



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

JAN 13 1986

MEMORANDUM FOR: Addressees on attached list.

FROM: William J. Olmstead  
Assistant General Counsel for  
Rulemaking and Fuel Cycle  
Office of the General Counsel

SUBJECT: RELATIONSHIP BETWEEN INVESTIGATIONS/  
INSPECTIONS AND ADJUDICATIONS -  
CODIFICATION OF PROCEDURES FOR RESOLVING  
CONFLICTS CONCERNING THE DISCLOSURE OR  
NONDISCLOSURE OF INFORMATION

I am circulating for your review and comment a revised draft Commission paper. While your office has previously reviewed and concurred in this paper and the text of the draft final rule, we have been asked to provide the Commission a choice of either (1) publishing a final rule codifying special procedures for resolving conflicts concerning the disclosure or nondisclosure of certain information in adjudicatory proceedings, or (2) withdrawing the proposed rule and terminating the pending rulemaking proceeding. Upon further consideration, both of the types of issues presented in this rulemaking proceeding and of the critical nature of the public comments, this alternative approach seems more appropriate. At the same time, the draft Commission paper fully comports with the Commission's instructions to develop a final rule.

Except for one change, the text of the draft final rule (Enclosure 1 to the Commission paper) is the same as the text previously circulated for review. Revised § 2.795k now reads:

§ 2.795k Prohibition against use of information subject to protective order.

Information subject to a protective order to withhold disclosure may not be used by the presiding officer in making any decision on the merits on any issue in controversy in the pending adjudication unless all parties to the pending adjudication have been accorded access to the information either with or without conditions. (New material underlined.)

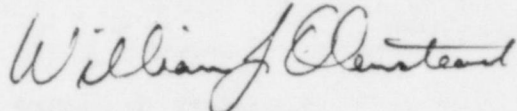
A conforming change has been made in the comparative text (Enclosure 3 to the Commission paper.) The preamble of the draft final rule has been substantially revised.

A draft Federal Register notice of withdrawal of proposed rule is also attached (Enclosure 4 to the Commission paper.) The public comments

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(Enclosure 2 to the Commission paper) remain unchanged and accordingly are not being recirculated.

In order to keep final office review and concurrence on schedule, we would appreciate your response on or before c.o.b. January 30, 1987. Any questions or comments may be referred directly to Jane R. Mapes of my staff at 492-8695.



William J. Olmstead  
Assistant General Counsel for  
Rulemaking and Fuel Cycle  
Office of the General Counsel

Enclosures:

Draft Commission paper with  
Enclosures 1, 3 and 4.

(Enclosure 2 to the Commission paper) remain unchanged and accordingly are not being recirculated.

In order to keep final office review and concurrence on schedule, we would appreciate your response on or before c.o.b. January 30, 1987. Any questions or comments may be referred directly to Jane R. Mapes of my staff at 492-8695.

William J. Olmstead  
Assistant General Counsel for  
Rulemaking and Fuel Cycle  
Office of the General Counsel

Enclosures:

Draft Commission paper with  
Enclosures 1, 3 and 4.

bcc: Ivan W. Smith, ASLBP  
Lawrence J. Chandler, OGC

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John G. Davis, Dir., NMSS  
Eric S. Beckjord, Dir., RES  
Ben B. Hayes, Dir., OI  
James M. Taylor, Dir., IE  
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John B. Martin, RA, Reg. V  
Regional Counsel, Reg. V



1/13/87

For: The Commissioners

From: William C. Parler  
General Counsel

Subject: RELATIONSHIP BETWEEN INVESTIGATIONS/  
INSPECTIONS AND ADJUDICATIONS - CODIFICATION  
OF PROCEDURES FOR RESOLVING CONFLICTS  
CONCERNING THE DISCLOSURE OR NONDISCLOSURE  
OF INFORMATION

Related Documents: SECY-85-20, January 17, 1985, referencing  
SECY-84-276/276A

Purpose: Obtain a Commission decision on the following  
alternatives:

- (1) Approval of a notice of final rulemaking, or
- (2) Approval of a notice withdrawing the proposed rule.

Summary: After reviewing the directives contained in the Commission's Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, both in light of the public comments received in response to the notice of proposed rulemaking relating to this matter, and in light of recent changes in the implementation of the Commission's board notification policy and the marked reduction in the number of pending and anticipated adjudicatory proceedings, we have prepared a Commission paper which offers the Commission the choice of (1) promulgating a final rule, or (2) withdrawing the proposed rule. The final rule, prepared to implement the first alternative (Enclosure 1.) would provide special procedures which NRC offices and staff may use to request that certain investigatory information be protected from disclosure in pending adjudicatory proceedings. Except for some minor editorial revisions, the final rule is substantially the same as the proposed rule (Enclosure 3. contains a comparative text.) The notice withdrawing the proposed rule, prepared to implement the second alterna-

Contact: Jane R. Mapes, OGC  
492-8695

tive (Enclosure 4.) concludes that codification of the proposed procedures in the Commission's rules of practice is not warranted because the procedures will seldom be needed and because the Commission believes that it will be able, using its existing procedures in accordance with the guidance in the policy statement, to adequately protect information from disclosure in those very rare instances in which such protection might be needed.

