RULEMAKING ISSUE
(Notation Vote)

September 20, 1988 SECY-88-269

For: The Commissioners

From: William C. Parler
General Counsel

Subject: PROMULGATION OF WITNESS/LAWYER SEQUESTRATION RULE FOR OI INVESTIGATIONS

Purpose: To obtain Commission approval for publication in the Federal Register of proposed regulations at 10 C.F.R. Part 19

Background: In a Staff Requirements Memorandum of May 23, 1988, the Commission directed the staff and OGC to draft a rule regarding the sequestration of lawyers and witnesses during the conduct of investigative interviews. The sequestration rule was alluded to in a March 29, 1988 letter from Congressman Sharpe.

Discussion: A proposed rule has been drafted that provides for the sequestration of all witnesses during the conduct of investigative interviews. The rule also provides for the exclusion of counsel when the agency investigator determines that a reasonable basis exists to believe that the investigation may be obstructed,

Contact:
Carolyn Evans, OGC
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impeded, or impaired, either directly or indirectly, by an attorney's representation of more than one witness or by an attorney's representation of both a witness and the employing entity of the witness. In the event an attorney is prohibited from representing one or more witnesses or a witness and the employing entity, the proposed rule provides that, when practicable, the attorney be advised of the reasons supporting the decision to exclude.

Recommendation: It is recommended that the Commission approve publication of the proposed rule in the Federal Register.

Coordination: The EDO's staff has reviewed the proposed rule. Their suggestions have been incorporated.

William C. Parler
General Counsel

Attachment:
Proposed Rule

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, October 6, 1988.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Thursday, September 29, 1988, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 19

Sequestration of Witnesses

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

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

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

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

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

SUPPLEMENTARY INFORMATION: The Commission is aware of the confusion that has arisen regarding who can attend investigative interviews of individuals. See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-82-34B, 15 NRC 918, 990-93 (1982) (discusses the question of whether an interviewee may have a representative of company management present during investigative interview). As a general matter, no person has a right to be accompanied by counsel or any other individual during a voluntary NRC investigative interview. Id. However, absent a subpoena, no person is required to submit to an NRC interview. Thus, to the extent the existence and scope of one's right to be accompanied by counsel or other representative becomes an issue, it is in the context of an interview compelled by administrative subpoena issued pursuant to 42 U.S.C. § 2201(c). In these cases, Section 6(a) of the Administrative Procedure Act, 5 U.S.C. § 555(b), provides that the interviewee is entitled "to be accompanied, represented and advised by counsel. . . ."

Questions concerning the scope of an interviewee's right to be accompanied by counsel or others, born out of the absence of clear Commission policy on the issue and the lack of clearly developed judicial guidelines, have been raised in essentially three ways. First, in several instances, an interviewee's employer has sought to arrange for a management representative to attend NRC interviews of its employees.

Second, the employer has provided corporate counsel, either unilaterally or with the agreement of the employee, to represent all employees during an NRC interview. Third, an employer has offered to provide its employees, free of charge, non-corporate counsel initially selected by management or independently retained by the individual employee.

Where the interviewee is a member of the employer's corporate control group, the presence of corporate counsel at an NRC interview is, except in extraordinary circumstances, not objectionable. Similarly, the fact that an employer has agreed to pay the fees of employee selected, non-corporate counsel should generally be of no concern to the investigative staff unless the fee reimbursement agreement on its face or in operation acts as an improper restraint on the employee's potential candor. However, where corporate counsel seeks to represent non-management employees during an NRC investigation, or where the employer effectively selects the employee's non-corporate counsel, the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to the inquiries of the agency and the potential impairment to the efficacy of the NRC investigation become a paramount concern.

In most cases, attempts to interject a corporate presence into investigative interviews of the non-management employees of a licensee or applicant have been satisfactorily resolved through negotiation between company management and NRC staff. However, such ad hoc negotiations have led to unnecessary delay in completing NRC investigations. In order to clearly delineate the rights of individual interviewees, the legitimate interests of the company or licensee, and the responsibilities of the NRC

to ensure the public health and safety, the Commission believes it appropriate to announce general guidance to be followed in this area.

The Commission believes as a matter of policy that investigative interviews should be conducted in an atmosphere free of outside influences. The Commission is aware that management often has a legitimate interest in NRC investigations in order to uncover and correct any violations of NRC regulations. Moreover, since the policy of the Commission is to hold the licensee or applicant strictly liable for the acts and omissions of its employees and contractors, the licensee or applicant normally has a corporate and/or financial interest in the outcome of the investigation. Nevertheless, the Commission believes that the purpose of its investigations (to protect the public health and safety by discovering violations of Commission regulations and the Atomic Energy Act), and its interest in ensuring the actual and apparent integrity of the agency's factual findings and regulatory conclusions based on the investigation would be better served by excluding all persons from the interview except for the interviewee's counsel.

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

and client does not always eliminate or reduce the inherent potential that the multiple representation could impair or impede the Commission's investigation. Dual representation of both the interviewee and the licensee or applicant could permit the subject of the investigation to learn through counsel, the direction and scope of the investigation. The subject could then take steps to structure the flow of information to the NRC or otherwise impede the investigation. For instance, if person A told the NRC interviewer that there were improper welds in a certain place, or that individual C had told him of improper construction, the attorney could report this to the licensee or applicant which could then correct the welds or talk to C before the NRC did. Indeed, in three recent cases where the company offered its own attorney to potential witnesses, the attorney stated prior to any interview that he would relate to the company all that took place in the interview. This produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer. Moreover, should the agency official conducting the investigation determine that an offer of confidentiality to an interviewee is warranted, the whole purpose for confidentiality could be undermined simply by the presence of counsel who represents other interviewees or the subject of the investigation.

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

that the attendance of a particular attorney might prejudice, impede or impair the investigation by reason of that attorney's dual representation of other interests, the particular attorney may be excluded from the interview. The rule further provides that where an interviewee's counsel is excluded and the interviewee is not given reasonable prior notice of an intent to exclude counsel, the interview may be delayed at the interviewee's option for a reasonable period to permit the retention of other counsel. The "reasonable prior notice" standard contemplates affording the witness sufficient time in advance of his/her interview to retain new counsel, e.g., one week. The Commission believes that the interest in ensuring the health and safety of the public through vigorous and probing investigations of possible regulatory violations justify the somewhat minor burden on an individual's right to be accompanied by a particular counsel.

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

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

With this guidance in mind, the Commission realizes that no absolute criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee or applicant under investigation. The Commission believes however, that dual representation of interviewees and licensees should be prevented wherever possible. Thus, under these circumstances, an appropriate rule would grant the Office conducting the interview the discretion to determine whether the attorney should be allowed to attend the interview. The factors to consider in favor of exclusion include: (1) whether the company under investigation suggested that the witness employ the particular counsel and is paying the fee; (2) whether there might be a divergence of interest between the witness and the company unknown to the witness such that the witness might not want the attorney to be present if he were aware of the divergency of interest; (3) whether the investigation could be prejudiced if the attorney is allowed to attend the interview, the greater the potential prejudice the greater the case for excluding. The factors to consider in favor of allowing the attorney to be present include: (1) whether there is little

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

This proposed rule does not contain any information collection requirements under The Paperwork Reduction Act of 1980, Pub. L. 95-511.

REGULATORY FLEXIBILITY ACT CERTIFICATION

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

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

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

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

Authority: Secs. 53, 63, 81, 103, 104, 161, Pub. L. 83-703, 68 Stat. 930, 933, 935, 936, 937, 948, as amended (42 U.S.C. 2073. 2093, 2111, 2133, 2134, 2201); sec. 401, Pub. L. 93-438, 88 Stat. 1254 (42 U.S.C. 5891O, unless otherwise noted.

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

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

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

The regulations in this part establish requirements for notices, instructions and reports by licensees to individuals participating in licensed activities and options available to such individuals in connection with Commission inspections of licensees to ascertain compliance with the provisions of the Atomic Energy Act of 1954, as amended, Title II of the Energy Reorganization Act of 1974, and regulations, orders, and licenses thereunder regarding radiological working conditions. The regulations in this part also establish the rights and responsibilities of the Commission and individuals during interviews conducted as part of agency investigations undertaken pursuant to Section 161c of the Atomic Energy Act of 1954, as amended.

§ 19.2 is revised to read as follows: § 19.2 Scope

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

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

§ 19.3 Definitions

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

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

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

__.__ Sequestration of Witnesses and Counsel

As used in this part:

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

(b) When the agency official conducting the investigation determines, after consultation with the Office of the General Counsel, that a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly, by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness, the agency official may prohibit that attorney from being present during the interview of any witness other than the witness on whose behalf counsel first appeared in the investigatory proceeding. To the extent practicable and consistent with the integrity of the investigation, the attorney will be advised of the reasons supporting the decision to prohibit his or her representation of more than one interviewee during the investigation.

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

Dated at Rockville, Maryland this ___ day of ____, 1988.

For the Nuclear Regulatory Commission

SAMUEL J. CHILK
Secretary of the Commission

DOCKET NUMBER
PROPOSED RULE PR 19
(53 FR 45768)

AD06-1
(1) PDR

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1 PM
30 NOV
1988

America the Beautiful USA 15

'88 DEC 13 A8:22

Secretary of the Commission
USNRC
Washington, DC 20555

ATTN: Docketing + Service

Dear Secretary,

Please send me 1 free copy of the Proposed Rule Governing Intervenors CFR 19 and accept this postcard as my comment.

The intent is understood. Sequestration and control of attorneys with interests contrary to the intervenor is necessary. "How" this is accomplished needs some solid but sophisticated maneuvering.

Respectfully submitted
Marvin Lewis

DEC 12 1988

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(2)

January 6, 1989

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

Dear Mr. Chilk:

Subject: NRC Proposed Rule on Sequestration of Witnesses Interviewed Under Subpoena (53 Fed. Reg. 45768, November 14, 1988)

This provides Commonwealth Edison Company's (Edison) comments on the subject proposed rule. In it, the Nuclear Regulatory Commission (NRC) has proposed to amend 10 CFR Part 19 to prohibit the presence of a witness, or a counsel for a witness, from generally being present during the examination of any other witness called to give evidence in the same investigation. The purpose of this rule is to limit the flow of information between interviewees subpoenaed to give evidence in the same investigation.

The rule also would limit an attorney's ability to represent more than one witness. The concern here is "dual representation", such as, an attorney's representation of both a licensee and that licensee's employee. Such dual representation, the NRC believes, could lead to a conflict of interest and inhibit the testimony of the licensee's employee. To prevent these consequences of dual representation, the NRC proposes to authorize the agency official conducting the investigation to exclude an attorney if there is a reasonable basis to believe that the dual representation might prejudice, impede or impair the investigation.

In particular, the rule would raise a presumption of conflict of interest by a lawyer who has been recommended to a witness by a company which is under investigation and is paying that lawyer's fee, even if that lawyer is not simultaneously representing that company. The concern is with the company's suggestion of the attorney and not with its payment of the attorney's fee (see 53 Fed. Reg. at 45768, col. 3). This concern is misplaced. The fact that a company suggests an experienced attorney instead of leaving the acquisition of competent counsel to a possibly inexperienced witness, by itself, does not raise a presumption of conflict. In the absence of a showing that the company's suggestion of a counsel creates a conflict of interest, the NRC should not interfere in Edison's long-standing practice of supporting its employees by recommending competent counsel and defraying their legal expenses when conditions warrant.

~~8902080057~~ 2pp.

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The NRC characterizes this rule as creating a minor burden on the fundamental right of a witness to choose a counsel but believes that such a burden is warranted by public health and safety considerations. By this characterization of the rule, the NRC would avoid a case-by-case balancing of this interference with the right to counsel against the potential public health and safety considerations involved in a particular investigation. This consequence could reinforce the views of those who believe that nuclear power cannot be realized without significant abridgements of our fundamental Constitutional guarantees. Edison does not share those views but believes that the right to a counsel of one's choice is so fundamental a right that such a balancing is required and should be provided for in the rule.

Edison appreciates the opportunity to provide these comments.

Sincerely,

Henry E. Bliss

Henry Bliss
Manager of Nuclear Licensing

rf
5484K

ADOC-1
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19

(53 FR 45768)

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OFFICE OF SECRETARY
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January 9, 1989

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

Re: Revisions to NRC Regulations Regarding Sequestration of Witnesses and Attorneys at Interviews Conducted Under Subpoena, 53 Fed. Reg. 45768 (November 14, 1988)

Dear Mr. Chilk:

The Nuclear Regulatory Commission has proposed amendments to its regulations regarding sequestration of witnesses and attorneys at interviews conducted under subpoena. The proposed changes in the NRC's regulations were published at 53 Fed. Reg. 45768 (November 14, 1988).

The Commission originally requested comments on the proposed changes by January 10, 1989. Subsequently, the Commission extended the comment period thirty days, 54 Fed. Reg. 427 (January 6, 1989). Nonetheless, we are providing the Commission with comments at this time in order to permit their fullest consideration.

Accordingly, pursuant to the notice and opportunity for comment, the firm of Conner & Wetterhahn, P.C. hereby offers the attached comments on behalf of its clients and itself.

Sincerely,

Troy B. Conner, Jr.

Troy B. Conner, Jr.

Enclosure

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24 pp.

COMMENTS OF CONNER & WETTERHAHN, P.C.
ON PROPOSED NRC RULE ON SEQUESTRATION OF WITNESSES
AND ATTORNEYS AT INTERVIEWS CONDUCTED UNDER SUBPOENA,
53 Fed. Reg. 45768 (November 14, 1988)

Executive Summary

The proposed sequestration rule is unworkable, unnecessary and unlawful because:

- Absent an actual conflict of interest, there is no sound reason why an interviewed employee or officer or his attorney should not inform the company what he said or learned during an interview. The utility has a legitimate interest in knowing all it possibly can about any problems in order to promptly institute corrective actions as required by law.

- Under federal case law, an agency can order sequestration only upon a showing of "concrete evidence" that an attorney's presence would obstruct and impede its investigation. The proposed rule, however, would allow sequestration on the basis of intuition and surmise. In fact, the proposed rule presumes that sequestration is appropriate whenever an attorney represents multiple clients.

- Given the potential for criminal charges, the federal courts have found the choice of counsel in an agency investigation to be "crucial." The courts have emphasized that the right to choose one's counsel under the Administrative Procedure Act and the Sixth Amendment "should not needlessly or lightly be disturbed."

- The proposed rule mistakenly assumes that an attorney will not meet his ethical obligations to clients he represents during the investigation. No agency should presume that an attorney will breach his client's confidence or engage in a conflict of interest. In any event, these are matters for the attorney and client to consider, not the investigating agency.

- The Commission has presented no evidence at all to show that its investigations are actually impaired

by the absence of sequestration authority. The only hardship cited -- delay in the completion of investigations -- occurred when NRC investigators sought to impose unreasonable conditions on the conduct of interviews.

- Sequestration orders will require a succession of attorneys to familiarize themselves with the matter being investigated in order to provide the best possible legal representation. This itself will delay the investigation and will necessarily increase legal fees. Also, it will create a hardship by requiring some clients to accept representation by counsel less experienced in the field of nuclear licensing.

- The proposed rule naively assumes that a licensee's employees and officers interviewed by the NRC will not voluntarily inform the company about the interview.

Experience shows that the current approach of working out an arrangement satisfactory to NRC investigators, interviewees and licensees has worked reasonably well. The proposed rule would create many more problems than the rather minor one it attempts to solve. The proposed rule need not and should not be adopted.

I. The Proposed Rule Is An Overbroad, Unlawful Restriction Upon The Right To Representation By Counsel Of One's Own Choosing

The Nuclear Regulatory Commission ("Commission" or "NRC") has proposed an amendment to Part 19 of its regulations to provide, inter alia, that when an individual is compelled to appear in person at an NRC interview in connection with an investigation, his counsel shall not be permitted to be present during the examination of any other witness subsequently called during the investigation. The proposed rule would also permit the NRC to exclude counsel who "represents the person or employing entity that is the subject of the investigation," even if that counsel did not initially represent any particular witness.[1/]

The NRC's proposed rule is apparently modeled after similar provisions adopted by the Securities and Exchange Commission ("SEC").[2/] It is ironic that the Commission has evidently tracked the SEC's regulation because an ill-fated attempt by the SEC to enforce its sequestration rule led to the judicial repudiation of exactly what the NRC is now proposing: categorical exclusion of counsel from agency investigative interviews where the attorney represents more than one witness subpoenaed by the agency.

1/ 53 Fed. Reg. 45768 (1988).

2/ See 17 C.F.R. §203.7(b)(1988).

In SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976), the SEC had subpoenaed the vice president of a corporation whose officers were under investigation for insider trading. The two attorneys retained by Csapo had already represented eight other witnesses in the investigation. When Csapo was subpoenaed, the SEC invoked its sequestration rule to bar the same attorneys from the interview.

Just as the NRC theorizes, the SEC relied upon "the presumption underlying the rule -- that multiple representation increases the likelihood that subsequent evidence will be tailored, either consciously or unconsciously, better to conform with or explain what has come earlier."[3/] Second, the SEC argued that evidence already adduced suggested the possibility that certain corporate principals "may have attempted to pressure other employees of [the corporation] to accept the services of [Csapo's attorneys] in order . . . to present a 'common front.'"[4/] The United States Court of Appeals for the District of Columbia emphatically dismissed both rationales as unsupported speculation. The SEC did not seek certiorari.

Preliminarily, the Court noted that Section 6(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. §555(a),

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3/ 533 F.2d at 9.

4/ Id. at 10.

provides that any person summoned to appear before a federal agency is entitled to the assistance of counsel. It further observed that "[t]his guarantee, phrased by the legislature in unequivocal terms, has been construed to imply the concomitant right to the lawyer of one's choice."[5/] The Court found that it was not "at liberty to ignore the clear congressional mandate" of Section 6(a) of the APA.[6/] Thus, "before the SEC may exclude an attorney from its proceedings, it must come forth, as it has not done here, with 'concrete evidence' that his presence would obstruct and impede its investigation."[7/]

The Court rejected out of hand the SEC's suggestion that the mere potential for an obstruction of its investigation would justify excluding counsel of a witness' own choosing. The Court said:

> The SEC would negate Csapo's informed and voluntary decision on the ground that "the objective of the investigation might be frustrated if [his attorneys] . . . were permitted access to the testimony of any further witnesses." (Emphasis added.) We hold that such speculation is insufficient. The mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation. On the contrary, in many

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5/ Id. at 10-11 (footnote omitted).

6/ Id. at 11.

7/ Id. (emphasis added).

> cases it is likely that such representation may facilitate and expedite the proceedings.8/

Yet, the very purpose and effect of the NRC's proposed rule is to institutionalize the presumption made impermissible by the District of Columbia Circuit's decision, namely, that dual representation of multiple clients in an ongoing investigation necessarily impedes and obstructs the investigation. The proposed rule would permit the NRC to bar an attorney from representing his client at an investigative interview whenever the inspector or investigator, in consultation with the Office of the General Counsel, determines that "a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness . . . ."9/

The phrase "reasonable basis" is nowhere discussed, much less explained or defined, elsewhere in the rule or supplementary information. Given the stated premises of the rule, however, a strong inference exists that the NRC does not intend to look to extrinsic evidence of misconduct by a

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8/ Id. at 11-12 (first emphasis by the Court; second emphasis added).

9/ 10 C.F.R. §19.18(b)(proposed).

licensee's employees or its attorneys, but rather to what it perceives as the intrinsic potential for impairment of its investigations if an attorney is permitted to represent multiple clients. Certainly, neither the proposed rule nor the supplementary information indicates that the Commission will require "concrete evidence" before finding that the presence of a particular attorney at an interview would obstruct the NRC's investigation.10/

The Court in Csapo overturned the sequestration of the interviewee's counsel of choice for yet another reason which also applies to the NRC, namely, the potential for referral to the Department of Justice for criminal charges. Said the Court:

> Our conclusion that the SEC has failed to sustain its burden is reinforced by the Commission's concession that Csapo is a potential target of its efforts and may therefore be subject to future criminal sanction. Since any statement made by Csapo during the course of his questioning may later be referred to the Department of Justice for future consideration by a grand jury, perhaps followed by an indictment and prosecution on criminal charges, Csapo's choice of counsel to accompany and advise him during his SEC interview is obviously a crucial one. That choice should not needlessly or lightly be disturbed.11/

10/ Also, it appears that the NRC intends to invoke sequestration procedures routinely rather than "only rarely," as with the SEC (SEC v. Csapo, 533 F.2d at 9), whose lead the NRC is apparently following.

11/ 533 F.2d at 12 (footnote omitted). As support for its (Footnote Continued)

As the United States Court of Appeals for the Third Circuit held in a criminal case where the Government sought to disqualify defense counsel:

> The reasoning underlying these decisions [of the Supreme Court on the right to counsel] makes it clear that the sixth amendment generally protects a defendant's decision to select a particular attorney to aid him in his efforts to cope with what would otherwise be an incomprehensible and overpowering governmental authority. While the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel.
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> . . . .
>
> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus

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(Footnote Continued)
holding, the District of Columbia Circuit cited the earlier decision of the Ninth Circuit in SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966), where the Court disallowed an SEC sequestration order not limited in its effect to the interests of those under investigation, but which impermissibly prejudiced the "interests of the witness himself."

falls within the ambit of the sixth amendment.12/

Here, whatever difficulties the NRC believes it has encountered "in conducting investigative interviews in an atmosphere free of outside influences,"13/ the proposed rule would constitute an unlawful interference with the customary prerogative of an individual under subpoena, affirmed by the federal courts, to seek and accept representation by an attorney of his choice. Any attempt to limit this right by exclusionary orders devoid of concrete factual justification simply cannot be squared with the rights afforded an individual under Section 6(a) of the Administrative Procedure Act, 5 U.S.C. §555(b) and, given the potential for criminal liability, the right to counsel under the Sixth Amendment.

These important statutory and constitutional protections cannot be easily brushed aside simply because the NRC

12/ Unites States v. Laura, 607 F.2d 52, 55-56 (3rd Cir. 1979). See also, e.g., United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982). Of course, the issue of whether a conflict or potential conflict of interest may preclude representation of multiple defendants in a criminal case involves far different concerns than those at issue here. In a criminal case, a court must be concerned with "the institutional interest in the rendition of just verdicts in criminal cases" as well as the interest of the defendant. Wheat v. United States, 108 S. Ct. 1692, 1698 (1988). And even though the government may seek to disqualify counsel in a criminal case in federal court, that is a far cry from unilateral administrative agency action during a government investigation.

13/ 53 Fed. Reg. at 45768 (1988).

perceives some "potential impairment to the efficacy" of its investigations.[14/] Nor do we agree that the Commission has shown that its responsibilities to protect the public health and safety by identifying unsafe practices and violations of the law cannot be met except by the extraordinary means of sequestering attorneys freely chosen by subpoenaed witnesses.

II. The Proposed Rule Is Unnecessary And Would Be Counterproductive To The Prompt Completion Of NRC Investigations

Even if the Commission were otherwise persuaded of its legality, past experience offers no evidence that a change in the NRC's investigatory practices is necessary. Since the Commission was first entrusted by Congress with enforcement powers under the Atomic Energy Act, hundreds if not thousands, of investigations have been made. Yet, despite the protestations of concern about potential abuses by the attorneys or other representatives of interviewees, no case histories or other facts have been disclosed to show that NRC investigations have actually been "impaired" because of any undue "outside influence." No claim is made that even a single investigation to date has been compromised or frustrated. Only the "potential" impairment of an investigation and the suspicion that attorney's dual

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14/ Id.

representation "might" prejudice an investigation are invoked as a basis for the proposed rule.[15/]

To the contrary, our law firm has participated in many investigatory interviews in which the investigation has in fact been expedited by explaining matters which investigators do not understand, usually of a technical nature. Most NRC investigators that we have observed try to conduct fair and honest interviews. However, they frequently do not understand various technical matters and often need clarification of the company's organization, reporting responsibilities, and similar details. In many agencies, investigators who are not lawyers approach their witnesses with a preconceived mind-set of guilt. Such interviews are counterproductive to obtaining actual facts.

Indeed, the Commission frankly acknowledges that, in most cases, its concerns over corporate presence during the interviews of non-management employees of a licensee "have been satisfactorily resolved through negotiation between company management and NRC staff."[16/] The only problem actually experienced by the Commission has been "unnecessary delay in completing NRC investigations."[17/] No prejudice to the ultimate outcome of an investigation nor any threat to

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15/ Id. at 45768-69.

16/ Id. at 45768.

17/ Id.

the public health and safety has been identified. In fact, the only "delay" of which we are aware is delay created by the NRC's demand to exclude the interviewee's attorney from the interrogation. Any incidental inconvenience created by minor delay is, in any event, scarcely a justification for the sweeping abridgement of the right to counsel which would be implemented under the proposed rule.

Moreover, the District of Columbia Circuit in Csapo effectively rebutted the Commission's argument that its sequestration rule would really expedite NRC investigations. The Court said:

> It is inconceivable to us that a new attorney could become acquainted with the facts of the situation in the short period of time which the SEC asserts would be sufficient. Thus, delay would likely be increased by the substitution of counsel while Csapo would be put to the additional expense of retaining a new attorney.
>
> . . . [A] witness' attorney may advise his client with respect to the right against self-incrimination, object to inquiries allegedly outside the scope of the investigation, and ask clarifying questions . . . . These responsibilities are of critical importance and their competent performance requires adequate preparation. In particular, intelligent exercise of the Fifth Amendment privilege demands both a knowledge of the underlying facts and an appreciation of their legal significance.18/

18/ SEC v. Csapo, 533 F.2d at 12 (emphasis added). It is for this reason that the Court concluded that representation by an attorney already involved in pending (Footnote Continued)

Hence, to bring new, separate counsel into a case for each in a succession of witnesses will most likely delay completion of the investigation, contrary to the stated purpose of the proposed rule.

III. The Stated Rationale Is Insufficient To Support The Proposed Rule

Perhaps the major weakness in the Commission's explanation of the need for sequestration authority in conducting investigations is the unfounded assumption that an interviewee's attorney might not fulfill his professional obligations to his client(s), requiring the NRC to intercede. This causes the Commission repeatedly to confuse an attorney's ethical responsibilities with the NRC's regulatory interests in conducting investigations. Although an attorney's ethical obligations would not ordinarily be a basis for supporting or opposing a rule change, in this instance the Commission itself has injected the matter into its rulemaking.

For example, the Commission states that "the attorney can ethically represent multiple clients if he or she fully discloses the potential conflict to the clients and they individually assent to the multiple representation."[19/] Actually, there might well be circumstances where even

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(Footnote Continued)
proceedings "may facilitate and expedite the proceedings." Id.

19/ 53 Fed. Reg. at 45769.

informed consent will not resolve an irreconcilable conflict of interest among multiple clients, including two or more non-management clients.[20/] While we agree that a potential conflict of interest could arise under some circumstances where counsel represents both management and non-management utility employees during an investigation, the decision by a client whether to retain counsel in the face of a possible or actual conflict belongs to the client, not the investigating agency.[21/] Agency rulemaking simply should not be founded upon the philosophy that a licensee's corporate counsel or its customarily retained counsel might not live up to his ethical responsibilities, or that a witness cannot make informed, intelligent decisions in choosing an attorney.

The Commission also suggests that, upon learning of the direction and scope of an investigation during an employee interview of a non-management employee, the attorney representing the employee would relay the information to the

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20/ DR 5-105(B) and (C), Code of Professional Responsibility. The American Bar Association takes the position that a lawyer "should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests." EC 5-15, Code of Professional Responsibility (emphasis added).

21/ See SEC v. Csapo, 533 F.2d at 11.

company.[22] In any representation of the employee, including possible divulgence of his statements to his corporate employer, however, the attorney is ethically bound to respect the confidentiality and best interests of the client employee.[23] It is wrong to assume that an attorney would fail to recognize and resolve a potential conflict of interest or, worse yet, exploit the confidence of his client to the client's detriment.

Beyond this caveat, which is governed by the canons of professional responsibility, the NRC has given no reason why a licensee's own attorney should not advise the licensee of the scope of the NRC's investigation. Indeed, what evidence convinces the Commission that it cannot seek the open and direct assistance of the licensee in determining whether a violation has been committed? Protecting the health and safety of the public in the operation of nuclear power reactors is not to be judged by the same criteria which

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22/ 53 Fed. Reg. at 45769.

23/ DR 4-101(B)(2) and (3), Code of Professional Responsibility, make it an ethical violation subject to disciplinary action for a lawyer to knowingly use a confidence or secret of his client to the disadvantage of the client, or to use a confidence or secret of his client for the advantage of a third person, unless the client consents after full disclosure. The American Bar Association counsels in the related ethical consideration that "[c]are should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." EC 4-5, Code of Professional Responsibility.

apply to uncovering and prosecuting drug dealing or similar overt crimes and criminal conspiracies.

Going further with these assumptions, the Commission states that the corporate employer receiving interview information from an attorney "could then take steps to structure the flow of information to the NRC or otherwise impede the investigation."[24/] No substantiation is given to this accusation that licensees have engaged or would engage in conduct that is tantamount to an obstruction of justice, or that an attorney would implicitly abet such an obstruction.[25/]

Contrary to the hypothesis that licensees must ordinarily be kept in the dark about the NRC's investigation, the Commission correctly (but inconsistently) acknowledges that "management has a legitimate interest in NRC inspections and investigations in order to detect and correct any violations of NRC regulations," especially "since the policy of the Commission is to hold the licensee or applicant liable for the acts and omissions of its employees and contractors . . . ."[26/] Given an NRC enforcement policy

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24/ 53 Fed. Reg. at 45769.

25/ Under DR 1-102(A)(5), Code of Professional Responsibility, a lawyer "shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."

26/ 53 Fed. Reg. at 45768.

that rewards a licensee's self-policing of violations and punishes any indifference, it would be irresponsible for management not to learn all it could about possible infractions of NRC regulations.

In the same vein, there is no justification for the belief that the presence of the corporate attorney or corporate-retained attorney at an employee interview will produce "an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer."[27/] NRC reactor licensees uniformly encourage their employees to bring to management's attention any significant information affecting the health and safety of the public or fellow employees. Often, the information provided by employees to their utility employers is "detrimental" in the sense that it reflects the employee's perception that a violation has or may have occurred.

The NRC should not reverse its position and begin to question the sincerity of its licensees' "open door" policy in desiring employees to come forward with information which raises serious safety questions. No reason exists to assume that a licensee would act differently upon the same information from an employee given under oath to an NRC representative. In either case, the information enables management to take prompt corrective action.

27/ Id. at 45769.

In determining that an employee might feel "inherent coercion" because of the presence of corporate representatives or counsel, the NRC has apparently given little if any credence to the protection afforded an employee "whistleblower" by Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851. As the Commission is well aware, the statute expressly protects licensee and contractor employees from any form of discrimination as a result of giving testimony to the NRC. Thus, if the NRC is concerned about dispelling any possible perception of "coercion," the inspector could simply remind the interviewee, at the outset, of the Company's "open door" policy regarding safety allegations and the protection against discrimination afforded by Section 210.[28/]

28/ On the issue of alleged "coercion," the Commission expresses a somewhat cynical attitude toward practicing attorneys. It says that an offer of confidentiality to an interviewee would be undermined "simply by the presence of counsel who represents other interviewees or the subject of the investigation." 53 Fed. Reg. at 45769. Here again, the Commission erroneously assumes that counsel would not fulfill his ethical obligations to each client, including assurances to the interviewee that the pledge of confidentiality would be respected and that counsel would take all steps necessary to maintain the appearance as well as fact of propriety with regard to his representation of the interviewee. See note 22, supra. The insinuation that the interviewee could not or should not trust his attorney is disturbing, to say the least.

IV. The "Factors" Designated For Applying The Proposed Rule Fail To Explain How Agency Discretion Will Be Exercised

To offer guidance on how the proposed rule would operate in practice, the Commission states three factors, "which in conjunction with other circumstances may justify exclusion" of an attorney or other individual from an investigative interview.[29/]

The most glaring deficiency in the stated three factors is the absence of any requirement, in the words of the District of Columbia Circuit, for "concrete evidence" that the attorney's presence "would obstruct and impede [the] investigation."[30/] We reiterate the Court's strong and unambiguous admonition: "The mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation."[31/] Yet, the Commission's proposed rule, if adopted, would embrace that very assumption.

