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

MEMORANDUM FOR: Ben B. Hayes, Director
Office of Investigations

FROM: Chester W. White, Director
Office of Investigations Field Office, Region I

SUBJECT: DRAFT SEQUESTRATION AND EXCLUSION RULE

Pursuant to your July 22, 1989 memorandum, following are examples of incidents where, we believe, attorneys impeded our investigation or at a minimum, prevented full and complete disclosure of information relative to the investigation.

1. Case No. 1-89-006 (Ongoing) - During the course of conducting an investigation at an NRC licensed facility, the investigator was approached by an individual previously interviewed. This individual informed the investigator that during his interview he wanted to answer questions in greater detail but felt "uncomfortable" about doing so with the licensee corporate attorney present. When advised by the investigator that he could have requested a meeting with the NRC in the absence of the corporate attorney, he responded that, "you have to understand, I work for higher management".

2. Case No. 1-85-011 (Closed) - During the course of this investigation, corporate attorney's for the licensee interviewed witnesses (licensee employees) immediately after they left the interview conducted by OI investigators. The attorneys asked each interviewee the details of their discussions with the OI investigator. Being aware of this caused the investigator to structure their interviews in such a manner as to attempt to disguise their questions to preclude disclosure of information that may have compromised their (the NRC) investigation, yet elicit the information needed.

While it is difficult to determine the full ramifications of the above incidents, common sense tells you that once an employee knew that management was going to be made aware of statements made during their respective interviews, they would be less than candid with information negatively impacting the licensee (their employer).

cc: W. Hutchison

tensibly limited to pendent state claims, or by dropping its own potential counterclaims. In each of these situations, the Commission's rules will cause an increase in the costs to be borne by ratepayers.

The rules may also create perverse incentives for the conduct of litigation. In its Order on Reconsideration, the FCC decided that a carrier would be allowed to record a pre-judgment settlement above the line to the extent that the amount of the settlement does not exceed the nuisance value of the suit. It declined, however, to apply this rule to a settlement entered after an initial adverse judgment. *See* 4 FCC Rcd at 4097–98. Yet the economics of the two situations are identical. As the agency recognized in the pre-judgment context, if the carrier cannot recover what it pays out in a settlement, then it has an incentive to continue litigating—in the post-judgment context, to pursue an appeal—even if the cost of doing so exceeds the amount for which it could settle the case. Again, the effect is to increase the amount recoverable from ratepayers. The agency's attempt to distinguish between the pre- and post-judgment situations—that "[t]he issuance of an adverse judgment by a court should place a heavier burden on a carrier to show why ratepayers should bear any cost of a subsequent settlement," 4 FCC Rcd 4098—does not address the incentive it creates by refusing to extend the nuisance value exception to settlements entered while an appeal is pending.

[11] We recognize that the FCC's orders do attempt to deal with some of the incentive effects of its rules, that no system of regulation will be perfect in this regard, and that any perverse incentive effect may be mitigated to the extent that a carrier may, as a practical matter, rebut the presumption against recovery. Nevertheless, because the FCC's rules may have very significant effects (indeed, even if they are ultimately re-adopted only with respect to antitrust litigation), we believe that the agency should explicitly address the incentive problems discussed above.

IV. Conclusion

For the reasons stated, we grant the petition and vacate the orders.

PROFESSIONAL REACTOR OPERATOR SOCIETY, et al., Petitioners,

v.

The UNITED STATES NUCLEAR REGULATORY COMMISSION and the United States of America, Respondents.

No. 90-1120.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 4, 1991.

Decided July 23, 1991.

Judicial review was sought of Nuclear Regulatory Commission (NRC) rule calling for sequestration of subpeonaed witnesses and their attorneys and authorizing exclusion of witnesses' counsel if there was "reasonable basis" for believing that counsel's presence would impair investigation. The Court of Appeals, Ruth Bader Ginsburg, Circuit Judge, held that: (1) sequestration portion of rule did not violate First Amendment and was not arbitrary, but (2) attorney exclusion portion of rule ran afoul of Administrative Procedure Act's right-to-counsel provision.

Ordered accordingly.

1. Administrative Law and Procedure ⇐668

Electricity ⇐8.5(2)

Organization representing reactor operators employed at nuclear power plant sites did not qualify as "party aggrieved" under Administrative Orders Review Act where it did not participate in challenged rulemaking proceeding before Nuclear

Regulatory Commission (NRC) by submitting comments. 28 U.S.C.A. § 2344.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐90.1(1)
Electricity ⇐8.5(2)

Nuclear Regulatory Commission (NRC) rule calling for sequestration of subpoenaed witnesses and their attorneys during interviews did not violate First Amendment. U.S.C.A. Const.Amend. 1.

3. Electricity ⇐8.5(2)

Nuclear Regulatory Commission (NRC) rule calling for sequestration of subpoenaed witnesses and their attorneys during interviews was not rendered arbitrary or illusory simply because it purportedly merely confirmed NRC policy of individually interviewing witnesses.

4. Administrative Law and Procedure ⇐797
Electricity ⇐8.5(2)

Nuclear Regulatory Commission (NRC) rule authorizing exclusion of subpoenaed witness' counsel during interview was not subject to deferential review since Administrative Procedure Act, as controlling statute, was outside NRC's particular expertise and special charge to administer. 5 U.S.C.A. § 555(b).

5. Administrative Law and Procedure ⇐361
Electricity ⇐8.5(2)

Nuclear Regulatory Commission (NRC) rule authorizing exclusion of subpoenaed witness' counsel from interview if "reasonable basis" existed to believe that NRC investigation would be impaired by counsel's representation of multiple interests ran afoul of Administrative Procedure Act's right-to-counsel provision by not requiring "concrete evidence" that presence of counsel would obstruct and impede NRC's investigation, notwithstanding contention that importance of protecting public health and safety warranted less stringent standard. 5 U.S.C.A. § 555(b).

Petition for Review of an Order of the Nuclear Regulatory Commission.

Deborah B. Charnoff, Washington, D.C., for petitioners.

Carolyn F. Evans, Attorney, Nuclear Regulatory Com'n, with whom William C. Parler, General Counsel, John F. Cordes, Jr., Sol. and E. Leo Slaggie, Sp. Counsel, Nuclear Regulatory Com'n, Richard B. Stewart, Asst. Atty. Gen., Evelyn S. Ying and Martin W. Matzen, Attorneys, Dept. of Justice, were on the brief, Washington, D.C., for respondents.

Before RUTH BADER GINSBURG, SILBERMAN and THOMAS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH BADER GINSBURG.

RUTH BADER GINSBURG, Circuit Judge:

This case concerns a rule adopted by the Nuclear Regulatory Commission (NRC or Commission) for the conduct of witness interviews in connection with NRC investigations and inspections of licensed facilities. The rule, titled "Sequestration of Witnesses Under Subpoena/Exclusion of Attorneys," permits: (1) sequestration of subpoenaed witnesses during an interview; and (2) exclusion, as counsel accompanying the interviewee, of an attorney representing "multiple interests," if the agency official conducting the inquiry has "a reasonable basis" for believing that the attorney's presence would impair the investigation. 55 Fed.Reg. 243, 247–48 (1990). Prompting the rule, the Commission stated, were instances in which the "licensee's counsel or counsel retained by the licensee has also represented [during interviews] witnesses who are employees of the licensee." *Id.* at 243. Employee witnesses, the NRC observed, "have been hesitant to divulge information against the interest of their employer in the presence of their employer's counsel or counsel retained by the employer." *Id.*

[1] Petitioning for judicial review of the rule are several public utility companies

PRO

licensed by the
nuclear power pl
company that pro
nuclear power fa
lenge the sequest
patible with the fi
guarantees of th
the attorney excl
missible under t
dure Act (APA) ri
5 U.S.C. § 555(b
clause of the Fift
assert that the N
violated the APA
quirements.

We reject as i
ers' challenge to
of the rule. Petit
the attorney excl
however, rests on
terpreting the AP
antee, this court
agency may exclu
resenting a subpo
interview, the age
with "concrete e
presence would i
SEC v. Csapo, 5
1976). Because th
standard is less
crete evidence" re
po, we vacate the
tion of the rule.

Ba

The Commission
ducts periodic rev
facilities to determ
legal requirements
ty standards. Wh
discovers reason
wrongdoing, or w
otherwise so appr
within the NRC,
tions (OI), conduct
primary investigat

1. Professional Reac
an organization of
at nuclear power
included in the lin
petitioners concede
rulemaking proce
ments. PROS ther
"party aggrieved" u

licensed by the NRC to own or operate nuclear power plants, and an engineering company that provides technical support to nuclear power facilities.[1] Petitioners challenge the sequestration provision as incompatible with the free speech and association guarantees of the First Amendment, and the attorney exclusion provision, as impermissible under the Administrative Procedure Act (APA) right to counsel guarantee, 5 U.S.C. § 555(b), and the due process clause of the Fifth Amendment. They also assert that the NRC, in adopting the rule, violated the APA's notice-and-comment requirements.

We reject as insubstantial the petitioners' challenge to the sequestration portion of the rule. Petitioners' APA challenge to the attorney exclusion portion of the rule, however, rests on a secure foundation. Interpreting the APA right to counsel guarantee, this court has ruled that, before an agency may exclude an attorney from representing a subpoenaed witness during an interview, the agency must come forward with "concrete evidence" that counsel's presence would impede its investigation. *SEC v. Csapo*, 533 F.2d 7, 11 (D.C.Cir. 1976). Because the NRC's "rational basis" standard is less rigorous than the "concrete evidence" requirement stated in *Csapo*, we vacate the attorney exclusion portion of the rule.

Background

The Commission's inspections staff conducts periodic reviews of licensed nuclear facilities to determine their compliance with legal requirements, notably, relevant safety standards. When the inspections staff discovers reason to suspect safety-related wrongdoing, or when the Commission is otherwise so apprised, a separate group within the NRC, the Office of Investigations (OI), conducts an investigation. OI's primary investigatory technique is to interview employees who might have information concerning the apparent wrongdoing. Sometimes these employees come forth voluntarily; frequently, however, OI must secure their attendance at an interview by administrative subpoena.

Persons whom the OI interviews under subpoena are "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). Because an OI finding of wrongdoing could lead to administrative sanctions against the nuclear facility, or even criminal prosecution by the Department of Justice, companies operating nuclear facilities have often provided counsel for their employees who are interviewed. On at least some occasions, the Commission has found, company attorneys have taken the position that they "would relate to the company all that took place in the interviews." According to the Commission, the presence of such attorneys or other management representatives at interviews has impeded OI's investigations, by "produc[ing] an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." 53 Fed.Reg. 45769 (1988).