Background:

On September 12, 1984, the Commission directed the Executive Director for Operations to prepare a proposed rule which would implement those provisions of the Commission's Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings (49 FR 36032, September 13, 1984) which call for the establishment of special procedures for resolving conflicts respecting the obligation of NRC offices and staff under the Commission's board notification policy and procedures to disclose information deemed relevant and material to a pending adjudication and the need to withhold that information from disclosure because it would reveal the identity of a confidential informant or prejudice an ongoing NRC investigation or inspection. The proposed rule was published for comment on May 22, 1985 (50 FR 21072.) The comment period expired on August 23, 1985 (50 FR 30446, July 26, 1985). The Commission received nine letters of comment expressing the views of interested utilities, professional organizations, private counsel, intervenors and individual members of the public. A list of the commenters and the text of the comments are provided in Enclosure 2.

Discussion:

The commenters objected to the proposed procedures as published for comment on the grounds that they were illegal, unnecessary, contrary to due process and unfair. Although most of the commenters recognized the Commission's need to withhold or otherwise protect information in order to protect a confidential source or to avoid prejudicing an ongoing investigation or inspection and the consequent necessity for in camera presentations, all of the commenters were opposed to using so-called ex parte techniques to achieve this objective. A summary of the public comments and the staff's response are set out in the preamble of the final rule (Alternative 1., see Enclosure 1., pp. 4-27.)

Since the receipt of the public comments, NRC practice regarding board notification policy and procedures has changed considerably. (See Commission Memorandum and Order of January 30, 1986 in Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3) Docket No. 50-382-OL, CLI-86-1, 23 NRC 1; NRR Office Letter No. 19, Rev. 3, May 29, 1986; June 3, 1986 directive of the Executive Director for Operations. See also Enclosure 1., pp. 16-19.) The obligation of NRC offices and staff to notify boards now arises only when NRC offices or staff have information which is relevant and material to the issues in controversy in a pending adjudicatory proceeding. As a result, the occasions on which these special procedures would be used are now quite limited. Moreover, under the most recent practice, with which the adjudicatory boards generally concur, the staff does not ordinarily notify the boards of issues pending for investigation until after the report of the investigation has been prepared. This practice further limits the occasions on which the new procedures would be used.

#### Alternative 1.

Subject to certain minor editorial revisions, the final rule (Enclosure 1.) is substantially similar to the proposed rule as published for comment. A comparative text is provided in Enclosure 3. The principal change is replacement of an amendment to § 2.780, Ex parte communications, by an amendment to § 2.781, Separation of functions, as set out in SECY-86-\_\_\_\_\_. As explained in the preamble of the final rule (see Enclosure 1., p. 21, footnote 4) the new procedures present a separation of functions issue because they concern communications between NRC offices and staff and NRC decisionmakers, not communications between persons outside the agency and NRC decisionmakers.

The justification for the final rule would be that the benefits to be gained from consistent decisions which will protect the radiological health and safety of the public while at the same time providing assurance that investigations are not prejudiced and confidential sources of information are adequately protected outweigh any unfairness which may result from in camera presentations by NRC offices and staff without other parties present.



Alternative 2.

The notice withdrawing the proposed rule (Enclosure 4.) recognizes that there will be very few occasions when the proposed procedures are likely to be used and is premised on the view that codification of the procedures in the Commission's rules of practice is not warranted. Current NRC practice and procedure respecting the board notification policy and the continuing decline in the number of ongoing adjudicatory proceedings are among the factors on which this determination is based. In addition, the Commission has also concluded that it will be able, on the basis of the guidance in its Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings and using existing procedures, to protect information from disclosure in those very rare instances in which such protection might be needed. Given the adverse nature of many of the comments received in response to the notice of proposed rulemaking, this approach offers a satisfactory means of resolving the problem with a minimum of litigative risk.

Recommendation:

If the Commission accepts the public comments, the Commission should choose Alternative 2. If the Commission decides to promulgate a final rule, the Commission should choose Alternative 1.

Note:

A. If the Commission selects Alternative 1. and approves publication of amendments to 10 CFR Part 2 (Enclosure 1.) as a final rule:

1. Certify that this final rule will not have a significant economic impact on a substantial number of small entities in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

2. The amendments to 10 CFR Part 2 will be published in the Federal Register and will become effective 30 days after publication.

3. The final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1) therefore, pursuant to 10 CFR 51.22(b) no environmental impact statement or environmental

assessment need be prepared in connection with the issuance of the final rule.

4. The final rule is not a backfit under 10 CFR 50.109. Preparation of a backfit analysis is not necessary because the final rule imposes no requirements on licensees.

5. The final rule is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) because it does not contain any information collection requirements within the meaning of § 3502(4) of that Act.

B. If the Commission selects Alternative 2, and approves publication of a notice withdrawing the proposed rule (Enclosure 4.):

1. The notice of withdrawal of the proposed rule will be effective on the date of publication in the Federal Register.

C. The appropriate Congressional committees will be informed.

D. The Office of Public Affairs agrees that a public announcement is not needed.

E. Copies of the Federal Register notice will be distributed to the commenters on the proposed rule and to all persons currently listed in NRC service lists for all pending licensing proceedings. The notice will be sent to other interested persons upon request.

