedures Act of 1949 and the attendant case law.

5/ See fn. 7.

6/ See, e.g., Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973).

Legal objections to the alternate could be removed if NRC regulations were revised to permit a limited period of discovery before would-be intervenors were required to specify their contentions. In this circumstance, an ample opportunity would have been provided to ferret out "facts" to support each contention, including "references to the specific sources and documents" relied upon. Indeed, then it could be expected that factual allegations be of sufficient weight and substance to "demonstrate that there is a genuine issue of material fact to be heard." Absent a change in the regulations governing the conduct of discovery in NRC proceedings, the alternate to the proposed rule should not be adopted.

The proposed rule would not change the "basis" legal standard. Instead, the proposal would unequivocally establish an understanding that the basis for a contention must include "a concise statement of the facts . . . together with references to the specific sources and documents" relied upon. The merits of the proferred facts and references, as under the present regulation, would be determined at the summary disposition or evidentiary phase of the licensing proceeding. However, the proposed rule would overr le a longstanding but troublesome series of appeal board rulings that members of the public are under no obligation to demonstrate the existence of some factual support for a contention, as a precondition to its acceptance under Section 2.714.[7/] Thus, the rulemaking proposal at first

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7/ See e.g., Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). The appeal boards interpret "basis" to mean a statement of reasons which they differentiate from facts. Id. at 548. It seems obvious that the term "basis" was intended to require factual support for contentions. 37 Fed. Reg. 15127, 15128 (July 28, 1972). Although the merits of the alleged facts should not be determined in the absence of any discovery, the "basis" test does require statements in support of contentions, such as those set forth in the Allens Creek biomass contention, that are recognizable as factual allegations. It is not enough, for example, to aver,

view appears to provide a reasonable basis for strengthening the contentions' test. However, there are several disquieting aspects of the proposal that warrant its rejection.

First, the Statement of Considerations states that the proposed rule "would permit the staff or applicant to seek and the presiding NRC official to compel a more specific or definite statement" of the contention. We assume, by this language, that NRC intends to adopt the federal court practice under Rule 12 of the Federal Rules of Civil Procedure whereby motions for more particular statements with respect to complaints and other pleadings are permitted. Such motions usually contribute nothing but delay to the proceeding, and the objective of a more particularized pleading is seldom realized. PSO opposes any attempt to introduce this process into NRC practice. Such an initiative would turn the clock back to 1970-1972 when contentions' development was a principal reason for hearing delays.

Second, a real danger exists that the proposal, if enacted as a regulation, could be misinterpreted and zealously applied to the point where the standard for admissibility of contentions will reach the level commanded by the alternate to the proposed rule. In other words, the effect of the emphasis placed by the Commission on requiring more factual support for contentions could result in the application of an impermissible legal standard. Lest this comment be misunderstood as unduly altruistic, the point is stressed out of a recognition that no interest, including that of license applicants and holders, is served by improvident rulemaking. This concern is underscored by the notion in the Statement of Considerations that the burden of establishing good cause

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without elaboration, that "local public safety officials were not prepared to deal with the emergency situation which might result in the event of a traffic accident involving the vehicle carrying spent fuel between facilities." The appeal board in McGuire erred in finding that this contention met the "basis" test. Id. at 549, n. 10. A further averment was needed which would indicate the prospective intervenor's view of the manner in which officials were unprepared, e.g., lack of qualified and experienced personnel, thereby providing some assertion of "basis" for the general allegation of unpreparedness.

should be placed on intervenors before they would be permitted "to seek or establish facts or rely on sources as to which notice was not given when the contention was admitted." Again, such a limitation without first providing the opportunity for discovery offends concepts of fairness and due process. Although the quoted language is not part of the proposed revision to Section 2.714, it certainly conveys a questionable signal as to the proper interpretation to be given to the proposed regulation.

There is no doubt that clarification is needed with respect to the proper application of the "basis" test. However, such clarification would be accomplished better by policy statement. The Commission could supplement the Statement of Policy issued on May 27, 1981, to include interpretive guidance on the proper meaning of "basis." Indeed, the use of the language of the proposed rule would be appropriate. The troublesome appeal board decisions referred to above would be overturned. More importantly, however, the use of a policy statement would clearly indicate that the basic thrust of the existing regulation is unchanged, and the adverse aspects of the proposed regulation would be avoided. Finally, a policy statement seems particularly appropriate when, as in this case, guidance is being provided on largely a judgmental decision. Such guidance, whether in the form of a regulation or policy statement, will not be the panecea. For when all the briefs are received and arguments made, the final outcome rests with judgment of the arbiter, a judgment that must, on the circumstances of a particular case, determine the adequacy of "facts" and "references" offered in support of contentions. PSO submits a policy statement fosters this process better than a regulation.