On careful review, the three "factors" given for deciding whether to sequester an attorney are not truly factors at all, but really just a restatement of the rule's prejudicial assumption that sequestration will ordinarily be

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29/ 53 Fed. Reg. at 45769.

30/ SEC v. Csapo, 533 F.2d at 11.

31/ Id. (emphasis added).

deemed appropriate where an attorney represents multiple clients.

Attorney's fees. The first factor is whether the company under investigation suggested that the witness employ the attorney and the company is paying his fee. Preliminarily, it is unclear how the NRC would collect this information. In its supplementary information, the Commission states that such matters "should generally be of no concern to the investigative staff unless the fee reimbursement agreement, on its face or in operation, acts as an improper restraint on the employee's potential candor."32/

The Commission has not explained what kind of fee reimbursement agreement could possibly restrain an employee's candor, nor is any example given from past experience. If the Commission means to suggest that an employer might condition reimbursement upon what the employee tells the NRC, it has cited no evidence of such a practice. Apparently, the NRC has not considered whether a lawyer could ethically accept representation of the employee as a client based on such a fee reimbursement agreement.33/

Even if the NRC were to consider fee arrangements, it is difficult to discern what inference the NRC would draw

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32/ 50 Fed. Reg. at 45768.

33/ See DR 2-103(B)(2), Code of Professional Responsibility. See also note 34, infra.

from a routine decision to provide counsel to an employee on a legal matter arising from the scope of his employment.[34/] Many employers -- not just NRC licensees -- frequently become involved in legal proceedings in which their employees are defendants or witnesses because of acts or alleged acts performed within the scope of employment.

In certain cases, an employer might therefore decide to provide counsel on behalf of the employee who, through no fault of his own, requires legal representation. Whether the employer decides to do so and whether the employee chooses to accept the recommended counsel rather than retain counsel at his own expense are not regulatory concerns of the NRC. Such private decisions should not be a reason for overturning the employee's decision to accept representation.

Also, legal ethics make it unnecessary for the NRC to consider payment of fees. An attorney is ethically bound not to accept compensation for his legal services from someone other than his client, except with the consent of

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34/ As the Court in Csapo stated: "It is neither unnatural nor unusual to provide the name of an attorney to a colleague in legal difficulty." SEC v. Csapo, 533 F.2d at 12. It is certainly no more "unnatural" or "unusual" for an employer to volunteer legal services on behalf of an employee who, for all the company knows, has done nothing wrong, but faces an unknown situation.

his client after full disclosure,[35] and under no circumstance may a lawyer "permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[36]

Conflict of interest. The second factor is whether there might be "a divergence of interest" between the interviewee and his employer unknown to the interviewee which, if known, would cause him to reject representation by the Company's attorney. This "factor" merely restates the unwarranted assumption that the attorney will not fully advise his client at the outset of representation and

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35/ DR 5-107(A)(1), Code of Professional Responsibility.

36/ DR 5-107(B), Code of Professsional Responsibility. The accompanying annotation to DR 5-107(B) by the American Bar Association admonishes that the third party paying for the services of the attorney "shall not interpose itself as an intermediary to control the activities of the attorney." ABA Opinion 294 (1958). We also note that the proposed Rules of Professional Conduct recently published for comment by the District of Columbia Court of Appeals on Sept. 1, 1988 state in Rule 1.8(e) that a lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation; there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and confidential or secret information is protected. We also note that the conflict of interest provisions in proposed Rule 1.7(b)(4) prohibit a lawyer from representing a client with respect to a matter if "the lawyer's professional judgment on behalf of the client will be . . . adversely affected by the lawyer's responsibilities to or interests in a third party . . . ."

thereafter of any potential conflict of interest or that the client cannot act intelligently on his own behalf.

If the NRC is aware of a potential conflict, but is uncertain whether the interviewee's attorney is also aware, the proper course would be for the Office of the General Counsel to so inform the interviewee and his attorney as has been done in the past. This allows the attorney to use his own best judgment in fulfilling his ethical responsibilities to his client and leaves the ultimate choice of counsel to the client, where it belongs. The NRC has no business or particular expertise in determining for an interviewee whether a conflict of interest exists or wherein lies his best interest.

Prejudice. The third factor, whether the investigation could be "prejudiced" if the attorney is allowed to attend the interview, openly begs the very question of how the NRC will determine the existence of "prejudice" to the investigation. Even more fundamentally, it is unclear from the rule or supplementary information exactly what the Commission means by "prejudice" to its investigation. If the NRC means that an investigation would be prejudiced by an obstruction of justice, subordination of perjury, or other practice intended to frustrate investigative fact-finding, it should say so.

On the other hand, "prejudice" sufficient for sequestration cannot legally be found in the mere opportunity an individual might have to learn of the nature of an

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(53FR 45768)

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NewYork Power Authority

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John C. Brons
Executive Vice President
Nuclear Generation

January 9, 1989
JPN-89-003, IPN-89-003

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

Attention: Docketing and Service Branch

SUBJECT: James A. FitzPatrick Nuclear Power Plant
Docket No. 50-333
Indian Point Unit 3 Nuclear Power Plant
Docket No. 50-286
Sequestration of Witnesses Interviewed under Subpoena

REFERENCE: NRC Notice of Proposed Rulemaking, 53 FR 45768, dated November 14, 1988.

Dear Sir:

The New York Power Authority has reviewed and evaluated the referenced notice of proposed rulemaking. The proposed rule would provide for the exclusion of an attorney from a compelled interview if the NRC interviewer considers that the presence of that attorney might prejudice, impede or impair the investigation because of the attorney's dual representation of other interests. This letter summarizes the Authority's comments on the petition.

The Authority reviewed the Supplementary Information in the Federal Register notice, and in particular, the cited cases as they apply to the proposed rule. The Authority does not consider the cited cases sufficient to support the proposed rule. Detailed comments are provided below.

1. SEC Sequestration Regulations

The NRC cites SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976) and SEC v. Higashi, 359 F. 2d 550 (9th Cir. 1966) for the proposition that there could be circumstances where an attorney could be barred from the interview. These two cases reviewed the SEC's disqualification of a witness's attorney pursuant to 17 CFR 203.7(b) based on that attorney's representation of another witness. The SEC's authority to disqualify attorneys under its sequestration rule is "plainly inconsistent" with the right to counsel which 5 USCA 555(b) provides, and "must, if it is to be enforced, be confined within 'permissible limits.'" SEC v. Higashi, 533 F.2d 7, 11 (1976). "[B]efore the SEC may exclude an attorney, it must come forth ... with 'concrete evidence' that his presence would obstruct and impede its investigation." Id. In both Higashi and Csapo, the court held that the SEC's application of 17 CFR 203.7(b) exceeded the permissible limits on its authority to disqualify attorneys.

Under the proposed 10 CFR 19.18(b), the threshold finding for excluding an attorney is "a determination that a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly" by the attorney's presence. The wording of the proposed rule would allow the disqualification of an attorney on a showing substantially less then the

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"concrete evidence" required in Higashi. The disqualification of an attorney based merely on a threshold finding wouldn't be within "permissible limits."

2. SEC Exclusion Rule

In support of its proposed right to exclude a witness's attorney where that attorney also represents the entity under investigation, the NRC cites United States v. Steel, 238 F. Supp. 575 (D.N.Y. 1965). In Steel, the court upheld the SEC's disqualification of an attorney pursuant to 17 CFR 201.3(c) (revised as of January 1, 1964), under such circumstances. The court noted that even in criminal prosecution cases, reasonable limitations may be imposed on counsel selection and that the witness was free to retain any counsel of her choice other than the disqualified attorney. Even assuming that 5 USCA 555(b) applies to investigations, the court concluded that 17 CFR 203(c) and the SEC application thereof, in this instance, did not involve a denial of counsel. Id. at 577.

Nonetheless, the NRC's reliance on this case in support of its proposed exclusion may prove to be misplaced. It appears that the SEC has had the provisions of 17 CFR 201.3(c), as construed in Steel, deleted from its regulations. A review of the 1988 version of 17 CFR 200 et seq indicates that Section 201.3 has been "reserved" and the exclusion provisions, as construed in Steel, have not been relocated to another section of the regulations. The CCH Title 17 "looseleaf" service does not make any reference to Section 201.3.

3. Ethical Considerations of Multiple Representation

An attorney "may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Model Code of Professional Responsibility, Rule 1.7(b). Furthermore, "a third party may pay the cost of legal services as long as control remains in the client and the responsibility of the lawyer is solely to the client." ABA Opinion 320 (1968).

During a multiple representation situation, the attorney's obligation to preserve the confidences and secrets of one client does not attach to disclosures to the other client(s). Therefore, it may not be unethical for an attorney to represent a licensee and its employee and to relay the employee's testimony during the interview to the licensee.

The Authority recommends that the NRC not procede with the issuance of the proposed rule until these issues are fully resolved. Should you or your staff have any questions regarding this matter, please contact Mr. J. A. Gray, Jr. of my staff.

Very truly yours,

John C. Brons
Executive Vice President
Nuclear Generation

cc: See next page

cc: U.S. Nuclear Regulatory Commission
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FYC 89-001
GLA 89-001

'89 FEB -1 P4:03

January 27, 1989

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

Attention: Docketing and Service Branch

Subject: Sequestration of Witnesses Interviewed Under Subpoena (53FR45768)

Dear Sir:

Yankee Atomic Electric Company (YAEC) appreciates the opportunity to comment on the proposed rule to change 10 CFR Part 19 regarding sequestration of persons compelled under subpoena to appear before NRC representatives in connection with an agency investigation. YAEC owns and operates a nuclear power plant in Rowe, Massachusetts. Our Nuclear Services Division also provides engineering and licensing services for other nuclear power plants in the Northeast, including Vermont Yankee, Maine Yankee, and Seabrook.

We vigorously object to the proposed initiative to dismiss the rights of witnesses to choose their own legal counsel. The discussion to the proposed rule change admits that "...no absolute criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee..." Nevertheless, the Commission has indeed established such absolute criteria despite the observation in the statement of considerations that courts have, more often than not, judged that a witness has a right to counsel of his or her own choice. Certainly, these admissions call into serious question the appropriateness of the subject proposed rule change.

Because this change, in effect, gives the NRC carte blanche in terms of selection of counsel, it appears contrary to an individual's basic right to counsel of his or her choice. The proposed rule could go so far as to permit restriction on choice of counsel even in the case where two or more witnesses, who are not the subject of the investigation, wish to retain the same counsel.

We contend that the provisions of the proposed rule go far beyond what is appropriate to deal with the kind of situations referred to in the discussion section. Furthermore, we consider that in developing this proposed rule, it is inappropriate to start from the premise that members of the bar will not recognize situations which constitute conflicts of interest and act in a professionally ethical manner. We urge the Commission not to proceed with this proposed rule.

Yours truly,

Donald W. Edwards

Donald W. Edwards
Director, Industry Affairs

JMG/mjc

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ADD6-1
PDR

NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION/300 ERIE BOULEVARD WEST, SYRACUSE, N.Y. 13202/TELEPHONE (315) 474-1511

February 1, 1989

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

Attention: Docketing and Service Branch

Re: Proposed Rule - Sequestration of Witnesses Interviewed Under Subpoena, 10 CFR Part 19
53 F.R. 45768, November 14, 1988

Dear Mr. Chilk:

The following remarks are respectfully submitted on behalf of Niagara Mohawk Power Corporation ("NMPC"), Syracuse, New York in response to the request of the U. S. Nuclear Regulatory Commission ("NRC") for comments on the NRC proposed rule on sequestration of witnesses and attorneys at interviews conducted under subpoena.

The proposed regulations present a wholly unacceptable intrusion of corporate policy and practice. NMPC refers you to the well-reasoned and thoroughly researched remarks in opposition to the amendment of Conner & Wetterhahn, P.C., Washington, D. C., a firm that provides legal services to NMPC on a regular basis. We concur in all respects with their views and urge the NRC staff to give their comments its fullest consideration.

This matter is of utmost importance to NMPC. As a licensed operator of a nuclear reactor for over 20 years, NMPC has been involved in NRC investigations on numerous occasions. These investigations often have required management and non-management employees to be witnesses at NRC hearings.

It is our general policy to provide counsel to both management and non-management employees. The counsel is usually in-house counsel located in Syracuse, New York. Occasionally, a witness is accompanied by outside counsel in NMPC's employ. The witness is free to hire his own lawyer if he so desires.

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Over the years, the practice has proved effective. Rarely does the situation arise where a conflict exists between witnesses or the Corporation and a witness. Of course, when a conflict is evident, it is fully disclosed to the employee, counsel excuses itself and recommends that the employee obtain private representation.

NMPC employees are aware they can hire their own attorneys at any time regardless of the appearance of a conflict. This, however, does not occur often. Rather, NMPC employees recognize the benefits of having counsel with the knowledge and expertise necessary for effective representation. The proposed regulations will unlawfully limit the NMPC employee's right to effective legal representation of his own choice.

One would conclude from the severity of the proposed regulatory solutions that conflict problems are rampant and unresolvable. Yet, the NRC staff itself admits "in most cases, attempts to interject a corporate presence into investigative interviews of non-management employees . . . have been satisfactorily resolved . . ." (53 FR 45768).

The proposed amendments to 10 CFR Part 19 present an inappropriate and unjustified invasion of corporate management and must not be adopted.

We appreciate this opportunity to comment and hope that your staff will give our remarks and the remarks of Conner & Wetterhahn your thoughtful review. If further information or comment is required, we would be happy to comply.

Very truly yours,

Gary D. Wilson
Senior Attorney

DOCKET NUMBER
PROPOSED RULE PR 19
(53 FR 45768)

ADD6-1
PDR (7)

SIDLEY & AUSTIN

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February 8, 1989

FEDERAL EXPRESS

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

ATTN: Docketing and Service Branch

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Re: Proposed Rule - Sequestration of Witnesses Interviewed Under Subpoena
53 Fed. Reg. 45768 - 45771 (November 4, 1988)
Request for Comments

Dear Mr. Chilk:

The following comments are submitted by Sidley & Austin in response to the request of the U.S. Nuclear Regulatory Commission ("NRC") for comments on the NRC's proposed amendment of its regulations at 10 C.F.R. Part 19, entitled "Sequestration of Witnesses Interviewed Under Subpoena." (53 Fed. Reg. 45768, November 14, 1988). By notice published in the Federal Register on January 6, 1989 (53 Fed. Reg. 427), the comment period was extended until February 9, 1989.

Sidley & Austin is a law firm which represents utilities licensed by the NRC as well as employees interviewed by NRC representatives.

The NRC's proposed rule provides that (1) multiple witnesses shall be separated from one another during the conduct of investigative interviews (§§ 19.3, 19.18(a)); (2) no witness or counsel accompanying a witness shall be permitted to be present during the examination of any other witness unless permitted in the discretion of the investigating official (§ 19.18(a)); (3) if a reasonable basis exists to believe that an investigation may be obstructed, impeded or impaired by an attorney's representation of more than one witness or of the witness and the witness' employer, then the investigating official may prohibit the attorney from being present during the interview of any witness except the witness on whose behalf the

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attorney first appeared (§ 19.18(b)); and (4) if a person is not provided reasonable prior notice of the investigating official's intent to exclude counsel then the interview shall be delayed for a reasonable period of time to permit the retention of new counsel (§ 19.18(c)). The Supplementary Information is devoted almost entirely to the issue of excluding a witness' counsel.

Sidley & Austin objects to the proposed rule in its entirety, but particularly to those provisions, addressed by the Supplementary Information, that would authorize an NRC investigating official to exclude a witness' counsel from an investigative interview. The impermissibility of this proposal, as well as numerous other prohibitive flaws in the proposed rule, are set forth at length in comments submitted to the NRC by the Nuclear Management and Resources Council ("NUMARC"), which Sidley & Austin endorses.

The proposal to authorize an investigating official to exclude a witness' counsel from the witness' interview is fundamentally misconceived. It purports to be based on a need to obviate "difficulties in conducting investigative interviews in an atmosphere free of outside influences," (53 Fed. Reg. 45,768), that is poorly explained, riddled with unreasonable assumptions and unsupportable. Moreover, the proposed remedy for this alleged problem confers impermissible discretion on the NRC, even as it usurps a witness' critical right to choose his or her own counsel.

The Supplementary Information attempts to support the need for granting the NRC the dramatic new power to exclude counsel by claiming that dual representation "could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation." (53 Fed. Reg. 45,769). The subject "could then take steps to structure the flow of information to the NRC or otherwise impede the investigation." (Id.) Moreover, dual representation "produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." (Id.)

This ostensible justification is completely at odds with Sidley & Austin's experience representing dozens of utility employees in NRC OI investigations. Our experience is that dual representation occurs only because an employee, after being carefully advised of the possibility for a conflict of interest, decides that his interest and that of the utility are aligned. Our experience is that such employees are generally grateful for

the opportunity to be represented by attorneys who also represent the utility and therefore are knowledgeable as to both the utility's and its employees' past interactions with the NRC. When this has not been the case, employees have declined their employer's offer to be represented by Sidley & Austin. Finally, in our long experience, we have never had any reason to believe that any employee conducted himself with the NRC Office of Investigations with anything less than candor.

Beyond our experience, the rationale for the rule suffers a number of severe flaws. First, the NRC's explanation assumes that it is improper for the subject of an investigation to learn "the direction and the scope of the investigation." The NRC offers no credible support for this assumption. Instead, the Supplementary Information offers only speculation: with knowledge of the scope of an investigation, a subject "could . . . . structure the flow of information . . . or otherwise impede the investigation." This amounts to either a claim that the NRC is entitled to interview witnesses who have had as little opportunity to prepare for their interviews as possible or an unsubstantiated assertion that licensees and their employees can be expected to engage in illegal conduct to obstruct investigations. This is completely contrary to Sidley & Austin's experience. Moreover, there are, of course, already severe disincentives for such behavior including criminal sanctions, revocation of licenses, civil penalties, etc. Second, even if it were somehow improper for the subject of an investigation to learn the "scope of the investigation," the Supplementary Information assumes that the NRC is therefore entitled to limit the rights of the individuals it interviews. This is a non [illegible] would unfairly penalize certain individuals because the NRC is concerned with what other individuals or the licensee might learn. Third, the efficacy of the proposed rule is also assumed. Its rationale is presumably that a licensee or applicant would be less likely to learn of the scope of an investigation if an attorney representing more than one witness is excluded from interviews. This is speculative at best. It ignores the fact that any employee who has deliberately chosen to be represented by an attorney also representing his employer, and therefore has decided that his interest is aligned with his employer, would very likely advise his employer about the scope of the investigation whether or not he is forced by the NRC to hire a new attorney. Fourth, the Supplementary Information assumes that an employee who has agreed to dual representation suffers an "inherent coercion" to be less than honest for the benefit of his employer that would be alleviated by the forced appointment of new counsel. However, there is no basis to label

an employee's decision that his interest is aligned with his employer "coercive." Indeed, the only true coercion here would be to force the employee to hire a different lawyer. Nor is there any reason to think that requiring a new lawyer will change the postulated "coercive" relationship between the employee and employer. Finally, the rationale unreasonably assumes, without discussion, that existing statutory and disciplinary measures are inadequate to address any improper conduct by a witness, lawyer or licensee. The NRC's failure to discuss any of these assumptions reveals the hollow basis for the proposed rule.

From this shaky premise the proposed rule leaps to wholly unwarranted conclusion that the NRC investigating official must have "the discretion to determine whether the attorney should be allowed to attend the interview" whenever there is "a reasonable basis to believe that [such] attendance ... might prejudice, impede, or impair the investigation ..." (Supplementary Information, 53 Fed. Reg. 43,769). Even if the proposed rule demonstrated a compelling need for the NRC to regulate dual representation at all, which it has not, this purported remedy is worse than the alleged disease. Contrary to the claim that the rule proposes only a "somewhat minor burden on an individual's right to ... particular counsel" (id.), the rule would in fact usurp the individual's right to make this critically important choice and substitute the effectively unfettered "discretion" of the interviewing official in its place. This exceeds any proper investigatory prerogative of the NRC and is plainly impermissible under the Administrative Procedure Act and judicial precedent. It is also improper for the reasons set forth in NUMARC's comments.

For these reasons, and for the reasons set forth in NUMARC's comments, Sidley & Austin strongly recommends that the NRC withdraw the proposed rule.

Sincerely,

Jon Fieldman

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(53 FR 45768)

February 8, 1989

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

Attn: Docketing and Service Branch

Re: Proposed Rule on Sequestration of Witnesses Interviewed Under Subpoena, 53 Fed. Reg. 45,768-45,771 (November 14, 1988)

Dear Mr. Chilk:

On November 14, 1988, the NRC published and requested comments on a proposed rule governing sequestration of witnesses interviewed under subpoena. The following comments are submitted on behalf of Houston Lighting and Power Company, Illinois Power Company, and Iowa Electric Light & Power Company.

The proposed rule vests NRC investigators with discretion to exclude counsel from an interview if the investigator believes that "the investigation may be obstructed, impeded or imparied [sic], either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness. . . ." 53 Fed. Reg. 45,770. The proposed rule does not include any requirement that the investigator make any particular factual findings prior to excluding counsel, nor does it require that the investigator document the basis for the decision to exclude counsel or communicate the basis for that decision to the witness or the attorney. The witness is

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11

to be provided only one week's time within which to acquire new counsel if the witness's chosen counsel is excluded.

The proposed rule suffers from a number of serious practical and legal flaws. These flaws are analyzed in detail in the comments on the rule submitted by NUMARC, which we endorse. In addition, the Commission's own task force on this topic, the "Silbert Committee," specifically recommended against the adoption of such a rule unless it required exclusion of counsel to be based upon "concrete evidence that the chosen representative of the witness . . . would seriously prejudice the investigation." The Committee noted that without such a requirement the rule "would not be sustained by the courts." Report of the Advisory Committee for Review of the Investigation Policy on Rights of Employees Under Investigation," submitted to the NRC on September 13, 1983 at 14, 16 (emphasis added.) Because the proposed rule allows investigators to exclude counsel without making such findings, NRC attempts to exclude counsel by invoking the rule are likely to be overturned in court.

The rule is inconsistent with a witness's right to counsel of choice under Section 6(a) of the Administrative Procedure Act, 45 U.S.C. § 555(b), which provides that persons compelled to appear before an agency are "entitled to be accompanied, represented and advised by counsel . . . ." This statute has been interpreted by the courts to mean that a witness is entitled to counsel of the witness's choice. See Securities and Exchange Commission v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976); Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (5th Cir. 1960). Unless the agency provides "concrete evidence" of misconduct by the attorneys involved, it is improper to override the right of the witness to utilize the counsel of his choice. Csapo, 533 F.2d at 11. In particular, this rule applies when the witness's counsel of choice is provided by the witness's employer. Securities and Exchange Commission v. Higashi, 359 F.2d 550 (9th Cir. 1966). Thus, the proposed rule cannot be reconciled with the requirements of the Administrative Procedure Act.

In addition, because NRC regulations provide that material gained through NRC investigations may be turned to the Department of Justice to be used in criminal investigations, implementation of the rule would deny counsel of choice to a witness who may later be prosecuted based upon statements made to the NRC. In such circumstances, "[the witness's] choice of counsel . . . is obviously a crucial one. That choice should

not needlessly or lightly be disturbed." Csapo, 533 F.2d at 12.

Finally, as a practical matter, exclusion of counsel pursuant to the proposed rule may entirely deprive the witness of competent counsel. If a witness chooses to be represented by the employer's counsel, but that counsel is excluded from the interview, it is unlikely that the witness will be able to retain other counsel familiar with NRC investigations and regulatory and technical issues. Even if qualified counsel is found, a witness may be unable to afford to pay for such counsel. This result is particularly likely when investigations are conducted at remote plant sites. Furthermore, even were acceptable counsel available, one week is not a reasonable time within which to locate competent counsel, familiarize them with the issues, and allow them to prepare for the interview. Consequently, invocation of the rule will often result in the denial of competent counsel.

Based upon these considerations, we recommend that the Commission withdraw the proposed rule. We would be happy to discuss any of these matters.

Very truly yours,

Harold F. Reis

Harold F. Reis

cc: Lando W. Zech, Chairman
Thomas M. Roberts
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WRITER'S DIRECT DIAL

February 9, 1989

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

Attn: Docketing and Service Branch

Re: Proposed Rule - Sequestration of Witnesses Interviewed Under Subpoena - 53 Fed. Reg. 45,768

Dear Mr. Chilk:

On November 14, 1988, the Nuclear Regulatory Commission (NRC) published in the Federal Register a proposed rule on the "Sequestration of Witnesses Interviewed Under Subpoena." 53 Fed. Reg. 45,768. On behalf of Arkansas Power & Light, Duke Power Company, Florida Power Corporation, Florida Power & Light Company, Northeast Utilities, Rochester Gas & Electric, Southern California Edison Company, System Energy Resources, Inc., Texas Utilities and the Washington Public Power Supply System, we respectfully submit the following comments. These comments are intended to supplement the comments filed by the Nuclear Management and Resources Council.

1. Introduction

The NRC is proposing changes to its regulations under 10 C.F.R. Part 19 to provide that all persons compelled to appear before investigations conducted by the NRC and their counsel shall, unless authorized by the NRC investigator, "be sequentered (sic) from other interviewees in the same investigation." 53 Fed. Reg. 45,768. Although the proposed rule is narrowly couched in terms of "sequestration" -- a term generally defined as physical separation -- the rule might more aptly be labeled "Dual Representation of Witnesses Interviewed Under Subpoena," for its true purpose and effect is to regulate whether an interviewee may be represented by his counsel of choice if that counsel represents another interviewee or the licensee. The Commission's stated justification for proposing the rule is to

12

permit investigative interviews "in an atmosphere free of outside influences" given the "inherent potential for a conflict of interest and impairment of the NRC's investigation." 53 Fed. Reg. 45,769. The Commission apparently fears that dual representation "could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation," which would in turn "enable the subject to take steps to structure the flow of information to the NRC or otherwise impede the investigation." 53 Fed. Reg. 45,769. The Commission further raises the specter of "inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." Another justification stressed is the "unnecessary delay" in completing NRC investigations now ostensibly caused by ad hoc negotiation between company management and NRC Staff over the dual representation issue. 53 Fed. Reg. 45,768. To combat these reputed evils, the proposed rule allows the NRC investigator the discretion to exclude counsel from an interview if he unilaterally determines that there is a "reasonable basis" to believe that dual representation "may" prejudice, impede, or impair the investigation, "directly or indirectly." Proposed § 19.18(b).

As our comments delineate in more detail below, the proposed rule stands on its head the fundamental judicial, administrative and constitutional precepts that normally guide administrative investigations, especially those that have the potential to lead to criminal prosecutions. Although dismissed by the Commission as a "somewhat minor burden," 53 Fed. Reg. 45,769, the proposed rule would deprive many witnesses of the fundamental right, guaranteed under the Administrative Procedure Act (APA), and protected under the Fifth and Sixth Amendments to the United States Constitution, to be represented by counsel of choice. What is more, the stated basis for this fundamental derogation of rights is nothing more than the thinnest speculation concerning the "inherent potential" for conflict of interest and impairment of an investigation, ignoring the weight of judicial precedent requiring "concrete evidence" before a witness can be deprived of his counsel of choice as guaranteed under the APA.

In addition to presupposing a nuclear bar (and licensees) bent on impairing and impeding investigations -- without a shred of evidence to back this supposition -- the proposed rule ignores the existence of the Canons of Ethics, the obstruction of justice statute, and Section 210 of the Energy Reorganization Act, the regulatory scheme already in place to protect against conflicts of interest due to multiple representation, and against interference with agency investigations by employer-employee coercion or otherwise.

With regard to the NRC's stated goal of curtailing "unnecessary delay," to the extent delay has plagued the investigatory process, it is delay resulting from the NRC's own inaction and entirely within NRC's control. Indeed, rather than eliminating delay, the proposed rule will bog the investigatory process down in increased subpoena enforcement litigation.

Finally, the rule is entirely unnecessary. With or without the rule, the NRC can seek a court order if a subpoenaed witness refuses to be interviewed without his counsel of choice (as will undoubtedly happen, notwithstanding the proposed rule). Simply put, the parties will wind up in court anyway, exactly where they would have been without the rule.

For all of these reasons, the proposed rule should be withdrawn.

2. The Proposed Rule Infringes Upon An Interviewee's Right to Counsel of Choice

a. The Proposed Rule Ignores the Constitutional Implications of Circumscribing The Right of a Witness to Choose His Own Counsel

Although there is no constitutional right to counsel (and thus to particular counsel) in an administrative proceeding, where administrative investigatory proceedings may result in criminal prosecutions, depriving the interviewee of his counsel of choice arguably has a constitutional dimension. An Office of Investigations (OI) inquiry can lead to criminal charges. The NRC can give the results of its investigation to the Department of Justice (DOJ) with a view towards criminal prosecution. See 42 U.S.C. § 2271. Indeed, the NRC has recently announced its policy of close coordination with the Justice Department to this end. See 53 Fed. Reg. 50,317 (1988) (Memorandum of Understanding between the NRC and the DOJ). Moreover, evidence obtained by the NRC during its investigation is admissible in a subsequent criminal trial. See United States v. Presley, 478 F.2d 163 (5th Cir. 1973). If convicted of violating the Atomic Energy Act, company employees can go to jail and pay large fines. 42 U.S.C. §§ 2272 et seq.[1] Because of the real possibility of criminal

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1/ See, e.g., NRC Information Notice No. 89-02, "Criminal Prosecution of Licensee's Former President for Intentional Safety Violations" (January 9, 1989) (former President of Radiation Technology Inc. convicted on six counts of violating Titles 18 and 42 of the United States Code, including conspiracy to defraud the United States, lying to

(Footnote 1 continued on next page.)

charges resulting from an OI investigation,[2] the Sixth Amendment, which provides for effective assistance of counsel in criminal matters, is implicated when an interviewee is deprived of his counsel of choice in an OI investigation.

Although the Sixth Amendment guarantee of counsel does not provide a defendant with an absolute right to the lawyer of his choice, see Wheat v. U.S., 486 U.S. __, 108 S.Ct. 1692, 1696, 100 L.Ed 2d 140 (May 23, 1988), the Sixth Amendment has been interpreted as affording "a fair opportunity to secure counsel of his own choice." Id., citing Powell v. State of Alabama, 287 U.S. 45, 53 (1932). The proposed rule would operate to deprive a witness in an OI investigation of this "fair opportunity," as well as of the right to effective assistance of counsel.

The nuclear bar is fairly small; to exclude members of that bar from representing interviewees may preclude their having experienced -- and thus effective -- counsel. Indeed, to exclude company counsel may be to exclude the most "effective" counsel of all. See SEC v. Higashi, 359 F.2d at 553 ("Here the act of sequestration . . . bears directly and prejudicially upon the interests of the witness himself. . . . [T]o sequester corporation counsel is to deprive the witness of the services of the attorney most familiar with the source of his vulnerability."). Moreover, if, as the Supplementary Information states, the fee arrangement is one factor for excluding an attorney, 53 Fed. Reg. 45,769, the logical extension of the proposed rule could be that virtually all experienced outside counsel may be excluded as well. This would clearly be contrary to the Sixth Amendment guarantee of effective assistance of counsel.[3]

(Footnote 1 continued from previous page.)
NRC investigators and intentionally violating the Atomic Energy Act.

2/ The "target" of an investigation is not always known with certainty at the outset. Any witness may, in fact, become the target.

3/ One factor the courts have repeatedly said argues against disqualification is the unavailability of alternative counsel in a specialized area of the law. See City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193, 196, 203 (N.D. Ohio), aff'd 573 F.2d 1310 6th Cir. 1977); United States v. Standard Oil Co., 136 F. Supp. 345, 364 (S.D.N.Y. 1955).

The due process clause of the Fifth Amendment is also implicated when an interviewee is deprived of counsel of choice in an OI investigation. See SEC v. Csapo, 533 F.2d 7, 12 (D.C. Cir. 1976) ("since any statement made by Csapo during the course of his questioning [by the SEC] may later be referred to the Department of Justice for future consideration of a grand jury and prosecution on criminal charges, Csapo's choice of counsel to accompany and advise him during his SEC interview is obviously a crucial one. That choice should not needlessly or lightly be disturbed . . .). See also Kentucky West Va. Gas Co. v. Penn. PUC, 837 F.2d 600, 618 (3rd Cir. 1988), reh'g denied (February 16, 1988) ("where the right to counsel exists, the due process clause of the Fifth Amendment does provide some protection for the decision to select a particular attorney").