The NRC decided in November 1988 to address this perceived problem by proposing a rule ensuring that interviews "be conducted in an atmosphere free of outside influences." *Id.* at 45768. After receiving comments, the Commission published its final rule in January 1990. Under the rule's "sequestration" provision, witnesses and their attorneys are to be separated from other witnesses and attorneys during interviews. Under the "attorney exclusion" provision, where "a reasonable basis exists to believe that an investigation or inspection will be obstructed, impeded, or impaired, either directly or indirectly, by an

1. Professional Reactor Operator Society (PROS), an organization of reactor operators employed at nuclear power plant sites, was improperly included in the line up of petitioners. PROS, petitioners concede, did not participate in the rulemaking proceeding by submitting comments. PROS therefore does not qualify as a "party aggrieved" under the Administrative Orders Review Act, 28 U.S.C. § 2344 (Hobbs Act), which governs direct review of NRC orders. *See Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir.1983). While PROS does not qualify as a petitioner, the nine other parties joining in the petition did file comments with the NRC and are in all respects qualified to maintain this review proceeding.

attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview." Various procedural protections apply to the attorney exclusion provision: first, the interviewing official, within five working days after the exclusion, must give to the witness and her attorney "a written statement of the reasons supporting the decision to exclude"; second, the witness may appeal the exclusion decision to the full Commission; and third, the witness may delay the interview "for a reasonable period of time to permit the retention of new counsel." 10 C.F.R. § 19.18, *reported at* 55 Fed.Reg. 243, 247–48 (1990).

Witness Sequestration

[2, 3] The "sequestration" portion of the NRC's rule reads:

> (a) All witnesses compelled by subpoena to submit to agency interviews shall be sequestered unless the official conducting the interviews permits otherwise.

10 C.F.R. § 19.18(a), *reported at* 55 Fed. Reg. 247 (1990). "Sequestration" is defined as "the separation or isolation of witnesses and their attorneys from other witnesses and their attorneys during an interview conducted as part of an investigation, inspection, or other inquiry." 10 C.F.R. § 19.3, *reported at* 55 Fed.Reg. 247 (1990). Petitioners challenge this part of the rule as either too sweeping to survive First Amendment scrutiny, or too inconsequential to survive review for rationality. Neither argument is tenable.

Despite the rule's defining language—that sequestration means separation "during an interview conducted as part of an investigation"—petitioners maintain that, in context, the rule could be construed to impose a vow of silence on every witness throughout the course of an entire investigation. But the Commission, in its Final Rule comments on "Sequestration," expressly stated that the rule, "neither by its terms nor in its intended application, effects a prohibition on the communications or associational rights of witnesses either before or after an interview." 55 Fed.Reg. at 244. Again, on brief, the NRC affirmed: "[T]he provision in no way regulates or restricts witnesses' communications before or after their interviews." Final Brief for Respondents at 13.

Recognizing a point on which the sequestration rule, as written, indeed left room for doubt, the court asked counsel for the Commission at oral argument:

> Let's assume that you don't prevail on the attorney disqualification rule, but you do prevail on the sequestration rule. Would that sequestration rule cover the following situation: Attorney A is representing witness X. [After] witness X concludes her testimony, ... witness Y comes in and attorney A is representing witness Y as well.... [D]o you interpret [the sequestration] rule to say you could exclude attorney A because attorney A has already been in an interview situation with a witness?

Counsel responded:

> Although the rule as written presently lends itself to that interpretation, your Honor, we would not exclude attorney A from representing the subsequent witness simply because he represented an earlier witness in that same [investigation].

The court, to conclude the colloquy, asked:

> So you simply interpret it as, in that very interview, you can isolate the witness?

Counsel replied:

> Exactly.

In sum, we take it to be beyond genuine debate, based on the regulatory text and the Commission's representations to this court, that the rule on witness sequestration covers only the isolation of the witness during an interview. It does not extend to pre- or post-interview communications by or with the witness, and it does not apply to multiple representation of witnesses by the same counsel.

A rule that simply limits the contemporaneous participants in the NRC interview to NRC investigators, the witness, and his or her chosen counsel, petitioners apparently concede, does not encounter any First Amendment shoal. Instead, petitioners say, the NRC has always individually inter-

viewed witnesses, so the rule, if it means no more than that, accomplishes nothing, remains "illusory," and should be vacated on that account. *See* Petitioners' Reply at 6. We see nothing arbitrary or illusory, however, in the Commission's confirmation, by rule, that its investigators may interview witnesses separately, and out of the hearing of other witnesses.

Attorney Exclusion

The "attorney exclusion" portion of the NRC's rule reads:

> (b) Any witness compelled by subpoena to appear at an interview during an agency inquiry may be accompanied, represented, and advised by counsel of his or her choice; however, when the agency official conducting the inquiry determines, after consultation with the Office of the General Counsel, that a reasonable basis exists to believe that the investigation or inspection will be obstructed, impeded or impaired, either directly or indirectly, by an attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview.

10 C.F.R. § 19.18(b), *reported at* 55 Fed. Reg. 247–48 (1990). The congressional instruction against which we evaluate the NRC's rule, section 6(a) of the APA, reads:

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

5 U.S.C. § 555(b).

[4] As an initial matter, we reject the NRC's contention that, in measuring its rule against the controlling APA prescription, we must apply a "narrow and deferential standard of review." Final Brief for Respondents at 14. It is true that, in reviewing an agency's interpretation of a statute Congress has entrusted it to administer, we accord the agency substantial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). The Supreme Court has indicated, however, that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer. *See Adams Fruit Co. v. Barrett*, — U.S. —, 110 S.Ct. 1384, 1390–91, 108 L.Ed.2d 585 (1990) (stating that *Chevron* deference to agency interpretation of statute would be inappropriate, because agency did not administer that statute); *Crandon v. United States*, 494 U.S. 152, —, 110 S.Ct. 997, 1010, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (rejecting *Chevron* deference, because statute in question "is not administered by any agency but by the courts"); *Air North Am. v. Department of Transp.*, 937 F.2d 1427, 1436–1437 (9th Cir. 1991) (no *Chevron* deference to agency interpretation of APA, because agency not assigned special role by Congress in construing that statute).

[5] Turning to the merits of the petitioners' challenge, the path we follow in this case is marked out for us by *SEC v. Csapo*, 533 F.2d 7 (D.C.Cir.1976). The Securities and Exchange Commission in that case sought to enforce a rule similar to the one at issue here. The SEC's rule allowed the officer conducting an investigation to exclude as counsel for a subpoenaed witness lawyers who had already appeared before the officer as counsel for another witness. Measuring the SEC's rule against the APA right-to-counsel guarantee, this court found the congressional mandate "clear," and the SEC's assertion of authority to disqualify attorneys under its rule, "plainly inconsistent" with the privilege of the witness "phrased by the legislature in unequivocal terms." 533 F.2d at 10–11. To adjust the SEC's investigatory procedure to the governing APA provision, the *Csapo* court directed: "[B]efore 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." *Id.* at 10.

The NRC, in its Final Rule comments on "Exclusion of Counsel" candidly acknowledged that its "reasonable basis" standard was "less exacting" than the "concrete evidence" standard of *Csapo*. 55 Fed.Reg. at

245. To justify the greater authority it claimed for its investigators, the NRC pointed to the different statutory responsibilities of the two agencies. The NRC stated:

> Impeding an SEC investigation, while serious, does not have substantial, immediate public health and safety implications. In contrast, undetected violations of [NRC] regulations or the Atomic Energy Act could have far reaching public health and safety implications.

Id. The importance of protecting the public health and safety, the NRC concluded, warrants "use of a less stringent standard." *Id.* *See also* Final Brief for Respondents at 19 (contrasting "the financial losses that might occur if an SEC investigation is impeded," with "the frightening consequences of an NRC failure to uncover nuclear safety hazards").

The NRC invites a comparison Congress has not commissioned us to make. The APA establishes a "simple and standard plan of administrative procedure," S.Rep.No. 752, 79th Cong., 1st Sess. 1 (1945), one "meant to be operative 'across the board' in accordance with its terms." H.R.Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946). If the right to counsel at investigatory interviews is to expand or contract depending on the mission of the agency, Congress must say so "expressly." *See* 5 U.S.C. § 559. Our current instruction, however, is to apply the APA prescription "equally to agencies and persons." *Id.*

The NRC stresses that it has brigaded its rule with "protective procedures": notably, the official conducting the inquiry must consult with the Office of General Counsel and provide a written statement of reasons for exclusion to both witness and counsel; furthermore, the witness may challenge the exclusion decision before the full Commission (and thereafter in court). *See* 55 Fed.Reg. at 244, 246, 248; Final Brief for Respondents at 20–22. The procedural protections, while commendably augmented by the NRC in response to comments, do not change the character of the standard that the Commission has set. By the Commission's own forthright admission, that standard does not measure up to the one we have held to be the APA-guaranteed personal right of the witness.

We note finally that, although the Commission vigorously defends its less confining "reasonable basis" test, the NRC also predicts: "[I]n virtually all cases where the Commission may find it necessary to exclude a particular counsel ... it is not unlikely that the reasonable basis for so doing will in fact amount to 'concrete evidence' that otherwise the investigation will be impaired." Final Brief for Respondents at 19. This NRC forecast suggests that the Commission has no strongly compelling need for a standard less protective of individual rights than the one stated in *Csapo*.

Conclusion

For the reasons stated, the petition for review is denied in part and granted in part. We uphold the sequestration portion of the Commission's rule, vacate the portion on attorney exclusion, and remand the matter to the Commission for further consideration consistent with this opinion.[2]

It is so ordered.

2. Because we have vacated the attorney exclusion provision, we need not reach the petitioners' notice-and-comment challenge to that part of the rule. Nor need we reach the petitioners' parallel challenge to the sequestration provision. We understand that portion of the rule to mean only that the NRC may exclude from interviews persons other than the witness and her attorney; petitioners concede that this has been NRC's uncontroversial "routine practice" and that it is fully consistent with the APA right to counsel. *See* Petitioners' Reply at 6–7. Thus, even if the NRC had violated the APA's notice and comment provisions, a point we do not decide, remand for comment on an issue not genuinely in dispute would be a pointless exercise.

UNITED

Bernardo

United Sta
District

Argue
Decid

Defendant w
States District
Columbia, Georg
session of over fi
on intent to distr
ing and in relati
fense, and posse
juana. Defendan
Appeals, Silberm
that: (1) derringe
buckle in paper
pocket of raincoa
not "used" in re
drugs with intent
fendant was not
fense reduction fo
bility.

Affirmed in pa

1. Weapons ⇐4

Derringer tha
buckle in paper b
pocket of raincoat
not "used" in rel
drugs with intent
hensive Drug Abus
trol Act of 1970, §
404, 21 U.S.C.A. §
844; 18 U.S.C.A. §

See publication
for other judicia
definitions.

2. Weapons ⇐4

When predicate
fense is possession
ute, Government fai
of demonstrating "u
tion to crime of violen
if evidence shows no

REPORT OF THE ADVISORY COMMITTEE FOR REVIEW OF INVESTIGATION POLICY ON RIGHTS OF LICENSEE EMPLOYEES UNDER INVESTIGATION

Submitted to the
Nuclear Regulatory Commission
September 13, 1983

Earl J. Silbert, Esq.
Chairperson
James A. Fitzgerald, Esq.
Oscar M. Ruebhausen, Esq.
Joseph B. Scott, Esq.
Professor Ralph S.
Spritzer, Esq.