F. (This paragraph will summarize any relevant staff comments and identify concurrences.)

Scheduling:

If scheduled on the Commission agenda, recommend this paper be considered at an open meeting. No specific circumstance is known to staff which would require a Commission meeting (as opposed to affirmation) or Commission action by any particular date in the near term.

William C. Parler  
General Counsel

Enclosures:

1. Federal Register Notice of  
Final Rule
2. Public Comments
3. Comparative text identifying  
differences between proposed  
and final rule
4. Federal Register Notice of  
Withdrawal of Proposed Rule



1/13/87

Enclosure 1.

Federal Register Notice of Final Rule

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Adjudications; Special Procedures for Resolving Conflicts  
Concerning the Disclosure or Nondisclosure of Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This final rule amends the Commission's rules of practice by providing special procedures which NRC offices and staff may use to request that certain information be protected from disclosure in pending adjudicatory proceedings. The new procedures were developed to resolve possible conflicts between the obligation of NRC offices and staff to notify licensing boards of information which is relevant and material to the issues in controversy in a pending adjudicatory proceeding and the obligations to protect the identity of a confidential informant or avoid compromising an ongoing investigation or inspection.

EFFECTIVE DATE: Insert date 30 days after date of publication in  
the FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT: Jane R. Mapes, Senior Attorney, Rulemaking and Fuel Cycle, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone: (301) 492-8695.

SUPPLEMENTARY INFORMATION:

I. Background.

On May 22, 1985, the Nuclear Regulatory Commission published in the Federal Register (50 FR 21072-21077) proposed amendments to its Rules of Practice (10 CFR Part 2) that would provide special ex parte in camera procedures for resolving conflicts concerning the disclosure or nondisclosure of information deemed relevant and material to an adjudication and relating to an NRC investigation or inspection not yet concluded or likely to reveal the identity of a confidential informant. On May 31, 1985 (50 FR 23138-23139) a correction notice was published. On July 26, 1985, the date for submitting comments on the proposed amendments was extended to August 23, 1985 (50 FR 30446-30447.)

The proposed amendments were prepared at the express direction of the Commission to implement certain provisions of the Commission's Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings published September 13, 1984 (49 FR 36032-36034). The proposed procedures would apply to all NRC offices and staff that have information relevant and material



to an issue in controversy in a pending adjudication. As drafted for comment, the proposed procedures provide a mechanism which presiding officers and boards may use to resolve conflicts between the need to make available to the boards and other parties all relevant and material information which may be necessary to allow full resolution of the issues in controversy in a proceeding and the need to protect confidential sources of information or to assure that an ongoing inspection or investigation would not be prejudiced by unrestricted disclosure of the information. As envisaged by the Commission, these special procedures would allow the boards to determine the relevance and materiality of the information to the issues in controversy in an adjudicatory proceeding and whether or under what circumstances the information must be disclosed to the parties. How these questions would be resolved in any given case would depend, in part, on the nature and the status of the proceeding. Consistent with the general rule in favor of full disclosure and subject to any applicable exemptions permitted by the Freedom of Information Act (FOIA) disclosure would be expected to be required in those circumstances in which withholding information might prejudice one or more parties to the proceeding, or in which a board would conclude that the release of information would not prejudice an ongoing inspection or investigation or reveal the identity of a confidential informant. Techniques which boards might use to resolve this conflict could include deferral or rescheduling of issues for hearing, and limitations on the scope, manner, or persons to whom disclosure may be made by the issuance of protective orders, including orders withholding information from disclosure.

## II. Comments.

The Commission received nine letters of comment expressing the views of interested utilities, professional organizations, private counsel, intervenors and individual members of the public. No commenter was satisfied with the text of the rule as proposed. Most of the commenters recognized the Commission's need to withhold or otherwise protect information in order to protect a confidential source or to avoid compromising an ongoing investigation or inspection and the consequent necessity for in camera presentations. However, the commenters uniformly opposed using ex parte techniques to achieve that objective. The principal objections voiced by the commenters were that the proposed procedures are illegal, unnecessary, contrary to due process and unfair. One commenter stated that if the Commission's Rules of Practice were amended as proposed, decisions reached in proceedings in which the proposed procedures were used would be subject to a greatly increased risk of judicial reversal. The proposed amendments were also criticized on grounds of bad policy. Several commenters suggested alternative methods of achieving the objectives sought by the Commission. A brief review of the commenters' reasons for each of these objections follows.

### A. The proposed amendments are illegal.

Several commenters expressed the view that the proposed amendments are illegal because they violate the provisions of the Administrative Procedure Act, which require decisions to be made on, not outside, the record. (See

§ 7(d), 5 U.S.C. § 556(e); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).) By permitting both oral and written ex parte presentations, the proposed amendments would not only contravene the "exclusiveness of the record" doctrine but would also increase the likelihood that in proceedings in which the proposed procedures were used, the record for judicial review would be inadequate and incomplete. This, in turn, would foreclose effective judicial review of final agency decisions.