In short, the proposed rule ignores the constitutional implications of giving an OI investigator the unbridled discretion to exclude an interviewee's counsel of choice.[4]

b. The Proposed Rule Ignores the APA's Guarantee of Effective Counsel of Choice

Unlike the Sixth Amendment right to counsel, which is not absolute, Section 6(a) of the Administrative Procedure Act, 5 U.S.C. § 555(b), provides unequivocally that any person compelled to appear before an agency by subpoena has a right to be "accompanied, represented, and advised by counsel."[5] This statutory guarantee of the right to counsel has been construed even more broadly than the constitutional right to a particular counsel. In Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 143 (5th Cir. 1960), the court said:

> It is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney advise him relative to his rights under the Fifth Amendment. The Act says such counsel may accompany, represent and advise the witness, without any limitation.

4/ The sequestration of witnesses provisions of the proposed rule [§§ 19.3, 19.18(a)] would also apparently bar discussions among interviewees, in contravention of the First Amendment protections of freedom of speech and association.

5/ This APA provision has been interpreted as applying to appearances required by an agency in an investigatory proceeding. See SEC v. Csapo, 533 F.2d 7, 10 (D.C. Cir 1976).

Consequently, this APA guarantee of assistance of counsel has been construed "to imply the concomitant right to the lawyer of one's choice." SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). Accord Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 381 (7th Cir. 1969); SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966); Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (5th Cir. 1960). Indeed, the APA guarantee has been interpreted so broadly as to extend to a witness and his counsel in an agency investigation the right to be accompanied and aided by a non-lawyer technical advisor in order to ensure "the full potency of the right to counsel," and "to give veritable meaning to the witness' right to counsel." See SEC v. Whitman, 613 F. Supp. 48, 50 (D.C. D.C. 1985).

Thus, even broader and more clearly defined than any constitutional right to a particular counsel, the APA guarantee has been interpreted as bestowing on a witness in an administrative investigatory proceeding the right not only to effective assistance of counsel, but also to counsel of choice, a right that may not be arbitrarily infringed. Again, the proposed rule pays little heed to this right.

3. The Proposed Rule is Without Supporting Basis

a. The Proposed Rule Ignores Recent Judicial Precedent Imposing a "Concrete Evidence" Standard

The NRC proposal, citing district court cases over 30 years old, completely dismisses the more recent circuit court cases (cited above) which are directly on point. The Commission's stated reasons for ignoring this precedent defy logic. According to the Supplementary Information, the court in Backer v. Commissioner of Internal Revenue -- although holding that a witness before an administrative investigatory proceeding has a right to counsel of choice -- "did not decide whether that right could be limited or otherwise qualified through formal rulemaking procedures." 53 Fed. Reg. 45,769. Higashi and Csapo, according to the Commission, both indicated that "there could be circumstances where an attorney could be barred from the interview, although it could not be done under the facts of these cases." Id.

When viewed together, the cases so lightly dismissed by the Commission clearly hold that because of the Congressional mandate in the APA, an attorney may be excluded from an agency investigatory proceeding (where a witness is compelled to appear by subpoena) only upon a showing of "concrete evidence" that his presence would obstruct and impede an investigation. Citing the Higashi case for its statement that an agency's sequestration

rule must be confined within "permissible limits," the court in Csapo defined those limits:

> We recognize [the SEC's sequestration rule's] practical necessity under certain circumstances. But we are not for this reason at liberty to ignore the clear congressional mandate of [the APA]. Thus, before the SEC may exclude an attorney from its proceedings, it must come forth . . . with "concrete evidence" that his presence would obstruct and impede its investigation.

533 F.2d at 11. These are the "circumstances" within which the APA right to counsel may be "limited or qualified." 53 Fed. Reg. 45,769.[6]

The NRC's rule ignores these limits, and is clearly outside these bounds.[7] The proposed rule allows the NRC investigator the virtually unfettered discretion to disqualify counsel based on his own weighing of vague factors leading him to the conclusion that a "reasonable basis" exists to believe that the attendance of a particular attorney "might" prejudice, impede, or impair the investigation, directly or indirectly. See proposed § 19.18(b); 53 Fed. Reg. 45,769 (emphasis added). The preamble to the proposed rule is replete with references to the "potential for conflicts of interest among counsel's multiple clients" and the "potential impairment to the efficacy of the NRC investigation."

6/ Moreover, it should be noted that the Backer court did not decide this question because the question was not before it. Little mileage can be gained from this.

7/ The proposed rule also ignores the recommendations of the NRC's own Advisory Committee. After extensive consideration of the question of whether the Commission may limit an interviewee's choice of counsel by excluding from an interview any attorney who also represents the entity being investigated, the Commission's "Advisory Committee for Review of Investigation Policy on Rights of Licensee Employees" concluded after reviewing the relevant judicial authorities that a blanket rule excluding any attorney who also represents the entity being investigated "would not be sustained by the courts." Advisory Committee Report at 14. The Report added that it would be appropriate for the NRC to seek an exclusion order only where "there is concrete evidence that the chosen representative of that witness is in such a position that his participation as counsel would seriously prejudice the investigation." Id. at 16.

53 Fed. Reg. 45,768 (emphasis added). Quite simply, the NRC's proposed rule ignores the "concrete evidence" standard set forth by the courts as the only circumstance under which counsel may be excluded.

The mere specter of "potential" obstacles and conflicts, without more, is too slender a thread upon which to hang a proposed rule that infringes upon the right to counsel of choice as guaranteed under the APA. As the court in Csapo said in the context of limiting the SEC's application of its sequestration rule,

> [t]he SEC would negate Csapo's informed and voluntary decision [regarding choice of counsel] on the ground that "the objective of the investigation might be frustrated if [Csapo's attorneys] . . . were permitted access to the testimony of any further witnesses." We hold that such speculation is insufficient. The mere fact that a witness' counsel also represents others who have been or are later to be questioned is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation.

533 F.2d at 11 (emphasis in original). See also In re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1360-61 (9th Cir. 1981). As shown below, the NRC's stated bases for the proposed rule are premised entirely on such insufficient speculation.[8]

8/ In the context of grand jury proceedings, often analogized to administrative investigatory proceedings, see Moore, Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury, 27 UCLA L. Rev. 1 (1979), the majority of courts have required "actual conflict" of interest before counsel may be disqualified rather than mere "potential" conflict. Also in the grand jury context, the courts have held that in order to disqualify counsel, any investigative obstacle posed by multiple representation must be specifically demonstrated, not merely assumed to exist. See In re Special February 1975 Grand Jury, 406 F. Supp. 194, 199 (N.D. Ill. 1975); In re Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976); In re Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978). But see In re Special February 1977 Grand Jury, 581 F.2d 1267, 1264 (7th Cir. 1978).

b. The Stated Basis of the Potential for "Inherent Conflict of Interest" is Mere Speculation and Not a Legitimate NRC Concern

The NRC provides no evidence to support its first stated basis for the rule regarding the ostensibly "inherent potential" for conflicts of interest among counsel's multiple clients in OI investigations. 53 Fed. Reg. 45,768-69. The speculative nature of this concern alone renders such a basis for the proposed rule suspect. Beyond that, this is simply not a legitimate NRC concern.

The proposed rule appears to ignore the fact that the propriety of multiple representation is governed by basic principles of legal ethics that bind all attorneys, and which the courts apply when exercising their inherent power to regulate the ethical conduct of attorneys. See Kreda v. Rush, 550 F.2d 888, 889 (3d Cir. 1977). The canons of legal ethics generally permit an attorney representing other licensee employees -- or the licensee itself -- to represent an employee during an OI interview as long as (1) the employee desires and consents to such representation after being fully informed that a conflict of interest may potentially arise and (2) the lawyer reasonably believes that representation of the employee will not be adversely affected by simultaneous representation of the employer or other employees. See ABA Model Code of Professional Responsibility, DR-105, DR-107, EC 5-15.[9] Indeed, the ABA Code of Professional Responsibility contemplates conflicts of interest in precisely the two contexts with which the NRC is concerned -- representation of two or more witnesses who may have differing interests, as well as payment of a witness's legal fees by a third party with differing interests. See DR-105, DR-107(B).[10]

9/ In NRC practice, to resolve ethical questions one would look to the Code of Ethics promulgated in the jurisdiction in which the lawyer is admitted to practice. See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2); LBP-85-19, 21 NRC 1707, 1717 (1985). These are generally modelled on the ABA Code.

10/ One of the factors that may justify exclusion of counsel, according to the Commission, is that "the company under investigation suggested that the witness employ the particular attorney and is paying the fee." 53 Fed. Reg. 45,769. DR-107(B) states that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

There is no reason for the Commission to assume that attorneys will ignore their ethical obligations (or that, if involved, a court would allow this to happen). Moreover, it is inappropriate for an NRC investigator, upon his own discretion, to exclude counsel based on the potential for a conflict of interest, since an individual may voluntarily consent to representation of conflicting interests. See In the Matter of the Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3rd Cir. 1976).[11] The choice of whether to accept multiple representation is for the individual, not for the agency.[12] This is because disqualification of counsel is for the protection of the individual, and not the agency. Thus, the NRC may not legitimately base a rule on its purported concerns regarding conflicts of interest among multiple interviewees.

The courts are the appropriate forum for resolution of conflicts of interest issues. If the NRC wishes to exclude an attorney from an interview in a particular case, it should file a motion before a federal judge to disqualify the attorney from representing both the employer and employee or from representing multiple employees. The disqualification decision would be made by the federal district court judge with immediate review in the Court of Appeals. This is not an appropriate subject matter for a generic rule which bestows upon the NRC investigator blanket authority to exclude counsel on behalf of an individual who can waive a conflict-free situation in any event.[13]

11/ Only where such a waiver of counsel free from conflicts cannot be made knowingly and intelligently would disqualification be justified. Grand Jury Empaneled January 21, 1975, 536 F.2d at 1009.

12/ As one court said of the SEC's analogous sequestration rule, "[W]e do not minimize the dangers inherent in counsel representing multiple clients in a single proceeding. . . . That decision, however, [does not belong to] the Commission. . . . The choice must be made by the witness after a full and frank disclosure by his attorney of the attendant risks." SEC v. Csapo, 533 F.2d at 11.

13/ Indeed, this is not properly the subject of a generic rule at all. First, the issue arises too infrequently to warrant generic treatment. As the NRC's Advisory Committee said in its report, ". . . we note at the outset that interviews conducted by the Office of Investigations . . . have almost always been conducted without the aid of legal process." Advisory Committee Report at 11. The Commission also refers in its Supplementary Information to problems arising in only "three recent cases," 53 Fed. Reg. 45,769, and further states

(Footnote 13 continued on next page.)

One final point about this stated supporting basis for the NRC's proposed rule. The proposed rule distinguishes witnesses who belong to the employer's corporate "control group" from those who do not in terms of the presence of corporate counsel "being objectionable." 53 Fed. Reg. at 45,768 col. 3. This distinction is invalid for several reasons.

First, it is inappropriate for the Commission to determine conflicts issues on the basis of an employee's position within a company. Section 6(a) of the APA is not limited to individuals within a "control group."[14]

Second, the term "control group" is nowhere defined in the proposed rule or the Supplementary Information. It is, in fact, a term inappropriately borrowed from an inapposite context. See Upjohn Co. v. United States, 449 U.S. 383 (1981) (term used in the context of the scope of the attorney-client privilege for corporate communications).

Third, analogizing here to the reasoning in the Upjohn case, from which the term "control group" is borrowed, licensee employees below upper management, whose actions the Supreme Court recognized may bind or otherwise be attributed to the company, may be entitled to be represented by the licensee's lawyer (as long as the employee's and the company's interests do not diverge). The Court held in Upjohn that communications by all level of employees -- not just the upper management "control group" -- may be considered to be the corporation's communications. 449 U.S. at 391-96. Indeed, the Court of Appeals for the Ninth Circuit has applied Upjohn to conflict of interest questions, and has permitted joint representation of a

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(Footnote 13 continued from previous page.)
that "[i]n most cases, attempts to interject a corporate presence into investigative interviews of the non-management employees of a licensee or applicant have been satisfactorily resolved through negotiation between company management and NRC Staff." 53 Fed. Reg. 45,768. Indeed, the SEC's comparable sequestration rule is "only rarely invoked." SEC v. Csapo, 533 F.2d at 12. Accordingly, multiple representation issues should be resolved -- as they are now -- on a case by case basis. There is nothing to suggest that a generic rule is warranted, much less one of this sweep and import.

14/ Although the Higashi case held that the SEC could not prevent a corporation's attorney from representing a director who was subpoenaed to testify at an investigative hearing, the case did not turn on this distinction. Nor do the other cases.

corporation and its employees -- including those below the upper management level -- by the company lawyer. See In re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1356, 1359 (9th Cir. 1981).

c. The "Potential Impairment to the Efficacy of the NRC's Investigation" is Speculative and Not a Valid Supporting Basis

The Commission grasps at another supporting premise in stating that "disclosure between counsel and client does not always eliminate . . . the inherent potential that multiple representation could impair or impede the Commission's investigation." Id. The NRC's concern here, apparently, is that the subject of the investigation may learn, through counsel, "the direction and scope of the investigation" and then "take steps to structure the flow of information to the NRC or otherwise impede the investigation." Id. In addition, the Commission fears that the dual representation situation will produce "an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." 53 Fed. Reg. 45,769.

This premise, too, is an inappropriate basis for the proposed rule. First, again, the NRC's concerns are based upon pure speculation. Aside from a vague reference to "three recent cases," 53 Fed. Reg. 45,769, the Commission provides no specific evidence that its investigations have been hindered by multiple representation, or that licensees, in cahoots with their attorneys, will attempt to so obstruct an investigation. The mere "potential" for impairment of an investigation is not enough. See Csapo, 533 F.2d at 11.

Second, the Commission -- again -- ignores the regulatory scheme already in place to protect against these types of concerns. The obstruction of justice statute (18 U.S.C. § 1505), provides sufficient protection that agency investigations will not be "impaired" and "impeded." Under Section 1505 of Title 18, it is a crime to obstruct proceedings before federal agencies, whether by attempting to influence witnesses or otherwise. See also Section 1510. Similarly, NRC's concerns regarding the employer/employee coercion "inherent" in the interview context are addressed by Section 210 of the Energy Reorganization Act and its implementing regulation, 10 C.F.R. § 50.7, which protect employees against retaliatory action on the part of employers.

Finally, even if the Commission could show that multiple representation posed a threat to the success of an NRC investigation, the mere fact that such representation could "prove detrimental to NRC investigations," 53 Fed. Reg. 45,769, is simply not a valid supporting basis for the rule. As one

comment ..or has said in the analogous context of grand jury investigations, "[t]he suggestion that either actual or potential injury to the success of a grand jury investigation is itself sufficient ground for depriving a grand jury witness of his chosen counsel must be regarded as theoretically unsound. . . . Since it is often the case that advice which is clearly ethical (for example, much advice concerning the privilege against self-incrimination) will have the effect of hindering the grand jury's search for truth, there is considerable doubt whether the mere fact of injury to the grand jury empowers the supervising court to disqualify the attorney involved, at least in the absence of any concern for ethical improprieties." Moore, Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury, 27 UCLA L. Rev. 1, 18, 20 (1979) (emphasis added).

This leads to another point that should not be overlooked. An NRC investigator would have an inherent conflict of interest in making the "reasonable basis" determination. The better the attorney for the witness is, the more likely the NRC will be held to observe the full panoply of a witness's rights, and the more likely an investigator will conclude that such strict scrutiny constitutes "impeding" the investigation. The Supreme Court of the United States has acknowledged this possibility, noting that:

> Petitioner of course rightly points out that the Government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility and must take it into consideration with all the other factors which inform this sort of a [disqualification] decision.

Wheat v. United States, 468 U.S. ____, 100 L.Ed. 2d 140 at 151, (emphasis added). By assuming the role of prosecutor, judge and jury with regard to the multiple representation issue, the NRC investigator usurps the role of a higher -- and disinterested -- authority that should be making this determination.

d. The NRC's Premise that Dual Representation Undermines Confidentiality Is Unfounded

The Commission also raises the concern that multiple representation could undermine an offer of confidentiality to an interviewee. 53 Fed. Reg. 45,769. The presumption that the presence at an interview of counsel who represents other interviewees or the licensee will undermine confidentiality is also unfounded and based on pure speculation. First, a witness desiring such confidentiality may approach the NRC on his own

initiative, in which case there would be no need for a subpoena. Second, a witness desiring confidentiality would be unlikely to choose corporate counsel to represent him during an interview. In any event, an attorney is bound by the canons of ethics and professional responsibility to respect a client's desire for confidentiality. See ABA Model Code DR 4-101.

e. The Proposed Rule Will Not Eliminate "Unnecessary Delays" in Completing Investigations

Another justification stated for the proposed rule is to curtail "unnecessary delay" in completing NRC investigations. 53 Fed. Reg. 45,770. The Commission attributes these delays to current attempts to resolve multiple representation issues on an ad hoc basis, as opposed to being dealt with by generic rule. Id. Again, no information supporting this basis for the rule is given. In fact, based on our review of the "three recent cases" referred to (which we can only surmise given their lack of identification) whatever delays have resulted from the multiple representation issue are attributable to the NRC's own tactics.

What is more, far from eliminating delay from the NRC's investigatory process, the proposed rule will have the opposite effect. The likely scenario is that the NRC will subpoena a witness, and invoke its sequestration rule to exclude an interviewee's attorney of choice. The witness will refuse to be interviewed without his chosen counsel. Since the Commission cannot enforce its own subpoenas, it must resort to federal court to compel the witness to appear. The court will decide the issue (precisely the appropriate forum). The result is foreshadowed by the cases dealing with the analogous SEC sequestration rule. In Csapo and Higashi, the efforts of the agency to exclude counsel of choice culminated in lengthy proceedings, much delay, and court decisions that the agency had exceeded its bounds.[15] In contrast to the current ad hoc approach to multiple representation issues the NRC's invocation of its sequestration rule will cause the investigatory process to grind to a halt in subpoena enforcement litigation.

f. The Rule Is Unnecessary

At bottom, the proposed rule is entirely unnecessary. With or without the proposed rule, the NRC can issue a subpoena conditioned upon exclusion of counsel, and then seek a court order to enforce it. With or without the proposed rule, if the

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15/ In both these cases there were four-year delays between issuance of the SEC subpoenas and rejection of the SEC's application of its sequestration rule.

NRC seeks to exclude a witness's chosen counsel, the witness will likely follow excluded counsel out of the interview. In short, despite the rule, the parties will wind up in court anyway -- precisely where they would have been without the rule.

4. Conclusion

One final point needs to be made here. The NRC's proposed rule seems to view the investigatory process as a pernicious one in which licensees and their counsel contrive to obstruct and impede the NRC's search for the truth.

On the contrary, the NRC's regulatory scheme is founded on the principle of voluntary compliance by licensees and their employees, whose cooperation is essential to safe construction and operation. See, e.g., 53 Fed. Reg. 40,109 (1988) (NRC Enforcement Policy). Licensees have every interest in getting at the truth along with the NRC investigator, and in taking corrective actions accordingly. A proposed rule that envisions the investigative process as an adversarial one that pits licensees and their counsel against the NRC Office of Investigations promotes a hostile climate that is not in the public interest.[16]

In summary, there is no adequate supporting basis for the proposed rule. More importantly, the proposed rule contravenes the right to counsel provision of the Administrative Procedure

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16/ Other agencies such as the SEC and the IRS may have sequestration rules. However, in investigations conducted by those agencies (generally involving issues such as insider trading and tax avoidance), there is much more of a motive to impede an investigation than in the NRC context where motive for individual gain is generally absent. Thus, these agencies would have far more need for a sequestration rule than would the NRC. In any event, the IRS Manual Handbook contains guidance as to when exclusion of counsel under its rule may be appropriate, guidance that is far more in line with judicial precedent than the NRC's proposed rule. The IRS Manual recognizes (1) the principle that clients have the right to consent to an attorney's representation of conflicting interests; (2) that the IRS will seek to disqualify chosen counsel only in "extreme circumstances," when an attorney impedes or obstructs an investigation; (3) that disqualification will be sought by requesting the Department of Justice to seek a court order; and (4) that mere speculation that the attorney might frustrate the objective of the investigation is an insufficient ground for exclusion.

Act, judicial precedent interpreting that provision, and the constitutional protections afforded by the Fifth and Sixth Amendments to the United States Constitution. It should be withdrawn.

Respectfully submitted,

J. Michael McGarry

Nicholas S. Reynolds
J. Michael McGarry, III
Marcia R. Gelman

BISHOP, COOK, PURCELL
& REYNOLDS

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February 9, 1989

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

Re: Proposed Amendments to 10 C.F.R. Part 19

Dear Mr. Chilk:

On November 14, 1988, the Nuclear Regulatory Commission published for comment a notice of proposed rulemaking concerning the sequestration of witnesses interviewed under subpoena and their counsel. 53 Fed. Reg. 45,768. The comment period was later extended to February 9, 1989. 54 Fed. Reg. 427. As attorneys representing several utilities involved in the Commission's licensing and regulatory process, we wish to submit comments in response to the Commission's notice. In so doing, we rely in part on our experience going back to 1980 in representing both licensees and non-licensed individual utility employees in NRC investigations.

The Commission should not adopt the proposed rule. There is no factual showing that any such rule is necessary or desirable. The rule would unduly and unnecessarily restrict the right to counsel in an NRC investigation. Implementation of the rule by NRC investigators will needlessly delay the completion of investigations and lead to numerous subpoena enforcement proceedings in the Federal courts, almost all of which the Commission will lose.

In its notice, the Commission maintains that the proposed rule is "necessary because the NRC has encountered difficulties in conducting investigative interviews in an atmosphere free of outside influences" 53 Fed. Reg. at 45,768. The Commission presents absolutely no evidence that its investigative interviews actually have been hampered by multiple representation of witnesses. Nor does the Commission explain the manner in which investigations can be obstructed. The Commission cites two

purported examples of how multiple representation by counsel could impede an NRC investigation. 53 Fed. Reg. 45,769. The first is nonsensical; the second both hypothetical and fanciful. The Commission expresses concern that an attorney representing a utility will report to his corporate client the substance of individual interviews. This overlooks the obvious fact that the utility will eventually get a copy of the investigative report. The "inherent coercion" not to testify against one's employer is always present; it does not depend upon who the witness's lawyer is. Next, the Commission expresses concern that multiple representation could undermine an offer of confidentiality to a witness. No example of such an occurrence is provided. In practice, a person seeking confidentiality will voluntarily approach the NRC at the outset. Issuance of a subpoena to compel testimony from an informant willing to provide confidential information is inherently contradictory.

Apparently the Commission believes that all lawyers are unethical and that its utility licensees are prone to obstruct justice. Without hard facts to support such a premise, it cannot be used to support restriction of the crucial right to the counsel of one's choice that is accorded to all witnesses in administrative investigations.

The Commission states that the proposed rule represents a "somewhat minor burden on an individual's right to be accompanied by a particular counsel." 53 Fed. Reg. at 45,769. This position is clearly untenable in light of precedent and key provisions of the Administrative Procedure Act ("APA"). A limit on the right to counsel of one's choice is not a "minor burden" -- it is a significant imposition on a witness' rights.

The APA, 5 U.S.C. §555, provides in pertinent part, that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." Based on this provision, the court in Backer v. Commissioner, 275 F.2d 141, 144 (5th Cir. 1980) stated unequivocally that a witness in an administrative investigation has the right to the counsel of his choice under provisions of the APA.

Similarly, in SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966) the Ninth Circuit held that the application of the SEC's sequestration rule violated the witness' statutory right to counsel. In Higashi, a mining company director was denied the right to be represented by the same counsel as his company. The court flatly stated that the SEC could not apply its sequestration rule because of the prejudicial effect that it would have on the witness whose interests were common with those of the corporation and for whose acts the witness could be held responsible. The court recognized

that the witness would be denied the services of the attorney most familiar with his case. The NRC's proposed rule could similarly be applied to prevent a witness, whose interests are common with his employer, from retaining the counsel of his choice. Thus, the potential application of the proposed rule directly conflicts with well-established precedent.

Other courts have specifically recognized that agency sequestration rules are inconsistent with the APA provisions on the right to counsel. Accordingly, it has been held that it is necessary to confine sequestration rules within certain limits by requiring that an agency provide "concrete evidence" that the presence of a particular attorney would obstruct an investigation. SEC v. Csapo, 533 F.2d 7 (9th Cir. 1976). However, few, if any, constraints exist on an NRC investigator's ability to limit a witness' right to counsel of choice. The investigator need only have a "reasonable basis" on which to conclude that counsel should be prohibited from representing more than one witness. A tension clearly exists between the proposed rule and the case law that permits only limited restrictions on the right to counsel.

Examination of analogous bodies of case law further confirms that the Commission's proposed rule is an inappropriate limit on the right to counsel. As the court recognized in Torras v. Stradley, 103 F. Supp. 737, 739 (N.D. Ga. 1951), "[q]uestions concerning the rights of witnesses arising in the course of purely administrative investigations, where compulsory process is available to the Government by statute, are to be determined on the same principles which apply to such questions in connection with grand jury investigations . . . ."

In general, courts consistently refuse to enforce the disqualification of counsel from grand jury investigations and permit multiple representation of grand jury witnesses. In the vast majority of cases on the right to counsel in the grand jury context, the courts have required that an actual conflict exist to support the disqualification of an attorney who represents more than one witness. The mere potential for conflict of interest is an inadequate basis upon which to disqualify counsel. Therefore counsel must actually be causing harm to a witness for the benefit of another client, in order for disqualification to be justified. See In the Matter of May 1980 Harrisburg Grand Jury, No. Misc. 81-038 (M.D. Pa., filed April 8, 1981). (A copy of the decision of the District Court is attached to this comment.) See also Mickenberg, Grand Jury Investigations: Multiple Representation and Conflicts of Interest in Corporate Criminality Cases, 17 Crim. L. Bull. 5 (1981). A witness may, of course, waive his or her right to conflict-free counsel. It is only when a knowing and intelligent waiver is impossible that a court may disqualify counsel. In the Matter of

the Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976); In re Grand Jury Investigation, 436 F.Supp. 818 (W.D. Pa. 1977), aff'd per curiam, 576 F.2d 1971 (3d Cir.)(en banc), cert. denied, 439 U.S. 953 (1978).

The Commission's position with respect to fee arrangements in which an employer pays the legal fees of its employees is also unacceptable, as such arra jements are appropriate and should not be interfered with by the Commission. First, the indemnification of legal fees is almost always expressly authorized under state law. Second, not only does an employer have the option to indemnify an employee, but, as a general rule, an employee has the right to be indemnified by his or her employer for all loss and injury sustained by the employee in the course of employment. 53 Am. Jur. 2d Master and Servant §133 (1964).

The proposed rule is also objectionable in that it allows an administrative agency to exercise control in an area of the law that is more appropriately reserved for the courts and counsel. For example, the judiciary is far better equipped to determine the appropriate limits on an individual's right to counsel than a self-interested agency. Similarly, it is generally recognized that conflict of interest issues are questions for counsel to resolve with the guidance of the American Bar Association's model rules of professional responsibility.

In Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, Docket No. LRP, the Presiding Board acknowledged the preeminence of the rules of professional conduct. It stated that a Commission proceeding "should be conducted in conformity with widely recognized principles governing [multiple] representation." Memo and Order, Docket Nos. LRP, ASLBP No. 86-519-02 SP, slip op. at 15 (March 16, 1986) (unpublished). The Board then referred to the ABA's Model Rules of Professional Conduct. Based on those rules of professional conduct, the Board concluded that "there is nothing inherently wrong with one lawyer representing several clients in one proceeding, or with a lawyer's fees being paid by someone other than the client, so long as the specifics are disclosed to the Presiding Board and appropriate steps are taken to ensure independent representation." Id.

The courts have similarly relied upon the ABA's Code of Professional Responsibility as a "guidepost" in evaluating the propriety of multiple representation and fee arrangements. Courts pay considerable attention to whether an attorney's actions are consistent with the applicable provisions of the Code, thereby indicating that multiple representation issues fall squarely within the realm of professional ethics and the domain of the courts. In Re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979); In Re

Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975).

In sum, the case law that directly addresses agency sequestration rules and the analogous grand jury precedent both suggest that the Commission's proposed rule is unnecessary and inappropriately restricts the right to counsel of one's choice.

Implementation of the proposed rule will not further the Commission's goal of prompt conclusion of investigations unfettered by "outside influences". Instead, interference by NRC investigators with witnesses' right to counsel will cause the investigation to bog down into subpoena enforcement litigation.

Because the Commission cannot enforce its own subpoenas, it is forced to act through the Department of Justice and must ultimately resort to a Federal district court when a witness refuses to appear. See, e.g., United States v. McGovern, 87 F.R.D. 582, 584, 590 (M.D. Pa. 1980). It is quite likely that refusals to comply with NRC subpoenas will increase when the Commission invokes its sequestration rule to prevent a witness from retaining the counsel of his or her choice. Therefore, the Commission will experience far greater delay in its proceedings than it does under the current ad hoc method of handling multiple representation issues, because it will be forced to take the matter to court. As the Commission recognizes in its notice, the courts are often suspicious of any limits placed on the right to counsel. 53 Fed. Reg. at 45,769. Although a court may not strike down the NRC's sequestration rule, it is quite likely that application of the rule would be limited to unusual circumstances, as indicated by the litigation history of the Securities and Exchange Commission ("SEC") rule, upon which the Commission's proposed rule is modeled. Indeed, as the preceding discussion of a witness's right to counsel shows, it is probable that the Commission will lose almost every case it takes to court. The court will decline to enforce the rule and condition subpoena enforcement upon the witness's right to be advised by, and appear with, counsel of his or her choice.

In addition, even if the Commission's rule were to be [illegible]y enforced by the courts, anyone familiar with the process is aware that the hypothetical concerns of the Commission would not be resolved simply by requiring separate counsel. In the interests of their clients, the attorneys representing the [illegible] would undoubtedly exercise their privilege to enter into joint defense agreements by which they would meet and exchange information, in order to place themselves in the best position to represent their clients. Viewed in this light, the proposed rule would serve only to increase the costs to a licensee of providing effective representation for its employees.

In summary, the proposed rule has no valid basis, improperly infringes on the right to counsel, and won't work in practice. The Commission should decline to adopt it.

Very truly yours,

LeBOEUF, LAMB, LEIBY & MacRAE

By Harry H. Voigt
Partner

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN THE MATTER OF)
MAY 1980 HARRISBURG) NO. MISC. 81-038
GRAND JURY)

FILED
HARRISBURG, PA.
APR 8 1981
DONALD R. BERRY, CLERK
PER.....
DEPUTY CLERK

MEMORANDUM

The United States has filed a motion to have this Court disqualify the law firms of LeBoeuf, Lamb, Leiby and MacRae of New York and Washington, D.C. and Killian and Gephart of Harrisburg, Pennsylvania from representing 33 present and former employees of Metropolitan Edison Company (Met Ed) who have been called or may be called to testify before the May 1980 grand jury which has been sitting in Harrisburg. The grand jury investigation relates to the possible falsification of certain safety tests at the Three Mile Island nuclear facility. Met Ed retained the two firms pursuant to the authority of Pennsylvania's Business Corporation Law, in particular 15 Pa. C.S.A. § 1410. It is undisputed that neither of the firms represents or has represented Met Ed. Nor has the government produced any evidence to refute the claim of the two firms that they represent the interests of the employees only, and are acting with complete independence from Met Ed, aside from billing.

The government seeks disqualification on two bases. It states that conflicts of interest exist between the witnesses represented by the firms.

It also maintains that the multiple representation will impede the grand jury investigation.

In this circuit disqualification based on a conflict of interest has been upheld only where there has been a demonstrable actual conflict which was not effectively waived by the client. In the Matter of the Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976); In re Grand Jury Investigation, 436 F.Supp. 818 (W.D. Pa. 1977), aff'd per curiam, 576 F.2d 1971 (3d Cir.) (en banc), cert. denied, 439 U.S. 953.(1978). On the facts before it, the court finds no actual conflict of interest. The government has made no offers of immunity to any of the Met Ed employees involved here. Counsel from the firms representing the employees have stated unequivocally that, if an offer of immunity were made to one of their clients, that client would be advised to seek separate counsel. There is undoubtedly a potential conflict of interest in this multiple representation, but, until that potential ripens, judicial intervention would be premature. In re Grand Jury Investigation, supra.

