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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

COMMITTEE ON NUCLEAR TECHNOLOGY AND LAW

JAY E. SILBERG
CHAIR
2300 N STREET, N.W.
WASHINGTON, D.C. 20037
(202) 663-8063

JEFFREY L. RISACK
SECRETARY
4 IRVING PLACE
NEW YORK, N.Y. 10003
(212) 460-3677

June 18, 1990

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

Re: Proposed NRC Rules on Willful Misconduct by Nonlicensees and Revisions to Procedures for Issuing Orders (55 Fed. Reg. 12371, 12374)

Gentlemen:

By Federal Register notices published on April 3, 1990, the Nuclear Regulatory Commission ("NRC" or the "Commission") published for comment two proposed rules. One would revise the NRC's procedures for issuing orders (55 Fed. Reg. 12371) and the other would establish enforcement rules for "willful misconduct" by nonlicensed persons (55 Fed. Reg. 12374).

The Committee on Nuclear Technology and Law (the "Committee") of the Association of the Bar of the City of New York is pleased to provide its comments on the proposed rules. The Committee is one of the standing committees of the Association, a voluntary bar association with more than 18,000 members. In 1949, the Executive Committee of the Association adopted a resolution establishing a Committee on Atomic Energy, the predecessor to the Committee. That resolution established a mandate for the Committee to report on all matters relating to atomic energy. Since its inception, the Committee has actively participated in the consideration, development and interpretation of much of the proposed legislation and regulation in the field of atomic energy.

I. Willful Misconduct by Nonlicensees

Relying on Section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201 et seq. (the "AEA"), the NRC proposes to take enforcement action against nonlicensees it considers malfeasant by ordering their removal from positions of

concern to the agency. See 55 Fed. Reg. at 12376. The Committee believes that there is a serious question, not adequately addressed by the NRC, as to whether the Commission's statutory authority authorizes such action against nonlicensees.

The ordering authority of the NRC is set forth at Section 161.i of the AEA. Section 161.i states:

> In the performance of its functions the Commission is authorized to --
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> i. prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material. . . , and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

The Supplementary Information accompanying the proposed rule states that the Commission's ordering authority extends to any person "who engages in conduct within the Commission's subject matter jurisdiction". 55 Fed. Reg. at 12370. The key issue, however is whether NRC is acting within its jurisdiction when it exercises such authority directly against nonlicensees. The Supplementary Information relies upon NRC and Federal Communications Commission ("FCC") cases to support this argument. These cases does not appear to support the NRC's position.

The Supplementary Information relies on four NRC cases. However, while these cases recognize the broad authority granted to the Commission by Congress, all of the cases concern only the application of NRC's authority to licensed entities. None of these cases deals with the issue of whether NRC's ordering authority pursuant to Section 161 of the AEA extends to nonlicensees. See 55 Fed. Reg. at 12370 citing Power Reactor Dev. Co. v. International Union of Elect. Radio and Mach. Workers, AFL-CIO, 367 U.S. 396 (1961); Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 527 n.3 (D.C. Cir. 1982); New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170,

173-74 (1st Cir. 1969); Siegel v Atomic Energy Comm'n, 400 F.2d 779, 783 (D.C. Cir. 1968).

The PRDC case concerned the Commission's first contested proceeding of a licensed facility. Connecticut Light concerned a new fire protection rule applicable to facility licensees. The New Hampshire case concerned a challenge to a construction permit license. And the Siegel case concerned protection of licensed nuclear power plants against sabotage and acts of war. None of these cases addressed the question of whether the Act authorizes the Commission to issue enforcement orders directly against nonlicensees.

Furthermore, the Supplementary Information accompanying the proposed rule does not appear to give adequate consideration to Reynolds v. United States, 286 F.2d 433 (9th Cir. 1960). The Reynolds decision states that Section 161.i of the Atomic Energy Act, "deals with licensees", and gives the Commission "power to regulate such licensees in the national interest". 286 F.2d at 441 (emphasis added). As the Supplementary Information points out, the issue in Reynolds was whether Section 161 applied to the activities of the Commission itself, in contrast to the activities of licensees (or nonlicensees). Nevertheless, the decision's substantial discussion of the limitations on the Commission's authority granted by Section 161, and how its "very language . . . indicates it is only dealing with licensees", see 286 F.2d at 441 (emphasis added), would appear to be more relevant than the other cases relied upon to support the proposed rule.