Report of The Advisory Committee For Review of Investigation Policy on Rights of Licensee Employees Under Investigation

Introduction

The Advisory Committee For Review of Investigation Policy on Rights of Licensee Employees Under Investigation (hereinafter "Advisory Committee"), was created by the Nuclear Regulatory Commission (hereinafter "NRC" or the "Commission"). Its charter, attached as Exhibit 1, became effective on February 25, 1983. Subsequently, by letter dated April 11, 1983, attached as Exhibit 2, the Commission delineated "exactly what questions the Advisory Committee should address."

In addressing these questions, the Advisory Committee has sought and considered a wide variety of documentary and testimonial input. It has held two full days of hearings open to the public. Notice of the meetings, pursuant to the Federal Advisory Committee Act, was published in the Federal Register. All witnesses who wished to be heard had an opportunity to present their views at the hearings. Others made submissions in writing. In addition, the views of some individuals and organizations were actively solicited by the Advisory Committee. Thus the Committee heard from federal investigators and from representatives of industry, unions, and the "public interest." Included among these were the Director of the Commission's Offices of Investigations and his chief assistants, a number

of attorneys representing licensees or vendors who appeared individually and/or in behalf of the Atomic Industrial Forum, investigators of other federal agencies, representatives of the International Brotherhood of Electrical Workers and their counsel, a representative of the Professional Reactor Operators Society, and the Legal Director of the Government Accountability Project (GAP) of the Institute for Policy Studies.

Among the written materials reviewed by the Committee were the following: letter dated August 13, 1982, from Gerald Charnoff, Esq. and J. Patrick Hickey, Esq. to the Chairman of the NRC; Inspection and Enforcement: Conflict or Cooperation, an address by Messrs. Charnoff and Hickey to the 1982 Annual Conference of the Atomic Industrial Forum; letters from Richard Littel, Esq. dated May 25, 1983 and June 3, 1983; a letter from James B. Burns, Esq. dated June 3, 1983; a proposed "Advice to Interviewees" presented by Gerald Charnoff, Esq. by letter dated June 3, 1983; a statement of Paul Shoof, International Representative of the International Brotherhood of Electrical Workers; memorandum dated March 4, 1983, to Ben B. Hayes, Director of the NRC's Office of Investigations, from the Secretary of the NRC, pertaining to policies of the Office of Investigations; and a letter dated July 16, 1982 from the NRC Chairman to the then Acting Director of the Office of Investigations, James A. Fitzgerald (a member of the Advisory Committee) delegating certain authority.

Despite the large volume of this testimonial and documentary information and pertinent legal materials considered by the Advisory Committee, the Advisory Committee has concluded that a comparatively brief report to the NRC which focuses solely on the specific questions the Commission wished addressed would be most consistent with th mandate of the Committee.

Question 1. **Should the NRC as a matter of policy apprise all interviewees prior to an interview that they have a right to have an attorney present?**

Initially, it is important to note that employees of licensees have no "right" to have counsel present during interviews conducted by NRC investigators when the employee has not been subpoened. The Committee understands, however, that the Commission permits counsel to be present at such interviews upon request. The question before the Committee is whether, as a matter of policy, notice of this opportunity to be accompanied by counsel should routinely be given to a prospective interviewee before an interview is conducted.

The Committee has concluded that the NRC should not adopt such a policy. The Committee believes that there are no persuasive policy reasons for adopting such a notice requirement and that there are important policy considerations which support rejection of this proposal.

The primary arguments presented to the Committee in support of routinely providing notice of an opportunity to be accompanied by counsel were that not providing such notice would (1) disadvantage those who are unsophisticated and ignorant of their rights and therefore most in need of this advice, and (2) deter employees from willingly assisting in the investigative process. The Committee believes these arguments must be considered in two separate situations: (1) in the usual interview in which the purpose of the OI investigation is to discover and assemble information to determine whether safety regulations or

procedures have been violated and, if so, by whom; and (2) in the unusual case in which the investigation changes from information- gathering to a focused effort to establish the criminal liability of a particular witness.

Most of the interviews conducted by NRC's Office of Investigations (OI) involve persons who are not themselves suspected of wrongdoing, malfeasance or the like. They are being interviewed solely for the information they may have and OI investigators do not have a reasoned basis for believing that their responses will expose them to potential criminal liability. Under these circumstances, the need for advice about counsel appears minimal. Moreover, rather than enhancing the willingness of employees to assist in the investigation, the Committee believes that there is a risk that adopting a mandatory notice policy could impede the investigative process. Regardless of how it is formulated, such notice may convey to interviewees a false impression of personal vulnerability and thereby cause them to resist providing assistance that might otherwise be forthcoming. In addition, providing such notice could unnecessarily formalize the investigator/interviewee relationship with a resulting adverse affect on the flow of information to NRC.

Importantly, the Committee is unaware of any other federal agency with such a policy or practice, despite suggestions to the contrary by several of the Committee's witnesses. If the policy of giving interviewees this notice encouraged cooperation

of witnesses, one would expect that other agencies would have adopted such a policy. That they have not indicates that they are at least doubtful that providing the notice would be helpful. The importance of NRC's mission and the fact that the public interest is directly implicated in most NRC investigations suggest that the NRC should not adopt a policy, apparently unique, that might impede its investigations. We therefore recommend against a policy for notice in the normal interview situation.

The Committee has also considered whether notice with respect to counsel should be given when the investigator has reasonable grounds to believe that the interviewee has engaged in wrongdoing, malfeasance or some other dereliction of duty for which the individual could be personally, but not criminally, accountable.

As a practical matter, it would frequently be very difficult for an NRC investigator to know whether or not the individual being questioned could be held civilly accountable for his or her conduct. The Committee believes that malfeasance and dereliction of duty are so imprecise and that potential civil liability so varied that a notice rule linked to these concepts would be unworkable. Even in those situations in which the risk of a civil sanction is clear, i.e., loss of an operator's license, the Committee believes that OI's need to obtain information that concerns its safety-related functions

outweighs any policy reasons for the OI investigator to give notice of the opportunity to consult with counsel.

There remains the situation where the important information-gathering function of OI becomes secondary to the effort to establish criminal liability of an interviewee whom OI already has reasonable grounds to believe has committed a crime. In this narrow instance, the Committee recommends that notions of fairness and decency which lie at the heart of all governmental conduct warrant the "target" being advised of his opportunity to consult with counsel.

Although existing law does not require this notice in noncustodial situations, the Committee does not intend this nor consider it as a substantive departure from existing practice. For example, Special Agents of the Internal Revenue Service by internal rules routinely advise taxpayers under investigation of the so-called Miranda rights whether or not the person is in custody and even at a preliminary phase of their investigation when the basis for the investigation is mere suspicion. Other investigative agents, from the testimony before the Committee, have given advice of Miranda rights in the past or presently as a matter of individual practice. That they are criminal investigators is relevant but not dispositive. OI investigators have overlapping responsibilities. They may, for instance, be considered criminal investigators under 18 U.S.C. § 1510 for purposes of persons obstructing a criminal investigation.

Information they obtain may be referred to the Department of Justice and form the basis for a criminal prosecution.

The Committee recognizes that the primary goal of OI investigators is to get to the bottom of allegations of violations of NRC requirements which may have a potential for causing great harm to the public. There is, accordingly, a strong public interest in the NRC's obtaining necessary information from all possible sources. The notice requirement recommended by the Committee should not unduly interfere with this primary OI function since it is applicable only when the OI already has reasonable grounds to believe that the interviewee has committed a criminal offense and its focus shifts to obtaining further evidence of that person's criminal liability. In this instance, because the witness may not realize he is a target for criminal referral and potential prosecution, the limited notice should be given.

The Committee believes that even in this exceptional situation, the investigator should retain the discretion to determine whether to convey the notice orally or in writing, as well as its precise formulation. While the Committee is mindful that this may result in some lack of uniformity, that is a consequence of preserving the flexibility that the Office of Investigations, in the Committee's view, must have.

Finally, during the course of the Committee's hearings several witnesses suggested that other affected parties, including the licensee and the collective bargaining

representative, should routinely be given notice of all interviews so that they could be present or offer to be present, either as participants or observers. The Committee is unaware of any precedent for such a policy and disfavors its adoption by the NRC. In the Committee's view, the routine presence of such additional persons at these interviews would so alter their investigative character as to deprive the NRC of the value of the investigative interview as an enforcement and oversight tool.

Separate Statement of Committee Member Professor Ralph S. Spritzer:

In addressing Question 1, the Committee recommends that a prospective interviewee who is a target of the investigation in the sense that there is reason to believe that he has committed a crime be advised of his opportunity to consult with counsel "where the important information-gathering function of OI becomes secondary to the effort to establish criminal liability" of the interviewee. I agree that considerations of fairness call for advice in this situation. I would not restrict the giving of advice, however, to the case where the investigation of criminal liability is the primary purpose of the investigation. In my view, it is desirable that an effective warning (one that covers the opportunity to seek and be represented by counsel, and the Fifth Amendment privilege) be given whenever there is reasonable likelihood that the interviewee's responses to the investigator may be self-incriminatory, whether or not prosecution, at that stage, is the investigator's primary concern. In short, I believe that it is enlightened public policy to see to it that the interviewee or witness threatened with the danger of self-incrimination is aware of his prerogatives. The sophisticated witness has that awareness. The witness who is uninformed to begin with should stand on equal footing.

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?

In responding to this question, we note at the outset that interviews conducted by the Office of Investigations or by the Office of Inspection and Enforcement have almost invariably been conducted without the aid of legal process. Doubtless this will continue to be the usual situation, although there may be occasional instances in which the Commission will resort to the issuance of compulsory process.

Where legal process has not been issued, the prospective interviewee may always decline to appear or to cooperate. Also, of course, he or she may decline to participate unless permitted to appear with counsel of his or her choice. It follows that an investigator has one of two options if an interviewee not under subpoena insists that he or she be represented by a particular attorney: the investigator may permit the attorney to be present or forego the conduct of the interview. 1/

1/ The investigator's decision on whether to forego the interview probably will be made by balancing the need for the interview against the potential prejudice to the investigation of having that particular attorney present at the interview. In this connection we note the apparently wide-spread belief of investigators that the presence of an attorney representing both the entity being investigated and the witness being interviewed may, in some circumstances, harm the investigation by inhibiting the freedom with which employees communicate to NRC investigators. This inhibition stems, investigators and others believe, from the concern that whatever the employee

This right of an interviewee to decline to cooperate if unaccompanied by counsel of his or her choice or, for that matter, by another person such as a union representative, includes the right to be accompanied by counsel for the licensee or other company counsel. The Office of Investigations obviously has no authority to prohibit an interviewee from being represented by such counsel or from being accompanied by a union representative, fellow employee or friend. Moreover, prior to

---

(cont.)
states to investigators will be reported to the company, even if harmful to the employee or the company. The representatives of the industry who appeared before the Advisory Committee disputed this, stressing that having available company counsel may, to the contrary, provide reassurance to the witness, help ease whatever anxiety he or she may have, and thereby enhance the freedom of communication.