The Court of Appeals for the Third Circuit has not yet decided whether disqualification should be ordered if there is evidence that multiple representation is impeding the effectiveness of a grand jury investigation.[1] However, it is clear that the conduct which would merit the sanction of disqualification would have to be something far more egregious than that occurring in this case. None of the witnesses who have thus

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[1] In the Matter of the Grand Jury Empaneled January 21, 1975, supra, spoke of this issue without deciding it. The court ruled that on the facts of the case disqualification would not be warranted on a theory of grand jury impediment. In that case nine witnesses, represented by the same counsel, had taken the Fifth Amendment before the grand jury.

far appeared before the grand jury have invoked the Fifth Amendment. The government states that there have been certain similarities in the testimony of the witnesses. It also claims that the testimony of one witness before the grand jury differed in material respects from statements the same witness made during an investigation by the Nuclear Regulatory Commission. These facts by themselves do not demonstrate the quality of grand jury impediment which might merit disqualification of counsel. The motion of the United States will be denied.

Sylvia H. Rambo
United States District Judge

Dated: April 8, 1981

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DEBORAH B. CHARNOFF

February 9, 1989

BY HAND

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

Attn: Docketing & Service Branch

Re: Proposed Rule on Sequestration
Of Witnesses Under Subpoena

Dear Mr. Chilk:

Attached hereto are comments on the proposal by the Nuclear Regulatory Commission ("NRC") to amend its regulations at 10 C.F.R. Part 19 in order to adopt a new rule for the "Sequestration of Witnesses Interviewed Under Subpoena," as set forth at 53 Fed. Reg. 45768-71 (Nov. 14, 1988). These comments, which oppose the proposed rule, have been adopted by Arizona Public Service Company, Baltimore Gas & Electric Company, Bechtel Power Corporation, Carolina Power & Light Company, The Cleveland Electric Illuminating Company, The Detroit Edison Company, Duquesne Light Company, GPU Nuclear Corporation, Louisiana Power & Light Company, Minnesota Mining & Manufacturing Company, Northern States Power Company, Sacramento Municipal Utility District, The Toledo Edison Company, Union Electric Company and Wisconsin Electric Power Company.

The purpose of our comments is not only to establish that the proposed rule is ambiguous, without adequate justification, and inconsistent with settled legal precedent, but also to provide some analysis of the reasons why this settled legal precedent is an integral part of our system of justice. In these

14

comments we show that the proposed rule fails to conform to certain fundamental precepts of our system of law. It also is contrary to sound public policy.

As the attached comments establish, the investigative function of the NRC has very serious ramifications for licensees and their employees, as well as other companies and individuals who work in the nuclear industry. The proposed rule on sequestration, which provides extraordinary limitations on the rights of witnesses, constitutes an unjustifiable foray into the arena of individual rights.

The proposed rule contains numerous inconsistencies and ambiguities which make its meaning obscure and its application dubious. An equally serious flaw is the complete absence of any factual justification for the rule, such as specific evidence of instances in the past in which an attorney's multiple representation of witnesses has actually "obstruct[ed], impair[ed], or impede[d] an agency investigation" and there was not adequate redress for such conduct available to NRC's Office of Investigations ("OI"). 53 Fed. Reg. at 45770 (proposed § 19.3). The rule also misstates its own economic consequences, and ignores other serious morale implications. Overall, we believe the proposed rule will have serious negative effects on the ability to attract and retain qualified personnel, will interfere with the ability of licensees to address potential issues in a timely way, and as a result will have an effect counter to safety.

Furthermore, the proposed rule is completely at odds with the First Amendment rights of witnesses, as well as the statutory [illegible] granted to subpoenaed OI witnesses under the Administrative Procedure Act. The rule similarly ignores an entire raft of case law which expressly rejects the (unsubstantial) arguments that are set forth in the proposed rule.

The numerous errors in the proposed rule are fatal flaws. The rule is indefensible and erroneous; it should be rejected. Perhaps the most troublesome aspect of the flawed rule is its proponents' treatment of certain fundamental values upon which our system of law is founded. These values include (1) the right to a fair legal outcome or "justice"; (2) the right to an objective decisionmaker; (3) the value of the adversarial function and activity of participants in American legal processes, including

the activity of investigators; (4) the abhorrence of secrecy in legal processes, absent compelling need and substantial safeguards; (5) the right to counsel in most circumstances, including administrative proceedings where the witness appears by subpoena; and (6) the right to counsel of choice, which a court will respect absent exceptional circumstances.

Experience shows not only that these principles are sacrosanct, but also that it is easy to accommodate these principles in the investigative interview process. In the attached comments, we direct the NRC's attention to Internal Revenue Service ("IRS") guidance which readily accomplishes this purpose. We also note that the proposed rule not only omits reference to this guidance, but instead relies on outdated IRS cases to support its position.

We urge the Commission to summarily reject the proposed rule on sequestration.

Respectfully submitted,

Deborah B. Charnoff

Deborah B. Charnoff

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Attachment

February 9, 1989

COMMENTS ON THE PROPOSED RULE ON
SEQUESTRATION OF WITNESSES UNDER SUBPOENA

I. INTRODUCTION

The statutory mandate of the Nuclear Regulatory Commission ("NRC") is to oversee the development and commercial use of nuclear power to assure the health and safety of the public. 42 U.S.C. § 2133. Because of its focus on highly technical matters, the NRC is not an agency that usually focuses its attention on the legal rights of individuals, which is the subject of the proposed rulemaking. The NRC has ventured into this arena from time to time; for example, in 1983, the Commission appointed an advisory committee to consider the rights of licensee employees under investigation by the NRC.1/ (In fact, as discussed in Section III.C.4, below, in this proposed rulemaking, the proponents of the rule appear to have totally forgotten the advice that it received five years ago from that committee.) There also have been adjudicatory decisions by the agency which touch on individual rights. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-2, 21 N.R.C. 282, 314-17 (1985). However, the proposed "sequestration" rule constitutes an extraordinary foray by the NRC into the arena of individual rights, presumably in order to facilitate investigations that are conducted by the NRC. 2/

1/ That advisory committee, under the chairmanship of a former United States Attorney for the District of Columbia, Earl J. Silbert, issued a report in 1983 entitled, "Report of the Advisory Committee for Review of the Investigation Policy on Rights of Licensee Employees Under Investigation," Sept. 13, 1983 (hereafter "Advisory Committee Report").

2/ The proposed rule on "sequestration" makes a number of references to inspections, as well as investigations. See 53 Fed. Reg. at 45768 (Summary and Supplementary Information). The subject of the rule is the interviewing of witnesses under subpoena during investigative interviews. Any reasonable reading of the purpose and intention of the rule suggests that the use of the word "inspection" is not meant to refer to the activities of the Office of Inspection, as those activities are not conducted in a manner that reasonably would expect to give rise to the issues addressed by the proposed rule. If the proponents intend to

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In 1982, the NRC created a new group within the agency that was assigned the specific task of investigating "wrongdoing". That group, the Office of Investigations ("OI"), utilizes professional investigators, some of whom have police or criminal investigation experience, to conduct NRC investigations.3/ From its inception in July of 1982 to the end of fiscal year 1987, OI has opened 933 new cases. Sixty-six of those cases have been referred to the Department of Justice ("DOJ") so that DOJ could consider whether to criminally prosecute individuals and corporations.4/ In 1986, OI reported that at any given time, the caseload of OI is about 175 cases.5/ Recently, OI reported a workload of approximately 80 active cases, with 60 to 90 cases each year expected during fiscal years 1989 through 1991.6/ "These cases are expected to become much more complex and controversial as allegations regarding wrongdoing at operating plants and facilities increase."7/ In December, 1988, the NRC and DOJ approved a Memorandum of Understanding which emphasizes that "it is useful and desirable for the NRC and the DOJ to coordinate to the maximum practicable extent" between the administrative investigations conducted by OI and the prosecutorial and investigative activities of DOJ and other law enforcement authorities. 53 Fed. Reg. 50318 (Dec. 14, 1988).

(Continued)

include inspections within the scope of the rule, their reference to them is impermissibly vague. See, e.g., Smith v. Goguen, 415 U.S. 566, 572, 94 S. Ct. 1242, 1247 (1974). Nevertheless, if inspections are covered by the proposed rule, the analysis contained in these comments would apply equally to a subpoenaed inspection interview.

3/ See NUREG-1145, Vol. 2, The 1985 NRC Annual Report (June 1986) ("NUREG-1145, Vol. 2") at 195.

4/ NUREG-1145, Vol. 2 at 195; NUREG-1145, Vol. 3, The 1986 NRC Annual Report (June 1987) at 214; NUREG-1145, Vol. 4, The 1987 NRC Annual Report (July 1988) at 9.

5/ See NUREG-1145, Vol. 2 at 195.

6/ See NUREG-1100, Vol. 5, NRC Budget Estimates, Fiscal Years 1990-1991 (Jan. 1989) at 124.

7/ Id.

In short, the investigative function of the NRC has become a significant activity of the agency, with very serious ramifications for licensees and their employees, as well as other companies and individuals who work in the nuclear industry.

The NRC now seeks, by rulemaking, to establish "general guidance" on certain aspects of the conduct of OI investigations.8/ The need for such "guidance" is not justified in the proposed rule, which explicitly acknowledges that past disputes, that would now be covered by the rule, "[i]n most cases . . . have been satisfactorily resolved" on an ad hoc basis. 53 Fed. Reg. at 45768. Nevertheless, in view of the proposal by the NRC to proceed by rulemaking, as well as the probability that OI will endeavor to apply the arguments and policies reflected in the proposed rule on subpoenaed interviews even when a witness appears voluntarily, the focus of the following comments is to explain how the "general guidance" reflected in the proposed rule stands fundamental tenets of our legal system on their head.

We submit that the NRC can achieve its paramount goal of protecting the health and safety of the public without severely compromising the rights of the many individuals who are subject to NRC's investigations. Other agencies have been able to accommodate their mandates within the traditional framework of our legal system and, in Section V, below, we propose guidance which we believe would permit the NRC to do so. In fact, the NRC must do so, because the law does not permit another alternative.

II. A SUMMARY OF NRC'S PROPOSED "SEQUESTRATION" RULE

The NRC proposes to amend Part 19 of its regulations in order to require that,

> [A]ll persons compelled to appear before NRC representatives under subpoena in connection with an agency investigation (and their counsel, if any) shall, unless otherwise authorized by the NRC official conducting the investigation, be sequentered [sic] from other interviewees in the same

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8/ There are OI policies that have been adopted by the NRC, although they are not codified as regulations. See Memorandum from S. Chilk, Sec., to B. Hayes, Director, OI, regarding OI Policies (March 4, 1983). A proposed policy apparently affecting the rights of individuals subject to investigations has been "held in abeyance" by the Commission for nearly six years without any public comment. Ibid.

investigation.

53 Fed. Reg. at 45768 (Summary).9/

The proposed rule itself defines "sequestration" in an anomalous manner. Typically, "sequestration" is a legal term that refers to the separation of one witness from another during a trial. See 6 Wigmore, Evidence § 1837 (Chadbourn rev. 1976). The definition proposed by the rule is much broader, and refers to "the separation of multiple witnesses from each other during the conduct of investigative interviews". Id. at 45770 (proposed §19.3). "Separation" is not defined. As discussed in detail below, the NRC's definition also encompasses disqualification of counsel -- a concept not ordinarily termed "sequestration."

Although the rule is ambiguous, if the intention of the rule's proponents is to utilize a process that is considered analogous to witness sequestration during trials, "separation" may mean that OI witnesses can and will be directed by OI not to discuss their testimony with each other for some (unspecified) period of time; and apparently, there is some (unspecified) risk to witnesses associated with the failure to do so. Furthermore, "sequestration" is defined not only as witness segregation during an investigation but, in addition "the exclusion of counsel who (1) represents one witness from the interviews of other witnesses

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9/ The statement of administrative considerations or Supplementary Information accompanying the proposed rule contains a number of statements which appear to be inconsistent with the proposed rule itself. For example, sections 19.3 and 19.8(b) of the proposed rule, as well as the introductory Summary of the proposal, contain the presumption that dual representation is impermissible, and requires the express permission of the investigator before it will be allowed. In contrast, the Supplementary Information reverses the presumption by stating that dual representation is appropriate, absent objection by the investigator. Similarly, sections 19.18(a) and (b) contain reverse presumptions about the presence of counsel of choice. Furthermore, the proposed rule's presumption against dual representation makes no distinction based on the status of the interviewee-client, such as whether he is a member of the licensee's "corporate control group." In contrast, the Supplementary Information appears to consider this classification to be meaningful.

This Summary attempts to capture the purpose and intent of the proposed rule as accurately as possible, notwithstanding some of the inconsistencies and ambiguities contained in the notice of proposed rulemaking.

or who (2) represents the employing entity of the witness or management personnel from the interview of that witness". Id. The exclusion of counsel of choice is stated as a presumption -- "all witnesses shall be sequestered." 53 Fed. Reg. at 45770 (proposed § 19.18(a)). The articulated standard for excluding counsel is "when a reasonable basis exists to believe that the investigation may be obstructed, impeded or imparied [sic], either directly or indirectly" by an attorney's multiple representation. Id. (proposed § 19.18(b)). The basis for making this determination is not specified but, instead, left to the prerogative of each OI investigator. Reference is made by the proposed rule and the statement of considerations accompanying the rule to some type of "consultation" with NRC's Office of General Counsel when a witness' counsel is excluded from an interview. 53 Fed. Reg. at 45770 (proposed §19.18(b)). But the staff proponents of the rule make plain their view that, "An appropriate rule would grant the NRC office conducting the interview"-- that is, OI -- "the discretion" -- that is, the unilateral authority -- "to determine whether the attorney should be allowed to attend the interview." 53 Fed. Reg. at 45769.

In the Supplementary Information, the proposed rule distinguishes between witnesses who are members of an employer's "corporate control group," and those who are not. In the former case, "except in extraordinary circumstances," representation by the employer's counsel would not be objectionable. 53 Fed. Reg. at 45768. No factual circumstances support the proposed rule's distinction here, nor is "extraordinary" defined. Furthermore, the acceptability of joint representation of members of a "corporate control group" by one attorney is not stated in the proposed rule itself as an exception to the "sequestration" that is prescribed. See 53 Fed. Reg. 45770 (proposed §§ 19.3, 19.18).

The proposed rule also provides that "To the extent practicable and consistent with the integrity of the investigation" -- in short, perhaps never -- "the attorney will be advised of the reasons supporting the decision to prohibit his or her representation of more than one interviewee during the investigation." 53 Fed. Reg. at 45770 (proposed §19.18(b)). Obviously, the proposed rule imposes no obligation on OI to explain, much less provide a reasoned basis for its disqualification decisions.

The prior restraint that the proposed rule would place on a witness' conversations and the limitations placed on his choice of counsel -- strictures on a witness' rights during an OI investigation which together are termed "sequestration" -- are considered "necessary" by the proponents of the rule "because the NRC has encountered difficulties in conducting investigative interviews in an atmosphere free of outside influences." 53 Fed. Reg. at 45768.10/ The vague term, "outside influences",

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10/ As previously noted, the staff proponents of the rule also state, however, that in most cases, these difficulties have been resolved. See 53 Fed. Reg. at 45768.

apparently refers to the influence of the licensee and/or counsel. See 53 Fed. Reg. at 45768 (last ¶). OI's "difficulties" are not specified or documented. The only OI "difficulty" that is referenced is that "the subject of the investigation" could "learn, through counsel, the direction and scope of the investigation," which is erroneously presumed to be impermissible and inappropriate. Id. at 45769. Thus, "dual representation could prove"-- and, the rule's proponents insist, without support, that dual representation has proven -- "detrimental to NRC investigations." Id.[11]/

Furthermore, it is argued, "Where the person being interviewed chooses to be represented by counsel for the licensee or applicant, an inherent potential for a conflict of interest and impairment of the NRC's investigation exists." Id. The rule proposes to eliminate this "inherent potential" by authorizing the OI investigator to exclude attorneys who represent multiple witnesses or who represent a licensee and one or more witnesses.

The proposed rule appears to rely exclusively on dated Internal Revenue Service cases[12]/ and three Securities Exchange Commission cases[13]/ as legal precedent for it.[14]/ In fact, one

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11/ The rule's proponents also contend that its offers of confidentiality to witnesses "could be undermined" by dual representation. 53 Fed. Reg. at 45769. This rationale is illogical, and therefore has not been considered further. It is highly unlikely that a witness who wants confidentiality would not impose such confidentiality on his attorney. If such confidentiality created a conflict for the attorney, his ethical obligations would govern the attorney's conduct.

12/ 53 Fed. Reg. at 45769, citing Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949); but see Backer v. Commissioner of Internal Revenue, 275 F.2d 141 (5th Cir. 1960), also referred to in the proposed rule.

13/ United States v. Steel, 238 F. Supp. 575 (S.D.N.Y. 1965); SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976); SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

14/ In response to a Freedom of Information Act ("FOIA") request, FOIA-88-605, the NRC Staff has indicated that there are no agency records on which it relies in support of the rule beyond the references provided in the Federal Register statement of Supplementary Information. In short, the proposed rule is not based on specific complaints from OI, documented incidents where chosen counsel impeded or obstructed an investigation and OI was unable to obtain adequate relief, or other data.

of the many infirmities of the rule is that, as indicated in Section V below, the IRS cases relied on by the rule's proponents are outdated, and the NRC staff's proposal is antithetical to the current IRS policy and procedure on dual representation of witnesses during investigations. Furthermore, the proposed rule misuses the two Court of Appeals cases on SEC investigations to which it refers; those cases provide absolutely no precedent for the proposed rule but, to the contrary, constitute compelling precedent in opposition to it. See Section III.C, below.

In summary, the proposed rule on "sequestration" provides that witnesses "are separated" during an investigation, and that a witness' "right to the counsel of his choice," 53 Fed. Reg. at 45769, may be subject to the virtually absolute and unfettered discretion of the OI investigator who is assigned to the particular case.

The proposed rule on sequestration is a radical and unsupported proposal. It contains numerous ambiguities and internal inconsistencies. There is no factual justification provided for the rule, such as a history of impaired or impeded OI investigations for which adequate redress was unavailable to OI. And as to the rule's reliance on IRS and SEC practices, Sections III and V below establish that the laws and guidance concerning those agencies' practices are antithetical to the NRC proposal.

III. THE UNITED STATES SYSTEM OF JUSTICE IS FOUNDED ON THREE FUNDAMENTAL PRECEPTS WITH WHICH THE PROPOSED RULE ON SEQUESTRATION IS AT ODDS: THE VALUE OF THE ADVERSARIAL PROCESS, PUBLIC JUSTICE AND ADEQUATE REPRESENTATION

The legal process in the United States is designed to protect individuals from undue encroachments of government.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215 (1972). Or, as the Supreme Court stated in Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974), "The touchstone of due process is protection of the individual against arbitrary action by government."

Due process or fundamental fairness is at the heart of our system of law, or justice. "In our culture, the most concrete manifestation of the collective sense of justice is the notion of fair play." B.A. Babcock, "Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel," 34 Stan. L. Rev. 1133, 1141 (July 1982) (hereafter "Babcock"). And justice requires some sort of system to effectuate it. The proposed rule obstructs the functioning of the system that our democratic society has determined to be the best and most appropriate means of pursuing justice: that of an adversarial process, conducted in public, in which the parties are afforded adequate representation.

A. The Adversarial System of Justice

The American system of law is an adversary system.15/ All of

15/ In contrast to the Anglo-American adversary system, there is the "inquisitional" or "continental" system, which is exemplified by European legal systems. In the former system the metaphor is a contest; in the latter, it is a scientific investigation.

> A representative difference between the two models is the existence in the Anglo-American adversary system of the privilege against self-incrimination. Since the accused necessarily knows the most about the charges, such a privilege would be inconceivable in criminal process modeled on a scientific investigation. The arguments for and against this privilege reflect the importance of the contest metaphor to the adversary system.

Babcock at 1137. But the privilege against self-incrimination is central to our system of law. "It is my view that the privilege against self-incrimination represents a basic adjustment of the power and rights of the individual, and of the state. . . . The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception."

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the formalities of the adversarial process are not necessarily required in informal or in nonadjudicative legal settings. And obviously, in the context of an OI investigation, there is no obligation on the part of the NRC to provide the complete raft of procedural opportunities, such as cross-examination, which are standard procedure during formal proceedings. See 5 U.S.C. § 554; 10 C.F.R. Part 2, Subpart G, Rules of General Applicability.

Nevertheless, the values endemic to our adversarial system of law provide the foundation for our entire legal system, including the administrative process utilized in OI investigations. The OI process is not an adjudicative adversarial process; nevertheless, it is a part of our system of law, which is adversarial in nature, and therefore there are adversarial attributes to the OI process which we tend to take for granted. A review of the attributes of the adversarial system of law that this country has adopted discloses certain concepts of justice, or values, that are useful in evaluating the NRC's proposed rule on sequestration.

A legal system should "apply the substantive legal principles [of society] so that those who have rights may claim them and those who have liabilities must face them." Saltzburg, "Lawyers, Clients, and the Adversary System," 37 Mercer L. Rev. 647, 654 (Winter 1986) (hereafter "Saltzburg"). The success of any system of law can be measured by the system's success in vindicating rights and imposing liability when the substantive law so intends. This goal is accomplished in our system of law by combining two different types of participants in the process: the impartial decisionmaker, and adversarial parties.

An impartial decisionmaker is a critical component of the adversary system. Without an impartial judge or jury, there is no need for any system of law because there is no basis for having confidence in the legal system. In short, one essential ingredient of any system, adversarial or otherwise, is objectivity. See Saltzburg at 658.

Once an impartial decisionmaker is assured, the adversary system then relies on human nature to achieve success.

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Fortas, "The Fifth Amendment: Nemo Tenetur Prodere Seipsum," 25 Clev. B.A.J. 91, n.23 at 97-99 (1954); see also Neef & Nagel, "The Adversary Nature of the American Legal System from a Historical Perspective, 20 N.Y.L. Forum 123 (Summer 1974).

> The American adversary system not only recognizes the desire of litigants to win, but it actually relies on the desire to motivate litigants to produce evidence and to develop legal theories for consideration by the decisionmaker.

Saltzburg at 656. As another commentator observed, "The usual justification for the adversary system is that truth will emerge from a rule-bound contest between two opponents presided over by a passive umpireal judge." Babcock at 1134 (citations omitted). Or, as another critic stated, "[P]roperly directed and purged of abuses, the juxtaposition of two contrary perspectives. the impact of challenge and counterproof, often describes to a neutral intelligence the most likely structure of Truth." Uviller, "The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea," 123 U. Pa. L. Rev. 1067 (1975).

Thus, in the context of discovery in a criminal case, the Supreme Court has observed:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nobles, 422 U.S. 225, 230-31, (1975), quoting United States v. Nixon, 418 U.S. 683, 709 (1974). Similarly, Justice Stevens relied upon the adversarial concept in a Supreme Court decision issued this Term:

> The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth -- as well as fairness -- is "best discovered by powerful statements on both sides of the question."

Penson v. Ohio, 109 S. Ct. 346, 352 (1988); but see Perry v. Leeke, 57 U.S.L.W. 4075 (U.S., Jan. 10, 1989) (compare majority opinion, Stevens J. at 4076 with dissenting opinion, Marshall, J. at 4079).

The adversary system employs procedural rules and rules of conduct to control the impulses of the participants. See

Saltzburg at 656. Thus, no one may lie under oath; to do so constitutes perjury. Inducing someone else to lie under oath is subornation of perjury, and destroying evidence is an obstruction of justice. Id. at 657; 18 U.S.C. §§ 1621, 1622, 1505 (1982). Similarly, the code of professional responsibility provides ethical guidance to attorneys and imposes rules of conduct and sanctions for ethical violations. See generally A.B.A. Model Rules of Professional Conduct Rules ("Model Rules") (1987); D.C. Code of Professional Responsibility ("D.C. Code of Prof. Resp.") (1983); see, e.g., D.C. Code of Prof. Resp., D.R. 5-101 (avoiding conflicts of interest); D.R. 7-102 (professional obligations in representation of client); D.R. 7-109 (relations with witnesses).

However, the rules governing attorneys' conduct do not proscribe zealous advocacy. As the Supreme Court stated in Sacher v. United States, 343 U.S. 1, 12, 72 S. Ct. 451, 457 (1952):

> Most judges . . . recognize and respect courageous forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client.

Before an attorney can be disqualified for his conduct, there must be a clear showing that the contemptuous conduct amounted to an obstruction of justice. Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 381 (7th Cir. 1969), citing In re McConnell, 370 U.S. 230, 82 S. Ct. 1288 (1962).

The adversary system further recognizes its own imperfection and society's values by assigning the risk of error between opposing parties. Thus, in criminal cases, the government bears a substantial burden of proof; in a civil case, the risk is [illegible] almost evenly. Saltzburg at 655.

In summary, once an impartial decisionmaker is assured,

> What is necessary to have an adversary system? The simple answer is that it is necessary to have more than one person with a stake in the outcome of a proceeding who is permitted to attempt to influence the outcome. This is the only definitional prerequisite.

Saltzburg at 652-653. And "an adversary proceeding in which both parties may participate" is "the fundamental instrument of judicial judgment." Carroll v. Princess Anne, 393 U.S. 175, 183, 89 S.Ct. 347, 352 (1968).

* * * *

The NRC's proposed rule on sequestration would give to the investigator the complete discretion to disqualify counsel of choice in numerous circumstances. See 53 Fed. Reg. at 45770 (proposed § 19.18.) This requirement constitutes an extraordinary departure from legal precedent and the process embraced by our legal system. Specifically, the scheme advocated by the proponents of the proposed sequestration rule appears to assume that disqualification by OI is appropriate, presumably because OI is an objective decisionmaker. This assumption is squarely at odds with our entire system of law and with the facts available.

OI is a prosecuting, investigative unit. Its job is to feret out "wrongdoing." In order to accomplish this, OI employs former criminal investigators and law enforcement officials. It is probably not a coincidence that OI's highlights of its accomplishments emphasize the number and nature of the criminal indictments and convictions which "came out of" or are attributable to OI's efforts; this is one small indication of its prosecutorial mindset. See, e.g., NUREG-1145, Vol. 3 at 213.

In short, OI is a partisan organization; it has an affirmative duty to pursue wrongdoing by individuals and companies, and to refer cases to DOJ for criminal prosecution. Our system of law recognizes that a prosecutor, or any party in our adversarial system, is an advocate. See Wong Yang Sung v. McGrath, 339 U.S. 33, 44, 70 S.Ct. 445, 451 (1950) (the "commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable . . . . For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity."); see also 5 U.S.C. § 554(d) (the adjudicative decisionmaker may not be the prosecutor or investigator). This is perfectly legitimate -- the system is designed to accomodate highly subjective, adversarial parties; it is the judge, not the advocate or investigator, upon whom our system relies for objectivity. See, e.g., Saltzburg at 656-658.

OI has attempted to represent itself as a neutral decisionmaker when it makes findings and reaches conclusions about wrongdoing.16/ This is not an accurate portrayal of OI's role.

16/ See, e.g., Hearing on the Nuclear Regulatory Commission's Oversight of the Tennessee Valley Authority's Nuclear Power Pro-

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For example, OI does not necessarily seek out exculpatory evidence from a licensee before reaching its decisions on wrongdoing. In fact, the OI process does not ensure that the targets' affirmative case is presented before OI makes its findings and conclusions. Such a one-sided consideration of the evidence is a far cry from "objectivity." As the Supreme Court stated in United States v. Nobles, supra, 422 U.S. at 230-31, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . ." This explains why, in current SEC investigations, for example, while the SEC investigator is an advocate, the role of defense counsel is well recognized and the investigator's rules require the investigator to afford the target of an SEC investigation an opportunity to present its side of the case. See 17 C.F.R. § 203.7(d) (". . . if the record shall contain implications of wrongdoing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence.") This right precedes the formulation of a position by the SEC investigator. Not only is this approach fair; it is prudent. In contrast, OI's process permits a one-sided assessment of the facts.

Now, through the proposed rulemaking on sequestration, OI would position itself as an adversarial party with virtually unlimited discretion to disqualify what fairly can be seen as its opposing party's counsel. There is no neutral judge in OI's fact finding process: OI makes the judgments. There is no balanced presentation of evidence in OI factfinding process: OI chooses its facts. Now, the proponents of the proposed rule would create a system in which the witnesses and targets of OI's investigations will be deprived of counsel of choice.

The proposed rule is totally at odds with our adversarial process, and is unprecedented. It is not surprising that OI finds it more difficult to "win" or prove "wrongdoing" when it is faced with an opposing voice that endeavors to bring forward

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gram, Thursday, April 21, 1988, House of Representatives Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, testimony of B. Hayes, at page 81; see also OI Policy 1 ("OI will perform . . . objective investigations."); 49 Fed. Reg. 16760 (Apr. 20, 1984) (notice of final rulemaking concerning establishment of OI).

facts favorable to a witness that are not evoked by OI. If an attorney acts improperly and obstructs an investigation, there is ample legal recourse available to the NRC. But, OI's objection to ostensible efforts by counsel "to structure the flow of information," 53 Fed. Reg. at 45769, is an inappropriate challenge to our basic system of law.

In summary, it is easy to win a debate if no one else is debating; but that does not mean that one's argument is persuasive or that the argument addresses critical issues which, if exposed, undermine one's position. Nevertheless, this is the process utilized today by OI. The power to unilaterally disqualify a witness' counsel is simply another step away from legitimate and fair decisionmaking; as such, it is a further step away from justice.

B. The Presumption Against Secrecy

The proposed rule contemplates the "[s]equestration" of witnesses "during the conduct of investigative interviews." 53 Fed. Reg. at 45770 (proposed § 19.3). The intention of the rule's proponents with regard to witnesses' activities is obscure, but the language of the proposed rule suggests that witnesses may be directed by OI not to discuss with other witnesses a myriad of subjects related to an investigation for an indefinite period of time. 17/ The felt need for this restraint on conversation apparently is an integral part of the proposed rule's strictures on multiple representation. The proponents of the rule do not want communications that they are able to restrict to be affected by the exchange of information through a common counsel. See, e.g., 53 Fed. Reg. at 45769 ("Dual representation of both the interviewee and the licensee or applicant could permit the

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17/ This intent is consistent with the practice of OI, during some of its interviews, to advise witnesses that it would be prudent for the witness not to discuss his interview with anyone, as to do so could impede the investigation. Witnesses can readily be intimidated by a statement of this type by a government investigator. In In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987), the Court of Appeals found impermissible the government's practice of sending a letter to a subpoened grand jury witness that informed the witness that disclosure of his subpoena could impede a criminal investigation and thereby interfere with law enforcement. "Absent a clear showing to the contrary, we fail to see how a reasonable, law-abiding person who received such a letter would think anything other than that he was being told that he was legally obligated not to engage in that course of action." Id. at 70.

subject of the investigation to learn, through counsel, the direction and scope of the investigation.")

A vital component of our legal system is the importance placed on public governance, or the abjuration of secrecy in the activities of government, particularly when the government is seeking to impose limitations or penalties on its citizens.

> [S]ecret proceedings are of course odious and smack of ideologies as repugnant to the Founders as they are today.

United States v. Bell, 464 F.2d 667, 670 (2d Cir.), cert. denied, 409 U.S. 991 (1972); see discussion of historical bases for public proceedings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-569, 100 S.Ct. 2814, 2821-2823 (1980).

There are recognized but limited exceptions to our system's rejection of secret proceedings. However,

> Whenever the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings.

In re Taylor, 567 F.2d 1183, 1188 (2d Cir. 1977). And in United States v. Ford, 830 F.2d 596, 599 (6th Cir. 1987), the Court of Appeals stated:

> The courts are public institutions funded with public revenues for the purpose of resolving public disputes, and the right of publicity concerning their operation goes to the heart of their function under our system of civil liberty.

Many of our procedural rules follow from our system's abhorrence of secrecy. Thus, in Wardius v. Oregon, 412 U.S. 470, 475 (1973), the Supreme Court struck down a nonreciprocal Oregon criminal discovery rule, asserting that, "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game secrecy' for its own witnesses." And in the Richmond Newspapers case, 448 U.S. at 571, 100 S. Ct. at 2824 (1980), the Supreme Court held the criminal trials must generally be public, regardless of the wishes of the prosecution and the defense.