The FCC cases cited in the Supplementary Information are not helpful to the arguments underlying the proposed rule. The Supplementary Information argues that Section 4(i) of the Federal Communications Act is similar to Section 161.i of the Act and as the former authorizes the FCC to regulate persons not licensed by the FCC so does Section 161.i authorize the NRC to regulate such non-licensees. The cases relied upon either address FCC rulemaking authority over to its licensees,1/ FCC's authority to issue

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1/ FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 793 (1978); United States v. Storer Broadcasting Co., 351 U.S. 192, 203, (1955); National Broadcasting Co. v. United States, 319 U.S. 190, 196 (1943); GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

interim relief and interim orders to its licensees,[2] or restrictions on the FCC's ordering authority over its licensees.[3]

The Supplementary Information also cites United States v. Southwestern Cable, 392 U.S. 157 (1968), for the proposition that "the FCC has the authority to issue orders under section 154.i to persons whether licensed or not," 55 Fed. Reg. at 12371. Southwestern Cable concerned the FCC's regulatory authority over the new communications technology of cable television. Southwestern Cable does not support the NRC's imposing direct regulatory authority over other established industry participants, such as vendors, suppliers, and nonlicensed workers, who have been in existence since the nuclear industry began.

In summary, the law relied upon in the proposal to extend the NRC's ordering authority to nonlicensees provides little, if any, support for this extension; and the Reynolds case provides strong precedent for a contrary outcome.

Furthermore, the inclusion in the Energy Reorganization Act of 1974 ("ERA") of a unique reporting and penalty provision applicable to specified nonlicensees also strongly suggests that the NRC at that time lacked authority to issue orders directly against nonlicensees. See Section 206 of the ERA, 42 U.S.C. § 5846. The passage of Section 206 of the ERA would have been unnecessary if the NRC's existing ordering authority included the authority to issue orders against the nonlicensees of concern to the NRC in Section 206. But, as the legislative history of Section 206 states, "The Atomic Energy Act contains no similar provision requiring the reporting of defects and noncompliances, subject to civil or criminal penalties." 1974 U.S. Code Cong. & Admin. News (93rd Cong. 2d Sess.), vol. 3 at 5527. In short, in 1974, neither the broad rulemaking authority nor ordering authority of the agency was expansive enough to reach the nonlicensees that are the subject of Section 206. No statutory changes have occurred since that time to expand that authority.

2/ Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092 (D.C.Cir. 1981); Western Union Telegraph Co. v. United States, 267 F.2d 715, 722 (2d Cir. 1959).

3/ American Telephone and Telegraph v. FCC, 487 F.2d 865 (2d Cir. 1973).

In summary, there are serious questions whether Section 161.i of the AEA, on which the NRC relies to extend its ordering authority, applies to nonlicensees.4/

In addition to these statutory questions, there are several aspects of the proposed rule that are bad policy and bad law.

The scope of the proposed rule covers willful misconduct which "does not in itself constitute or create a violation of Commission requirements." 55 Fed. Reg. at 12376. NRC has no legal basis for enforcement action aimed at conduct that does not violate a specific regulation or other law associated with its mandate.

The Supplementary Information states that the proposed rule "is intended to address cases in which the willful misconduct does not in itself constitute or create a violation of Commission requirements, either because of the wording of the particular requirement applicable to the activity or because NRC has not yet acted in an area, i.e., drug use by employees of a materials licensee while engaged in licensed activity." Id. The two cited cases demonstrate why it is inappropriate to punish this type of conduct. In the first instance, if the conduct does not violate a NRC regulation, it is difficult to understand how such conduct can be labelled "misconduct" in an NRC enforcement context, let alone "willful misconduct." In the second case, if the NRC has not yet acted in an area, then the conduct in question is not prohibited, at least not by the NRC. Otherwise illegal conduct (as in the drug use example cited by NRC), can be referred by NRC to the appropriate authorities.