Another point raised by investigators and other witnesses was the concern that if the NRC allows company counsel to be present at interviews of their employees, the latter will not be able to refuse the offer of company counsel to be present without adversely affecting their employment status with the company. The response of the industry representatives to this is that experience has shown that employees, when offered the assistance of company counsel, often do in fact reject the offer. The empirical evidence presented to the Advisory Committee on these matters was minimal. Although the Committee believes that the responses of the industry representatives may accurately reflect what occurs in some cases, common sense dictates that at least in other cases, employees will be reluctant to refuse the offer to be represented by company counsel and to communicate freely in the presence of company counsel.

One final point is the concern of the investigators that company counsel, when reporting back to the company what transpired in the interview, will reveal the direction and scope of the investigation and thereby potentially prejudice the investigation by allowing the company to affect the availability or content of testimony or documents subsequently sought by the investigators to the company's benefit.

or during an investigation, a licensee, contractor, subcontractor, vendor, or union has the right to advise its employees or union or nonunion members of their right to have present counsel, including counsel for the company or a union representative. This procedure has been followed in prior NRC investigations and no basis exists of which this Committee is aware to preclude it from being done in the future. 2/

Although in informal interviews the NRC cannot prohibit interviewee-selected company counsel, union representative or specific friend from attending the interview, nothing would prevent the investigator from discussing with the company, its counsel, the union, or special friend the reasons why they should not attend an interview of a service employee in a particular case. Similarly, if such counsel, union representative or friend appears at an interview, there is nothing to prevent the Office of Investigations from following a procedure analogous to that which an Internal Revenue Service officer may pursue at an interview of a summoned third party

---

2/ The law, of course, makes it unlawful to obstruct an investigation by agents authorized to conduct investigations of criminal conduct. 18 U.S.C. § 1510. Any communication, oral or written, that appeared to violate this law would, we assume, be referred to the Department of Justice for appropriate investigation. It was suggested that guidelines be adopted setting forth what advice could properly be communicated to employees and others without exposure to the charge of obstruction of justice. The Advisory Committee considers this impractical. What is controlling in such matters is the intent with which advice is given, an intent that will be predicated on an assessment of surrounding circumstances. No simple formulation is possible.

witness. See Internal Revenue Service Manual ¶ 4022.42, MT 4000-181. The IRS officer may first explore the potential conflict of interest with the attorney, and if the matter is not resolved, he may ask the witness such questions as whether the witness wishes an attorney to be present, who hired the attorney, who is paying for the attorney, whether the witness understands that the attorney represents others, and whether the witness realizes that there is a potential conflict of interest. As the IRS Manual recognizes, the witness ordinarily is entitled to have counsel of his choice present. Only under "extreme circumstances" will the IRS attempt to seek disqualification of counsel in court. Although these IRS procedures apply to witnesses formally summoned for an interview, the Advisory Committee believes that these procedures can be adapted to the voluntary setting of field interviews by NRC investigators.

The remaining question is whether the Commission, in a situation where it undertakes to compel testimony by issuance of a subpoena, may appropriately issue an order, or seek a court order, limiting the witness' choice of counsel. Section 6(a) of the Administrative Procedure Act broadly provides, "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented and advised by counsel. . . ." 5 U.S.C. § 555(a). The "plain and necessary meaning of this provision" is that the person summoned is entitled to "counsel of [his] choice," Backer v. Commissioner,

275 F.2d 141, 144 (5th Cir. 1960). Accordingly, the courts have been restrictive of occasional efforts by administrative agencies to exclude, on conflict-of-interest grounds, counsel chosen by a witness. The issue posed by the Commission's Question 2 has much in common with the issue presented to the court of appeals in S.E.C. v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). That case involved the application of an S.E.C. sequestration rule providing that absent permission no counsel for a witness "shall be permitted to be present during the examination of any other witness called in such proceeding." The court stated (p. 11):

> We are of course mindful of the historical antecedents of the sequestration rule and of the important purposes which it is designed to serve. See Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1951); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949). We do not question its utility in preserving the integrity of an investigation and recognize its practical necessity under certain circumstances. But we are not for that reason at liberty to ignore the clear congressional mandate [Section 6(a), Administrative Procedure Act] referred to above. 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.

An earlier Ninth Circuit case involving the same sequestration rule likewise upheld its "general propriety," but held that it must be accommodated to the demands imposed by the Administrative Procedure Act. S.E.C. v. Higashi, 359 F.2d 550 (9th Cir. 1966). The court concluded that Higashi, a corporate

director, might not be deprived of the services of corporate counsel because that would deny him the services of the attorney who might be of greatest help to him. We are satified that a blanket rule excluding "any attorney who also represents the entity being investigated" would not be sustained by the courts. An order of exclusion addressed to a particular situation might be upheld, in the words of the Csapo opinion, if there was "concrete evidence" that the attorney's presence would obstruct [illegible]eding.

[illegible] accordingly of the view that it would be appropriate [illegible]r seek an order of exclusion only where (a) a witness [illegible]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.

Question 3. **Should the NRC allow interviewees to tape record the interview and/or should the NRC record the interview at the request of an interviewee?**

In responding, we have limited our consideration to interviews that are voluntary or conducted without the aid of legal process. These represent the large majority of NRC investigatory interviews. Being voluntary, we believe the interviews accordingly should be conducted in a manner agreeable to the parties.

If an interviewee insists upon tape-recording the interview or having it tape recorded by the NRC, we would expect the NRC to accommodate this wish or terminate the interview.

As subsidiary questions, it is asked:

(a) whether the NRC should advise the interviewee, prior to the interview, of the right to tape record it; and, if so, what form the advice should take?

Tape recording is a privilege or an option available to the interviewer and interviewee. We do not think it rises to the dignity of a right in the context of a voluntary interview. Similar privileges extend to the time and place of an interview and to whether third parties are present or whether a written summary is prepared and signed by the interviewee. If the circumstances of the interview are agreeable to the participants, we do not think any advice need be given as to

the other optional ways in which the interview might be conducted.

(b) under what circumstances should the interviewee be allowed to keep the tape or a copy of the tape?

If the interviewee has arranged for the tape recording, it seems to us the dominion over the tape belongs to the interviewee, not to the NRC. It is for the interviewee to decide who is to have custody of the tape and whether copies should be made. If on the other hand the NRC makes the tape recording, the situation is reversed and the decisions are up to the NRC to make. Normally, we would think the NRC should make a copy available to the interviewee, with such charge for its costs as may be deemed appropriate.

(c) whether, if the interviewee records the interview, and the NRC does not, the NRC may insist on having a copy to the tape?

We do not think the NRC is in any position to insist on receiving a copy of the tape. It may request a copy. The interviewee may offer a copy. But if the NRC really wants a copy, it has the option of recording the interview for itself.

Question 4. Should the NRC give all interviewees express grants of confidentiality?

The Advisory Committee believes that the term "confidentiality" must be precisely defined for meaningful discussion and coverage in NRC's investigatory policies. As understood by the Committee, it is the withholding from dissemination to the public (including licensees, vendors, or other employer organization) of the name and other personal identifiers of certain individuals who provide information to the Commission, subject to some limitations as discussed below. It is to be distinguished from formal "informer" designation whereby some agencies essentially contract with carefully screened individuals not to divulge their identities under almost any circumstances in return for information. This latter category may include such measures as providing the individual with money, job and even a new identity if he/she is compromised.

We believe that the considerations against granting confidentiality to all interviewees outweigh those in favor of such a universal grant. The considerations weighing against such a blanket approach are as follows:

- Effective confidentiality agreements are extremely difficult to implement. Not only must the name and obvious personal identifiers, such as position or job title, be protected, but other information as well. This could include relationships to other individuals, presence at events or meetings, and other

material from which the interviewee's identity might be inferred. While difficult, this is achievable on a selective basis but as a practical matter not feasible for wholesale use. We perceive th inadvertent breach of the confidentiality promise is very likely if there are widespread confidentiality grants. The publicity resulting from breach of these agreements, however unintentional the breaches may have been, can seriously harm the investigative program by deterring others from coming forward who had important information but who will disclose it only on a promise of confidentiality.

- Reports of investigations which contain confidentiality grants are more difficult to use. The more reports are expurgated to preserve confidentiality, the more cryptic they become. Confidentiality requires that the Commission staff endeavor to keep some information from adjudicatory boards and parties or, alternatively, seek protective orders. It may also impede the staff's enforcement purposes. Finally, it could restrict the use of these reports by Congressional oversight committees.
- Confidentiality grants can make it more difficult to conduct the investigation. For example, when a person has been given confidentiality, the investigators are not free to use his name and other information which

may identify him as the source in eliciting information from other interviewees.

- In some instances, confidentiality conceivably may serve to protect wrongdoers.

The major reason for considering a universal express grant of confidentiality is the possibility that it might increase the flow of information to the NRC. However, we are aware of no empirical evidence that this would occur. Indeed, as noted above, the widespread employment of such grants could decrease the flow of unsolicited information through inadvertent breaches of confidentiality. In addition, we believe an experienced investigator will normally not need confidentiality to obtain information from the great majority of witnesses.

a. What limitations, if any, should be placed on grants of confidentiality by the NRC?

The Committee believes that grants of confidentiality should be in writing, signed by an NRC investigator, and contain an acknowledgement by the interviewee that he understands the agreement. Further, we believe it prudent to include in the agreement the following limitations:

- That the interviewee's identity may be communicated to other public agencies if necessary to fulfill their statutory responsibilities;
- That the interviewee may waive confidentiality by taking action inconsistent with confidentiality such as disclosing his/her identity or providing

information to another person that contradicts the information provided to the NRC;

- That the confidentiality is not absolute and the NRC may have to disclose his/her identity in response to an order of a hearing board or a court.

The limitations set out above are not all-inclusive. Because the NRC is free to grant or withhold confidentiality as it sees fit, it may impose any conditions or limitations on the grant which it considers appropriate in a particular case.

We deem it most important that the agreement candidly reflect the limitations on the grant of confidentiality.

b. Should there be different policies for different types of interviewees, e.g., those who come forward on their own, and those whom the NRC has to seek out?

There are various types of interviewees for whom different policies on confidentiality could be forged, e.g., supervisory/non-supervisory, licensee/non-licensee employees, voluntary/compelled, executive/non-executive, those who come forward on their own/those approached by the NRC. Because the subject matter of investigations varies widely, we do not believe that any rigid policy differentiations should be adopted for these various groups. Rather, we believe that the status of various types of interviewees may, on a case-by case basis, be one of several relevant factors which should be considered in determining whether to grant confidentiality to a particular

interviewee, the principal factor being the investigation's need for information.