Furthermore, prior restraint of witnesses' speech and conduct raises very serious first amendment free speech and

association issues. "In a long series of cases the Supreme Court has made it clear that prior direct restraints by government upon First Amendment freedoms of expression and speech must be subjected by the courts to the closest scrutiny." CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) citing Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931) and Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239 (1975); see also United States v. Ford, supra. "To justify imposition of a prior restraint, the activity restrained must pose a clear and present danger, or a serious or imminent threat to a protected competing interest." CBS, Inc. v. Young, supra, 522 F.2d at 238 (emphasis added), citing Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364 (1962) and Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249 (1947). Not only does the government carry a heavy burden to justify a prior restraint, but the restraint must be "narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." CBS, Inc. v. Young, supra, 522 F.2d at 238 (citations omitted).

In short, restricting the speech and personal interactions of a witness outside the courtroom constitutes a prior restraint on free speech and association which can only be justified in exceptional circumstances.

One well-established exception to the principle of public governance that is embedded in American society is grand jury secrecy, which is not only permitted, but required. Fed R. Crim. P. 6(e)(2). One of the reasons for this secrecy is that it protects the many innocent individuals who are the subject of grand jury inquiries by preventing the public airing of false or unsubstantiated accusations. See United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6, 78 S. Ct. 983, 986 n.6 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 99 S. Ct. 1667, 1672 (1979). In contrast, OI investigations often lead to publicly released accusations of wrongdoing.18/ Moreover, in contrast to OI witnesses, grand jurors are functioning as agents of the state in carrying out its judicial responsibilities and, accordingly, "are subject to speech restrictions that would violate the first amendment if imposed against private citizens generally." U.S. v. Ford, supra, 830 F.2d at 599, citing 2 ABA Standards for Criminal Justice, Standard 8-3.6 & Commentary at 8-54-55 (2d ed. 1980). A prosecutor or investigator who fails to maintain grand jury secrecy is himself subject to punishment. Fed. R. Crim. P. 6(e)(2); see Blalock v. United States, 844 F.2d 1546, reh'g denied en banc, 856 F.2d 200 (11th

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18/ In some cases, these releases "leak" before OI has formally issued its findings and conclusions.

Cir. 1988); Marion S. Barry, Jr. v. United States, No. 87-5268 (D.C. Cir. Jan. 27, 1989).

Furthermore, even in the grand jury context, where witnesses appear before the grand jury in closed session, and where counsel is not present, (although a grand jury witness may consult with counsel at any time, see United States v. Mandujano, 425 U.S. 564 (1976),) a grand jury witness is free to discuss his experience before the grand jury with anyone, and that certainly includes his attorney. As Rule 6(e)(2) of the Federal Rules of Criminal Procedure specifically provides, "No obligation of secrecy may be imposed on [grand jury witnesses]." See, e.g., United States v. Sells Engineering, Inc., 463 U.S. 418, 425 (1983); Blalock v. United States, supra, 844 F.2d at 1556; In re Grand Jury Proceedings, 814 F.2d 61, 68-69 (1st Cir. 1987).19/

The well-accepted circumstances in which witnesses' testimony can be kept "secret" from other witnesses is "sequestration," in which witnesses are excluded from the courtroom during the trial testimony of other witnesses. Fed. R. Evid., Rule 615;20/ see, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 N.R.C. 565 (1977).

However, an important constraint on the secrecy permitted by sequestration is that this option, which each adversary party generally may elect, but see Consumers Power Co., supra, is available only in the courtroom, and does not become available until after the substantial involvement of counsel and the

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19/ The Department of Justice Manual, Title 9, Criminal Division, Section 9-11 362 (1988 Supp.) explains to assistant U.S. attorneys that Rule 6(e) means that "Witnesses . . . cannot be put under any obligation of secrecy." See also Advisory Committee's note to Rule 6(e)(2) ("The rule does not impose any obligation of secrecy on witnesses . . . . The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if [witnesses] are not permitted to make a disclosure to counsel or to an associate.")

20/ Rule 615 contains an express exception for parties, who have a personal stake in the outcome of the proceeding. "At the request of a party the court shall order witnesses excluded . . . . This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause."

parties in the "discovery," discussion and analysis of the evidence. It is an evidentiary rule during trial that has no application during pre-trial phases of a proceeding, including the investigative phase. Cf. United States v. Bloom, C.A. No. 88-H-682-S (M.D. Ala. 1988). Thus, in Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), the Court of Appeals observed that "[w]itnesses . . . to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." While witnesses usually can be separated when they take the witness stand at trial, this late stage of a proceeding is not a context in which a witness is likely to be uncertain or confused about what the issues in the case are, what he knows first hand (in contrast to his speculations), and the significance of his knowledge or opinions on the subject.

* * * *

If the staff proponents of the sequestration rule intend to limit witnesses' freedom to discuss their interviews with others, it is an impermissible prior restraint on speech and association. Moreover, the rule's effort to control the exchange and flow of information is dramatically at odds with our public system of law. By insisting on the "paramount" importance of "the efficacy of the NRC investigation," 53 Fed. Reg. at 45768, the proposed rule tramples on the rights of individual interviewees to be free from oppressive government intrusions into their rights of association and speech, and to be subject to a noninquisitorial system of law.

C. Adequate Representation

1. The Role of Counsel

The American system of law generally presumes that individuals who become involved in any of a myriad aspects of our legal process may choose to have their interests represented by an attorney.

> [C]lients hire lawyers to do what the clients cannot do for themselves, either because of their relationship to a dispute or their lack of knowledge and experience in legal matters. Without help, clients might not maximize their chances of demonstrating that the substantive legal principles to a dispute favor them. The lawyer helps to assure that the client will not lose because of an inability to comply with the system's procedural requirements or an unawareness of substantive principles.

Saltzburg at 661-62.

A lawyer stands in the shoes of his clients, and it is his duty "to represent his client[s] zealously within the bounds of the law." D.C. Code Prof. Resp., Canon 7; see also A.B.A. Model Rule 1.3, Comment (attorney should act "with zeal in advocacy upon the client's behalf"). In essence, then, the lawyer's actions and advice are no different than the actions and advice a client would give himself if the client were able to dispassionately evaluate the facts and if he were knowledgeable about the applicable process and the law. But, as the Supreme Court has observed, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 64 (1932).

2. The Right to Counsel

There is a substantial body of law on the right to counsel in a variety of circumstances. Most relevant, for purposes of evaluating the NRC's proposed rule on sequestration, is Section 6(a) of the Administrative Procedure Act ("APA"), which provides to subpoenaed witnesses in administrative proceedings the right to be represented by counsel:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

5 U.S.C.A. § 555(b); see Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 143 (5th Cir. 1960). The provisions of the APA, including the right to counsel, are directly applicable to NRC investigations. 42 U.S.C. § 2231.

3. Counsel of Choice

The courts also have made clear that the right to counsel means counsel of one's choice. "The term 'right to counsel' has always been construed to mean counsel of one's choice. We think this is the plain and necessary meaning of this provision of the law." Backer, supra, 275 F.2d at 144 (citations omitted); accord, SEC v. Csapo, 533 F.2d 7, 11 (D.C.Cir. 1976); SEC v. Higashi, 359 F.2d 550, 552-53 (9th Cir. 1966).

Counsel of choice means exactly that: the lawyer that the client prefers. The reasons for the preference are personal to the client. The courts recognize the importance to clients of the particular knowledge and expertise of different lawyers in

our highly complex society. Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1202 (4th Cir. 1978), was a civil action involving an airplane crash in which the government sought to represent four air traffic controllers employed by the Federal Aviation Administration. In rejecting efforts by the plaintiff to disqualify government counsel, the Court of Appeals stated:

> [I]t appears to us that such representation is highly desirable since these defendants will have the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation, and will be spared the burden upon their time and resources incident to the employment of independent counsel.

See also SEC v. Higashi, 359 F.2d 550, 553 and n.5 (9th Cir. 1966) ("familiarity with a complicated corporate background would appear to be a prerequisite for effective representation," and so to deny a witness his statutory right under the APA to be represented by the counsel for the corporation "impermissibl[y] . . . strikes directly at the witness himself.")

The courts also have recognized that the freedom to choose is a compelling component of the right to counsel. In United States v. Diozzi, 807 F.2d 10, 16 (1st Cir. 1986), in rejecting the Government's effort to disqualify defense counsel, the Court stated:

> When, however, it is the government that seeks to disturb the planned proceedings by moving to disqualify defense counsel, it has only one arrow in its quiver. It must demonstrate that any infringement on choice of counsel is justified. It cannot expect to prevail by saying, in effect, "The court should grant our motion because even though we have not demonstrated a sufficient need for disqualification, no harm will have been done if competent substitute counsel are appointed and given enough time to prepare their defense." Such an approach would entirely eviscerate a defendant's right to counsel of choice.

See also SEC v. Csapo, supra, 533 F.2d at 11 (importance to client of his confidence in counsel of choice).

In short, subpoenaed witnesses in administrative investigations are entitled to be represented by their counsel of choice.

4. Dual or multiple representation

Most attorneys routinely represent more than one client; and it is not at all uncommon for clients' interests in specific matters to conflict. It is the responsibility of the attorney in every case to ensure that his representation of each client can be "zealous" and will not be adversely affected by his representation of other clients. See, e.g., D.C. Code Prof. Resp., Canon 5. No two clients are identical; hence, their interests frequently are not the same. But, usually, the interests of clients are perfectly compatible, albeit distinct.

There is a substantial body of law involving the ethical obligations of attorneys which provides guidance and rules on conflicts of interest among an attorney's clients, and the proper actions of counsel in various "conflict" situations. See generally Model Rules, Rule 1.7-1.10; D.C. Code of Prof. Resp., Canon 5. Among other responsibilities, an attorney should inform his clients about the attorney's representation of other clients whose interests might conflict. Model Rules, Rule 1.7; D.C. Code Prof. Resp. DR 5-105. In some circumstances, even when there is an actual conflict of interest among clients, the clients are free to "waive" the conflict if they choose to do so, and to continue to use their attorney of choice. Model Rules, Rule 1.7; D.C. Code Prof. Resp. DR 5-105(C).

It is the exceptional case where a court will intercede in the relationship between a client and his attorney and, over the client's objection, disqualify an attorney. Most of these cases involve criminal defendants at the post-indictment stage, where the court has an independent statutory obligation to ensure that the criminal defendant has adequate representation at trial. See Rule 44(c) of F. R. Crim. P. (trial court required to advise each criminal defendant represented jointly with other defendants "of his right to the effective assistance of counsel, including separate representation"). This responsibility of course rests on the impartial decisionmaker. The system assumes that the government, as an adversarial party, cannot make this evaluation objectively, and so should not be the party to make it. But, even in this context, the predominant focus of the court is on ensuring that the defendant's rights are adequately protected.

> [T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant. . . .

Wheat v. United States, 108 S.Ct. 1692, 1697 (1988).

Moreover, it is important to recognize that joint representation of multiple defendants or witnesses may be the most effective form of representation, even in the context of a criminal trial, where joint representation poses "special dangers".[21] Wheat v. United States, supra, 108 S.Ct. at 1697. Accordingly, the Supreme court has rejected any presumption that the mere possibility of a conflict of interest, which is inherent in every joint representation, results in ineffective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980).

> Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.'

Id., quoting Holloway, supra, 435 U.S. at 482-83, 98 S.Ct. at 1178.[22] Compare proposed NRC rule on sequestration, 53 Fed. Reg. at 45769 ("In cases where dual representation is an issue, the Commission believes that exclusion of the particular counsel chosen by or for the interviewee might be warranted.")

Other cases illustrate the legitimacy of the "common defense" approach. For example, in Halperin v. Kissinger, 542 F. Supp. 829 (D.D.C. 1982), the district court refused to disqualify

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21/ In Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181 (1978), the Supreme Court explained how, in the context of a conflict among multiple criminal defendants an attorney may, for example, be prevented "from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another."

22/ The distinction in the Supplementary Information to the proposed rule between individuals who are members of an employer's corporate control group and those who are not, see 53 Fed. Reg. at 45768, has no basis in law. Neither the entitlement to effective counsel nor the entitlement to counsel of choice is affected by the job description of the individual. And while it may be a factor, whether there is a conflict of interests among witnesses cannot be determined exclusively on the basis of an individual's seniority in an organization. Conflicts analyses involve the consideration of a number of factors and are necessarily highly fact-specific. See, e.g., In re Grand Jury Proceedings, 859 F.2d 1021, 1026 (1st Cir. 1988) (specific factual findings required to disqualify counsel for conflict of interest).

government counsel from representing several former government officials in a civil suit. In rejecting the plaintiff's argument, the court pointed to the legitimate "benefits to defendants of a 'united front,'" as well as the experience of government counsel in presenting the officials' defense. Halperin, supra, 542 F. Supp. at 832.

The value of joint representation was recognized by the Fifth Circuit in the Backer case, where the Court rejected the government's objection to a taxpayer's counsel representing taxpayer's accountant during an IRS investigation. Commissioner of the IRS had argued that "the mere presence of taxpayer's counsel at the investigation . . . serves as a damper on the voluntary testimony of taxpayer's accountant." 275 F.2d at 143 n.4. Similarly, in its proposed rule on sequestration, the staff proponents of the NRC rule contend without any factual support that if a licensee's attorney is also the attorney for interviewee, "[t]his produces an inherent coercion on the interviewee". 53 Fed. Reg. at 45769. But in Backer, the Court of Appeals rejected this rationale, finding that the taxpayer's counsel was retained by the accountant because of the latter's "confidence in [counsel] and because of said counsel's familiarity with the entire matter." 275 F.2d at 143 n.4. The Court ruled that absent a showing that the witness or counsel "will violate either the law or the ethics of their profession in the proposed investigation," disqualification is impermissible. 275 F.2d at 144. This holding is reinforced in the NRC context by the NRC's whistleblower statute, which expressly prohibits licensees from taking adverse personnel actions against their employees because of the information they provide to the NRC. 42 U.S.C. § 5851. While the proposed rule on sequestration refers to Backer, it ignores the holding of the case.

The appropriateness and value of multiple representation of government co-defendants is recognized in the Department of Justice's Torts Branch Manual for assistant U.S. attorneys:

> Eighty percent of the damage suits against individual federal employees involve multiple defendants. In some of those cases individual defendants will have different versions of the underlying facts and will accuse each other of wrongdoing. Usually, these conflicts do not ripen until threshold legal motions to dismiss or for summary judgment have been filed and lost. In addition, it is frequently very much in the tactical interest of the defendants to assume a joint defensive front and

not to be divided and weakened by cross accusations.

Torts Branch Monograph: Representation Practice & Procedure, DOJ Manual, 4-15 A.300(E)(1) (1984). The "conflicts" to which the Manual refers arise substantially after the investigative phase with which OI is involved.

Even in the criminal context, where the judge has an independent duty to protect the defendant's rights, a defendant's choice of counsel will not be disturbed without a very substantial showing by the government that there is an actual conflict of interest or that there is a serious potential for conflict. Wheat, supra, 108 S. Ct. at 1700.[23/] Moreover, the courts are advised to be sensitive to, and take into consideration any effort by the government "to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side." Wheat, supra, 108 S.Ct. at 1699. Thus, in United States v. Diozzi, supra, the First Circuit set aside convictions for income tax evasion because the government improperly infringed on defendant's right to counsel of choice in order to gain a tactical advantage. "[T]he government may not infringe upon the right to counsel of choice for such an improper purpose." 807 F.2d at 13-14.

Furthermore, disqualifying counsel is the action "of last resort" by the court. United States v. Diozzi, supra, 807 F.2d at 12. Before counsel is disqualified, the court must not only be assured that the conflict standard has been met, but also must be convinced that there are no other options available to the government short of seeking disqualification. See Matter of Abrams, 465 N.E.2d 1, 9 (N.Y. 1984). For example, the government's grant of immunity to a witness might obviate the need for disqualification. Id.

In administrative proceedings, there is also an extraordinary presumption favoring a witness' choice of counsel. In the administrative context, which is directly applicable to the proposed rulemaking at issue here, intercession by a third party, such as a court or agency, is less compelling because there is no

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23/ Even when there is an actual conflict which has been waived by the clients, the court is not required to disqualify counsel; it simply has the authority to do so. See United States v. Provenzzano, 620 F.2d 985, 1004-05 (3d Cir.) cert. denied, 449 U.S. 899 (1980) (where there is an actual conflict of interest, district court "could" refuse to accept a defendant's waiver of effective assistance of counsel).

independent statutorily-mandated duty owed by the court or agency to protect the individual's right to counsel of choice. Consequently,

> [B]efore [an agency] may exclude [a witness's chosen] attorney from its proceedings, it must come forth . . . with 'concrete evidence' that his presence would obstruct and impede its investigation.

SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976).

The "concrete evidence" standard was relied upon by the NRC's Advisory Committee when it made its recommendation to the NRC in 1983 on policies on rights of licensee employees during OI investigations. See Advisory Committee Report at 16. There are absolutely no references in the proposed NRC rule to the Advisory Committee recommendation of the "concrete evidence" standard. There also are no references to the legal precedent for that standard.

Furthermore, the law is clear that speculation that "the objective of the investigation might be frustrated" is insufficient. Csapo, supra, at 11 (emphasis in original). And yet this is precisely the justification set forth in the proposed NRC rule on sequestration. See 53 Fed. Reg. at 45769 (NRC investigator can disqualify counsel when he believes that the attorney "might prejudice, impede, or impair the investigation by reason of that attorney's dual representation of other interests"). The proposed rule's Supplemental Information even suggests that any attorney whose fees are paid by a witness' employer is subject to disqualification. See 53 Fed. Reg. at 45768; but see discussion of indemnification responsibilities of employers in Section IV.B, below.

Moreover, in Csapo, the Court of Appeals stated in unequivocal terms that dual or multiple representation cannot be presumed by an agency or investigator to be objectionable. "The mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation." Id. at 11 (emphasis added); see also SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

In Csapo, the Court of Appeals expressly rejected the following arguments that were advanced by the SEC and are now advanced by the staff proponents of the NRC rule:

° "that multiple representation increases the likelihood that subsequent evidence will be tailored, either consciously or unconsciously, better to conform with or explain what has come earlier"; see argument in proposed NRC rule on sequestration that dual representation might permit witness to "take steps to structure the flow of information to the NRC"; 53 Fed. Reg. at 45769;

° "that [the principal targets of the investigation] may have attempted to pressure other employees of [the corporation under investigation] to accept the services of [the corporation's attorneys] in order, the Commission fears, to present a 'common front'"; see argument in proposed NRC rule on sequestration that fee arrangements may act as "an improper restraint on the employee's potential candor"; 53 Fed. Reg. at 45769; and

° that "collateral inquiries [into the evidentiary basis for the Commission's request to disqualify Csapo's counsel] would delay and hinder its investigations"; see argument in proposed NRC rule on sequestration that the basis for disqualification decisions will be disclosed "[t]o the extent practicable and consistent with the integrity of the investigation"; 53 Fed. Reg. at 45770 (§ 19.18(b)).

See Csapo, supra, at 9-10, 12.

In short, Csapo expressly rejects the arguments on which the proposed NRC rule is based. The proposed rule misrepresents the Csapo and Higashi cases, suggesting that they indicate only that counsel of choice can, in some circumstances, "be barred from the interview." 53 Fed. Reg. at 45769.

In fact, in Csapo, the Court emphasized that Mr. Csapo's choice of counsel was "crucial' because he might be "subject to future criminal sanction." The Court concluded that only "concrete evidence" that multiple representation would obstruct and impede the investigation could justify disqualification of an agency investigation witness' counsel of choice. Id. at 11;

compare proposed NRC rule on sequestration, 53 Fed. Reg. at 45770 (§§ 19.3 and 19.18); see also Great Lakes Screw Corp. v. NLRB, 409 F.2d. 375, 380 (7th Cir. 1969) ("By excluding counsel without setting forth with sufficient particularity the basis for such action, [an agency] substantially and prejudicially violate[s] the Administrative Procedure Act"). The proposed rule on sequestration expressly does not require particularized findings. 53 Fed. Reg. at 45770 (§ 19.18(b)).

Furthermore, in SEC v. Whitman, 613 F.Supp. 48, 50 (D.D.C. 1985), the district court held that Csapo permits the witness' attorney to bring a technical expert of counsel's own choosing to the investigation proceedings as "an extension of himself." The court reasoned as follows:

> Given the extraordinary complexity of matters raised in agency investigations . . . , counsel trained only in the law, no matter how skillful, may on occasion be less than fully equipped to serve the client in agency proceedings. Unless the lawyer can receive substantive guidance from an expert technician -- in this case, an accountant -- when he determines in his professional judgment that such assistance is essential, his client's absolute right to counsel during the proceedings would become substantially qualified.

613 F. Supp. at 49.

Finally, there is a third context, before the grand jury, in which a substantial body of law reaffirms the extraordinary weight to be given counsel of choice.[24/] Thus, in In re Taylor, 567 F.2d 1183 (2d Cir. 1977), the court rejected as premature a motion to disqualify the attorney for a grand jury witness simply because the attorney also represented other targets of the grand jury investigation. The government's concern with "stonewalling" was judged by the court to be unjustified, when the witness had not yet appeared or invoked the Fifth Amendment or been offered immunity or refused on advice of counsel to answer a proper question. 567 F.2d at 1187.

24/ Unlike a subpoenaed investigation witness, a grand jury witness has no right to have counsel accompany him, although the witness may consult with counsel outside the grand jury room. Mandujano, supra, 425 U.S. at 581.

In summary, the right to counsel during an administrative investigation will only be infringed by a court of law in extreme circumstances. Only when the court is presented with concrete evidence that an attorney's dual or multiple representation during an administrative investigation actually creates a conflict of interest which, notwithstanding the clients' choice, prevents the attorney from adequately representing the clients, will a court disqualify counsel of choice.

* * * *

Witnesses in OI investigations are entitled to counsel, and counsel means counsel of choice. The only parties with any authority to remove chosen counsel are (1) the clients who have chosen the counsel; (2) the attorney, if he cannot adequately represent a client; and (3) in extreme circumstances, a judge. OI does not qualify as any one of these parties, and has no authority, much less complete discretionary authority, to disqualify a witness' counsel of choice. Assuming the most benign motives by the staff proponents of the rule, it is simply not the prerogative of an OI investigator to unilaterally disqualify a witness' counsel. 25/ As the Court of Appeals stated in Csapo, 533 F.2d at 11 (emphasis added):

> We do not minimize the dangers inherent in counsel representing multiple clients in a single proceeding. It is at least plausible that as matters develop the best interests of [one client] may prove to be antagonistic to those of [other clients]. That decision, however, belongs to neither the district court nor the Commission. The SEC properly fulfilled its duty by informing those who came before it whether their lawyer had appeared on behalf of others, and, if so, the possible conflicts which might arise. The choice must then be made by the witness after a full and frank disclosure by his attorney of the

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25/ The proposed rule does not explain how an investigator would accomplish this authority to disqualify if counsel disagreed with the investigator's judgment. NRC's subpoenas are not self-enforcing; the investigator would have to go to court and persuade a judge that his judgment was sound. 42 U.S.C. § 2281. In short, the proposed rule does not appear to be capable of serving its intended purpose.

attendant risks. See ABA Code of Professional Responsibility, Disciplinary Rule 5-105(c).

Certainly, it is not the prerogative of an OI investigator to disqualify counsel. The investigator is not trained in law, and is thus largely unfamiliar with the legal definition and application of the doctrine of conflict of interest. He also is not a disinterested, objective party; rather, he is partisan. See Section III.A, above.

Furthermore, it is incorrect to characterize the impact of the rule as a "somewhat minor burden on an individual's right to be accompanied by a particular counsel." 53 Fed. Reg. at 45769. Denying an individual's chosen counsel is often equivalent to denying the effective assistance of counsel. This is particularly true in situations where the law and facts are highly complex and technical, and where it may require not only a highly knowledgeable attorney, but an attorney who has had the opportunity to understand the myriad facts and circumstances at issue. See, e.g., SEC v. Higashi, supra, 359 F.2d at 553 n.5 ("familiarity with a complicated corporate background would appear to be a prerequisite for effective representation"). In fact, there may only be one attorney in a particular situation who is really familiar with the case.

In short, in the context of NRC investigations, the disqualification of chosen counsel is a particularly harsh action, because other attorneys, even if they are of outstanding caliber, and even if they are familiar with nuclear regulatory matters, often are not knowledgeable about the complex facts of an OI case.[26]

The NRC's proposed rule, like the motion for disqualification in Aetna, appears "motivated more by a desire to fragmentize the [witnesses] than by any sensitivity to the ethical considerations involved." 570 F.2d at 1201 n.7. The ethical rules concerning the representation of clients with conflicting interests are intended to protect the attorney's clients; "the impact of such multiple representation upon the plaintiffs is irrelevant." The tactical or practical advantage to an investigator of

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[26] It is beyond reason for the proponents of the rule to suggest that in one week, a witness can retain other counsel. While this literally may be true, the issue is counsel of choice and effective counsel, not just counsel. And becoming knowledgeable about a case usually entails learning about the facts from a number of witnesses.

disqualifying an attorney who represents multiple witnesses simply is not a recognized basis for disqualification. As the Court of Appeals of New York explained,

> An individual's right to an attorney of his choice is too important to be disregarded simply because the prosecutor's or the investigator's task may be made easier if he is allowed to divide and conquer his perceived opposition.

Matter of Abrams, supra, 465 N.E. 2d at 9; see also United States v. Diozzi, supra, 807 F.2d at 13-14 (setting aside convictions for income-tax evasion because government improperly infringed upon defendant's right to counsel of choice in order to gain a tactical advantage).

In summary, the proposed rule is fundamentally flawed because it unjustifiably impairs the APA-granted right to the effective assistance of counsel of choice.

IV. THE PROPOSED RULE ON SEQUESTRATION HAS SIGNIFICANT OTHER COSTS

There are three other costs, in addition to those already enumerated, which the proposed rule imposes on those subject to it. Those costs are (1) a potentially adverse impact on public health and safety, (2) economic consequences, and (3) loss of morale.

B. Public Health and Safety

A licensee, as well as other nuclear industry participants, has an obligation to ensure that it makes every reasonable effort to understand the facts and circumstances that have led to facility incidents, possible communication problems affecting a licensed facility and other matters that might have an adverse impact on the operation of a facility and the health and safety of the public. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 N.R.C. 281, 335 (1982); see also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 N.R.C. 1193, 1208 (1984). This is a "legitimate interest," see 53 Fed. Reg. at 45768, that is not addressed by the proposed rule; yet the proposed rule would operate in a manner designed to limit to the extent possible the disclosure of factual information to a licensee.

While there may be extreme cases where resort to such secrecy becomes necessary, it is not consistent with the statutory responsibilities of licensees and others for the NRC to

fashion a routine agency process that presumes that factual disclosure to licensees and other interested parties results in some type of improper "outside influence" on the investigation.

In fact, it is logical to assume, and the courts have recognized, that the cooperative participation by an attorney representing targets of an investigation frequently facilitates the fact-finding process. As the court stated in Csapo, "in many cases it is likely that such [multiple] representation may facilitate and expedite the proceedings." 533 F.2d at 11-12.

In short, disclosure of investigative facts to a licensee may facilitate the investigation; furthermore, the presumption that OI will not do so may impede the ability of a licensee and others in the industry to fulfill their responsibilities.

B. Economic Loss

The proponents of the rule incorrectly assert that the proposed sequestration rule is "not expected to have any economic impact on the NRC or its licensees." 53 Fed. Reg. at 45768. This conclusion is unrealistic.

It is only common sense that the total cost of individual representation of several witnesses will exceed the cost of joint representation. See, e.g., SEC v. Higashi, supra, 359 F.2d at 553 (cost may render corporate counsel the only affordable qualified counsel; but a "rule which, except for a wealthy few, denies effective counsel is not permitted by the Administrative Procedure Act"); see also Aetna Casualty & Surety Co. v. United States, supra, 570 F.2d at 1202; SEC v. Csapo, supra, 533 F.2d at 12. This cost is born by the witness or his employer.

In many states, a corporation is required to indemnify its employees for legal expenses they incur because of actions they took within the scope of their employment.27/ Where

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27/ For example, under the indemnification provisions of Delaware's corporations law, copied in twenty-eight states and the Model Business Corporation Act of 1967, a Delaware corporation must reimburse an employee for all "expenses (including attorneys' fees) actually and reasonably incurred" in connection with an investigation, "[t]o the extent that [the employee] has been successful on the merits or otherwise in defense of" a proceeding. 8 Del. C. § 145(c); see 2 J. Bishop, The Law of Corporate Officers and Directors § 6.03 (Callaghan 1981 and 1986 supplement). And "[i]n a criminal action, any result other than

(Continued Next Page)

indemnification is not required by state law, it is permitted,[28] and as a policy matter, a corporation might choose to pay such legal fees, among other reasons, in order to preserve employee morale. In such circumstances, or if a witness is paying for an attorney himself, the increased cost of individual representation would either effect the individual witnesses or have a direct economic impact on the individual's employer. The only way that the proposed rule's finding of no economic impact would be true is if the rule caused individuals to be unable to afford any counsel -- a result that is not permitted by the APA. See SEC v. Higashi, supra.

The economic advantages of multiple representation are recognized by the Department of Justice in its Manual: "It is obviously in the interest of the government and the Department to provide representation" for government officers and employees sued "in connection with the performance of their official duties." Torts Branch Monograph: Representation Practice & Procedure, DOJ Manual, 4-15A.300(E)(1) (1984). When those suits involve multiple defendants (as 80% do), and when a conflict of interest between those defendants "persists beyond threshold motions," the Department may employ private counsel to represent the defendants. Id. But it will then "group[ ] them into the largest compatible groups possible to minimize the number of private counsel needed."

In contrast to DOJ's approach, the NRC's proposed rule ignores the interest of a corporation in providing legal representation for its employees and ignores the costs to both the employees and the corporation in providing individual representation for each.

B. Loss of Morale

The inability of individuals who work in the nuclear industry to obtain the most qualified counsel possible in circumstances when the individual is subject to a process that is not only unfamiliar and bewildering, but frequently intimidating, is a substantial cost of the proposed rule. As a matter of public

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(Continued)

conviction must be considered success," so that indemnification is required. Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138, 141 (Del. Super. 1974); see also Stewart v. Continental Copper & Steel Industries, Inc., 67 A.D.2d 293, 414 N.Y.S.2d 910, [illegible] (1st Dep't 1979).

28/ See, e.g., 8 Del. C. § 145(a).

policy, this is a cost of which the NRC should be particularly concerned.

The nuclear industry needs the services of the most capable and honest individuals.

> It must be clearly recognized that competent, knowledgeable, dedicated people are the most important factor in the safety equation.

Remarks by Chairman Lando W. Zech, Jr., U.S. Nuclear Regulatory Commission, at the 1988 INPO CEO CONFERENCE, Atlanta, Georgia, Nov. 4, 1988. It is not difficult to deduce that individuals who do not feel that their rights are being considered, much less protected, and yet who are subject to very serious personal sanctions, up to and including criminal liability, for their professional conduct, will not have a great deal of incentive to subject themselves to the nuclear regulatory process. And those who do choose to do so will not do so with the best attitude about or dedication to the process, nor will their morale be high.

If this industry is to retain its best performers, it must minimize the burdens it places on its people, and respect the rights and privileges of those individuals.

V. AN ALTERNATIVE RULE CAN PROMOTE PUBLIC HEALTH AND SAFETY WITHOUT JEOPARDIZING INDIVIDUAL RIGHTS

It is ironic that the proponents of the rule rely on a number of IRS cases to support their proposed usurpation of the rights of witnesses. See ns. 12 & 13, supra. In fact, consideration of the current guidance of the IRS provides an excellent model for an NRC rule on the conduct of investigations that would ensure that the investigative process and the rights of individuals are fully protected.