The proposed is also flawed in that it unfairly permits orders to be issued which have no specified time limits, even though those orders adversely affect the livelihood and well-being of the individuals against whom the orders are directed. While such orders would "ordinarily" contain time limits, 55 Fed. Reg. at 12376, the proposed rule does not mandate the inclusion of such limits.

4/ Because Section 161 is inapplicable, there is no need to consider whether orders against nonlicensees could be accompanied by civil penalties issued under Section 234 of the AEA.

We believe that it is also inappropriate that an enforcement order may be issued based upon the "attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility." 55 Fed. Reg. at 12376. A licensee has an absolute right to object to an NRC determination without the NRC interpreting such action to be evidence of "bad attitude." Enforcement action is only appropriate based upon the substantive violation, and not on a licensee's response to the charge by NRC that such a violation occurred. If an individual has not engaged in any misconduct or believes in good faith that he or she has not been involved in any misconduct, that person should be fully justified in objecting to the allegation, and denying responsibility for any wrongdoing. In our society, individuals are permitted the opportunity to challenge accusations against them, particularly those that can result in very onerous consequences, such as the type of orders contemplated by the proposed rule, without the fear of reprisal for exercising that opportunity. The NRC should not seek to attach adverse consequences to the exercise of that right. Basing an enforcement order on perceived "bad attitude" creates the possibility of "chilling" the legitimate expression of completely appropriate technical or substantive views.

II. The Show Cause Process

The purpose of the proposed change to the established show cause process is not clear. The Supplementary Information describes two justifications for the recommendation: the NRC's desire to issue orders and take other enforcement action directly against nonlicensed individuals and entities, and a fear that someone might request a hearing if the NRC demands that the person provide information to the NRC.

With respect to the first justification, our above discussion indicates the serious questions that the Committee has with the proposed rule's legal basis in taking enforcement action against nonlicensees. Our discussion in the willful misconduct context applies equally here, since both proposed rules rely on the same NRC and FCC cases. See 55 Fed. Reg. at 12370-71 and 12377-78.

With respect to the NRC's second justification for a change to the Commission's show cause process, see 55 Fed. Reg. at 12371, the NRC's concern about hearing rights in connection with submissions of information does not appear significant. The proposed rule cites no instances where an individual or entity that

had been requested to "show cause" by explaining specified prior conduct challenged the need to provide such information.

If the purpose of the demand for information remains the same as in the current show cause process, which the text of the proposed rule suggests, it would ensure that the agency has correct and complete information **before** it takes enforcement actions. This would normally occur through the notice of violation process; however, when time is of the essence, the show cause process would be available to the Staff. When a request to show cause or a demand for information is issued, since the agency would intend only to seek information and not yet to take adverse action against an individual or an entity, untimely requests for hearings would seem to be an unlikely event.

Apart from the rationale contained in the Supplementary Information, the enforcement nature of the new demand provision raises questions. If the NRC is only seeking information at a pre-enforcement stage, it is not obvious why it must require the answer to admit or deny each allegation, and why it does not advise an individual of an opportunity for a hearing if an order subsequently is issued against him. Furthermore, if the NRC is only seeking information, it already has the authority to do so and does not need this new provision. See 42 U.S.C.A. § 2201(c); United States v. Comley, 890 F.2d 539 (1st Cir. 1989).

III. Conclusion

In conclusion, we suggest that the Commission not adopt the proposed new rules dealing with the issuance of enforcement orders against nonlicensed parties and the revision of the agency's show cause process. Both proposals raise serious questions under the Commission's enabling statutes. And both proposals contain flawed provisions that will be injurious to those affected by them.

Respectfully submitted,

Jay E. Silberg, Chair
Committee on Nuclear Technology
and Law
The Association of the Bar of
the City of New York