We are aware, however, that Part 21 of the Commission's regulations can be read as providing express confidentiality to certain individuals who voluntarily come forward with information, as opposed to those who are sought out. 10 CFR 21.2. Nonetheless, for the reasons set forth above, we do not believe drawing such a distinction outside of Part 21 is warranted.

c. Should the NRC grant confidentiality in the absence of a request for confidentiality?

The Committee does not believe that the NRC should normally grant confidentiality in the absence of a request. However, if it is apparent to an investigator that there is unusual apprehension on the part of the interviewee or a withholding of information, he should explore this and use sound judgment as to raising the subject of confidentiality on his own initiative.

d. Should the NRC advise witnesses of the availability of confidentiality, and, if so, what form should this notification take?

The Committee believes that the NRC should normally advise individual witnesses of the availability of confidentiality only when, in the judgment of the investigator, the grant of confidentiality may be appropriate and the advice of its availability may persuade an otherwise reluctant interviewee to provide information. The form of notice should be left to

the discretion of the investigator. If confidentiality is granted, however, it should be in writing as discussed above.

Respectfully submitted,

Earl J. Silbert, Esq.
Chairperson

James A. Fitzgerald, Esq.

Oscar M. Ruebhausen, Esq.

Joseph B. Scott, Esq.

Ralph S. Spritzer, Esq.

September 13, 1983

Ex. A

UNITED STATES NUCLEAR REGULATORY COMMISSION

Charter for Advisory Committee for
Review of Investigation Policy on Rights of
Licensee Employees Under Investigation

1. Official Designation

Advisory Committee for Review of Office of Investigation Policy on Rights of Licensee Employees Under Investigation

2. Objectives and Scope of Activities and Duties

To provide the Commission comments on the subject of rights of licensee employees under investigation. Specifically the Committee is to provide comments on what these rights ought to be, whether such employees should be informed by NRC of their rights, and, if they are to be informed, when and how they should be informed. The Committee is also expected to identify and comment on the considerations that bear upon discretionary NRC actions, including the effectiveness of NRC investigations and fairness to the interviewee and the licensee.

3. Time Period

Three to five months.

4. Agency to Whom the Committee Reports

U. S. Nuclear Regulatory Commission

5. Agency Responsible for Providing Necessary Support

U. S. Nuclear Regulatory Commission

6. Duties

As set forth in Item 2 above.

7. Cost

a. $8,000 (allowed expenses, including travel and per diem).
b. Less than one man-year.

8. Estimated Number of Meetings

Two to three meetings.

9. Termination Date

Approximately three to five months from date of filing.

10. Date of Filing _____

John C. Hoyle
Advisory Committee
Management Officer

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

CHAIRMAN

April 11, 1983

Earl J. Silbert, Esq.
Schwalb, Donnenfeld, Bray & Silbert
Suite 400
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007

Re: NRC Advisory Committee on Rights of Employees Under Investigation

Dear Mr. Silbert:

The Commission believes that in order to aid the Advisory Committee in its deliberations it would be advisable to delineate exactly what questions the Advisory Committee should address. Those questions are as follows:

1. Should the NRC as a matter of policy apprise all interviewees prior to an interview that they have a right to have an attorney present?

   (a) Should there be different policies for those merely being questioned to obtain information and for those being personally investigated, i.e., "suspects"?

   (b) If the NRC should advise interviewees of their right to an attorney, what form should that advice take, i.e., published rule, oral advice, signed acknowledgement, etc.?

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?

3. Should the NRC allow interviewees to tape record the interview and/or should the NRC record the interview at the request of an interviewee?

   (a) If so, should the NRC advise of this right prior to the interview, and, if so, what form should that advice take?

(b) Under what circumstances should the interviewee be allowed to keep the tape or a copy of the tape?

(c) If the interviewee records the interview but the NRC does not, should the NRC insist on having a copy of the tape?

4. Should the NRC give all interviewees express grants of confidentiality?

(a) What limitations, if any, should be placed on grants of confidentiality by the NRC?

(b) Should there be different policies for different types of interviewees, e.g., those who come forward on their own, and those whom the NRC has to seek out?

(c) Should the NRC grant confidentiality in the absence of a request for confidentiality?

(d) Should the NRC advise witnesses of the availability of confidentiality, and, if so, what form should this notification take?

I hope this further guidance will assist the Committee in its task. The Commission would, of course, welcome any other comments which the Committee might have on these subjects.

Sincerely,

Nunzio J. Palladino

AE 11-1
PDR

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

August 7, 1989

MEMORANDUM FOR: James L. Blaha
Assistant for Operations
Executive Director for Operations

FROM: Ben B. Hayes, Director
Office of Investigations

SUBJECT: DRAFT FINAL RULE ON THE SEQUESTRATION OF WITNESSES INTERVIEWED UNDER SUBPOENA AND THE EXCLUSION OF ATTORNEYS (EDO Control Number 0004630)

This memorandum is provided in response to your tasking of August 2, 1989, in reply to a memorandum to your office from James A. Fitzgerald, Assistant General Counsel for Adjudications and Opinions, dated July 27, 1989, subject as above. I would first like to thank the Office of General Counsel (OGC) for their fine work on this rule, which is most important to the Office of Investigations (OI). There were no negative comments regarding the draft rule from either my headquarters staff or the OI field offices.

I also had each field office review their files for examples of past problems with sequestration of witnesses or the exclusion of attorneys. I have attached the examples received from the field. If there are any questions, please contact Bill Hutchison of my office (2-3484).

Attachments:
As stated

cc: H. Thompson, DEDS, w/o attach
J. Fitzgerald, OGC, w/attach

9005040295 (5)

August 7, 1989

MEMORANDUM FOR: Ben B. Hayes, Director
Office of Investigations

FROM: James Y. Vorse, Field Office Director
Office of Investigations, Region II

SUBJECT: DRAFT OF FINAL SEQUESTRATION RULE

In response to your Memorandum of July 28, 1989, regarding subject Sequestration Rule, OI:RII hereby submits the following examples of problems encountered in the conduct of investigations in which either the Sequestration of Witnesses or Exclusion of Counsel would have been both beneficial and proper.

It is appropriate, at the outset of this memorandum, to ensure that it is understood that the NRC Office of Investigations has no objection to any individual's basic right to advice and/or accompaniment by counsel in any situation, including an interview by OI. The objection arises when this counsel represents both the potential wrongdoer (licensee) and a potential innocent witness to the alleged wrongdoing. An inherent conflict of interest exists in that situation.

The following examples illustrate how conflict of interest situations, as described above, have impeded the progress and integrity of OI investigations.

1. Case No. 2-87-002: Material False Statement by TVA Manager of Nuclear Power regarding compliance with 10 CFR Part 50, Appendix B

Licensee: Tennessee Valley Authority (TVA)

Investigators: Daniel D. Murphy
E.L. Williamson
Larry L. Robinson

Example Number 1:

Just prior to the final OI interview of the TVA Manager of Nuclear Power, at the direction of an outside law firm that was retained by TVA to represent Senior TVA Managers and Board of Directors, TVA's Office of General Counsel sent a letter to each TVA employee that had been previously interviewed by OI without presence of counsel. At the time of their interviews, these employees were not suspected of any wrongdoing by OI, and they did not request representation by counsel. The aforementioned letter suggested that each addressee request a copy of his/her transcript of interview from OI. The letter also suggested that, "...we would appreciate your sharing it with us so that we can

be better prepared when OI issues its findings." Attached to this letter was a sample letter of request that could be used to obtain the transcript copy. Of course, the letter disclaimed any TVA pressure on these employees to either request, or "share" these transcripts with the Office of General Counsel (and subsequently, the outside law firm), but I believe it is fair to say that these employees were put in a position where it appeared to be prudent to "request and share" copies of their transcripts.

Although this is not the classic example of the inhibition of free flow of information from a witness by a licensee attorney actually sitting in on the interview, ostensibly also representing the witness' interests as well as the licensee's; but the above example indirectly applies to the sequestration situation, in that the counsel representing the potential wrongdoers are able to assess potentially adverse testimony prior to the interview of their client during the investigative process. While the discovery process is very appropriate during the pretrial (prehearing) phase of the prosecution (enforcement) process, it is not appropriate during the investigative phase because it compromises the objectivity and openness of the testimony.

Example Number 2:

Toward the end of the field investigative phase of this case, OI received information that the Manager of Nuclear Power had contracted with some outside engineers to assess the accuracy of the alleged Material False Statement (March 20, 1986, letter to NRC from TVA), and that these contractors had found that some of the information in the March 20, 1986, letter was not true, and had subsequently briefed the Manager of Nuclear Power to that effect. OI identified the contract engineers involved, who were no longer working at TVA, and directly contacted one of these engineers, an Ebasco employee, and arranged an interview date. Both the Ebasco corporate counsel and the TVA retained counsel became aware of the impending interview. This Ebasco engineer, through Ebasco counsel, cancelled the initial interview appointment. After a reasonable amount of time and communication between OI and Ebasco counsel regarding a rescheduled interview date, with no results, OI subpoenaed the Ebasco engineer to be interviewed.

Present at this interview on February 10, 1988, in addition to the witness and OI, were the Ebasco counsel, representing both Ebasco as a corporate entity and the engineer as an Ebasco employee, and the TVA retained counsel, representing both the engineer personally and TVA Senior Management. When the TVA retained counsel refused to be excluded from the interview, due to OI's perception of a conflict of interest, OI terminated the interview. Six months later on August 11, 1988, after extensive legal analysis of both the conflict of interest issue and an additional issue of privileged information under the protection of the Attorney Work Product principle, the Ebasco engineer was interviewed by OI. However, the interview was still conducted in the presence of TVA retained counsel, who was, admittedly, being paid by TVA for this representation of an Ebasco employee.

Example Number 3:

During the interview of an attorney, who in the past had personally represented a Senior TVA Manager, the attorney retained by the utility to represent the manager insisted on being present during the interview to protect the interest of her client. This was a condition of the waiver of the attorney/client privilege before conducting the interview. This situation provides the utility's retained counsel with information concerning the ongoing investigation which can be used to prepare the subject of an interview at a later date.

2. Case No. 2-83-038: Harassment and Intimidation of QC Welding Inspectors

Licensee: Duke Power Company/Catawba

Investigators: James Y. Vorse
E.L. Williamson

Initial interviewees advised investigators that company lawyers had gathered all welding inspectors and advised by them that "dark forces" (OI) were coming to interview them and would compare testimony and attempt to find conflict which could result in criminal sanctions against the inspection personnel. Interviewees were encouraged to have company counsel present during all interviews for their protection. Licensee advised OI that any interviews conducted on-site would be in the presence of a company attorney. To avoid potential compromise of the investigative process, OI interviewed all QC welding inspection personnel off-site after normal work hours at various locations convenient to the employees. This extended the investigation by several months.