The Internal Revenue Services Manual ("IRM") provides that the targets of IRS investigations have the right to be accompanied by counsel and that third party witnesses should be accorded the same right. See IRM 4022.41, MT 4000-181 (Feb. 23, 1981) (applicable to civil investigations by revenue agents); IRM 97871, Handbook for Special Agents § 343.6, MT 9781-18 (April 13, 1981) (applicable to criminal investigations by Special Agents). There are detailed provisions in the Manual on the matter of Dual Representation. These provisions are designed to ensure the following:

(1) that each of the individuals who is represented by an attorney who represents other witnesses or targets

expressly consents to such representation after full disclosure of the dual or multiple representation;

(2) that "the mere existence" of dual representation which may potentially adversely impact an investigation does not provide a sufficient basis for the IRS seeking disqualification;

(3) that efforts to disqualify a chosen attorney, which is an "extreme remedy," will only be used "in extreme circumstances," such as "where an attorney has taken some action to improperly or unlawfully impede or obstruct the investigation";

(4) that "speculation that the objective of the investigation might be frustrated" is insufficient grounds upon which to seek disqualification, as is "the mere potential for obstruction";

(5) that "[t]here must be active obstruction by an attorney before disqualification will be sought," such as refusing to permit the witness to answer questions for other than legitimate reasons, or disruptive behavior by counsel;

(6) that even when the attorney obstructs the investigation, the proper remedy may be other available alternatives short of disqualification, such as compelling the witness to answer;

(7) that an investigator's role in the disqualification process is simply to terminate the interview if he determines he cannot proceed;

(8) that it is not within the discretion of the investigator to disqualify an attorney but, rather, the investigator is required to seek IRS management's agreement with his view; if management agrees that extreme circumstances are present, a request is made to IRS counsel that it recommend to DOJ that DOJ seek judicial enforcement of the IRS summons and exclusion of the attorney; and

(9) that an investigator is expected to maintain a record of the circumstances that led to his termination of an interview because of concerns regarding dual representation; the investigator is also expected to have a verbatim transcript of the interview, if possible, so that the factual allegations concerning the attorney's conduct at the interview may be proven.

These well-thought-out IRS provisions, which supersede the cases referred to in the NRC rule, provide useful agency guidance to investigators on their conduct during an investigation. The legal standards and policies reflected in the IRS guidance is not reflected in the NRC's proposed rule on sequestration. In fact, the presumptions contained in the OI rule are virtually in all respects the opposite from the presumptions reflected in the IRS guidance.

Sound guidance on witness' rights during investigations would facilitate the OI process. If the NRC is interested in pursuing such guidance, the IRS's internal procedures provide an excellent model.

VI. CONCLUSION

There are certain values that permeate our system of law. Among those values are the following:

(1) the right to a fair legal outcome or "justice";

(2) the right to an objective decisionmaker;

(3) the value of the adversarial function and activity of participants in American legal processes, including the activity of investigators;

(4) the abhorrence of secrecy in legal processes, absent compelling need and substantial safeguards;

(5) the right to counsel in most circumstances, including administrative proceedings where the witness appears by subpoena; and

(6) the right to counsel of choice, which a court will respect absent exceptional circumstances.

Certainly there are other values sewn into the fabric of our legal system, such as the presumption of innocence of the accused until he is proven guilty, among others. But the set of values articulated above are among the fundamental tenets of the American system of justice.

The proposed rule on sequestration appears to have been created in a legal vacuum, without regard to either the applicable decisions of the courts, the fundamental values that are reflected in the American system of law, or other important considerations of public policy. It is a flawed proposal and should be withdrawn.

NUMARC
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Joe F. Colvin
Executive Vice President &
Chief Operating Officer

February 9, 1989

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

ATTN: Docketing and Service Branch

RE: Proposed Rule - Sequestration of Witnesses Interviewed Under Subpoena
53 Fed. Reg. 45768 - 45771 (November 14, 1988)
Request For Comments

Dear Mr. Chilk:

The enclosed comments are submitted on behalf of the Nuclear Management and Resources Council, Inc. ("NUMARC") to the proposed rule of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") entitled "Sequestration of Witnesses Interviewed Under Subpoena," published on November 14, 1988.

NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant is a member of NUMARC. In addition, NUMARC's members include major architect-engineering firms and all of the major nuclear steam supply system vendors.

NUMARC strongly opposes the proposed rule and recommends its immediate withdrawal.

First, the proposed rule is not needed. Although the NRC alludes to "confusion that has arisen regarding who can attend investigative interviews," aside from vague references such as "in several instances" and "in three recent cases," there is nothing to suggest that a generic rule is warranted, much less

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one of this sweep and import. The proposed rule is in direct opposition to the recommendations of the Advisory Committee for Review of Investigation Policy on Rights of Licensee Employees under Investigation, established by the Commission in 1983 to address specific matters including, inter alia, the right of a subpoenaed witness to choice of counsel. Moreover, the notice of proposed rulemaking does not even refer to the existence of the Advisory Committee or address in any way the Advisory Committee's findings and recommendations.

Second, the proposed rule evidences a fundamental misunderstanding of legal principles associated with the paramount right of a subpoenaed witness to be represented by his or her chosen counsel. This right has been established by the Congress in the Administrative Procedure Act, has been enforced by judicial decisions construing the Act, and is supported by constitutional principles of due process, as well as the Sixth Amendment. NUMARC does not maintain that this right to counsel of choice is necessarily an absolute right. However, the law permits federal agencies to limit a witness's fundamental right to counsel of choice only when specific concrete evidence exists showing that chosen counsel will impede the agency investigation. The proposed rule is flawed under this standard because it would allow NRC investigators to abrogate a witness's right to chosen counsel without first demonstrating that such evidence is present.

Third, if a rule affecting the rights of a subpoenaed witness is to be promulgated, such a rule must contain certain basic provisions protective of those rights. At a minimum, such a rule must include the following provisions:

- recognition of the principle that clients have the right to consent to an attorney's representation of conflicting interests;
- the NRC will seek to disqualify chosen counsel only in "extreme circumstances" (i.e., when an attorney impedes or obstructs an investigation);
- disqualification will be sought by requesting the Department of Justice to seek a court order;

- the express recognition that mere speculation that the attorney might frustrate the objective of the investigation is an insufficient ground to disqualify an attorney; and

- the investigator will make a record (including a verbatim transcript of the interview, if possible) of the basis for the allegation concerning the attorney's improper obstruction of the investigation.

A commendable example of guidance in this area is set forth in the Internal Revenue Service Manual Handbook provisions on witness representation in investigations.

The proposed rule is neither justified nor justifiable and should be withdrawn. We would be pleased to discuss our comments further with the Commission or appropriate NRC staff personnel.

Sincerely,

Joe F. Colvin

Enclosure

cc: Chairman Lando W. Zech
Commissioner Thomas M. Roberts
Commissioner Kenneth M. Carr
Commissioner Kenneth C. Rogers
Commissioner James R. Curtiss

Enclosure to
NUMARC February 9, 1989
Letter to Samuel J. Chilk

NUMARC COMMENTS

NRC Proposed Rule -- Sequestration of Witnesses
Interviewed Under Subpoena
53 Fed. Reg. 45768 (November 14, 1988)

I. Introduction

As the title of the subject notice indicates, the proposed rule pertains to the sequestration (separation from each other) of witnesses interviewed under subpoena. However, neither the title nor the Summary portion of the notice suggest the primary impact of the proposed rule, which is to significantly limit the right of a subpoenaed witness to be accompanied, and advised by counsel of his or her choice.

Specifically, the proposed rule provides that the NRC official conducting the investigation may exclude counsel from an interview if the official determines that a "reasonable basis exists to believe that the investigation may be obstructed, impeded or imparied [sic], either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness." 53 Fed. Reg. at 45770, col. 3 [§ 19.18(b)]. This provision of the proposed rule grants to the NRC investigator virtually unbridled discretion to determine whether an attorney chosen by the witness may represent the witness in the interview. Attempts by NRC investigators to implement the proposed rule will undoubtedly result in a host of subpoena enforcement proceedings in which the NRC, in the vast majority of such cases, will not prevail.

NUMARC believes that the Commission's proposed rule could lead to arbitrary disqualification of counsel chosen by a witness in a setting where substantial individual rights are at stake and the witness's right to counsel of choice is crucial. This right has been established by the Congress in the Administrative Procedure Act, has been enforced by judicial decisions construing that Act, and is supported by constitutional principles of due process, as well as the Sixth Amendment.

The detailed comments that follow are, in summary:

- The proposed rule represents a serious infringement on the right of a subpoenaed witness to choose his or her counsel (Section II).

- The Courts have restricted efforts by administrative agencies to exclude, on conflict-of-interest grounds, counsel chosen by a subpoenaed witness (Section III).

- The proposed rule cannot be justified by the Commission's asserted concerns with dual representation (Section IV).

- The proposed rule cannot be justified by the Commission's responsibility for public health and safety (Section V).

- The proposed rule is otherwise inherently defective (Section VI).

In short, NUMARC opposes this rulemaking proceeding and strongly recommends its termination.

II. The Proposed Rule Represents A Serious Infringement On The Right of a Subpoenaed Witness To Choose His or Her Counsel

A. The Proposed Rule Violates § 6(a) of the Administrative Procedure Act

The proposed rule would operate in the setting of NRC investigations.[1] The Commission created the NRC's Office of Investigation ("OI") in 1982 to assist in implementing its statutory authority. Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to conduct such investigations as it may deem necessary and proper to assist it in determining

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1/ NUMARC assumes that the proposed rule would of course not apply to NRC inspections; however, the notice is ambiguous on this point. Compare 53 Fed. Reg. 45768, col. 1 [Summary] ("investigations and inspections") with 53 Fed. Reg. 45770, col. 3 [§§ 19.3, 19.18] ("investigations"). If this assumption is incorrect, the Commission is requested to promptly advise NUMARC and other commenters to this effect and to provide an opportunity to file supplemental comments.

whether enforcement or other regulatory action is required under the Act, or any regulations, licenses, or orders issued thereunder. See Chapter 0119 of the NRC Manual, entitled "Organization and Functions -- Office of Investigations," February 23, 1986. See also, 53 Fed. Reg. 50317, 50318 (December 14, 1988) (Memorandum of Understanding Between the NRC and the DOJ).

During an NRC investigation, individuals employed by a licensee (whether management or non-management personnel) may be requested to meet with a field investigator. Indeed, the persons interviewed may be the very target of the investigation. If an individual declines to be interviewed voluntarily the NRC may issue a subpoena setting forth terms of compulsory attendance. 42 U.S.C. § 2201(c). An NRC subpoena is not self-enforcing; the subpoena does not become legally enforceable until an order is issued by a federal district court requiring the subpoena recipient to comply. 42 U.S.C. § 2281. Although NRC investigations have not always been conducted utilizing such legal process,[2] the rare issuance of a subpoena triggers the "right to counsel" provisions of the Administrative Procedure Act ("APA").[3]

Section 6(a) of the APA explicitly affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied, represented and advised by counsel, viz.:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

5 U.S.C. § 555(b).[4]

2/ See Earl J. Silbert, et al., "Report of the Advisory Committee for Review of the Investigation Policy on Rights of Licensee Employees Under Investigation," (hereinafter "The Silbert Committee Report") submitted to the NRC September 13, 1983, at 11. The Silbert Committee was created by the NRC in 1983 to advise the Commission on matters including the right of a subpoenaed witness to counsel of choice. The findings of the Silbert Committee will be further discussed below.

3/ Section 181 of the Atomic Energy Act of 1954 as amended (42 U.S.C. § 2231), makes the provisions of the APA directly applicable to "all agency action."

4/ The proposed rule distinguishes witnesses who are "a member of the employer's corporate control group" from those who are

(Footnote 4 continued on next page.)

As used in § 6(a), the term "right to counsel" has been construed to mean counsel of one's choice. Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (10th Cir. 1960); Securities and Exchange Commission v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966); Securities and Exchange Commission v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976); Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 381 (7th Cir. 1969); Kentucky [illegible] Co. v. Penn. P.U.C., 837 F.2d 600, 618 (3d Cir. 1988), reh'g and reh'g en banc denied (February 16, 1988). The applicability of § 6(a) of the APA extends to all types of NRC proceedings, including OI investigations. See Csapo, 533 F.2d at 10 ("[§ 6(a)] provides that any person summoned to appear before a federal agency is entitled to the assistance of counsel."); Higashi, 359 F.2d at 551 ("[§ 6(a)] grants the right to counsel to any witness subpoenaed to appear before any Federal agency").[5] Furthermore, the right to counsel is phrased in § 6(a) in "unequivocal terms", Csapo, ibid. and "without any limitation", Backer, 275 F.2d at 143.

The Supplementary Information attempts to overcome these precedents by citing three relatively old district court cases in support of its proposition that "a witnesses' attorney [may be excluded] from an investigative interview where the attorney also represented the person under investigation". 53 Fed. Reg. at 45769. See United States v. Steel, 238 F.Supp. 575 (S.D. N.Y. 1965); Torras v. Stradley, 103 F.Supp. 737 (N.D. Ga. 1952); United States v. Smith, 87 F.Supp. 293 (D. Conn. 1949). An examination of these cases reveals that they do not support the

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(Footnote 4 continued from previous page.)
not. 53 Fed. Reg. at 45768, col. 3. However, neither the Supplementary Information nor the specific proposed revisions to 10 C.F.R. Part 19 clarify the term "control group" or apply the term in any manner. In any event, the status of a witness within the corporate organization is no basis for disqualification of counsel; § 6(a) of the APA is clearly not limited to individuals within a "control group".

5 See also, S. Doc. No. 24; 88th Congress, 1st Session 229 (1963) ("It thus appears that section 6(a) in fixing the right to counsel, abandoned the distinction that had earlier been commonly drawn between trial-type and investigatory proceedings."); S. Doc. No. 248, 79th Congress, 2d Session 266-67 (1946) ("The section [6(a)] is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public or private.")

proposed rule, and the more recent U.S. Court of Appeals decisions cited above demonstrate that the Staff's reliance on them is misplaced.[6]

In United States v. Smith, a 1949 case, the court specifically found that "no harm seems likely from such a situation [i.e., dual representation] in this case". 87 F.Supp. at 294. This finding does not comport with the "concrete evidence" test subsequently developed in Csapo, where it was held that dual representation was appropriate since there was no "'concrete evidence' that [a specific attorney's] presence would obstruct or impede [an] investigation". 533 F.2d at 11. Moreover, the Smith decision, precluding counsel of choice, was based on the "possibility of prejudice". 87 F.Supp. at 294. Such a basis is inconsistent with Csapo's holding that "speculation is insufficient" to preclude counsel of choice. 533 F.2d at 11. Lastly, and most importantly, the Fifth Circuit's decision in Backer reversed the trial court which had relied upon Smith.

The basis for the decision in Torras v. Stradley, another old case, is not the one advanced in the Supplementary Information, and accordingly, Torras is not of moment. The court excluded counsel because of his tactics ("Indeed, in the instant case, the Government's agents have been put to much delay,

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6/ The proposed rule recognizes some of the referenced United States Appellate Court decisions. See 53 Fed. Reg. at 45769, col. 2, which cites Backer, Higashi and Csapo. However, the Commission attempts to circumvent Backer by stating that it "did not decide whether that right [i.e., the right to counsel of choice] could be limited or otherwise qualified through formal rulemaking procedures". Id. Backer did not decide this question because the question was not before it. With respect to Csapo and Higashi, the NRC states, and we acknowledge, that both courts "indicated that there could be circumstances where an attorney could be barred from the interview, although it could not be done under the facts of these cases." 53 Fed. Reg. at 45769, col. 2. However, for the reasons contained in these comments, it is our position that the right to counsel of choice is both a significant statutory and constitutional right that is best left to judicial, as opposed to regulatory, determination. Furthermore, the proposed rule does not provide any specific guidance or test to determine when the exclusion of counsel is appropriate, but places this decision within the discretion of the investigator. In effect, the investigator is given the power to abrogate the statutory right to counsel at his convenience. Such a result cannot be supported.

trouble and expense by the actions of the taxpayer's attorney."). 103 F.Supp. at 738-39. This point is underscored by the subsequent 10th Circuit decision in Backer which states:

> Nor do we have a case in which the Commissioner is complaining to a trial court that counsel is in fact obstructing the orderly inquiry process by improper conduct or tactics. Cf. Torras v. Stradley, D. C. Ga., 103 F.Supp. 737.

275 F.2d at 144.[7]

In United States v. Steel the court excluded the company counsel as a matter of law holding that

> [I]n tax investigations it has been held to be no violation of Section 6(a) of the Administrative Procedure Act to require that a third party witness select as counsel some one other than counsel for the taxpayer.

238 F.Supp. at 578. Smith and Torras are cited as the sole authority. Neither Smith nor Torras support this holding. Neither Smith nor Torras excluded counsel as a matter of law as did the court in Steel; rather, both the Smith and Torras courts made factual inquiries (as noted, the proposed rule does not provide for such inquiry). In addition, Steel recognized the contrary precedent of the 5th Circuit's decision Backer, 238 F.Supp. at 578.

In short, in view of Backer and other later Court of Appeals' cases on this point, the Steel, Torras and Smith district court cases are simply no longer good law.

B. Substantial Individual Rights Are At Stake During An NRC Investigation

Substantial individual rights are at stake during an NRC investigation. NRC investigations are closely coordinated with the Justice Department, and may lead to criminal indictments.

7/ Furthermore, it appears that the Torras court was influenced by the IRS statute which required that investigations "be conducted secretly and confidential". 103 F.Supp. at 739. No such statutory requirement is involved in the instant proposed rulemaking.

See generally, 53 Fed. Reg. 50317 (December 14, 1988) (Memorandum of Understanding Between the NRC and the DOJ) ("[S]uspected criminal violations * * * may be identified during the course of NRC investigations and referred to DOJ for prosecutive determination." Ibid.) ("When a matter arises in which the NRC concludes that regulatory action is necessary to protect the public health and safety, or that it is necessary to propose a civil penalty, and the Director, Office of Enforcement (OE), has been informed by the Director, OI, that there is a reasonable suspicion that a criminal violation has occurred, the Director of OE will promptly notify the DOJ of such matter, notwithstanding the fact that an investigation has not yet been completed by NRC." Id. at 50319.).

It is therefore clear that a preliminary investigation conducted by NRC's Office of Investigation could be merely one part of a continued procedural sequence culminating in criminal prosecution by the Justice Department. Indeed, the record compiled during an NRC investigatory interview may constitute evidence later relied upon at a criminal trial, see United States v. Presley, 487 F.2d 163 (5th Cir. 1973). If convicted of violating the Atomic Energy Act, individuals can be imprisoned and required to pay large fines. 42 U.S.C. §§ 2272 et seq.

The intention of the NRC to use the results of its investigations for criminal purposes was underscored in statements made to the Commission in 1983 by George H. Messenger, then Acting Director, Office of Inspector and Auditor, in SECY-83-497 entitled, "NRC Conduct of Civil Versus Criminal Investigations," viz.:

> In most cases, an OI investigation, conducted for civil purposes, should be as thorough as it would be had it been done for criminal purposes. In those cases there is no reason to argue over whether the NRC is conducting a civil or a criminal investigation; the NRC is conducting an investigation for civil purposes, the results of which can also be used for criminal purposes.

Id. at 4 (emphasis supplied).

In view of this dual nature of NRC investigations conducted for civil/criminal purposes, the constitutional implications of depriving subpoenaed witnesses of the right to counsel should not

lightly be dismissed.[8] The Supreme Court recently noted that the Sixth Amendment establishes a "presumption" in favor of counsel of choice. Wheat v. United States, ___ U.S. ___, 56 U.S.L.W. 4441, 4444 (May 24, 1988).

The Supreme Court has also held that constitutional due process rights, including the right to counsel, do apply when an agency investigation is for the purpose of uncovering criminal violations and the information obtained might indicate individual guilt of a crime. See Mathis v. United States, 391 U.S. 1 (1968) (the Fifth Amendment requires that in a tax investigation a taxpayer in custody in a matter wholly unrelated to taxes is entitled to be informed as to his right to counsel, since such investigations may result in criminal prosecutions).

The Fifth Amendment protection is not strictly limited to criminal cases. The D.C. Circuit elaborated on this very point in Csapo, supra, ruling that the agency (SEC) bears a heavy burden when attempting to veto the witness's choice of counsel, viz.:

> Since any statement made by Csapo during the course of his questioning may later be referred to the Department of Justice for future consideration of a grand jury and prosecution on criminal charges, Csapo's choice of counsel to accompany and advise him during his SEC interview is obviously a crucial one. That choice should not needlessly or lightly be disturbed . . . .

533 F.2d at 12. Other circuits have reached similar results.[9]

8/ The sequestration of witnesses provision of the proposed rule [§ 19.18(a)] would bar discussions among interviewees, apparently in contravention of First Amendment provisions of freedom of speech and freedom of association. See e.g., Kentucky West Va. Gas Co., 837 F.2d at 617-18 (noting arguments presented to the district court but not reached on appeal).

9/ See e.g., Kentucky West Va. Gas Co., 837 F.2d at 618, wherein the court, in this civil case, stated "[W]here the right to counsel exists, the due process clause of the Fifth Amendment does provide some protection for the decision to select a particular attorney".

C. The Proposed Rule Ignores the Recommendations of the NRC's Own Advisory Committee

The Commission's own advisory committee on the issue previously rejected the basic tenets of the proposed rule. See supra, n.2. Former Chairman Palladino in an April 11, 1983 letter to Earl J. Silbert, Esq., the Chairman of the "Advisory Committee for Review of Investigation Policy On Rights of Licensee Employees," (a committee of legal experts created by the NRC on February 25, 1983), instructed the Silbert Committee to consider the following question ("Question 2"):

> May, and, if so, should the Commission limit an interviewee's choice of counsel by excluding from the interview any attorney who also represents the entity being investigated?

After extensive consideration, including review of many of the same judicial authorities cited earlier in these comments, the Silbert Committee concluded that a blanket rule excluding any attorney who also represents the entity being investigated "would not be sustained by the courts." The Silbert Committee Report at 14. The Silbert Committee added:

> We are accordingly of the view that it would be appropriate to enter or seek an order of exclusion only where (a) a witness has been ordered to testify, and (b) there is concrete evidence that the chosen representative of that witness is in such a position that his participation as counsel would seriously prejudice the investigation.

Id. at 16.

Nothing in the Supplementary Information explains the conspicuous disregard for the findings and conclusions from these legal experts of the Commission's own choosing. Instead, the proposed rule establishes an extremely low standard, falling far short of requiring "concrete evidence" that participation by the chosen representative would seriously prejudice the investigation.[10]

10/ Some aspects of the Silbert Committee Report were criticized in a letter dated February 16, 1984 by Mr. Stephen S. Trott, then Assistant Attorney General in the Criminal Division of the Department of Justice, to then NRC Chairman Palladino.
(Footnote 10 continued on next page.)

In sum, the proposed rule clearly represents an infringement violative of the protections afforded a subpoenaed witness under § 6(a) of the APA, as well as constitutional guarantees. It is axiomatic that an agency cannot act in excess of the authority which it has been granted by Congress, nor is it free to ignore statutory restrictions, such as APA § 6(a), which apply to the exercise of such authority. The proposed rule defies the clear mandate of Congress, the APA, the weight of judicial decisions, and the recommendations of the Commission's own advisory committee. The proposed rule should accordingly be withdrawn.[11]

III. The Courts Have Restricted Efforts by Administrative Agencies to Exclude, on Conflict of Interest Grounds, Counsel Chosen By A Subpoenaed Witness

The tenor of the proposed rule suggests a per se exclusion of counsel simply on the basis of dual representation or other alleged conflict of interest grounds. Judicial precedent is clear that a greater showing is required. The courts have held repeatedly that the mere fact that a lawyer is representing one subpoenaed witness does not constitute sufficient ground to prevent him or her from representing other witnesses. An across-

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(Footnote 10 continued from previous page.)
Mr. Trott concluded that even a mere "possibility of a conflict of interest" can warrant disqualification. Trott Letter at 7. However, Mr. Trott's views obviously reflect the criminal context with which he is familiar, and not the context of administrative regulation and oversight of utility companies and their employees who are responsible for the construction and operation of nuclear power plants. The letter fails to cite or discuss any of the especially relevant authority referred to above, including § 6(a) of the APA and the leading and on-point decisions construing the comparable SEC sequestration rule. Even so, Mr. Trott's letter does not constitute support for the proposed rule. It emphasizes that the Commission itself has no power to exclude an attorney but can only seek a court order to that effect. The letter, therefore, merely advises the Commission not to adopt a policy which, in advance, would limit the circumstances under which it might seek a court order barring an attorney. Trott Letter at 4.

11/ The Supreme Court has stated that the APA was "framed against a background of rapid expansion of the administrative process and a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

the-board limitation placed upon the right of a subpoenaed witness to choose his or her counsel cannot be enforced.

In an SEC proceeding investigating a corporation for alleged security law violations, the SEC invoked its sequestration rule in an attempt to prevent the corporation's attorney from representing the director of the corporation who was subpoenaed to testify in an investigative hearing. Securities and Exchange Commission v. Higashi, 359 F.2d 550 (9th Cir. 1966). The SEC had contended, similar to many of the contentions advanced by the NRC in support of the proposed rule, that the exclusion of the attorney from the SEC interview was warranted because (1) violation of securities laws are often difficult to detect and require extensive investigation, (2) it may be necessary to determine whether individuals are acting in concert, (3) investigations are frequently sought to be frustrated by noncooperation and even subornation of perjury, and (4) the purpose of sequestration could be defeated by an attorney advising witnesses of the testimony which had been given by other witnesses. Id. at 552.

Despite the SEC's allegations, the court enforced the SEC subpoena only on the condition that the director be allowed to be accompanied by the corporation's lawyers. The court based its decision on the statutory right to counsel provision, APA § 6(a), observing that the attempted exclusion was improper because the witness was a director of the corporation with which he has common interests and for the actions of which he may be held responsible. The court concluded that to sequester corporate counsel is to deprive the witness of the services of the attorney most familiar as to the source of his potential vulnerability; in essence, depriving the witness of effective counsel, viz.:

> This invocation of the rule exceeds the bounds and purposes of sequestration. It strikes not only at others who would use the witness' right to counsel for their own purposes; it strikes at the witness himself.

Id. at 553.

The magnitude of an agency's burden to go beyond mere appearances was underscored in Securities and Exchange Commission v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). In that case, the SEC was conducting a formal investigation to determine whether insider trading violations had occurred in connection with a bankrupt corporation. Id. at 8. The corporation's vice-president, Mr. Csapo, was subpoenaed to be questioned by the SEC staff, but the SEC insisted that Csapo could not be accompanied by his chosen

attorneys, who were now also representing eight other witnesses in the investigation. Id. at 8-9. The SEC sought enforcement of the subpoena in U. S. District Court, arguing that the risk that subsequent witnesses' testimony would be tailored (consciously or unconsciously) to conform to or explain earlier testimony justified exclusion of Csapo's attorneys, particularly in light of the fact that they also represented three former company officers who were the principal targets of the investigation. Id. at 9. Additionally, the SEC argued that inferences from evidence acquired through depositions suggested that the principal targets of the investigation had pressured the other witnesses to accept representation by the lawyers representing Csapo so that the witnesses could present a "common front" against the SEC. Id. at 9-10. The district court refused to enforce the subpoena to exclude Csapo's chosen attorneys because the SEC had failed to produce any "concrete evidence" of misconduct such as would be necessary to override the right of a witness under the § 6(a) of the APA to be represented by counsel of his choice. See Id. at 8, 10.

On the SEC's appeal to the D. C. Circuit, the refusal to disqualify or sequester Csapo's counsel was affirmed. Id. at 8. The court explained its position respecting dual representation as follows:

> We do not minimize the dangers inherent in counsel representing multiple clients in a single proceeding. It is at least plausible that as matters develop the best interests of Csapo may prove to be antagonistic to those of [the principal targets of the investigation]. That decision, however, belongs to neither the district court nor the Commission. The SEC properly fulfilled its duty by informing those who came before it whether their lawyer had appeared on behalf of others and, if so, the possible conflicts which might arise. The choice must then be made by the witness after a full and frank disclosure by his attorney of the attendant risks. See ABA Code of Professional Responsibility, Disciplinary Rule 5-105(C) . . . .
>
> The SEC would negate Csapo's informed and voluntary decision on the ground that "the objective of the investigation might be frustrated if [Csapo's attorneys]

> . . . were permitted access to the testimony of any further witnesses." (Emphasis added.) We hold that such speculation is insufficient. The mere fact that a witness' counsel also represents others who has been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation.

Id. (emphasis added except where denoted as original).

In sum, it is clear from an examination of the holdings of these cases that a witness's right to counsel of choice is virtually inviolate. To be sure, particular circumstances might justify the exclusion of a particular counsel on the basis of concrete evidence that the attorney is actually obstructing the investigation; but such a determination requires objective facts rather than mere suspicion and speculation. The proposed rule does not afford the protection that statutory provisions and judicial interpretations require.[12]

IV. The Proposed Rule Cannot Be Justified By The Commission's Asserted Concerns With Dual Representation

The Supplementary Information discusses at some length the numerous concerns pertaining to cases where "dual representation" is an issue. The proposal states that "dual representation should be prevented wherever circumstances require this." 53 Fed. Reg. at 45769, cols. 2-3. The concerns in this regard focus primarily on the situation "[w]here the person being interviewed chooses to be represented by counsel for the licensee or applicant . . . ." Id., col. 1. Such concerns with dual representation are evidently the predominant justification for the proposed rule's § 19.18(b), which would permit an NRC investigator to summarily exclude the counsel of choice from the interview of the client.[13]

12/ Csapo and Higashi arose as appellate review of district court subpoena enforcement proceedings. In both cases, the district court order enforcing the subpoena was conditioned upon the prospective witness's right to be accompanied by counsel of choice. The issue of the underlying legality of the SEC's rule was not before the courts. Indeed, we are informed that the SEC has refrained from using its rule.

13/ Mention is also made of situations where independent counsel represents multiple witnesses; however, the sparse treatment

(Footnote 13 continued on next page.)

For the reasons that follow, the specific concerns pertaining to dual representation described in the notice accompanying the proposed rule are misplaced and, accordingly, constitute an unjustifiable basis for this rulemaking.

1. The Commission is concerned with the "inherent potential that [the] multiple representation could impair or impede the Commission's investigation." 53 Fed. Reg. at 45769.

The issue of multiple representation of clients has been previously addressed by the American Bar Association, which has promulgated disciplinary rules and canons of ethics to protect clients from potential conflicts of interest in such situations. See ABA Model Code DR 5-105 (1980); ABA Model Rules, Rule 1.7 (1984). In NRC practice for example, one looks to the Code of Ethics enacted in the jurisdiction(s) in which the lawyer is admitted to practice to resolve ethical questions. Houston Lighting & Power Co., (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1717 (1985).

Professional codes of ethics recognize and address the responsibility of attorneys to be alert for potential conflicts, and to advise clients of the possibility of conflicts in multiple representation situations. See e.g., In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979) (multiple representation issues addressed by ethical codes and the courts). In some situations, conflicts of interest may require an attorney to withdraw, and in other situations the clients may (after full and frank disclosure) elect to accept the possibility of such conflicts. In cases where multiple representation is ethically permitted, it is the choice of the client whether to accept multiple representation.[14]

(Footnote 13 continued from previous page.)
in the Supplementary Information suggests that this issue is of secondary concern to the NRC. Compare 53 Fed. Reg. at 45769, col. 1 (line 11, et seq.) with 53 Fed. Reg. at 45770, col. 3 (§ 19.18(b), line 9, et seq.).

To be clear, NUMARC's concerns and these comments extend to both aspects of the proposed rule.

14/ Clearly, a witness must waive his or her right to counsel free from conflicts of interest; only where such waiver cannot be made knowingly and intelligently would disqualification be justified. See In the Matter of the Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d. Cir. 1976).

The proposed rule, however, incorrectly provides the right to exclude counsel to an NRC official based on his/her unilateral determination that a potential conflict of interest might exist. This seriously misconstrues the responsibility of the agency, and the ethical framework within which attorneys are required to operate. Pertinent court decisions make it clear that the choice of counsel is for the individual, not for the agency. See Backer 275 F.2d 141; Csapo, 533 F.2d 7; Higashi, 359 F.2d 550.

2. The Commission asserts that dual representation "could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation" which could enable the subject to "take steps to structure the flow of information to the NRC or otherwise impede the investigation." 53 Fed. Reg. 45769.

This assertion is unfounded in several respects. First, even if separate counsel is required for each witness, the attorneys could freely participate in joint defense agreements in order to provide the best possible representation for their clients. To maintain otherwise would amount to a direct assault on the role of counsel in situations where the client-witness could in fact be the very subject of the investigation. Second, NRC investigators cannot dictate constraints on witnesses; witnesses may freely discuss their interviews with each other and anyone else they might choose. To attempt to bar such discussions among interviewees would contravene the First Amendment freedoms of speech and association.[15]

Third, NRC is surely in the best position to control its investigation; it is simply beside the point to imply that there is something nefarious about learning the "direction and scope" of an investigation. For example, NRC can subpoena witnesses in any order and NRC investigative officials seeking to preserve the element of surprise can exercise caution not to ask all witnesses the same question. In any event, to the extent the NRC actually encounters an obstruction of justice, a very forceful deterrent to such impediment already exists in the form of obstruction of justice statutes, 18 U.S.C. §§ 1505, 1510.