In contravention of proposed § 2.795k which explicitly precludes a Board from relying on information received ex parte in camera "in making any decision on the merits on any issue in controversy in the pending adjudication unless all parties to the pending adjudication have been accorded access to the information," the proposed procedures would permit a presiding officer to impose an ex parte stay of substantial duration without informing the other parties, e.g., the license applicant and intervenors, of the reasons for the stay and without complying with the requirements in § 2.788 of the Commission's Rules of Practice. One commenter pointed out that the ability of a Board to make a reasoned determination that certain information is or is not relevant to the issues in a proceeding, that disclosure of the information without a protective order would or would not impede an investigation or compromise a confidential informant, and that protection of the information is or is not needed, and to prescribe the requisite degree of protection for that information, whether through imposition of a stay or by other means, would be significantly impaired if the Board were precluded from obtaining the views of all the parties on those issues. Another commenter remarked on the sharp contrast between the



standards prescribed in the proposed amendments for issuance of an order to protect information from disclosure in NRC proceedings and the standards applicable to issuance of an ex parte temporary restraining order in Federal judicial proceedings. The former are far more lenient. There are also significant differences in the scope and duration of the respective orders. Under existing practice, the Federal courts will only entertain ex parte motions for temporary restraining orders in extraordinary circumstances. Any temporary restraining order which is granted is of brief duration, and further proceedings involving all the parties usually resume within a few days. Upon entry of the temporary restraining order, the factual basis for issuance of the order is immediately revealed to all the parties to the proceeding.

The commenters considered the proposed amendments illegal because the amendments would contravene the provisions of the Freedom of Information Act (FOIA) by exempting a class of information from public disclosure which is considerably broader than the classes of information protected from public disclosure by the exemption provisions of that Act. Under the proposed amendments, information used by the NRC to determine whether to initiate an inspection or investigation would be protected from public disclosure. Section 552(b)(7) of FOIA only accords this protection under certain conditions to investigatory records compiled for law enforcement purposes.

The commenters considered the proposed amendments illegal because the amendments would, when implemented, effectively deny applicants, licensees

and intervenors their statutory right to an adjudicatory hearing provided by § 189a of the Atomic Energy Act of 1954, as amended. In the opinion of the commenters, the proposed amendments run counter to one of the basic tenets of the Act that a license shall not be granted until all relevant and material health and safety issues have been thoroughly reviewed and an adequate opportunity to litigate those issues has been provided.

Finally, the commenters considered the proposed amendments illegal because they purport to protect information which has not been accorded protection by statute.

B. The proposed amendments are contrary to basic principles of fairness and due process.

The commenters reiterated the fundamental obligation of every party to an adjudicatory proceeding, including an NRC adjudicatory proceeding, to disclose to the presiding officer or Board and to all parties to the proceeding all information which may be relevant and material to the issues in controversy. This obligation, they maintain, cannot be satisfied by disclosing information to the presiding officer or the Board alone. Noting that the proposed amendments are both contrary to the Commission's expressed position favoring full disclosure and to its existing policy and practice with respect to Board notification, the commenters pointed out that if this obligation is not scrupulously adhered to, parties will be deprived of their right to participate fully in the proceeding and will to that extent suffer an unfair disadvantage

and be denied due process. The impropriety of receiving ex parte evidence from witnesses not under oath and not subject to cross-examination was also noted.

Parties have a right to participate in all aspects of an adjudicatory proceeding. To the extent that relevant and material information is not disclosed, parties are denied an opportunity to know and therefore to respond to opposing claims and contentions, to present evidence in rebuttal and to cross examine. To the extent that relevant and material information may require protection for an extended period of time, the ability of Boards to make fully informed decisions will be significantly hampered and the possibility that proceedings will be concluded and decisions made on the basis of inadequate or incomplete information will be greatly increased. This practice would constitute a significant departure from the ideal of informed, reasoned public decision-making. Some commenters point out that the proposed amendments do nothing to alleviate the heavy burdens which must now be met to persuade a presiding officer or a Board to reopen the record or accept late-filed contentions. A related but somewhat different concern is that the presiding officer who is both privy to the protected information and responsible for rendering a decision in the proceeding will be influenced, at least to some degree, by the protected, but totally unchallenged, information. In the opinion of the commenters, explicit directives to the presiding officer not to rely on the protected information provide insufficient protection against this hazard. One consequence of the proposed procedures may well be to



increase the number of decisions which can be successfully challenged in the courts on grounds of prejudice and bias.

Two commenters claimed that the proposed amendments would cause excessive delay in the conduct of adjudicatory proceedings and would for that reason result in a denial of due process.

C. The proposed amendments are unnecessary.

Several commenters objected to the proposed amendments on the grounds that the objectives which the amendments were designed to achieve could be accommodated equally well under the Commission's existing procedures and that therefore the proposed amendments were unnecessary.

D. Other objections.

The proposed amendments were also faulted because they are based on unfounded assumptions, are self-defeating, have significant potential for abuse and constitute bad public policy. Several commenters expressed the view that the proposed amendments are ill-grounded insofar as they rest on the unfounded assumption that the representatives of other parties to the proceeding are likely to be guilty of misconduct and to violate their ethical and moral obligations by failing to comply with the provisions of a protective order, or on the assumption that an applicant or licensee will correct defects under investigation before the investigation can be completed. In the opinion

of the commenters, these situations are not only unlikely to occur but can also be adequately handled under the Commission's existing regulations, which prescribe sanctions for misconduct in Commission proceedings and require applicants and licensees to maintain detailed records and submit reports. The proposed amendments were criticized as being self-defeating because they prevent the presiding officer or the licensing board from taking any positive steps to resolve the problems which the proposed amendments purport to address. <sup>1/</sup> Several commenters pointed out that the proposed amendments have significant potential for abuse. Noting that the standards for determining what constitutes an inspection or an investigation are more than a little vague, several commenters claimed that the proposed amendments could be used to shield information from the adjudicatory process. Other commenters were concerned that the proposed amendments would create inequities in that information would be disclosed to some parties to a proceeding but not to others. Finally, the proposed amendments were faulted on the grounds of bad public policy. Contrary to the Commission's general policy in favor of full disclosure and to the express purpose of the Commission's Board notification procedures, the proposed amendments would diminish rather than promote public confidence in the integrity and completeness of NRC licensing proceedings.