3. Case No. 2-85-004: Possible Deliberate and Willful False Statement Regarding RO and SRO Training Requirements

Licensee: Florida Power Corp./Crystal River

Investigators: James Y. Vorse
Robert H. Burch

During initial investigative efforts, the company wanted to represent all parties in the interview process. OI took the position that non-senior management personnel were entitled to counsel, but counsel could not represent the company. The licensee hired individual private attorneys to represent the non-management employees. After these apparent conflict of interest issues were resolved, the investigation proceeded to its conclusion.

4. Case No. 2-86-005: Possible Willful Falsification of Health Physics Records

Licensee: Alabama Power Company/Farley

Investigators: Robert H. Burch
E.L. Williamson

During the early investigative process, the company attorneys demanded that they represent all employees to be interviewed by OI. Over a 2-year period of time this issue was resolved only when the company hired an attorney to represent the non-management personnel and the corporate attorney represented the Senior Management. This process extended the investigation much longer than necessary and actually resulted in the Commission going to Federal Court to resolve normal, routine investigative issues as they apply to the interview process. The licensee through its attorney continued to place restrictions on the interview process which were unacceptable to OI. All of these factors caused the investigation to be unnecessarily delayed.

A-11-1
PDR

RULEMAKING ISSUE
(Affirmation)

November 15, 1991 SECY-91-370

For: The Commissioners

From: William C. Parler
General Counsel

Subject: PROMULGATION OF A FINAL RULE REVOKING THE VACATED ATTORNEY EXCLUSION RULE FOR NRC INVESTIGATIONS AND INSPECTIONS AND PROMULGATION OF A PROPOSED RULE REPLACING THE VACATED PROVISIONS

Purpose: To obtain Commission approval for publication in the Federal Register of a final rule removing regulations at 10 CFR Part 19 and for publication of a proposed rule adding regulations at 10 CFR Part 19

Background: On January 4, 1990 (55 FR 243), the Commission promulgated a final rule which amended 10 CFR Part 19. The amendments provided for sequestration of witnesses compelled by subpoena to appear in connection with NRC investigations or inspections. The amendments also provided for the exclusion of counsel for a subpoenaed witness when the witness's counsel represented multiple interests and there was reasonable basis to believe that such representation would prejudice, impede or impair the integrity of the investigation, inspection or inquiry.

NOTE: TO BE MADE PUBLICLY AVAILABLE WHEN THE FINAL SRM IS MADE AVAILABLE

Contact:
Roger K. Davis, OGC
x21606

9112050074

Upon judicial review, the United States Court of Appeals for the District of Columbia Circuit upheld the sequestration portion of the final rule, vacated the portion on attorney exclusion, and remanded the matter to the Commission for further consideration consistent with the Court's opinion. The court held that the "reasonable basis" part of the standard for exclusion of counsel, unlike a "concrete evidence" standard, was insufficiently rigorous for abridgement of the right to counsel guarantee of the Administrative Procedure Act, 5 U.S.C. 555(b).

Discussion: A final rule (Enclosure 1) has been drafted which removes the previously-promulgated, attorney exclusion provisions from 10 CFR Part 19. Thus, this final rule merely effectuates the appeals court decision which vacated these provisions.

A proposed rule (Enclosure 2) has also been drafted for replacement of the vacated provisions with new provisions which follow the guidance of the appeals court. The proposed rule provides for the exclusion of counsel when the agency investigator has concrete evidence that the investigation would be obstructed and impaired, either directly or indirectly, by an attorney's representation of multiple interests, e.g., another witness or an employing entity, in the investigation. The proposed rule also provides that: 1) the interviewing official shall provide a written statement of the reasons supporting the exclusion of counsel within five days after exercise of the exclusion authority; 2) the witness whose counsel is excluded may proceed without counsel or delay the interview for a reasonable period of time to permit the retention of new counsel; and, 3) within five days after receipt of the notice of exclusion, the witness whose counsel has been excluded may appeal the exclusion decision by filing a motion to quash with the Commission.

The only significant change between the proposed rule and the attorney exclusion portion of the final rule that was vacated is

the replacement of the "reasonable basis" standard with the "concrete evidence" standard.

Recommendation: It is recommended that the Commission approve publication of the final rule in the Federal Register. It is also recommended that the Commission approve publication of the proposed rule in the Federal Register for a sixty-day comment period.

Coordination: The EDO has reviewed the draft final rule and the draft proposed rule and concurs with the recommendation that they be published.

William C. Parler
General Counsel

Attachments:
1. Final Rule
2. Proposed Rule

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Monday, December 2, 1991.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, November 22, 1991, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of December 2, 1991. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:
Commissioners
OGC
OCAA
OIG
OCA
OPA
REGIONAL OFFICES
EDO
SECY

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 19
RIN: 3150-AE09

Exclusion Of Attorneys From
Interviews Under Subpoena

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is revoking its regulations pertaining to exclusion of attorneys from interviews under subpoena. These regulations were vacated upon judicial review by the United States Court of Appeals for the District of Columbia Circuit.

EFFECTIVE DATE: [insert the date of the day that is thirty days after the date of publication of this action in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Roger K. Davis, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555, telephone (301) 492-1606.

SUPPLEMENTARY INFORMATION: Upon judicial review, the United States Court of Appeals for the District of Columbia Circuit vacated the attorney exclusion portion of the rule, titled "Sequestration of Witnesses Under Subpoena/Exclusion of Attorneys," which was published by the Commission on January 4, 1990 (55 FR 243). Professional Reactor Operator Society v. United States Nuclear Regulatory Commission, 939 F.2d 1047 (D.C.

Cir. 1991). Consequently, the NRC is revoking and removing the definition of "exclusion" appearing in 10 CFR 19.3, and the standard and procedures for attorney exclusion appearing in 10 CFR 19.18(b)-(e).

Since this action implements the ruling of the appeals court, the NRC has determined that there is "good cause" for publication of this final rule without a general notice of proposed revocation for comment. See 5 U.S.C. 553(b). However, the NRC is concurrently publishing for comment a proposed rule that would replace the vacated attorney exclusion provisions with a rule that conforms to the guidance of the court.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0044.

Regulatory Analysis

This regulatory action is taken in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in Professional Reactor Operator Society v.

United States Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991). The appeals court vacated the attorney exclusion portion of 10 CFR 19. Consequently, the NRC is revoking the attorney exclusion provisions reported in 10 CFR Part 19.

Backfit Analysis

The NRC has determined that a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 19.

PART 19 - NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

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

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201,

2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 19.3 [Amended]

2. In § 19.3, the definition of "Exclusion" is removed.

§ 19.18 [Amended]

3. In § 19.18, paragraphs (b)-(e) are removed and reserved.

Dated at Rockville, Maryland this ___ day of _____, 1991.

For the Nuclear Regulatory Commission,

_____
SAMUEL J. CHILK
Secretary of the Commission

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 19
RIN: 3150-AE09

Exclusion Of Attorneys From
Interviews Under Subpoena

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC, is proposing to amend its regulations to provide for the exclusion of counsel from interviews of a subpoenaed witness when that counsel represents multiple interests and there is concrete evidence that such representation would obstruct and impede the investigation. The proposed amendments are designed to ensure the integrity and efficacy of the investigative and inspection process. The proposed amendments are not expected to have any economic impact on the NRC or its licensees. Concurrently, the NRC is publishing a final rule revoking its previously-published attorney exclusion regulations. Those regulations were vacated upon judicial review.

DATES: Comment period expires [insert a date that is sixty days from date of publication in the Federal Register]. Comments received after this date will be considered if it is practical to do so, but the Commission can only assure consideration of those comments received on or before that date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission Washington, DC 20555, Attention: Docketing and Servicing Branch.

Deliver Comments to: 2120 L Street, NW., Washington, DC, between 7:30 am and 4:15 pm, Monday through Friday.

Comments received may be examined at the NRC Public Document Room, at 2120 L Street NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roger K. Davis, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1606.

SUPPLEMENTARY INFORMATION:

On January 4, 1990 (55 FR 243), the Nuclear Regulatory Commission (NRC) published in the Federal Register amendments to its regulations found at 10 CFR Part 19. The NRC had published the proposed rule on November 14, 1988 (53 FR 45768). These amendments provided for the sequestration of witnesses compelled by subpoena to appear in connection with NRC investigations or inspections. These amendments also provided for the exclusion of counsel for a subpoenaed witness when that counsel represented multiple interests and there was reasonable basis to believe that such representation would prejudice, impede, or impair the integrity of the inquiry. In addition, the amendments specified responsibilities of the NRC and rights of individual witnesses, licensees and attorneys when exclusion authority was to be exercised.

Both the sequestration provision and the attorney exclusion portion of the rule were challenged in a petition to the United States Court of Appeals for the District of Columbia Circuit for judicial review. On July 23, 1991, the court of appeals upheld the sequestration portion of the Commission's rule, vacated the portion on attorney exclusion, and remanded the matter to the Commission for further consideration consistent with the court's opinion. Professional Reactor Operator Society v. United States Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991). The provisions of the rule relating to attorney exclusion were the definition of "exclusion" appearing in 10 CFR 19.3 and the standard and procedures for attorney exclusion appearing in 10 CFR 19.18(b)-(e).

The court of appeals found that the "reasonable basis" part of the standard for exclusion of counsel infringed to an impermissible degree on the right to counsel guarantee of the Administrative Procedure Act (APA), 5 U.S.C. 555(b). The court reasoned that it was not free, without express Congressional direction, to expand or contract the right to counsel at investigatory interviews depending on the mission of a particular agency. In a prior interpretation of the APA right to counsel guarantee, the court had ruled that the Securities and Exchange Commission could not exclude an attorney from representing a subpoenaed witness during an interview unless the agency came forward with "concrete evidence" that the counsel's presence would obstruct and impede its investigation. SEC v. Csapo, 533

F.2d 7, 11 (D.C. Cir. 1976). Since the NRC's "rational basis" standard was less rigorous than the "concrete evidence" requirement stated in Csapo, the court vacated the attorney exclusion portion of the NRC rule.

These proposed amendments are, in essence, a logical outgrowth of the court's guidance in Professional Reactor Operator Society v. NRC, supra. In response to the appeals court decision, the Commission has determined that its statutory responsibilities would be served by adoption of an attorney exclusion rule containing a "concrete evidence" standard. The Commission notes that a number of the commenters on the NRC's earlier proposed rule (53 FR 45768) expressed the view that the proper standard for exclusion of counsel by the NRC was the Csapo "concrete evidence" standard.

It is clear that one important means by which the Commission implements its responsibility for ensuring public health and safety is by investigation of unsafe practices and potential violations of the Atomic Energy Act and NRC regulations. See 10 CFR Part 19; 10 CFR 1.36. NRC investigators must often interview licensees, their employees, and other individuals having possible knowledge of matters under investigation. Effective identification and correction of unsafe practices or regulatory violations through an investigative or inspection process may depend upon the willingness of individuals having possible knowledge of the practices or violations to speak openly and candidly to Commission officials. In many cases, investigating

officials must also conduct extensive and difficult inquiries to determine whether violations were willful and/or whether licensee's management engaged in wrongdoing.