15/ See supra, n.8. Furthermore, the Supplementary Information does not elaborate as to the temporal aspects of the proposed definition of "sequestration" [§ 19.3]. NUMARC assumes that separation is limited to the investigative interview.

3. The Commission further asserts that dual representation "produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." 53 Fed. Reg. at 45769.

This assertion is mere speculation; the Supplementary Information provides no specific example to substantiate a nexus between the witness's choice of counsel, and the witness's "inherent coercion" not to testify against his or her employer. It should not be readily accepted that a subpoenaed witness testifying under oath will not tell the truth.

In many instances when a utility has chosen to offer such assistance, employees may expect their employer to provide them with competent counsel; to fail to do so during the trauma of an NRC investigation could frustrate employee relations and be perceived as a breach of the employer's responsibility to its employees. Further, the proposed rule fails to account for the fact that many witnesses prefer to be represented by corporate counsel.

Moreover, the Commission's specific concern (i.e., witness coercion) is addressed elsewhere. Section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. § 5851), commonly referred to as the "whistleblower" section, prohibits an employer from taking any adverse personnel action on account of an individual engaging in such "protected activity". Section 210 specifically applies to all NRC licensees and applicants for NRC licenses.

NRC has promulgated regulations regarding Section 210 (10 C.F.R. § 50.7), giving examples of what may constitute "protected activity". These regulations provide that a violation of § 210 may be grounds for (in addition to any relief obtained [illegible] of federal Department of Labor proceedings) NRC-imposed sanctions including "denial, revocation, or suspension of the license; imposition of a civil penalty; or other enforcement action." § 50.7(c). See also General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, App. C., Supp. VII.

In sum, the concern advanced regarding employee coercion is speculative and does not account for the fact that witnesses often prefer to be represented by corporate counsel. In any event, the NRC already has regulatory tools to prevent coercion.

4. The Commission also asserts that "the purpose for confidentiality could be undermined" by such dual representation i.e., "simply by the presence of counsel who represents other interviewees or the subject of the investigation". 53 Fed. Reg. at 45769.

The Supplementary Information fails to substantiate the proposed rule's presumption that dual representation undermines confidentiality. Indeed, a witness desiring strict confidentiality may approach the NRC on his or her own initiative -- in which case there would be no need for issuance of a subpoena.[16] A witness desiring such confidentiality would be unlikely to choose corporate counsel to represent him or her during an interview. In any event, an attorney may not divulge confidential communication, information or secrets imparted by the client or acquired during their professional relations unless he or she is authorized to do so by the client. See ABA Model Code DR 4-101 (1980). Further, the witness may request the attorney to leave the interview to maintain confidentiality.

Any concern by NRC of confidentiality for a witness could be easily cured by introductory statements typically made by investigators in explaining rights to a witness. For example, SEC investigators inform those who come before it whether their lawyers have appeared on behalf of others and of the possible conflicts which might arise. Csapo, 533 F.2d at 8.

5. Finally, the Commission asserts that "unnecessary delay in completing NRC investigations" has been occasioned by ad-hoc negotiations between company (licensee) management and NRC Staff in situations where corporate counsel seeks to represent non-management employees during an NRC investigation, or where the employer "effectively selects" the employee's non-corporate counsel. 53 Fed. Reg. at 45768.

The assertion of unnecessary delay does not support the proposed rule. The NRC presently has at its disposal tools to

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16/ Even the NRC's measures to provide confidentiality to a witness are not necessarily comprehensive; it is customary that NRC's offers of confidentiality are made with the proviso that, in some instances, a witness's name may be disclosed.

address unnecessary delay incurred by ad-hoc negotiations. If negotiations break down, the NRC can seek a subpoena from a designated officer. 42 U.S.C. § 2201(c). If the NRC should seek to enforce a subpoena and exclude a chosen lawyer from the interview, a motion would be filed before a federal judge to prohibit, on grounds of conflict of interest, the employee/licensee attorney from representing both the employer and the employee (or from representing multiple employees). The exclusion or disqualification decision would be made by the federal district court judge, with review in the U.S. Court of Appeals of any decision disqualifying the attorney.[17] The proposed rule will have no impact whatsoever on this process.[18]

V. The Proposed Rule Cannot Be Justified By The Commission's Responsibility for Public Health and Safety

The Commission has stated that the proposed rule was promulgated to "clearly delineate the rights of individual interviewees, the legitimate intersts [sic] of the company or licensee, and the responsibilities of the NRC to ensure the public health and safety." 53 Fed. Reg. at 45768, col. 3.

There is no serious question concerning the Commission's general statutory obligation to protect the public health and safety from the potential radiological hazards of commercial nuclear power. When safety concerns arise in connection with licensed activities under NRC's jurisdiction, NRC can take prompt and decisive action. The Commission retains the full panoply of enforcement options specified in Chapter 18 of the Atomic Energy Act (42 U.S.C. § 2271, et seq.) whenever a safety concern is identified.[19] These enforcement options include license

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17/ See e.g., In re Grand Jury, 536 F.2d 1009, 1011 (3d Cir. 1976).

18/ The proposed rule will result in administrative inefficiency and delay simply by involving more, less experienced attorneys. In any event, the NRC may not assert delay as a basis to abrogate a witness's right to counsel of choice. See e.g., Inland Steel Co. v. NLRB, 109 F.2d 9, 21 (7th Cir. 1940) ("avoidance of delay cannot justify a tolerance of rights fundamental in the administration of justice.").

19/ Since the proposed rule is a rule of procedure, and does not define rights and obligations of the licensee, the NRC's civil penalty authority (42 U.S.C. § 2282) is arguably inapplicable. Accordingly, the remedy for an alleged violation of this rule (e.g., a witness-employee refuses to be interviewed without counsel of choice despite NRC

(Footnote 19 continued on next page.)

revocations, suspensions and modifications, cease and desist orders, civil penalties, and notices of violations. The NRC can take such actions as it deems necessary and may act immediately, if appropriate. See, e.g., 53 Fed. Reg. 50317, 50318 (December 14, 1988) (Memorandum of Understanding Between NRC and DOJ).

In contrast to situations which may necessitate immediate measures to ensure safety, the proposed rule pertains only to investigations conducted by the Office of Investigations. Such investigations are rarely concerned with immediate safety issues brought on by licensee error or mistake. Immediate safety issues are normally addressed outside the Office of Investigations, e.g., by the Office of Nuclear Reactor Regulation, to determine the impact on public health and safety before an investigation ensues. In contrast, OI investigations are more in the nature of followup to "allegations of wrongdoing." See NRC Manual Chapter 0119, entitled "Organization and Functions -- Office of Investigations," February 23, 1986.

Thus, with or without the proposed rule, the Commission is already well equipped to take whatever actions are deemed necessary to protect the public health and safety.

VI. The Proposed Rule is Inherently Defective

A. The Proposed Rule Affords Unbridled Discretion to NRC Investigators and Lacks Procedural Safeguards for the Subpoenaed Witness

The exercise of discretion by an agency by its very nature requires flexibility. However, when dealing with the subversion of basic rights such as the right to counsel of choice, the factors for exclusion must be specific. Specifics have not been provided in support of the proposed rule, thereby permitting an NRC investigator to unilaterally exclude counsel of choice from an interview when even if only in the investigator's mind alone, a "reasonable basis" exists to do so [§ 19.8(b)]. The Supplementary Information merely discusses "[s]ome factors, which in conjunction with other [unspecified] circumstances may justify exclusion." 53 Fed. Reg. at 45769, col. 3.[20]

(Footnote 19 continued from previous page.)
protestations) would exist only in the courts -- there could be no NRC notice of violation.

20/ It should be noted that even the three factors raised in the Supplementary Information are questionable: the propriety of offering to reimburse counsel is addressed in Higashi; conflict-of-interest, discussed above, is an ethical matter
(Footnote 20 continued on next page.)

The proposed rule does not provide any criteria to guide and confine the investigator's exercise of discretion, thus allowing the arbitrary exercise of discretion. See generally, DAVIS, ADMINISTRATIVE LAW TEXT, § 4.03 (1972). Statutes and regulations which are not sufficiently explicit to inform those subject to them what conduct is appropriate or what standard is to be applied are unconstitutional under the "void for vagueness" doctrine.[21]

Moreover, the proposed rule fails to provide adequate procedural safeguards for the subpoenaed witness in situations where counsel has been excluded by the NRC investigator.[22] The proposed rule does not explicitly require the NRC official notify the witness or counsel of the reasons for the exclusion. The NRC official is expected to give reasons for the exclusion only "[T]o the extent practicable and consistent with the integrity of the investigation." 53 Fed. Reg. at 45770, col. 3 [§ 19.18(b)].

For an NRC official to exclude counsel without setting forth, with sufficient particularity, the basis for such action substantially and prejudicially violates the APA. See Great Lakes Screw Corp., 409 F.2d at 380 (an attorney may not be disqualified without explicit findings of specific conduct that justifies the exclusion). An exclusion not supported by specific

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(Footnote 20 continued from previous page.)
between the witness and his or her counsel; the mere claim of prejudice is simply inconsistent with the "concrete evidence" test.

21/ As stated in Occupational Safety and Health Rev. Comm'n, 505 F.2d 869, 872 (10th Cir. 1974), a statute which is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). This rule applies to regulations. See Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 72 S.Ct. 329 (1951). The question is whether the regulation "delineates its reach in words of common understanding." Cameron v. Johnson, 390 U.S. 611, 616 (1967).

22/ The Supplementary Information portion of the notice downplays the proposed rule's impact on the paramount right to counsel of choice -- reference is made to the "somewhat minor burden on an individual's right to be accompanied by a particular counsel". 53 Fed. Reg. at 45769, col. 2 (emphasis supplied). Such a blatant mischaracterization of the effect of depriving a witness of counsel of his or her choice reflects a serious misunderstanding of the above-noted legal principles.

factual references violates the witness's right to counsel afforded by the APA. Ibid.

As a practical matter, were explicit findings of specific conduct not a prerequisite to exclusion, and were an agency official free to exclude counsel without advising either the witness or the attorney of such findings, the witness would be left without any inkling as to what counsel might be considered acceptable in the eyes of the NRC investigative official. In accordance with the proposed rule, a witness would have to guess what the grounds of exclusion might have been so that he or she could attempt to retain an attorney who might be acceptable to the NRC investigator.

Moreover, the Supplementary Information states that "one week" would typically afford the affected witness sufficient time in advance of a scheduled interview to retain new counsel. 53 Fed. Reg. at 45769, col. 2. A period of one week for a witness to secure new counsel is manifestly unreasonable given the context of an NRC investigation. Identification of competent counsel, and familiarization of such counsel with the issues of the investigation (insofar as the witness may know them), as well as the technical details of nuclear licensing and regulatory issues, could rarely be accomplished in one week. This is particularly true where a nuclear plant is remotely located and counsel experienced in NRC investigations and federal administrative law principles are scarce or completely unavailable.

In this connection, the proposal further implies disapproval of the common practice of indemnification arrangements where an employer offers to pay the legal fees of its employees. 53 Fed. Reg. at 45768, col. 3. Even if such experienced counsel could be found, a witness forced to pay legal fees from his or her own pocket, without reimbursement from his or her employer, may be forced to retain a relatively inexperienced attorney unfamiliar with the legal and factual issues typical to an NRC investigation. Forced by the proposed rule to choose between inexperienced counsel and no counsel (due to cost considerations) witnesses as a practical matter could be deprived of effective representation altogether.

This possibility of ineffective representation was addressed by the Ninth Circuit in Higashi, 359 F.2d 550, viz.:

> Where, as here, the interests of the witness and corporation are common, familiarity with a complicated corporate prerequisite for effective representation. Independent counsel

> could only acquire such familiarity through the substantial expenditure of his time. The resulting cost may render corporate counsel the only adequately qualified counsel many directors can afford. On the other hand, where the director or corporation is willing and able to bear such additional costs, there is good reason to suppose that the parties would be able to accomplish through independent counsel exactly what the SEC's rule seeks to prevent. A rule which, except for a wealthy few, denies effective counsel is not permitted by the Administrative Procedure Act § 6(a), 60 Stat. 241, 5 U.S.C. § 1005(a) (1964).

Id. at 553, n.5.

Similarly, the D. C. Circuit in Csapo, noted that the witness's right to counsel under the APA persists even after the chosen counsel has been excluded, 533 F.2d at 11, and that,

> [I]t is inconceivable to us [the court] that a new attorney could become acquainted with the facts of the situation in the short period of time which the SEC asserts would be sufficient. Thus, delay would likely be increased by the substitution of counsel while Csapo would be put to the additional expense of retaining a new attorney.

Id. at 12.

B. Provisions of the Proposed Rule Are Inconsistent With the Supplementary Information

The proposed rule is faulty in that its provisions are in several important respects inconsistent with the Supplementary Information. These inconsistencies, when coupled with the failure of the NRC to place in the Public Document Room copies of any documents which would clarify the inconsistencies, prevent meaningful comment on the proposed rule.[23]

Examples of these unexplained inconsistencies include the following:

- Proposed § 19.3 specifically provides for the "separation of multiple witnesses from each other during the conduct of investigative interviews . . . ."; proposed 19.18(a) has a similar provision ("all witnesses shall be sequestered . . . ."). 53 Fed. Reg. at 45770.

  However, the Supplementary Information is totally silent on this point. Rather, its focus is on the attorney-client relationship and the Commission's concerns with respect to dual representation of a witness and his or her employer. 53 Fed. Reg. at 45769.

- Proposed §§ 19.3 and 19.18 can be read as an absolute bar to the presence of attorneys who represent more than one person "unless permitted in the discretion of the official conducting the investigation . . . ." 53 Fed. Reg. at 45770.

  However, the Supplementary Information approaches the matter from the exact

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23/ In response to a Freedom of Information Act request (88-605) for the complete administrative record that constitutes the basis for the proposed rule, the NRC provided nothing. In order for there to be meaningful comment, information in agency files or reports which are relevant to a proceeding must be disclosed in notices of proposed rulemaking, and failure to do so is a critical defect, U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 534-35 (D.C. Cir. 1978).

opposite side; it assumes that an attorney representing more than one party can be present unless "the agency official conducting the investigation determines after consultation with the Office of the General Counsel that there is a reasonable basis to believe that the attendance of a particular attorney might prejudice, impede or impair the investigation . . . ." See 53 Fed. Reg. at 45769, col. 1.

Simply put, the proposed rule assumes exclusion and will admit on discretion; the Supplementary Information assumes admission and will exclude on discretion.

- Proposed § 19.18 focuses on the situation where independent counsel represents multiple witnesses. 53 Fed. Reg. at 45770, col. 3.

  However, the Supplementary Information focuses almost exclusively on the situation where the witness chooses counsel for the employer, suggesting that the multiple-witness issue is of secondary concern to the Commission. 53 Fed. Reg. at 45769, col. 1.[24]

These inconsistencies make it difficult to divine the meaning of the proposed rule or to discern what its requirements in fact are. Consequently, a fair opportunity to comment has not been provided. Adversarial comment is a particularly important component of reasoned decision making. Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 528 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982).

VII. Conclusion

The proposed rule contravenes the Administrative Procedure Act, administrative law rulemaking standards, judicial precedent, and constitutional rights of subpoenaed witnesses. Procedural safeguards to protect the rights of a subpoenaed witness are lacking, the "reasonable basis" standard for exclusion of counsel is inappropriate, and the proposed rule would place too much discretion in the hands of NRC investigators. The proposed rule

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24/ See supra, n.13.

could even have the effect of discouraging a subpoenaed witness from exercising his or her right to counsel of choice as guaranteed by § 6(a) of the APA. Moreover, these infirmities cannot be overcome by asserting speculative concerns about "dual representation" and general interests in public health and safety.

In short, the proposed rule has no valid basis and improperly infringes on the right to counsel of a subpoenaed witness. Accordingly, and for the reasons detailed in the foregoing comments, NUMARC strongly recommends that the proposed rule be withdrawn.

A006-1
PDR

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DOCKET NUMBER PR 19
PROPOSED RULE
(53 FR 45768)

(13)

'89 FEB 13 P3:30

Alabama Power
the southern electric system

February 9, 1989

Docket Nos. 50-348
50-364

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

Attention: Docketing and Service Branch

Comments on NRC Proposed Rule -
Sequestration of Witnesses Interviewed Under Subpoena
(53 Federal Register 45768 of November 14, 1988)

Dear Mr. Chilk:

The Nuclear Regulatory Commission (NRC) published a proposed rule on sequestration of witnesses interviewed under subpoena (10 CFR Part 19) in the Federal Register on November 14, 1988 and invited comments by January 10, 1989. The comment deadline was later extended to February 9, 1989. Alabama Power Company (APC) has monitored the efforts of the NUMARC task force that was established to develop comments for this proposed rule. In accordance with the request for comments, APC hereby endorses the NUMARC comments to be provided to the NRC on February 9, 1989.

Alabama Power Company appreciates the opportunity to comment on the proposed rule. If you have any questions, please contact our office.

Sincerely,

RPM:TM/db

cc: Mr. S. D. Ebneter
Mr. E. A. Reeves
Mr. G. F. Maxwell

bc: Mr. W. G. Hairston, III
Mr. B. M. Guthrie
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R. P. McDonald
Executive Vice President
Nuclear Operations

February 9, 1989

Docket Nos. 50-321 50-424
50-366 50-425

HL-302
VPV-00033
X7GJ17-C220

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

Attention: Docketing and Service Branch

GEORGIA POWER COMPANY
COMMENTS ON NRC PROPOSED RULE -
SEQUESTRATION OF WITNESSES INTERVIEWED UNDER SUBPOENA
(53 FEDERAL REGISTER 45768 OF NOVEMBER 14, 1988)

Dear Mr. Chilk:

The Nuclear Regulatory Commission (NRC) published a proposed rule on sequestration of witnesses interviewed under subpoena (10 CFR Part 19) in the Federal Register on November 14, 1988 and invited comments by January 10, 1989. The comment deadline was later extended to February 9, 1989. Georgia Power Company (GPC) has monitored the efforts of the NUMARC task force that was established to develop comments for this proposed rule. In accordance with the request for comments, GPC hereby endorses the NUMARC comments to be provided to the NRC on February 9, 1989.

Georgia Power Company appreciates the opportunity to comment on the proposed rule. If you have any questions, please contact our office.

Sincerely,

RPM:TM/db

cc: See Distribution

8902220068 2pp.

17

c: Georgia Power Company
Mr. W. G. Hairston, III, Senior Vice President - Nuclear Operations
Mr. P. D. Rice, Vice President and Vogtle Project Director
Mr. G. Bockhold, Jr., General Manager - Plant Vogtle
Mr. C. K. McCoy, Vice President - Nuclear, Plant Vogtle
Mr. J. T. Beckham, Vice President - Nuclear, Plant Hatch

U. S. Nuclear Regulatory Commission, Washington, D.C.
Mr. J. B. Hopkins, Licensing Project Manager - Vogtle
Mr. L. P. Crocker, Licensing Project Manager - Hatch

U. S. Nuclear Regulatory Commission, Region II
Mr. S. D. Ebneter, Regional Administrator
Mr. J. F. Rogge, Senior Resident Inspector, Operations - Vogtle
Mr. J. E. Menning, Senior Resident Inspector - Hatch

0403j

FPL

P.O. Box 14000, Juno Beach, FL 33408-0420

February 6, 1989

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

Attn: Docketing and Service Branch

Re: Proposed Rule on Sequestration of Witnesses Interviewed Under Subpoena 53 Federal Registration 45768-45771 (November 4, 1988)

Dear Mr. Chilk:

On November 4, 1988, the NRC published and requested comments on a proposed rule governing sequestration of witnesses interviewed under subpoena. The following comments are submitted on behalf of Florida Power & Light Company. In addition, FPL is in complete agreement and endorses the comments submitted by NUMARC.

Among other things, the proposed rule vests NRC investigators with discretion to exclude counsel from an interview if the investigator believes that "the investigation may be obstructed, impeded or impaired (sic), either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness." 53 Fed. Reg. at 45770. The proposed rule does not include any requirement that the investigator make any particular factual findings prior to excluding counsel, nor does it require that the investigator document the basis for the decision to exclude counsel or communicate the basis for that decision to the witness or his attorney. Witnesses are to be provided only one week's time within which to acquire new counsel if their chosen counsel is excluded.

The proposed rule suffers from a number of serious practical and legal flaws. First, as a practical matter, exclusion of counsel pursuant to the proposed rule may entirely deprive the witness of competent counsel. If a witness chooses to be represented by the employer's counsel, but that counsel is excluded from the interview, it is unlikely that a witness will be able to retain other counsel familiar with NRC investigations and regulatory and technical issues, or that witnesses will be able to afford to pay for such counsel to travel to the site to represent them.

This result is particularly likely when investigations are conducted at remote plant sites. Furthermore, one week is not a reasonable time within which to locate competent counsel, familiarize them with the issues, and allow them to prepare for the interview. Consequently, invocation of the rule will often result in the denial of competent counsel.

Second, the rule is inconsistent with witnesses' rights to counsel of their choice under Section 6(a) of the Administrative Procedure act, 42 U.S.C. 555(b), which provides that persons compelled to appear before an agency are "entitled to be accompanied, represented and advised by counsel ..." This statute has been interpreted by the courts to mean that a witness is entitled to counsel of the witnesses's choice. See Securities and Exchange Commission v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976), Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (10th Cir. 1960). In particular, a witness may choose to be represented by the counsel provided by his employer. Unless the agency provides "concrete evidence" of misconduct by the attorneys involved, it is improper to override the right of the witness to utilize the counsel of his choice, including counsel provided by his employer. Csapo, 533 F.2d at 11. See also Securities and Exchange Commission v. Higashi, 359 F.2d 550 (9th Cir. 1966).

Third, because material gained through NRC investigations may be provided to the Department of Justice to be used in criminal investigations, implementation of the rule would violate witnesses' constitutional right to counsel under the Due Process clause of the Fifth Amendment. See Mathis v. United States, 391 U. S. 1 (1968) (person has right to counsel when facts discovered during investigation could lead to criminal prosecution). In such circumstances, "[the witness's] choice of counsel is obviously a crucial one. That choice should not be needlessly or lightly disturbed." Csapo, 533 F. 2d at 12. Thus, attempts by the NRC to implement the sequestration rule to exclude counsel of choice are likely to be invalidated on constitutional grounds.

These infirmities in the proposed sequestration rule, and others, are more fully analyzed in the comments on the rule submitted by NUMARC, which we endorse. In addition, the Commission's own task force on this topic, the "Silbert Committee," specifically recommended against the adoption of such rule unless it required "concrete evidence that the chosen representative of the witness...would seriously prejudice the investigation," and that without such requirements the rule "would not be sustained by the courts." Silbert Committee report at 14, 16 (emphasis added.) 1/

Based upon these considerations, we recommend that the Commission withdraw the proposed rule.

Very truly yours,

W. F. Conway
Senior Vice President - Nuclear

WFC/JAD/cm

1/ Report of the Advisory Committee for Review of the Investigation Policy on Rights of Employees Under Investigation, submitted to the NRC on September 13, 1983.

DOCKET NUMBER
PROPOSED RULE PR 19
(53 FR 45268)

(16) ADOG-1
PDR

EXVP-89039

'89 FEB 13 P4:12

TU ELECTRIC

February 7, 1989

W. J. Cahill
Executive Vice President

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

Attn: Docketing and Service Branch

RE: PROPOSED RULE ON SEQUESTRATION OF WITNESSES INTERVIEWED UNDER SUBPOENA 53 FED. REG. 45768-45771 (NOVEMBER 4, 1988)

Dear Mr. Chilk:

On the 4th of November, 1938, the Nuclear Regulatory Commission published a proposed rule governing sequestration of witnesses interviewed under subpoena. The comments in this letter are submitted on behalf of Texas Utilities Electric Company.

We recommend that the Commission withdraw the proposed rule. Comments on the rule are being submitted by NUMARC, and TU Electric endorses those comments. We also agree with the Commission's own task force, the "Silbert Committee," when it recommended against the adoption of such rule unless it required "concrete evidence that the chosen representative of the witness . . . would seriously prejudice the investigation." The proposed rule contains, in our opinion, a number of serious flaws and we think it is clearly inconsistent with a witness' right to counsel of their choice.

TU Electric appreciates the opportunity to provide comments in this rule-making.

Very truly yours,

William J. Cahill, Jr.

WJC/pw

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Acknowledged by card.....

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P. O. Box 1002 Glen Rose, Texas 76043-1002

CC: Commissioners:
Lando W. Zech, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtiss
Kenneth M. Carr

A006-1
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James D. Shiffer
Vice President
Nuclear Power Generation

DOCKET NUMBER
PROPOSED RULE PR 19
(53 FR 45768)

(17)

February 9, 1988

'89 FEB 13 P4:25

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

PG&E Letter No. DCL-89-033

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

Attention Docketing and Service Branch

Re: Docket No. 50-275, OL-DPR-80
Docket No. 50-323, OL-DPR-82
Diablo Canyon Units 1 and 2
Comments on Proposed Rulemaking - Sequestration of Witnesses Interviewed Under Subpoena

Dear Mr. Chilk:

The Nuclear Regulatory Commission published Proposed Rulemaking regarding sequestration of witnesses. This notice (53 FR 45768) proposed rulemaking under 10 CFR 19 concerning the scope of the rights of persons who are compelled by subpoena to appear before NRC representatives in an agency investigation. Additionally, the Nuclear Management and Resources Council (NUMARC) has prepared comments on the proposed rulemaking, to be filed with the NRC, that PG&E has reviewed.

PG&E endorses the comments provided by NUMARC who opposes the rule and recommends its withdrawal.

Kindly acknowledge receipt of this material on the enclosed copy of this letter and return it in the enclosed addressed envelope.

Sincerely,

J. D. Shiffer

cc: B. C. Hanschen
B. Lee, Jr. (NUMARC)
J. B. Martin
M. M. Mendonca
P. P. Narbut
B. Norton
H. Rood
B. H. Vogler
CPUC
Diablo Distribution

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MAR 9 1989

Acknowledged by card.....

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PDR

TENNESSEE VALLEY AUTHORITY
CHATTANOOGA, TENNESSEE 37401

5N 157B Lookout Place

FEB 09 1989

'89 FEB 13 P4:35

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Gentlemen:

NUCLEAR RECULATORY COMMISSION (NRC) - PROPOSED RULE 10 CFR PART 19 - SEQUESTRATION OF WITNESSES INTERVIEWED UNDER SUBPOENA

The Tennessee Valley Authority (TVA) has reviewed and is pleased to provide comments on the proposed rule noticed in the November 14, 1988 Federal Register (53 FR 45768-45771) regarding sequestration of witnesses interviewed under subpoena. TVA opposes the rule in its present form and offers the following comments.

Before any attempt is made to regulate the sequestration of witnesses with such serious limitations on the witnesses' right to counsel as are contained in the proposed rule, we recommend that the NRC carefully review the harm which such a rule would seek to avoid. We do not believe the speculative harm perceived by the NRC in fact exists. We also believe the rule as proposed does not give proper recognition to the right of subpoenaed witnesses to counsel of their choice under the Administrative Procedure Act. 5 U.S.C. § 555(b) (1982). In addition, we believe the rule as drafted could in fact be detrimental to the NRC's investigative function. Each of these points is discussed below.

1. The proposed rule addresses a nonexistent harm.

   The NRC has not shown any actual harm from multiple representations. We submit that no harm could in fact be shown and that the NRC's speculative concerns are unwarranted. Nuclear management has a clear incentive to uncover any acts of wrongdoing and take appropriate corrective action because the financial risks to management for noncompliance with regulatory requirements--including trying to cover up any wrongdoing--far outweigh any potential gains. Under the NRC's enforcement policies, fines may be sufficiently large as to make compliance less costly than noncompliance. More importantly, however, failures to comply with regulatory requirements can result in the shutdown of operating reactors and modification or even the loss of operating licenses.

In addition, as the NRC frequently points out, it does not have the resources to inspect all licensed activities. It can only audit the activities of licensees. The NRC therefore must assume--and quite properly so--that it is in the licensee's interest to comply with regulatory requirements. This assumption is equally valid for NRC inspection and investigative activities and any rule which has the effect of routinely excluding the involvement of corporate counsel, as the proposed rule is apparently intended to do, would be inconsistent with this fundamental assumption.[1] Instead, the underlying assumption of the proposed rule seems to be that the licensee's management and its counsel cannot be trusted and that the presence of corporate counsel will cause employees to be less than forthright. This assumption seems contrary to the underlying premise of NRC regulation--that the NRC has sufficient confidence in the integrity of the licensee's management to be able to rely on management's efforts to comply with regulatory requirements. There is no reason to believe that corporate counsel would in fact engage in any activity that would undermine this confidence.

2. The proposed rule does not give proper recognition to a witness' right to counsel.

As noted in the Supplementary Information preceding the proposed rule, three United States district court decisions (two involving the Bureau of Internal Revenue and one the Security Exchange Commission (SEC)) held under the facts of those cases that the Government could compel witnesses to appear under conditions which prevented representation by counsel who also represented other witnesses in the same investigation. However, in three more current United States circuit court decisions (two involving the SEC and one involving the Bureau of Internal Revenue) which were also noted in the NRC Supplementary Information, the courts declined to uphold the exclusion of attorneys representing multiple witnesses. In the latest of these cases, the court observed that "[t]he mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation." Securities & Exch. Comm'n vs. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). The court held that "before the SEC may exclude an attorney from its proceedings, it must come forth, as it has not done here, with

1. Indeed, licensees are required to ensure that information provided to the NRC is complete and accurate in all material respects and they have an affirmative obligation to notify the NRC of information which the licensee identifies as having a significant implication for public health and safety. 10 CFR § 50.9 (1988).

'concrete evidence' that his presence would obstruct and impede its investigation."[2] Id. at 11. Under the logic of this holding, the NRC's proposed rule is invalid.

3. The proposed rule could be detrimental to the NRC's investigative function.

Not only is there no need to routinely sequester witnesses or exclude counsel representing multiple witnesses, but such restrictions could themselves tend to slow the investigative process, possibly hinder the flow of information, and hide from licensee management facts which could hinder its ability to effectively perform its responsibilities. For example, restrictions on counsel could slow the process as witnesses sought to make alternative arrangements or licensees contested exclusion decisions in court, and restrictions could hinder the flow of information as witnesses might be more hesitant to talk to OI if they could not have counsel provided by the company. We submit that the purpose of the NRC's investigative function is to develop facts and--because of expertise and knowledge--counsel in many cases can help, not hinder, the NRC investigators in understanding and developing the facts.

Conclusion

We submit that the proposed rule does not give sufficient credence to the statement in the Supplementary Information that "[t]he Commission is aware that management has a legitimate interest in NRC inspections and investigations in order to detect and correct any violations of NRC regulations." (53 Fed. Reg. 45,768 (1988)). The NRC's observation that "the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to the inquiries of the agency and the potential impairment to the efficacy of the NRC investigation," (id. at 45,768) incorrectly assumes that such conflicts are the norm and that competent counsel will necessarily act inconsistently with the client's duty to conduct licensed activities in accordance with regulatory requirements and protection of the public health and safety. The

In the September 13, 1983 report of the NRC's Advisory Committee for the Review of Investigation Policy or Rights of Licensee Employees Under Investigation also endorsed this view in its statement that "a blanket rule excluding 'any attorney who also represents the entity being investigated' would not be sustained by the courts," but noted, citing the Csapo case, that "[a]n order of exclusion addressed to a particular situation might be upheld . . . if there was 'concrete evidence' that the attorney's presence would obstruct the proceeding" (p 11).

U.S. Nuclear Regulatory Commission

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Supplementary Information also contains the statement that "[w]here the person being interviewed chooses to be represented by counsel for the licensee or applicant, an inherent potential for a conflict of interest and impairment of the NRC's investigation exists" (id. at 45,769), but gives no support for such a statement. We submit that there is no such inherent potential for conflict of interest or impairment of an investigation. We do not suggest that conflicts or impairments to an investigation never exist. Certainly, they may on occasion; and when they do, appropriate measures should be taken to get at the truth. However, the NRC has not demonstrated that any such inherent potential exists, and the proposed rule ignores the legitimate interest of management in NRC inspections and investigations.