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<sup>1/</sup> Licensing and appeal boards lack contempt powers and cannot themselves compel disclosure of the identity of a confidential source. However, the Commission itself may reveal the identity of a confidential source. See NRC Statement of Policy on Confidentiality, 50 FR 48506, November 25, 1985.

E. Alternative Approaches Suggested by Commenters

The commenters suggested several alternative approaches to the problem addressed by the proposed amendments.

A majority of the commenters expressed the view that the respective concerns of the NRC and of the parties to an NRC proceeding could best be accommodated by making sensitive information available to all parties to the proceeding under an appropriate protective order strictly prohibiting further dissemination of the information. Some commenters suggested that the protected information should only be made available to selected representatives of the parties, e.g., counsel, and that these representatives should be the only persons allowed to attend an in camera hearing. In cases in which the NRC is a party, this would mean that the information would only be made available to NRC staff counsel, not to NRC staff, and that the latter would not be allowed to be present at the in camera hearing. One commenter suggested that NRC be given an opportunity in any proceeding in which there is a need to protect relevant and material information to indicate its willingness or unwillingness to release the information to the particular representatives selected by the parties. Another commenter recommended that the presiding officer or the Board be empowered to prohibit a party from attending an in camera hearing in extraordinary circumstances, such as when there is a reasonable basis for believing that a party may not abide by a protective order and that disclosure of investigatory information would



seriously hamper the Commission's regulatory responsibilities. One commenter suggested that the proposed rule should require the NRC office seeking a protective order to demonstrate that allegations triggering an inspection or investigation are under active review in accordance with the Commission's procedures for the management of allegations. The NRC office seeking the protective order should also be required to demonstrate that all NRC offices having custody of the protected information have been consulted and that the information sought to be protected has not been disclosed to the applicant, licensee or any other party. One commenter suggested that all proceedings in which protective orders to withhold information have been granted should be suspended until such time as the protected information can be released. The commenter also suggested that the standard which the presiding officer or the Board should apply in deciding whether to protect or disclose information should be the same as the Freedom of Information Act standard.

The advantages of the above approaches, as summarized by one of the commenters, are that they

- 1) satisfy due process requirements for administrative proceedings while doing a minimum of violence to the current, tested, traditional Rules of Practice;
- 2) fully comply with the obligation to inform not only the Board but also the other parties of new, material, relevant information;

- 3) actually provide the Board with a better factual and legal basis by allowing all the parties to raise additional facts and arguments, possibly precluding an unnecessary delay in the proceedings because of an easily clarified Staff misperception or error; and
- 4) promote greater public confidence in the NRC, its adjudicatory proceedings, and the ultimate safety of licensed facilities.

One commenter suggested that the task of reviewing sensitive information in camera to determine whether or not it should be disclosed should be carried out by an independent presiding officer not connected with the pending adjudication in any way. The commenter proposed that all parties to the proceeding be permitted to participate in this separate in camera review, but that the participation should be limited to filing on-the-record briefs in which the information sought to be protected would not be disclosed.

Under another suggested alternative approach, the NRC would be required to inform the presiding officer and all the parties to the proceeding that an inspection or investigation is being conducted. In making this notification, the NRC staff could indicate that further testimony and discovery updates would be provided. However, information respecting the nature of the inspection or investigation or likely to disclose the identity of a confidential source would not be revealed. In the absence of a showing warranting a stay, suspension or deferral of the adjudicatory proceeding pending the outcome of the inspection or investigation, the adjudicatory proceeding would

continue on schedule and the inspection or investigation would also go forward as planned. According to the commenter, this approach would be consistent with basic considerations of due process, the Atomic Energy Act and established NRC precedent and would not be prejudicial because the Commission's Rules of Practice provide a variety of techniques for assuring that any new determinative information discovered during the course of the inspection or investigation will be properly considered. The particular technique selected depends in each case on the status of the adjudicatory proceeding and whether any licensing action has in fact been taken. If the adjudicatory proceeding is still pending and depending on the point to which it has progressed, the parties may pursue further discovery, supply additional prefiled testimony, move for the summary disposition of contentions, submit late-filed contentions, request an additional hearing if the record is not yet closed, move to postpone an evidentiary hearing, move to reopen the record if the record is closed, or move to stay the issuance of a decision. If the adjudicatory proceeding has been concluded and the licensing action has been taken, a § 2.206 petition may be filed. If the NRC has instituted an enforcement proceeding because of information obtained during an inspection or investigation, a petition to intervene in the enforcement proceeding may be filed.