As specified in 10 CFR 19.2, the rule would apply to all interviews under subpoena within the jurisdiction of the Nuclear Regulatory Commission other than those which focus on NRC employees or its contractors. The rule does not apply, however, to subpoenas issued pursuant to 10 CFR 2.720. Although in the discussion that follows we use the terms "licensee" or "licensee's counsel," the rule and its rationale apply as well to "non-licensees" whose activities fall within the jurisdiction of the Commission. Similarly, while much of the discussion most directly concerns interviews conducted under subpoena by the NRC's Office of Investigations, the proposed rule would also apply to NRC inspections and investigations conducted under subpoena by other NRC officials.

The Commission's principal concerns relate to cases in which licensee's counsel or counsel retained by the licensee represent both the licensee or licensee's officials under investigation and other employees who are to be witnesses. In these contexts, the Commission believes that there is potential for inhibiting the candor of witnesses who may be hesitant or unwilling to divulge information against the interests of the licensee or its officials in the presence of the licensee's counsel or counsel retained by the licensee. The concern about potential inhibition may be heightened where the counsel intends to tell the employer

everything that was said during an interview. It also may be heightened where the matter under investigation concerns whether licensee's employees have been, or are being, harassed or intimidated for raising safety issues. Multiple representation can also raise the concern that a subject of the investigation may learn facts, theories or strategies that are revealed in an interview and then act in ways that would obstruct further steps in the investigation. Consequently, the Commission has had a long-standing concern[1] that, in some instances of multiple representation, the Commission's ability to identify and correct unsafe practices and regulatory violations may be seriously impaired.

The Commission recognizes that neither mere multiple representation nor speculation about a potential for obstruction of an investigation is a sufficient basis to exclude counsel. The Commission does not presume that a witness's retention of counsel who also represents the licensee or other employees necessarily will inhibit that witness from providing information to an NRC inspector or investigator during an interview. It also does not view vigorous advocacy by competent counsel as improper.

Rather, the proposed rule provides direction for handling cases in which there is concrete evidence that the presence of counsel for multiple interests at a witness's interview would

---

[1]See, e.g., Report of the Advisory Committee for Review of the Investigation Policy on Rights of Licensee Employees Under Investigation, Sept. 13, 1983. This Report is available for inspection at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

obstruct and impede the investigation. The Commission cannot predict in detail what manner of circumstances will arise in particular investigations that will lead to consideration of application of the exclusion rule. However, invocation of the rule would obviously be supported by concrete evidence that the witness would be more forthcoming or candid during the interview if the witness were not represented by counsel who also represents the licensee or other employees. This might involve evidence that the witness would answer in greater detail if there were not an understanding that the counsel would, or might, report the substance of the interview to the licensee or other witness. For instance, evidence that the employee had a concern that his employment would be jeopardized by transmittal of information from the interview to the licensee would surely be relevant. It would also be relevant if there were evidence that the multiple representation would lead to disclosure of the substance of an interview to a future interviewee or subject in the investigation and that this disclosure would have an adverse impact on the investigation.

While there have been particular cases raising questions about means of addressing the perceived impairment of investigations as a result of multiple representation,[2] this

---

[2] See, e.g., Memorandum dated August 7, 1989, from Ben B. Hayes, Director, Office of Investigations, to James L. Blaha, Assistant for Operations, Office of the Executive Director for Operations. This memorandum is available for inspection at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

rulemaking does not require, or rest upon, a determination of whether past cases have involved concrete evidence of obstruction. The principal bases of this rule are the Commission's policy judgments that: (1) Cases may arise where there will be concrete evidence that the presence of counsel representing multiple interests during an NRC interview would seriously obstruct the NRC investigation; (2) The remedy of exclusion of the counsel from that interview should be available; and (3) The rule should facilitate expeditious and satisfactory consideration of many questions concerning multiple representation during the course of NRC investigations. The Commission notes that the propriety and utility of such a rule, however rarely invoked and applied, was recognized in both Csapo and a previous circuit court decision involving the SEC's sequestration rule, although the facts of those cases did not warrant exclusion. SEC v. Csapo, 533 F.2d 7; SEC v. Higashi, 359 F.2d 550, 552 (9th Cir. 1966).

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork

Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0044.

Regulatory Analysis

The APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of choice. 5 U.S.C. 555(b). Although the right to counsel guarantee of section 555(b) is not to be lightly disturbed, it is not absolute and may be circumscribed within permissible limits when justice requires as when there is concrete evidence that the presence of counsel during an investigative interview would impede and obstruct the agency's investigation.

Questions concerning the scope of the right to counsel have arisen in the context of NRC investigative interviews of licensee employees when the employee is represented by counsel who also represents the licensee or other witnesses or parties in the investigation. Although this arrangement is not improper on its face, the Commission believes that such multiple representation has the potential in some cases of inhibiting the candor of the witnesses and seriously impairing the integrity or efficacy of the NRC investigation. The proposed rule, which delineates NRC responsibilities concerning the availability of the remedy of exclusion of counsel, as well as rights of witness and counsel concerning the presence of counsel during the conduct of interviews, is intended to further expeditious and satisfactory

resolution of NRC's inquiry into public health and safety matters. Guidance in this area should reduce delay and uncertainty in the completion of an investigation when certain questions of multiple representation arise. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility 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 impact on a substantial number of small entities. The proposed rule, which sets forth rights and limitations on the choice of counsel of licensee employees and other individuals who are compelled to appear before NRC representatives under subpoena, would have no significant economic impact on a substantial number of small entities.

Backfit Analysis

The NRC has determined that a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 19.

PART 19 -- NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

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

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 19.3, the definition of "Exclusion" is added to read as follows:

§ 19.3 Definitions.

* * * * *

"Exclusion" means the removal of counsel from an interview whenever the NRC official conducting the interview has concrete evidence that counsel's representation of multiple interests will

obstruct and impede the particular investigation, inspection or inquiry.

* * * * *

3. In § 19.18, paragraphs (b)-(e) are added to read as follows:

§ 19.18 Sequestration of witnesses and exclusions of counsel in interviews conducted under subpoena.

* * * * *

(b) Any witness compelled by subpoena to appear at an interview during an agency inquiry may be accompanied, represented, and advised by counsel of his or her choice. However, when the agency official conducting the inquiry determines, after consultation with the office of the General Counsel, that the agency has concrete evidence that the investigation or inspection will be obstructed and impeded, directly or indirectly, by an attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview.

(c) The interviewing official is to provide a witness whose counsel has been excluded under paragraph (b) of this section and the witness's counsel a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after exclusion, must explain the basis for the counsel's exclusion.

(d) Within five days after receipt of the written notification required in paragraph (c) of this section, a witness

whose counsel has been excluded may appeal the exclusion decision by filing a motion to quash the subpoena with the Commission. The filing of the motion to quash will stay the effectiveness of the subpoena pending the Commission's decision on the motion.

(e) If a witness's counsel is excluded under paragraph (b) of this section, the interview may, at the witness's request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The interview may also be rescheduled to a subsequent date established by the NRC.

Dated at Rockville, Maryland this ___ day of _____, 1991.

For the Nuclear Regulatory Commission,

_____
SAMUEL J. CHILK
Secretary of the Commission

AE11-1
PDR

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

OFFICE OF THE
SECRETARY

IN RESPONSE, PLEASE
REFER TO: M911126B

December 4, 1991

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., TUESDAY, NOVEMBER 26, 1991, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-91-370 - Promulgation of a Final Rule Revoking the Vacated Attorney Exclusion Rule for NRC Investigations and Inspections and Promulgation of a Proposed Rule Replacing the Vacated Provisions

The Commission, by a 4-0 vote, approved a final rule which revokes its regulations pertaining to exclusion of attorneys from interviews under subpoena. This action implements action by the U.S. Court of Appeals which earlier vacated the Commission regulation.

The Commission (with all Commissioners agreeing) has also approved the proposed rule in SECY-91-370 for public comment.

The Federal Register Notices should be forwarded for signature and publication in the Federal Register following review by the Regulatory Publications Branch, ADM.

(OGC) (SECY Suspense: 12/13/91)

cc: The Chairman
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
OIG
EDO
ACRS
PDR - Advance
DCS - P1-24

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

OFFICE OF THE
SECRETARY

IN RESPONSE, PLEASE
REFER TO: M911126B

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., TUESDAY, NOVEMBER 26, 1991, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-91-370 - Promulgation of a Final Rule Revoking the Vacated Attorney Exclusion Rule for NRC Investigations and Inspections and Promulgation of a Proposed Rule Replacing the Vacated Provisions

The Commission, by a 4-0 vote, approved a final rule which revokes its regulations pertaining to exclusion of attorneys from interviews under subpoena. This action implements action by the U.S. Court of Appeals which earlier vacated the Commission regulation.

The Commission (with all Commissioners agreeing) has also approved the proposed rule in SECY-91-370 for public comment.

The Federal Register Notices should be forwarded for signature and publication in the Federal Register following review by the Regulatory Publications Branch, ADM.

(OGC) (SECY Suspense: 12/13/91)

cc: The Chairman
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
OIG
EDO
ACRS
PDR - Advance
DCS - P1-24

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

OFFICE OF THE
SECRETARY

December 4, 1991

IN RESPONSE, PLEASE
REFER TO: M911126B

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., TUESDAY, NOVEMBER 26, 1991, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-91-370 - Promulgation of a Final Rule Revoking the Vacated Attorney Exclusion Rule for NRC Investigations and Inspections and Promulgation of a Proposed Rule Replacing the Vacated Provisions

The Commission, by a 4-0 vote, approved a final rule which revokes its regulations pertaining to exclusion of attorneys from interviews under subpoena. This action implements action by the U.S. Court of Appeals which earlier vacated the Commission regulation.

The Commission (with all Commissioners agreeing) has also approved the proposed rule in SECY-91-370 for public comment.

The Federal Register Notices should be forwarded for signature and publication in the Federal Register following review by the Regulatory Publications Branch, ADM.

(OGC) (SECY Suspense: 12/13/91)

cc: The Chairman
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
OIG
EDO
ACRS
PDR - Advance
DCS - P1-24

9105010

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 19
RIN: 3150-AE11

Exclusion Of Attorneys From
Interviews Under Subpoena

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to provide for the exclusion of counsel from interviews of a subpoenaed witness when that counsel represents multiple interests and there is concrete evidence that such representation would obstruct and impede the investigation. The proposed amendments are designed to ensure the integrity and efficacy of the investigative and inspection process. The proposed amendments are not expected to have any economic impact on the NRC or its licensees. Concurrently, the NRC is publishing a final rule revoking its previously-published attorney exclusion regulations. Those regulations were vacated upon judicial review.