We appreciate the opportunity to provide these comments.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

R. L. Gridley, Manager
Nuclear Licensing and
Regulatory Affairs

cc: Ms. S. C. Black, Assistant Director
for Projects
TVA Projects Division
U.S. Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
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Mr. F. R. McCoy, Assistant Director
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101 Marietta Street NW, Suite 2900
Atlanta, Georgia 30323

(19)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 FEB 13 P4:26

Proposed Rule: 10 CFR Part 19)
)
Sequestration of Witnesses)
Interviewed Under Subpoena)
)
53 Fed. Reg. 45768)

NUCLEAR INFORMATION AND RESOURCE SERVICE COMMENTS

INTRODUCTION

On November 14, 1988 the Nuclear Regulatory Commission published a proposed rule on the sequestration of witnesses interviewed under subpoena. The Commission believes that the proposed rule would help ensure that investigative interviews will be conducted in an atmosphere free of outside influences. While the Commission acknowledges the legitimate interests of management in NRC investigations, the proposed rule would allow for the sequestration not only of witnesses but counsel as well when "the attendance of a particular attorney might prejudice, impede, or impair the investigation by reason of that attorney's dual representation of other interests...." We at the Nuclear Information and Resource Service applaud the Commission's attempt to bolster the integrity of the investigative process and support the Commission's proposed rule.

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THE PROPOSED RULE IS NECESSARY TO ENSURE THE INTEGRITY OF THE COMMISSION'S INVESTIGATIVE PROCESS

As the Commission has noted, there is the potential for serious impairment of NRC investigations where corporate council seeks to represent non-management employees. While the attorney must disclose potential conflicts of interest arising out of dual representation, the integrity of the NRC investigation is none the less compromised. The present rule affords the subject of the investigation the opportunity to learn the nature of the investigation through its own corporate counsel. As the Commission staff noted, in three recent cases the attorney stated that the content of the interview would be made known to the company under investigation. This information makes it considerably easier for the subject of the investigation to structure the flow of information and there by compromise the integrity of the NRC's findings. Additionally, the knowledge that the company will know the content of the interview will adversely affect the witness' willingness to provide information that could be damaging to his employer. The proposed rule would at least provide for an environment free of the inherent coercion of the process as it presently exists.

Respectfully Submitted,

James P. Riccio

James P. Riccio
Nuclear Information & Resource Service
1424 16th Street NW
Washington, D.C. 20036

(20) ADO6-1
PDR

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

DONALD B. KARNER
EXECUTIVE VICE PRESIDENT
ARIZONA NUCLEAR POWER PROJECT

February 8, 1989

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

Attn: Docketing and Service Branch

Re: Proposed Rule on Sequestration of Witnesses Under Subpoena

Dear Mr. Chilk:

The Arizona Nuclear Power Project ("ANPP"), which is comprised of the seven licensees of the Palo Verde Nuclear Generating Station, submits the following comments in opposition to the proposed amendments by the Nuclear Regulatory Commission (the "NRC" or the "Commission") to its regulations at 10 C.F.R. Part 19, as published in the November 14, 988 notice in the Federal Register (53 Fed. Reg. 45768-71). The proposed amendments, which are entitled "Sequestration of Witnesses Interviewed Under Subpoena," would in fact do far more than that title implies. In addition to granting NRC officials conducting investigations the power to sequester witnesses, the Commission's proposal would also grant such

officials the power to veto a witness's selection of counsel by prohibiting particular attorneys from being present during the interviews of their clients.

This proposed rule, which is aimed at precluding the dual representation of licensees and interviewees (particularly those interviewees who are non-management employees), is supposedly necessary in order to facilitate the conduct of NRC investigations. As discussed below, because the adoption of the proposed amendments would not only blatantly violate the right of interviewees to counsel of their choice, but would actually impede and not facilitate the conduct of investigations, ANPP strongly urges the Commission to reject these amendments in their entirety.

I. THE SUBSTANCE OF THE PROPOSED AMENDMENTS

The regulatory scheme envisioned by the proposed amendments to 10 C.F.R. Part 19 would define "sequestration" as follows:

> [T]he separation of multiple witnesses from each other during the conduct of investigative interviews, and the exclusion of counsel who (1) represents one witness from the interviews of other witnesses or who (2) represents the employing entity of the

> witness or management personnel from the interview of that witness, when such representation obstructs, impairs, or impedes an agency investigation.

Proposed 10 C.F.R. § 19.3 (53 Fed. Reg. at 45770). The regulations would mandate that all witnesses compelled to appear in NRC investigations be "sequestered" and would provide that "unless permitted in the discretion of the official conducting the investigation," no witness or counsel for such witness (including counsel who also represents a licensee) shall be permitted to be present during the examination of any other witness. Proposed 10 C.F.R. § 19.18(a).

Of even greater significance is subsection (b) of that proposed rule, for it would empower the official conducting the investigation to prohibit an attorney from being present during the interview of any witness other than the witness on whose behalf that attorney first appeared in the investigation. The predicate for such a prohibition would be the official's determination "that a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness." Proposed 10 C.F.R. § 19.18(b) (53 Fed. Reg. at 45770). Thus, under the proposed rule the NRC official, "after consultation with the

Office of the General Counsel," could unilaterally preclude witnesses from being represented by counsel of their choice merely because such counsel also represents another witness or the licensee.

An attorney so precluded would be advised of the reasons supporting the official's decision "[t]o the extent practicable and consistent with the integrity of the investigation," under proposed § 19.18(b) and the witness thus denied counsel of his choice would be given "a reasonable period of time" to permit the retention of new counsel under proposed § 19.18(c). The supplementary information concerning the proposed amendments states that one week would constitute "reasonable prior notice" in such a situation. 53 Fed. Reg. at 45769.

II. THE DEFICIENCIES IN THE PROPOSED RULE

The focus of ANPP's comments on the proposed rule, discussed in Section III below, is that the proposed amendments to 10 C.F.R. Part 19 will actually impede and not facilitate the conduct of NRC investigations. This will occur (1) because of the delays that will inevitably result from court challenges to the investigating official's determination under the rule

and (2) because the basic philosophy underlying the rule, i.e., that "dual representation" is detrimental to the investigation and thus to be avoided, will deprive the investigatory process of many advantages of "dual representation."

ANPP believes that the proposed amendments to the Commission's regulations contain many inherent deficiencies in addition to the rule's failure to achieve its stated purpose. Such defects are spelled out in great detail in the comments submitted on behalf of the Nuclear Management and Resources Council, Inc. ("NUMARC") and by the law firm of Shaw, Pittman, Potts & Trowbridge on behalf of a group of licensees. Among the most significant and troubling criticisms of the proposed rule raised in the NUMARC comments are the following:

- The proposed rule represents a potentially serious infringement on the right of a subpoenaed witness to choose his or her counsel.
- The proposed rule cannot be justified by the Commission's asserted concerns with dual representation.
- The Courts have restricted efforts by administrative agencies to exclude, on conflict-of-interest grounds, counsel chosen by a subpoenaed witness.
- The proposed rule cannot be justified by the Commission's interest in public health and safety.

- The Commission's own advisory committee previously rejected the basic tenets of the proposed rule.
- The proposed rule is inherently defective.
- The proposed rule fails to provide adequate procedural safeguards to protect the rights of the subpoenaed witness.

The comments submitted by Shaw, Pittman, Potts & Trowbridge demonstrate that the proposed sequestration rule is further flawed because it is fundamentally at odds with some of the most basic values of the American legal system, including:

- The right to a fair legal outcome or "justice".
- The objective role of the decisionmaker.
- The adversarial function and activity of participants in American legal processes, including the activity of investigators.
- The abhorrence of secrecy in legal processes, absent compelling need and substantial safeguards.
- The right to counsel in most circumstances, including administrative proceedings where the witness appears by subpoena, and
- The right to counsel of choice, which a court will respect absent exceptional circumstances.

ANPP will not repeat the extensive and detailed analysis of the deficiencies in the proposed rule set forth in those comments. Suffice it to say that ANPP is in full agreement with those comments and concurs in their conclusion that the proposed rule is fatally flawed and should be rejected.

III. THE PROPOSED RULE WILL BE DETRIMENTAL TO THE COMMISSION'S OBJECTIVE OF FACILITATING NRC INVESTIGATIONS

As discussed above, the fundamental premise on which the so-called sequestration rule appears to be based is the notion that representation by the same counsel of the licensee and its employees who are being interviewed is somehow detrimental to NRC investigations. This premise is false. Not only does the proposed rule ignore the many benefits that such "dual representation" can bring to the investigative process, but the invocation of the sequestration rule by the official conducting the investigation would affirmatively delay and complicate the investigation. These two deficiencies, either one of which supports the rejection of the rule, are detailed below.

A. "Dual Representation" Enhances the Efficiency of the Investigative Process

Far from impeding an investigation, the representation of the licensee and its employees by the same counsel can

vastly increase the efficiency of the investigation. For example, licensee's counsel will already be familiar with the operations of the nuclear plant, its licensing history, and many of its employees, as well as with the NRC and its regulations and operations. The same would probably not be true of counsel that employees would be forced to retain if they were not permitted to be represented by licensee's counsel. Because the subject of nuclear power plant licensing and regulation is a highly specialized field of the law, in most areas of the country the only attorneys who are conversant with this subject are counsel for a licensee. Attorneys who practice in other fields would be forced to spend a good deal of time familiarizing themselves with both the legal and technical issues involved before they could effectively represent the interests of employees in interviews. Extensive delays in the investigatory process would inevitably result. Even if attorneys who were knowledgeable in NRC practice were brought in from other parts of the country to represent the employees, those attorneys would not be familiar with the particular nuclear plant or personnel involved. This, too, would cause delays in an investigation.

Thus, having licensee's counsel represent the employees would greatly increase the speed with which the

investigation can be commenced and completed. Moreover, to the extent that licensee's employees have had a prior working experience with licensee's counsel, the employees may well be less intimidated by the interview process, and thus more cooperative, than if they were represented by virtual strangers.

The use of common representation of the employees would also facilitate the investigation process in terms of the review of pertinent documents. Because one attorney would be representing many (if not all) of the employee-interviewees, only one review of the documents pertinent to the investigation would be required. In addition, the scheduling of the interviews and related matters and indeed the conduct of the entire investigation would be facilitated if the NRC official need only deal with one attorney on behalf of all interviewees.

The arguments against "dual representation" set forth in the supplementary information to the proposed rule are apparently based upon a concern with the existence of potential conflicts of interest in such representation. In raising this concern, however, the Commission misperceives its role. It is for the attorney, and not the official conducting the investigation, to evaluate such potential conflicts of interest

in accordance with the ethical rules to which the attorney is subject and to resolve the matter in accordance with such rules. Securities & Exchange Commission v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). The investigating official's supposed concern with potential conflicts of interest cannot abrogate the right of a witness to counsel of his choice as guaranteed by the Administrative Procedure Act, 5 U.S.C. § 555(a).

Nor can the NRC's stated belief "as a matter of policy that investigative interviews should be conducted in an atmosphere free of outside influences," 53 Fed. Reg. at 45768, override the statutory right of a witness to be represented at an interview by counsel of his choice. An attorney may constitute an "outside influence," but it is an influence that Congress had mandated be present if a witness so chooses.

B. The Sequestration Rule Will Encourage and Not Eliminate Delay in the Conduct of Commission Investigations

The supplementary information accompanying the proposed rule states that "[g]uidance is required in this area because attempts to resolve multiple representation on an ad hoc basis have led to unnecessary delays in completing investigations." 53 Fed. Reg. at 45770. ANPP is as concerned as the NRC with reducing unnecessary delays in investigations.

The sequestration rule, however, by its very nature, cannot reduce delay and will most probably increase it.

The Commission "realizes that no absolute criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee," yet concludes that an "appropriate rule would grant the NRC office conducting the interview the discretion to determine whether the attorney should be allowed to attend the interview." 53 Fed. Reg. at 45769. Obviously, such a determination is itself nothing but an "ad hoc decision" of exactly the type the Commission deplores as causing delay. Moreover, given the virtually unfettered discretion that is accorded the NRC official to make the determination and the unsound legal basis on which the rule is grounded, it is a veritable certainty that any and every determination to exclude counsel will be challenged in court. How such a situation could cure the "unnecessary delays" that have allegedly hindered NRC investigations in the past is not explained.

Even in the rare instance in which a witness did not choose to challenge in court an NRC decision to exclude a particular attorney from an interview, delay would nonetheless be introduced into the investigation. As the rule itself

recognizes, the witness would have to obtain substitute counsel. What the rule fails to recognize is the difficulty that might be encountered in finding such an attorney, as discussed in Section III.A., above, and the delay inherent in familiarizing the new attorney with the case. The rule's assumption that a one-week postponement of the interview would allow sufficient time for this process can only be termed naive. Moreover, the amount of delay involved will inevitably increase geometrically and not arithmetically with the number of witnesses and attorneys involved.

All of that could be avoided by the simple expedient of permitting the licensee's counsel to represent all employee-witnesses who desire such counsel at their interviews. The employees would receive more effective assistance of counsel and the NRC's investigation would be completed far more expeditiously than if separate counsel for each interviewee had to be retained. Assuming that licensee's counsel would have determined that no conflict of interest precluded such representation (as counsel would be required to do in order to undertake the representation without violating the canons of ethics), the NRC's investigation would not be "tainted" by the dual representation of the licensee and the employee-witnesses.

IV. CONCLUSION

For the reasons set forth above, ANPP urges the Commission to reject the proposed sequestration rule. The rule would not cure the Commission's perceived problem of ad hoc determinations about representation, would increase delay in investigations and would hinder the use of the very technique, multiple representation, that could facilitate NRC investigations. In view of the serious infringement on a witness's right to counsel of his choice that this rule would work, there can be no justification for adopting a rule that is antithetical to its stated objective.

Very truly yours,

ARIZONA NUCLEAR POWER PROJECT

Donald B. Karner
Executive Vice President

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(53 FR 45768)

(21)

GE Nuclear Energy

General Electric Company
175 Curtner Avenue San Jose CA 95125

NUCLEAR ENERGY LEGAL OPERATION
(408) 925-6776 M/C 822

February 13, 1989

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

Attn: Docketing and Services Branch

Re: Proposed Rule - Sequestration of Witnesses Interviewed under Subpoena-53FR 415768 (Nov. 14, 1988)

Dear Mr. Chilk:

GE Nuclear Energy appreciates the opportunity to comment on the proposed rule. As currently written, the proposed 10CFR Part 19 would sacrifice the individual rights of persons subject to compelled interviews, in favor of the convenience of the investigators, and ostensible avoidance of delay. We have reviewed the comments submitted by the Nuclear Management and Resources Council, Inc. ("NUMARC"). We heartily endorse these comments, and have little of a technical nature to add to them. They demonstrate, in detail and with a force which the Commission should find impossible to ignore, that the proposed rule represents a potentially serious denial of the interview subjects' right to counsel of their choice, and perhaps to any effective counsel. To that extent, the proposed rule is inconsistent with both constitutional and statutory guarantees of that right. Several courts of appeal have so held in the case of a similarly misconceived rule by the Securities and Exchange Commission, as discussed at length in the NUMARC comments.

As also discussed in detail in those comments, the rule cannot be justified by the Commission's expressed concerns over what it sees as the evils of dual representation. The premise of the proposed rule appears to be that there are virtually no situations where it is appropriate for an employer to provide, or a non-control group employee to accept, joint representation by company counsel. The feeling evidently is that no employee would accept such dual representation, with its admittedly real possibility of a conflict of interest developing, were it not for "inherent coercion" by the employer to do so; and that no employer would offer to do so, were it not for a desire to monitor, impede, and ultimately thwart an ongoing investigation.

This ignores a host of perfectly legitimate reasons for electing such dual representation. An employee, especially one who believes neither he nor his employer has done wrong, may very logically be most comfortable, taking what he perceives as a surpassingly small risk of a conflict of interest developing, being represented by common counsel with his employer. Comfort level aside, this may well be the most prudent course, given the specialized nature of the proceedings and of the factual setting, with both of which company counsel is likely to be infinitely more familiar than almost any other counsel that the employee could retain, or certainly that he could retain for a reasonable price, with a reasonable preparation time. Similarly, the employer's interests may be best served -- and just because something permits the employer to more effectively defend itself, it does not equate to "impeding" the Commission's investigation - by having counsel provide a coordinated defense for itself and its employees. There are plenty of mechanisms, including criminal sanctions and whistleblower protections, not to mention the canons of ethics of the bar, to prevent attempts to misuse information gained through attendance at employee interviews, as by trying to influence the testimony of other witnesses. There is, however, the proposed rule's implication to the contrary notwithstanding, nothing improper or suspect about the employer's counsel having such information, or even sharing it with the employer, with the employees' knowledge and consent, thereby enhancing his ability to knowledgeably defend both employer and employees. Doing so within the bounds of the applicable legal and ethical constraints is by definition not impeding or interfering with NRC's investigation.

Just as there is a possibility of abuse by unethical defense counsel, so is there a very real likelihood of agency abuse of the proposed rule, by virtue of the unguided discretion afforded the investigator to exclude counsel of the interviewee's choice, and the nearly total lack of procedural safeguards to prevent abuse of this discretion. The proposed regulation would go so far as to permit the investigator to decline to give the reason for the exclusion of counsel to either the witness or the excluded counsel!

Finally, the proposed rule wholly ignores, and runs almost completely counter to, the recommendations of the so-called Silbert Committee, convened by the Commission a few years ago to make an expert assessment of how it should proceed in this area. The proposed rule writes the Committee's report out of existence. Fortunately, it cannot so easily dispose of the underlying legal considerations which caused the Committee to conclude that any attempt to limit witnesses' access to counsel of their

choice should be made only where "there is concrete evidence that the chosen representative of that witness is in such a position that his participation would seriously prejudice the investigation." The current proposal would, by contrast, permit such exclusion where "a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly, by the presence of a common counsel." This is far too thin a basis upon which to take such an extraordinary action as denying a witness counsel of his choice, in a proceeding with the potential for criminal liability.

In the final analysis, as stated in the NUMARC comments, "the proposed rule portrays a genuine disinclination to have any counsel of choice present at investigative interviews." Such draconian measures as the proposed rule doubtless would make it significantly simpler for NRC to conduct its investigations, free of the occasional delays and other inconveniences occasioned by slavish adherence to such niceties as the right to effective representation of counsel. Fortunately, however, administrative efficiency is not the sole objective of the Constitution, the courts, or even the Administrative Procedures Act. Proposed 10CFR19 is a misconceived attempt to further administrative efficiency at the expense of individual rights, and should be unequivocably repudiated by the Commission.

Sincerely,

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February 17, 1989

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

Attn: Docketing & Service Branch

Re: Proposed Rule re Sequestration
of Witnesses Under Subpoena

Dear Mr. Chilk:

The following comments by the Committee on Nuclear Technology and Law of the Association of the Bar of the City of New York (the "Committee") are provided on the proposal by the Nuclear Regulatory Commission ("NRC") to amend its regulations at 10 C.F.R. Part 19 in order to adopt a new rule for the "Sequestration of Witnesses Interviewed Under Subpoena," as set forth at 53 Fed. Reg. 45768-71 (Nov. 14, 1988). The Committee respectfully submits that the proposed new rule is inconsistent with both well-established legal precedent and sound public policy; it therefore should not be adopted.

I. Introduction

The Committee is one of the standing committees of the Association of the Bar of the City of New York, 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.

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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. The NRC's proposed rule on sequestration is one such regulation.

II. Analysis

The NRC proposes to amend Part 19 of its regulations in order to require that witnesses be "sequestered" during NRC interviews conducted pursuant to a subpoena. The NRC's proposal encompasses both the "separation of multiple witnesses from each other during the conduct of investigative interviews", 53 Fed. Reg. at 45770 (proposed §19.3), and the disqualification of an attorney from representing a witness during such a subpoenaed interview if the attorney also represents other witnesses, the witness' employer or management, and the NRC investigator determines that "the investigation may be obstructed, impeded or imparied [sic], either directly or indirectly" as a result of the attorney's multiple representation. Id. (proposed §19.18(b)). The purpose of the rule is to "ensur[e] the integrity of the agency's factual findings and regulatory conclusions" during inspections and investigations. Id. at 45769-70 (Supplementary Information accompanying proposed rule).

The proposal does not explain the manner in which the integrity of NRC's investigations heretofor has been compromised as a result of witnesses' behavior or the conduct of witnesses' counsel. And while the integrity of NRC's processes must be assured, there is no reason to achieve this laudable end by means which disregard the established legal rights of individuals who are involved in OI processes.

As indicated in the Supplementary Information accompanying the proposed rule on sequestration, Section 6(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. §555(b), provides that an individual who is subpoenaed by a government agency "is entitled to be accompanied, represented, and advised by counsel. . . ." See 53 Fed. Reg. at 45768 (Supplementary Information). There is a substantial body of law that defines the right to counsel, both in the context of the APA, and in other non-administrative contexts, such as the right to counsel during a criminal trial, a civil trial, or a grand jury proceeding. The NRC's proposal on sequestration appears to give little, if any consideration either to this judicial precedent or to the traditional legal analysis that is reflected in these cases.

The right to counsel is not an absolute right; nevertheless, it is a right of enormous importance in our system of law, and the courts do not permit that right to be lightly infringed.

One of the touchstones of the right to counsel is that it "has always been construed to mean counsel of one's choice." Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (5th Cir. 1960); accord, SEC v. Csapo, 533 F.2d 7, 11 (D.C.Cir. 1976); SEC v. Higashi, 359 F.2d 550, 552-53 (9th Cir. 1966). In the context of a criminal trial, the First Circuit has recently elaborated on the importance of an individual's personal choice as to the attorney in whom he or she has confidence:

> When, however, it is the government that seeks to disturb the planned proceedings by moving to disqualify defense counsel, it has only one arrow in its quiver. It must demonstrate that any infringement on choice of counsel is justified. It cannot expect to prevail by saying, in effect, "The court should grant our motion because even though we have not demonstrated a sufficient need for disqualification, no harm will have been done if competent substitute counsel are appointed and given enough time to prepare their defense." Such an approach would entirely eviscerate a defendant's right to counsel of choice.

United States v. Diozzi, 807 F.2d 10, 16 (1st Cir. 1986); see also SEC v. Csapo, supra, 533 F.2d at 11 (discussion of importance to client of his confidence in counsel of choice).

Thus, counsel of choice is an integral part of the right to counsel. Ordinarily, that right encompasses the opportunity to select one's own counsel including, for example, an attorney who has a particularized knowledge, such as a familiarity with a highly technical area. See Aetna Casualty & Surety C. v. United States, 570 F.2d 1197, 1202 (4th Cir. 1978) (in a civil action involving an airplane crash, government employees were entitled to "the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation").

The standard used by the courts to evaluate the merits of an effort by an administrative agency to disqualify a witness' chosen counsel was set forth in the Csapo case:

> [B]efore [an agency] may exclude [a witness' chosen] attorney from its proceedings, it must come forth . . . with "concrete evidence" that his presence would obstruct and impede its investigation.

533 F.2d at 11 (emphasis added).

The "concrete evidence" standard was relied upon by the NRC's Advisory Committee for Review of the Investigation Policy on Rights of Licensee Employees Under Investigation when it made its recommendations to the NRC in 1983. See Advisory Committee Report, Sept. 13, 1983, at 16. Referencing the Csapo case, the Advisory Committee stated:

> We are accordingly of the view that it would be appropriate to enter or seek an order of exclusion only where (a) a witness has been ordered to testify, and (b) there is concrete evidence that the chosen representative of that witness is in such a position that his participation as counsel would seriously prejudice the investigation.

There is no reference to the Advisory Committee's recommendation in the proposed rule on sequestration, nor is the Csapo "concrete evidence" standard addressed. Instead, the standard set forth in the NRC's proposal is squarely at odds with the Csapo test, in that it requires only that an investigator determine that an investigation "may" be obstructed, impeded or impaired, "either directly or indirectly," in order to disqualify a witness' chosen counsel. 53 Fed. Reg. at 45769 (proposed [illegible]). The proponents of the rule do not explain why they have proposed a standard that is inconsistent with settled law, nor do they address the policy or other considerations that went into the adoption of their standard.

The "concrete evidence" standard reflects prevailing law, and appropriately balances countervailing interests of substantial importance. If the conduct of witness' attorney is actually obstructing, impeding or imparing an agency investigation, whether because of the attorney's allegiance to other clients or for any reason, the integrity of the agency's process is in fact threatened, and the interest of the agency and the public-at-large need not be subjugated to the ostensible interest of the witness. However, because of the witness' statutory entitlement to counsel of choice, disqualification is inappropriate

when there is not an actual obstruction of justice but simply aggressive lawyering, euphemistically referred to by the Supreme Court as "courageous forthright lawyerly conduct." See Sacher v. United States, 343 U.S. 1, 12, 72 S. Ct. 451, 457 (1952). And the "mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation." Csesso v. SEC, supra, 533 F.2d at 11.

In short, while the interests of the individual witness in an agency investigation are not the only interests at stake, the witness' APA-granted right to counsel is deserving of the agency's substantial deference. The NRC Staff's proposed amendment to Part 19 of its regulations too readily encroaches on witnesses' statutory right to counsel. Contrary to the suggestion contained in the proposed rulemaking, the proposal is not a "somewhat minor burden on an individual's right to be accompanied by a particular counsel," 53 Fed. Reg. at 45769 (Supplementary Information); rather, it would institutionalize an onerous burden.

In addition to the standard for disqualifying counsel that is contained in the proposed rule on sequestration, there is another element of the proposal which appears to be inconsistent with settled law and with sound practice.

The proposed rule expressly permits NRC investigators to "separate" witnesses, see 53 Fed. Reg. at 45770 (proposed §§ 19.3, 19.18). Although neither the proposed rule nor the Supplemental Information defines what this "separation" entails, it appears to encompass prior restraints on witnesses' conversations and contacts with other witnesses or interested parties. This inference is suggested by the fact that the concept of "sequestration," used in evidentiary proceedings, contemplates limits on a witness' conversations to other witnesses who have not yet testified about the former's trial testimony. See Fed. R. Evid. Rule 615 (witnesses excluded from trial so that they cannot hear the testimony of other witnesses). The inference also is suggested by the concern set out in the Supplementary Information to the proposed rule that dual representation "could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation" -- a result the rule seeks to avoid. 53 Fed. Reg. at 45769.

The situation where one witness' testimony can be kept "secret" from other witnesses is sequestration at trial, in which witnesses are excluded from the courtroom during the courtroom

testimony of other witnesses. Fed. R. Evid., Rule 615. In contrast, the proposed NRC rule contemplates the "[s]equestration" of witnesses "during the conduct of investigative interviews." 53 Fed. Reg. at 45770 (proposed § 19.3).

The traditional concept of evidentiary sequestration is available only in the courtroom. Sequestration has no application during pre-trial phases of a proceeding, including the investigative phase. Thus, in Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), the Court of Appeals observed that "[w]itnesses, particularly eye witnesses, to a crime ar he property of neither the prosecution nor the defense. Botn sides have an equal right, and should have an equal opportunity, to interview them."1/

If, by its form of "sequestration," the NRC Staff intends to impose a prior restraint on witnesses' speech and conduct, the staff is infringing on witnesses' First Amendment rights. Not only does the government carry a heavy burden to justify such a prior restraint, but the restraint must be "narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) (citations omitted). No such analysis is proferred in the proposed rule, not it is likely that such an analysis would be persuasive.

1/ While the secrecy element of sequestration is present in grand jury proceedings, Fed. R. Cr. P. 6(e)(2), grand jurors are functioning as agents of the state in carrying its judicial responsibilities and, accordingly, "are subject to speech restrictions that would violate the first amendment if imposed against private citizens generally." U.S. v. Ford, 830 F.2d 596, 599 (6th Cir. 1987), citing 2 ABA Standards for Criminal Justice, Standard 8-3.6 & Commentary at 8-54-55 (2d Ed. 1980).

Furthermore, even in the grand jury context, where witnesses appear before the grand jury in closed session, and where counsel is not present, a grand jury witness is free to discuss his experience before the grand jury with anyone, and that certainly includes his attorney. As Rule 6(e)(2) of the Federal Rules of Criminal Procedure specifically provides, "No obligation of secrecy may be imposed on [grand jury witnesses]." See, e.g., United States v. Sells Engineering, Inc., 463 U.S. 418, 425 (1983); Blalock v. United States, 844 F.2d 1546, 1556 (11th Cir. 1988); In re Grand Jury Proceedings, 814 F.2d 61, 68-69 (1st Cir. 1987).

In summary, restricting the speech of a witness outside the courtroom constitutes a prior restraint on free speech which can only be justified in exceptional circumstances. The proposed rule on sequestration, insofar as it intends to restrict witness's conversations or associations with, at most, modest justification, is impermissible.

Finally, there is ambiguity and vagueness in the proposed rule which would appear to make the rule void for vagueness. See, e.g., Smith v. Goguen, 415 U.S. 566, 572, 94 S. Ct. 1242, 1247 (1974); Connolly v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926); Bass Plating Co. v. Town of Windsor, 639 F. Supp. 873, 881 (D. Conn. 1986); see generally Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

The proposed rule's definition of sequestration is sufficiently vague that it is unclear precisely what activities could be prohibited. In addition, there are many inconsistencies in the rule which obscure its meaning.

There are confusing and inconsistent characterizations of the presumption the rule intends to embrace concerning dual representation. For example, sections 19.3 and 19.8(b) of the proposed rule contain the presumption that dual representation is impermissible, and require the express permission of the investigator before it will be allowed. 53 Fed. Reg. at 45770. In contrast, the Supplementary Information reverses the presumption by stating that dual representation is appropriate, absence objection by the investigator. 53 Fed. Reg. at 45769. Moreover, sections 19.18(a) and (c) contain reverse presumptions about the presence of counsel of choice. Furthermore, the proposed rule's presumption against dual representation makes no distinction based on the status of the interviewee-client, such as whether he is a member of the licensee's "corporate control group." In contrast, the Supplementary Information appears to consider this characterization to be meaningful. Compare 53 Fed. Reg. at 45770 (proposed §§ 19.3, 19.18) with 53 Fed. Reg. at 45768.

Conclusion

The Committee opposes the NRC Staff's proposal to amend Part 10 of the agency's regulations to provide for sequestration of witnesses as defined in the Staff's proposed rulemaking. See 53 Fed. Reg. at 45768-71. The Committee's opposition is based on

its assessment that the sequestration proposal appears to be inconsistent with settled law, and is imprudent as a matter of public policy.

Jay E. Silberg, Chair

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* The separate views of Kenneth F. McCallion appear below.

Separate Views of Kenneth F. McCallion

While I agree that the proposed NRC amendment to Part 19 of its regulations is ill-advised to the extent that it would give total discretion to an agency official conducting an investigation to disqualify counsel representing more than one witness (§ 19.18(b) and (c)), it is my opinion that the portion of the proposed rule dealing with "sequestration of witnesses" (§ 19.18(a)) is reasonably related to the legitimate investigative function of the NRC and does not impermissibly intrude on a witness right of association or freedom of speech.

On their face, proposed Sections 19.3 and 19.18(a) permit a witness to be "accompanied, represented, and advised by counsel of his or her choice," and merely prohibits another witness, another witness' counsel or his employer's counsel from being present during the interview of that witness. This aspect of the proposed rule seems to be more analogous to the provisions of Fed. R. Evid. 615 (excluding witnesses from trial), and rules prohibiting other witnesses or their counsel from attending grand jury proceedings, than cases involving "prior restraints" by courts enjoining publication of news articles. The proposed regulations no more contemplate a prohibition on communications between two witnesses either before or after an interview, than Fed. R. Evid. 615 can be interpreted as restricting out-of-court communication between trial witnesses. Any restraint on freedom of expression or association resulting from an adoption of the proposed rule would, therefore, be minimal.

In order to eliminate any ambiguity in proposed Section 19.18(a) as to whether a witness may be accompanied to an interview by counsel of his own choice, even though such counsel also represents another witness or the employing entity, I would propose the following language be added at the end of proposed Section 19.18(a):

> "However, nothing herein shall be construed to prohibit a witness from being accompanied during an examination by an attorney of his choice, even though said attorney may als represent another witness or the employing entity, as long as any potential conflict is fully disclosed to the witness and the witness assents to the multiple representation."