Although several commenters acknowledged the existence of these procedures, they seriously questioned their effectiveness. The proposed amendments were particularly criticized because they did nothing to lessen the current stringent requirements associated with the submission of late-filed contentions



or requests to reopen the record by intervenors, despite the fact that the intervenors could have no prior knowledge of the information or exercise any control over the timing of its release for use in a proceeding. These commenters recommended that the rule explicitly provide that new contentions based on recently released information previously held confidential be evaluated under the standards applicable to the initial filing of contentions.

Several commenters recommended that the rule should prohibit licensing boards from closing the record or reaching a final decision in a proceeding until all information relevant and material to any proposed action, including such actions as issuance of a license or license amendment, has been disclosed to the parties. The suggestion that matters addressed by the protected information should be judged according to the Commission's standards for the initial filing of contentions was reiterated.

One commenter stated that the procedures in 10 CFR § 2.744, which relates to the production of NFC records and documents, should apply to investigatory information in documentary form.

One commenter expressed the view that a rule which would require the Commission to review and approve the release of the name or other information identifying a confidential informant could be of use, but qualified the suggestion by stating that the best policy would be not to reveal the identity of confidential informants under any circumstances.

### III. Response to Comments

The objection that the proposed amendments are illegal because they violate the provisions of the Administrative Procedure Act which require decisions to be made on, not outside, the record lacks substance. The proposed procedures make clear that protected information cannot be used in reaching a decision until it has been formally introduced into evidence and all parties to the proceeding have had an opportunity to review and consider it (see proposed § 2.795k.) Thus, they are in accord with a basic requirement of the Act that issues in controversy in an adjudicatory proceeding must be resolved on the basis of information contained in the adjudicatory record of the proceeding (see 5 U.S.C. § 556(d)).

All the commenters objected to the ex parte <sup>2/</sup> aspects of the proposed procedures. In addition to stating that such procedures are unfair and

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<sup>2/</sup> The proposed procedures present a separation of functions issue rather than a prohibited ex parte communications problem because they concern communications between NRC offices and staff and NRC decisionmakers, not communications between persons outside the agency and NRC decisionmakers. In order to preserve the integrity of formal adjudicatory proceedings, the Administrative Procedure Act prohibits ex parte communications relevant to the merits of a proceeding between interested persons outside the agency and agency decisionmakers, see 5 U.S.C. § 557(d)(1). Towards this same end, the Act also provides that an agency's decisionmaking functions shall be kept separate from its investigative or prosecuting functions. Under 5 U.S.C. § 554(d), agency employees engaged in decisionmaking may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for

contrary to due process, the commenters also claimed that the procedures would compromise the impartiality of presiding officers.

The Commission is sensitive to the views of the commenters respecting the ex parte aspects of the proposed procedures. At the same time, the Commission considers the concerns expressed by the commenters somewhat misplaced. The proposed procedures are narrowly limited in application and scope and, in consequence, will only be used infrequently. For example, the procedures are expected to be used only by NRC officers and staff. However, NRC officers and staff are not entitled to use the procedures to protect information until after a determination has been made, under established board notification procedures, that the information should be disclosed to the boards and the public. The the procedures may only be used for the limited purpose of protecting information from disclosure when such protection is essential to avoid compromising an ongoing investigation and any subsequent enforcement action. Founded in part on the Commission's broad legal authority to suspend proceedings without making formal legal findings (see Westinghouse Electric Corporation v. United States Nuclear Regulatory Commission, 598 F.2d 759, 3rd Cir., 1979), the proposed procedures are not intended to be used to resolve issues in controversy on

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

an agency." Nor may an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case or in any factually related case "participate or advise in the decision, recommended decision, or agency review pursuant to [5 U.S.C. § 557] . . . , except as witness or counsel in public proceedings."



the merits. Instead, the procedures provide a mechanism for the prompt, fair and orderly resolution of important but transient conflicts between the need to disclose and the need to protect relevant and material information. Although the procedures may cause adjudicatory proceedings to be suspended temporarily, they are not intended to be used to suspend those proceedings for unreasonably long periods of time or to place information which is relevant and material to an issue in controversy in a proceeding permanently beyond the reach of one or more of the parties. Nor are the procedures intended to be applied in a manner which will permit an issue in controversy to be decided on the merits either without considering or without giving all the parties to the proceeding an opportunity to consider any relevant and material information. If further adjustment should be necessary, beyond that contemplated in these procedures, to accommodate the Commission's dual needs both to protect and to disclose specific information, the Commission is confident that other suitable and effective measures, such as expediting a pending investigation or making the information available to the parties in camera and under a strict protective order, will be taken.

The Commission is convinced that the impartiality of its presiding officers will not be compromised by the proposed procedures. In many respects, the proposed procedures are not significantly different from other types of decisionmaking procedures in which presiding officers, judges and other decisionmakers are called upon to disregard information which has been brought to their attention in reaching a decision. For example, juries are often told that they must disregard certain evidence, which has in fact been

heard, in reaching a decision. In a non-jury trial, the judge is frequently exposed to inadmissible evidence which the judge is required by law to disregard. In deciding questions of privilege, judges may become aware of information of extreme relevance and yet be precluded because the information is privileged, from relying on the information in reaching a decision.