DATES: Comment period expires [insert a date that is sixty days from date of publication in the Federal Register]. Comments received after this date will be considered if it is practical to do so, but the Commission can only assure consideration of those comments received on or before that date.

2/18/92

Publ. 12/19/91

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Servicing Branch.

Deliver Comments to: 2120 L Street, NW., Washington, DC, between 7:30 am and 4:15 pm, Monday through Friday.

Comments received may be examined at the NRC Public Document Room, at 2120 L Street NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roger K. Davis, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1606.

SUPPLEMENTARY INFORMATION:

On January 4, 1990 (55 FR 243), the Nuclear Regulatory Commission (NRC) published in the Federal Register amendments to its regulations found at 10 CFR Part 19. The NRC had published the proposed rule on November 14, 1988 (53 FR 45768). These amendments provided for the sequestration of witnesses compelled by subpoena to appear in connection with NRC investigations or inspections. These amendments also provided for the exclusion of counsel for a subpoenaed witness when that counsel represented multiple interests and there was reasonable basis to believe that such representation would prejudice, [illegible]pede, or impair the integrity of the inquiry. In addition, the amendments specified responsibilities of the NRC and rights of individual witnesses, licensees and attorneys when exclusion authority was to be exercised.

Both the sequestration provision and the attorney exclusion portion of the rule were challenged in a petition to the United States Court of Appeals for the District of Columbia Circuit for judicial review. On July 23, 1991, the court of appeals upheld the sequestration portion of the Commission's rule, vacated the portion on attorney exclusion, and remanded the matter to the Commission for further consideration consistent with the court's opinion. Professional Reactor Operator Society v. United States Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991). The provisions of the rule relating to attorney exclusion were the definition of "exclusion" appearing in 10 CFR 19.3 and the standard and procedures for attorney exclusion appearing in 10 CFR 19.18(b)-(e).

The court of appeals found that the "reasonable basis" part of the standard for exclusion of counsel infringed to an impermissible degree on the right to counsel guarantee of the Administrative Procedure Act (APA), 5 U.S.C. 555(b). The court reasoned that it was not free, without express Congressional direction, to expand or contract the right to counsel at investigatory interviews depending on the mission of a particular agency. In a prior interpretation of the APA right to counsel guarantee, the court had ruled that the Securities and Exchange Commission could not exclude an attorney from representing a subpoenaed witness during an interview unless the agency came forward with "concrete evidence" that the counsel's presence would obstruct and impede its investigation. SEC v. Csapo, 533

F.2d 7, 11 (D.C. Cir. 1976). Since the NRC's "rational basis" standard was less rigorous than the "concrete evidence" requirement stated in Csapo, the court vacated the attorney exclusion portion of the NRC rule.

These proposed amendments are, in essence, a logical outgrowth of the court's guidance in Professional Reactor Operator Society v. NRC, supra. In response to the appeals court decision, the Commission has determined that its statutory responsibilities would be served by adoption of an attorney exclusion rule containing a "concrete evidence" standard. The Commission notes that a number of the commenters on the NRC's earlier proposed rule (53 FR 45768) expressed the view that the proper standard for exclusion of counsel by the NRC was the Csapo "concrete evidence' standard.

It is clear that one important means by which the Commission implements its responsibility for ensuring public health and safety is by investigation of unsafe practices and potential violations of the Atomic Energy Act and NRC regulations. See 10 CFR Part 19; 10 CFR 1.36. NRC investigators must often interview licensees, their employees, and other individuals having possible knowledge of matters under investigation. Effective identification and correction of unsafe practices or regulatory violations through an investigative or inspection process may depend upon the willingness of individuals having possible knowledge of the practices or violations to speak openly and candidly to Commission officials. In many cases, investigating

officials must also conduct extensive and difficult inquiries to determine whether violations were willful and/or whether licensee's management engaged in wrongdoing.

As specified in 10 CFR 19.2, the rule would apply to all interviews under subpoena within the jurisdiction of the Nuclear Regulatory Commission other than those which focus on NRC employees or its contractors. The rule does not apply, however, to subpoenas issued pursuant to 10 CFR 2.720. Although in the discussion that follows we use the terms "licensee" or "licensee's counsel," the rule and its rationale apply as well to "non-licensees" whose activities fall within the jurisdiction of the Commission. Similarly, while much of the discussion most directly concerns interviews conducted under subpoena by the NRC's Office of Investigations, the proposed rule would also apply to NRC inspections and investigations conducted under subpoena by other NRC officials.

The Commission's principal concerns relate to cases in which licensee's counsel or counsel retained by the licensee represent both the licensee or licensee's officials under investigation and other employees who are to be witnesses. In these contexts, the Commission believes that there is potential for inhibiting the candor of witnesses who may be hesitant or unwilling to divulge information against the interests of the licensee or its officials in the presence of the licensee's counsel or counsel retained by the licensee. The concern about potential inhibition may be heightened where the counsel intends to tell the employer

everything that was said during an interview. It also may be heightened where the matter under investigation concerns whether licensee's employees have been, or are being, harassed or intimidated for raising safety issues. Multiple representation can also raise the concern that a subject of the investigation may learn facts, theories or strategies that are revealed in an interview and then act in ways that would obstruct further steps in the investigation. Consequently, the Commission has had a long-standing concern[1] that, in some instances of multiple representation, the Commission's ability to identify and correct unsafe practices and regulatory violations may be seriously impaired.

The Commission recognizes that neither mere multiple representation nor speculation about a potential for obstruction of an investigation is a sufficient basis to exclude counsel. The Commission does not presume that a witness's retention of counsel who also represents the licensee or other employees necessarily will inhibit that witness from providing information to an NRC inspector or investigator during an interview. It also does not view vigorous advocacy by competent counsel as improper.

Rather, the proposed rule provides direction for handling cases in which there is concrete evidence that the presence of counsel for multiple interests at a witness's interview would

---

[1] See, e.g., Report of the Advisory Committee for Review of the Investigation Policy on Rights of Licensee Employees Under Investigation, Sept. 13, 1983. This Report is available for inspection at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

obstruct and impede the investigation. The Commission cannot predict in detail what manner of circumstances will arise in particular investigations that will lead to consideration of application of the exclusion rule. However, invocation of the rule would obviously be supported by concrete evidence that the witness would be more forthcoming or candid during the interview if the witness were not represented by counsel who also represents the licensee or other employees. This might involve evidence that the witness would answer in greater detail if there were not an understanding that the counsel would, or might, report the substance of the interview to the licensee or other witness. For instance, evidence that the employee had a concern that his employment would be jeopardized by transmittal of information from the interview to the licensee would surely be relevant. It would also be relevant if there were evidence that the multiple representation would lead to disclosure of the substance of an interview to a future interviewee or subject in the investigation and that this disclosure would have an adverse impact on the investigation.

While there have been particular cases raising questions about means of addressing the perceived impairment of investigations as a result of multiple representation,[2] this

---

[2] See, e.g., Memorandum dated August 7, 1989, from Ben B. Hayes, Director, Office of Investigations, to James L. Blaha, Assistant for Operations, Office of the Executive Director for Operations. This memorandum is available for inspection at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

rulemaking does not require, or rest upon, a determination of whether past cases have involved concrete evidence of obstruction. The principal bases of this rule are the Commission's policy judgments that: (1) Cases may arise where there will be concrete evidence that the presence of counsel representing multiple interests during an NRC interview would seriously obstruct the NRC investigation; (2) The remedy of exclusion of the counsel from that interview should be available; and (3) The rule should facilitate expeditious and satisfactory consideration of many questions concerning multiple representation during the course of NRC investigations. The Commission notes that the propriety and utility of such a rule, however rarely invoked and applied, was recognized in both Csapo and a previous circuit court decision involving the SEC's sequestration rule, although the facts of those cases did not warrant exclusion. SEC v. Csapo, 533 F.2d 7; SEC v. Higashi, 359 F.2d 550, 552 (9th Cir. 1966).

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork

Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0044.

Regulatory Analysis

The APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of choice. 5 U.S.C. 555(b). Although the right to counsel guarantee of section 555(b) is not to be lightly disturbed, it is not absolute and may be circumscribed within permissible limits when justice requires as when there is concrete evidence that the presence of counsel during an investigative interview would impede and obstruct the agency's investigation.

Questions concerning the scope of the right to counsel have arisen in the context of NRC investigative interviews of licensee employees when the employee is represented by counsel who also represents the licensee or other witnesses or parties in the investigation. Although this arrangement is not improper on its face, the Commission believes that such multiple representation has the potential in some cases of inhibiting the candor of the witnesses and seriously impairing the integrity or efficacy of the NRC investigation. The proposed rule, which delineates NRC responsibilities concerning the availability of the remedy of exclusion of counsel, as well as rights of witness and counsel concerning the presence of counsel during the conduct of interviews, is intended to further expeditious and satisfactory

resolution of NRC's inquiry into public health and safety matters. Guidance in this area should reduce delay and uncertainty in the completion of an investigation when certain questions of multiple representation arise. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility 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 impact on a substantial number of small entities. The proposed rule, which sets forth rights and limitations on the choice of counsel of licensee employees and other individuals who are compelled to appear before NRC representatives under subpoena, would have no significant economic impact on a substantial number of small entities.

Backfit Analysis

The NRC has determined that a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 19.

PART 19 -- NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

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

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 19.3, the definition of "Exclusion" is added to read as follows:

§ 19.3 Definitions.

* * * * *

"Exclusion" means the removal of counsel from an interview whenever the NRC official conducting the interview has concrete evidence that counsel's representation of multiple interests will

obstruct and impede the particular investigation, inspection or inquiry.

* * * * *

3. In § 19.18, paragraphs (b)-(e) are added to read as follows:

§ 19.18 Sequestration of witnesses and exclusions of counsel in interviews conducted under subpoena.

* * * * *

(b) Any witness compelled by subpoena to appear at an interview during an agency inquiry may be accompanied, represented, and advised by counsel of his or her choice. However, when the agency official conducting the inquiry determines, after consultation with the office of the General Counsel, that the agency has concrete evidence that the investigation or inspection will be obstructed and impeded, directly or indirectly, by an attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview.

(c) The interviewing official is to provide a witness whose counsel has been excluded under paragraph (b) of this section and the witness's counsel a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after exclusion, must explain the basis for the counsel's exclusion.

(d) Within five days after receipt of the written notification required in paragraph (c) of this section, a witness

whose counsel has been excluded may appeal the exclusion decision by filing a motion to quash the subpoena with the Commission. The filing of the motion to quash will stay the effectiveness of the subpoena pending the Commission's decision on the motion.

(c) If a witness's counsel is excluded under paragraph (b) of this section, the interview may, at the witness's request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The interview may also be rescheduled to a subsequent date established by the NRC.

Dated at Rockville, Maryland this 13th day of December, 1991.

For the Nuclear Regulatory Commission,

SAMUEL J. CHILK
Secretary of the Commission