PSO supports the remaining elements of the proposed rulemaking. The proposal to limit the number of interrogatories to 50, absent a showing of good cause justifying a larger number, is consistent with the practice employed by various federal district courts. A memorandum entitled, "Limitation on the Number of Interrogatories in Federal District Court," provides a review of the various approaches taken by the district courts to limit the number

of interrogatories. The practice apparently has been successful in reducing abuse of the discovery process, and its adoption by NRC should also prove beneficial.

Sincerely,

Joseph Gallo

Joseph Gallo
Counsel for Public Service
Company of Oklahoma

Enclosure
JG/pm

M E M O R A N D U M

TO: Joseph Gallo

FROM: Morgan Scudi MS

DATE: July 1, 1981

RE: Limitations on the Number of Interrogatories in Federal District Court

Several federal district courts have rules that limit the number of interrogatories that may be filed without special court permission. Generally this is done under Rule 83 of the Federal Rules of Civil Procedure, which grants district courts rulemaking authority over their practice. Fed.R.Civ.P. 83. At least eighteen federal district courts have such rules, and in addition, at least five district courts limit the number of interrogatories by a standing order or by instruction from a particular judge.

Federal Rules on the Number of Interrogatories

Prior to the 1946 amendment of Rule 33 of the Federal Rules of Civil Procedure, several courts had fixed a more or less arbitrary limit on the number of interrogatories which could be served in an action. [1970] Fed. Civil Prac. ( ) § 33.05. This practice was ended by the the amended Rule 33 of 1946, which provided that "the number

of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression." Id.; Fed.R.Civ.P. 33 (1946).

The present Rule 33, adopted in 1970, does not mention the number of interrogatories; however, Rule 26 states, "Parties may obtain discovery by ... written interrogatories ... [and] the frequency of use of [this method] is not limited." Fed.R.Civ.P. 26(a). Thus, Rule 33 currently allows large numbers of interrogatories and with them the possibility for abuse.

One proposed amendment to Rule 33(a) would have added the following sentence:

> A district court may by action of a majority of the judges thereof limit the number of interrogatories that may be used by a party.

R.FIELD, B.KAPLAN, & K.CLEMENT, MATERIALS ON CIVIL PROCEDURE, at 12 (Supp. 1979).[1/] This proposal would have formalized what several federal district courts already do by local rule. In fact, the language of the proposed amendment mimics that of Rule 83 which allows district courts to make local rules of practice. Fed.R.Civ.P. 83; Appendix B.

1/ This proposed amendment was not adopted.

Federal Local Court Rules Limiting
The Number of Interrogatories

The present use of interrogatories as authorized by Rule 33 has been linked to discovery abuse. Cohen, A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules, 63 Minn. L.R. 253, at 271-272 (1979). Many district courts have responded to this abuse of discovery by enacting maximum limits on the number of interrogatories that may be filed without special court permission. Id. at 276-277. Cohen, in her article on local discovery rules, cites Rule 83 as the basis for these local rules limiting the number of interrogatories,[2/] but then goes on to state: "As Rule 33 provides no limitation in number, the validity of such local rules is questionable." Id. at 277. Cohen's questioning is based on the fact that Rule 83 allows district courts to "make and amend rules governing its practice not inconsistent with the federal rules." Fed.R.Civ.P. 83 (emphasis added by Cohen); id. footnote at 272. Apparently, several district courts believe that limiting the number of interrogatories that may be filed without court permission is not inconsistent with the Rule 26 which dictates that their "frequency of use ... is not limited." Fed.R.Civ.P. 26(a).

2/ Additional authority can be found in the Act of March 2, 1793, Ch. 22, § 7, 1 Stat. 335 (1793) (lawful to make rules for their respective courts); and 28 USC § 2071 (1976) (all courts established by Act of Congress may prescribe rules for the conduct of their business).

There are at least eighteen federal district courts which limit the number of interrogatories filed without special court permission. See Appendix A. These local court rules limit the number of interrogatories to 20, 25, 30, or 50, depending on the district. Many rules count all parts and subparts as separate interrogatories in arriving at the limit.

These local court rules may be placed into three categories, the first category being those rules which simply limit a party from serving any other party with more than one set of X number of interrogatories unless otherwise permitted by the court. A typical example is the rule for the Eastern District of Missouri:

> Rule 8. Interrogatories
> In all civil cases, the total number of interrogatories propounded to each party pursuant to Rule 33, Federal Rules of Civil Procedure, shall be limited to twenty. Any subparts contained within an interrogatory shall relate directly and specifically to the principal interrogatory. Further interrogatories may be propounded only with leave of Court.

Court Rule 8, E.D. Missouri. Three additional courts could be placed into this category: Louisiana (W.D.), Hawaii, and Georgia (S.D.)