With respect to the treatment of information, the proposed amendments do not depart markedly from existing NRC practice. Although they differ in certain minor respects, <sup>3/</sup> the new procedures are consistent with § 2.744 of the Commission's Rules of Practice, which relates to the production of NRC records and documents and has been in effect since 1972. Section 2.744 authorizes a presiding officer, in those cases in which the Executive Director for Operations objects to the production of a record or document, to request that the record or document "be produced for the in camera inspection of the presiding officer, exclusively, . . . and only to the extent necessary to determine-- (emphasis supplied) (1) The relevancy of that record or document; (2) Whether the document is exempt from disclosure under § 2.790; (3) Whether the disclosure is necessary to a proper decision in the proceeding; (4) Whether the document or the information therein is reasonably obtainable from another source."

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<sup>3/</sup> For example, the procedures in § 2.744 are available to any party to an NRC adjudicatory proceeding; the new procedures apply to NRC presiding officers and staff. The procedures in § 2.744 apply to information contained in records and documents while the new procedures place no constraints on the form or manner in which information is presented.

In making the determinations required by § 2.744, the presiding officer cannot help but be aware of the content of the document or record produced for inspection. Despite this, the Commission's § 2.744 procedures are well accepted and have not been faulted on the ground that they must inevitably compromise the impartiality of the presiding officer.

The Commission does not intend the proposed procedures to be used to contravene the provisions of the Freedom of Information Act. As requested by the commenters, the provision in the proposed rule permitting the staff to protect information used to initiate an investigation from disclosure has been deleted.

Several commenters expressed the view that the conflict between disclosure and non-disclosure of information which the proposed procedures are designed to resolve could be achieved by making the information available to all the parties to a proceeding under an appropriate protective order strictly prohibiting further dissemination of the information. This suggestion overlooks the fact that the purpose of the proposed procedures is to provide an additional mechanism which may be used to resolve those few hard cases which are not amenable to resolution by routine measures such as rescheduling of issues for hearing, limiting the scope of disclosure to parties or restricting disclosure by protective orders. <sup>4/</sup>

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<sup>4/</sup> 49 FR 36032 at 36033, September 13, 1984.



The Commission considered but rejected the suggestion of one commenter that the task of reviewing sensitive information in camera to determine whether or not the information should be disclosed should be carried out by an independent presiding officer not connected with the pending adjudication in any way. In the opinion of the Commission, such an approach would be counterproductive because it would require the independent presiding officer to make decisions respecting the protection or disclosure of information relevant and material to a proceeding without being familiar with the details of the issues in controversy or the parties to the proceeding. Such an approach would also be wasteful of already scarce staff resources.

#### IV. Description of Special Procedures in 10 CFR §§ 2.795a-2.795k.

As envisaged by the Commission, the special procedures in new §§ 2.795a-2.795k would only be available to and used by NRC offices and staff having information deemed relevant and material to issues in controversy in an ongoing adjudication which those offices and staff are under a duty to disclose in accordance with established board notification procedures. In most cases, it is expected that the conflict between the need to protect the information and the need to make the information available can be resolved by a protective order placing restrictions on the time and manner in which the information is disclosed. For example, such an order could change the sequence in which testimony on particular issues will be heard. Such an order could also specify the manner, time, place, or persons to whom the

information may be disclosed. However, in some cases, expected to be relatively few, use of these special procedures to protect relevant and material information from disclosure for a specified period of time may be needed.

Information which is protected from disclosure to avoid prejudicing an ongoing investigation or inspection becomes available when the investigation or inspection has been completed and a report prepared and issued. However, information which would reveal the identity of a confidential informant may only be made available by Commission order. (In accordance with the Commission's Statement of Policy on Confidentiality, the only persons entitled to protection would be those who have signed a standard NRC Confidentiality Agreement.) In this connection it should be noted that before release to the public, whether in response to an FOIA request or similar inquiry or through admission as evidence in an adjudicatory proceeding, inspection and investigation reports are redacted to eliminate all information which might reveal the identity of a confidential source. (Information exempt from disclosure under the provisions of section 552(b) of the Freedom of Information Act may also be eliminated from these reports.) The remaining information, which in the usual case is principally technical in nature, may then be used in whatever way is appropriate, including use as relevant and material evidence in an NRC adjudicatory proceeding. The new procedures in §§ 2.795a-2.795k provide a special mechanism for dealing with those hard cases where the technical information contained in the sanitized version of an inspection or investigation report, either by reason of its nature and special

characteristics or by reason of the fact that sponsoring witnesses must be called to attest to the validity of the report and the information it contains, compromises or reveals the identities of the confidential sources responsible for providing the information.

Under the special procedures, the appropriate NRC office may move the presiding officer of the pending adjudication to grant relief from the disclosure requirement either by ordering information disclosed subject to conditions or by ordering information withheld from disclosure. For the purposes of these procedures, the term "presiding officer" includes an administrative judge, an administrative law judge, an Atomic Safety and Licensing Board, and an Atomic Safety and Licensing Appeal Board. The motion, which may be made orally or in writing, must contain a brief description of the nature of the information subject to the request and explain the relevance and materiality of the information to the issues in controversy in the pending adjudication. The motion must also state why and to what extent disclosure of the information will reveal the identity or otherwise compromise a confidential source, or will prejudice an ongoing investigation or inspection. At the time the motion is made, the NRC office must notify all parties to the pending adjudication that the imposition of conditions on or the withholding of disclosure of information has been requested. However, the information subject to the motion shall not be revealed. The NRC office must also notify the Director, Division of Rules and Records, NRC Office of Administration, who is the agency official responsible for processing Freedom of Information Act (FOIA) requests.