The second category of local court rules includes those rules which require a showing of good cause before the court will grant additional interrogatories. A typical

example of this type of rule is found in the District of Minnesota:

> Rule 3B. Interrogatories
> Parties answering interrogatories under Fed. R. Civ. P. 33 or requests for admissions under Fed. R. Civ. P. 36 shall repeat the interrogatories or requests being answered immediately preceding the answers.
> No party may serve more than a total of fifty (50) interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. Such motions shall be in writing setting forth the proposed additional interrogatories and the reasons establishing good cause for their use. In computing the total number of interrogatories, each subdivision of separate questions shall be counted as an interrogatory.

Court Rule 3B, D. Minnesota. Seven other sets of court rules which limit the number of interrogatories follow this general pattern. Note also that the Middle District of Tennessee requires a higher showing of good cause; after limiting the number to twenty, the rule goes on to state:

> Requests for such additional interrogatories or sets of interrogatories to be submitted, and a statement of counsel as to the necessity for such information, its relevance, or likelihood to lead to relevant information, and the fact that it cannot readily be obtained from other sources.

Court Rule 9(2), M.D. Tennessee.

The final category includes the three sets of local court rules which combine limits on the number of

interrogatories with limits on the number of Requests for Admission. One such rule is found in the Western District of Texas:

> Rule 26(d)(1) Number of Interrogatories and Requests Limited.
> Each party that chooses to submit written interrogatories pursuant to Rule 26 of the Federal Rules of Civil Procedure will be initially limited to propounding twenty (20) questions to each adverse party. In determining whether this requirement has been met, each separate paragraph within a question and each subpart contained within a question which calls for a separate response shall be counted as a separate question. Requests for Admissions made pursuant to Rule 36, F.R.Civ.P., will be limited in length to ten (10) Requests which shall in a like manner include all separate paragraphs and subparts contained within a numbered Request. Upon completion of depositions and upon application for leave of Court to file further Interrogatories or Requests, the Court may permit further Interrogatories or Requests to be filed, upon a showing of good cause. [Added 6-27-78.]

Court Rule 26(a)(1), W.D. Texas. Note that this rule requires the completion of depositions before further interrogatories may be requested of the Court.

A variation on these three general types of court rules is found in the Southern District of Georgia where "[a]dditional interrogatories will be allowed only after initial interrogatories are answered...." Court Rule 7.4, S. D. Georgia. Another is found in the Southern District of California which requires that a pretrial discovery conference

be held before the court can entertain any "motion pursuant to Rules 26 through 37, F.R.Civ.P." Court Rule 232-1, S.D. California.

In addition to court rules, several federal judges have limited the number of interrogatories they will allow. Cohen, supra at 276. Cohen's study cites the practice of Judge Pollack in the Southern District of New York to

> let it be known that the 'use of interrogatories is not allowed until other means have been exhausted, and then only upon good cause shown to the court.'

Cohen, supra at 276. Other judges in five different district courts have issued standard orders or instructions to limit the number of interrogatories allowed in discovery. Cohen, supra, footnotes at 277.

APPENDIX A

I. DISTRICT COURTS WITH RULES WHICH LIMIT THE NUMBER OF INTERROGATORIES

District Court	Number of Interrogatories	Additional Interrogatories
Alaska	20	Upon completion of depositions and application to the court and upon good cause appearing.
Missouri (E.D.)	20	w/leave of court.
Tennessee (W.D.)	20	w/leave of court and strong showing of good cause.
Texas (W.D.)	20	Upon completion of depositions and w/leave of court (Also limits Admissions to 10).
California (S.D.)	25	w/Motion After Discovery Conference.
Georgia (S.D.)	25	Only after interrogatories are answered and w/written permission of the court.
Louisiana (W.D.)	25	Permitted for cause shown.
Hawaii	30	Not w/out prior leave of court.
Indiana (S.D.)	30	w/motion establishing good cause.
Kentucky (W.D.)	30	w/motion for permission.
Virginia (E.D.)	30	w/written motion and showing of good cause.
West Virginia (N.D.)	30	Not unless permitted by the court for good cause shown.
Delaware	50	w/court order (limits Admissions to 25).
Florida (M.D.)	50	Not unless permitted by the court for cause shown.

District Court	Number of Interrogatories	Additional Interrogatories
Minnesota	50	w/motion, notice and showing good cause.
New Mexico	50	w/motion showing good cause.
Illinois (N.D.)	rules not reviewed	
Missouri (W.D.)	rules not reviewed	
Tennessee (W.D.)	rules not reviewed	

Source: [1981] FED. LOCAL COURT RULES (CALLAGHAN)

II. DISTRICT COURTS WITH STANDARD ORDER OR INSTRUCTIONS BY A JUDGE TO LIMIT THE NUMBER OF INTERROGATORIES.

Georgia (M.D.)

North Carolina (W.D.)

Oregon

Pennsylvania (E.D.)

Pennsylvania (W.D.)

Source: Cohen, supra.

APPENDIX B

Rules of Civil Procedure

Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time-to-time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.