Upon receipt of a motion from an NRC office to impose conditions upon or to withhold disclosure of information, the presiding officer, without other parties present, may either rule on the motion on the basis of the information provided, conduct an in camera oral presentation, or request further information. Under these amendments, the presiding officer is authorized to conduct an in camera oral presentation without other parties present at any time on his or her own initiative. The presiding officer must notify all parties to the pending adjudication of the occurrence of any in camera oral presentation. The notice shall state the purpose of the in camera oral presentation and the approximate date a ruling concerning the disclosure or nondisclosure of the information subject to the presentation may be expected. The identity of any witness and the substantive content of the information shall not be disclosed. To provide a record, a verbatim transcript will be made of each in camera oral presentation. After consideration of the motion, including any in camera oral presentation, and after finding that the information subject to the motion is both relevant and material to the pending adjudication, the presiding officer will rule on the motion. This ruling, which will be made with due regard for the Commission's policy favoring full disclosure, will determine whether disclosure of the information without a protective order could adversely affect the NRC's ability to protect the identity of a confidential informant or to complete an investigation or inspection and whether to what extent the information should be withheld from disclosure or only disclosed subject to certain conditions.

If the presiding officer grants the motion, the presiding officer shall issue an appropriate protective order. If the presiding officer determines that the motion should be denied in whole or in part, the presiding officer shall notify the NRC office submitting the request of the intent to order disclosure. The notice of intent to order disclosure shall specify the nature of the information to be disclosed, the terms and conditions of any proposed order and the basis for the conclusion that prompt disclosure is required. The notice of intent shall state a reasonable time by which the NRC office must submit a statement of objection or concurrence. If the NRC office concurs in the disclosure specified in the notice of intent and if the disclosure does not reveal the identity of a confidential informant, the presiding officer shall issue the order proposed. If the NRC office objects to the disclosure specified in the notice of intent and any such objection is disallowed, the presiding officer shall promptly certify the matter to the Commission for review and notify the NRC office requesting the protective order. The presiding officer shall also notify all parties to the pending adjudication and the Director, Division of Rules and Records, NRC Office of Administration, whenever a ruling relating to the disclosure or nondisclosure of information has been issued or has been certified to the Commission for review. A notice of certification shall state the reason for the certification, the certification date, and that, in accordance with § 2.795f, the NRC office or any other party to the adjudication may file a timely brief with the Commission. The NRC office must notify all parties to the adjudication whenever an NRC brief is filed. However, the NRC brief need not be served on the parties if to do so would reveal any of the withheld information. Within seven days after service of the notice of

filing of the NRC brief, any other party to the adjudication may file a brief with the Commission. The order of the presiding officer shall be stayed pending Commission review.

The Commission shall consider any matter certified to it for review under these procedures in camera without other parties present and may on its own initiative or at the request of the affected NRC office conduct an in camera oral presentation. The record for Commission review shall consist of the information provided to the presiding officer in camera, all documents filed with the presiding officer by the NRC office requesting a protective order, including any statements of concurrence or objection, the transcript of any in camera oral presentation, the presiding officer's notice of intent to require disclosure, statement of reasons why the information should be disclosed, and information disclosure ruling. After completing its review, the Commission will decide whether to affirm, reverse or amend the ruling.

Whenever the presiding officer or the Commission issues an order withholding information or imposing conditions upon the manner in which information may be released, the in camera record on which the order is based shall be deemed sealed pending further order.

The Commission does not intend these special procedures to be used to shield information properly subject to disclosure under the Freedom of Information Act (FOIA). Upon receipt of an FOIA request for release of information deemed sealed by reason of a protective order, the presiding officer or the



Commission, as appropriate, will again review the nature and status of the information to determine whether all or part of the information should continue to be protected or whether all or part of the information should be released.

The NRC office at whose request the presiding officer or the Commission has issued a protective order respecting the disclosure of information shall notify the presiding officer or the Commission, as appropriate, and the Director, Division of Rules and Records, NRC Office of Administration, when its objection to disclosure to the parties to the pending adjudication of all or any portion of the information subject to the order is withdrawn, when an ongoing investigation or inspection is completed, or when it learns of any other change in the status of the protected information. Unless the information relates to the identity of a confidential informant or unless the Commission orders otherwise, information which an NPC office has consented to release shall be disclosed to the parties and made available for inclusion in the public record of the pending adjudication. The identity of a confidential informant may only be released by order of the Commission.

Under the special procedures, after notice that an objection to the disclosure of information has been withdrawn or that an investigation or inspection has been completed, and subject to the prohibition against inclusion in the public record of the adjudication of any part of the in camera record containing information pertaining to the identity of a confidential informant except pursuant to Commission order, the presiding officer or the Commission, as appropriate, shall order the in camera record, including the verbatim

transcript of any in camera oral presentation, unsealed. Subject to any other exemptions from mandatory public disclosure that may validly be claimed under the Commission's regulations, including any exemptions that may be available under 10 CFR §§ 2.790, 9.5, 9.61 or 9.95, the unsealed record and the information are then available for use in the pending adjudicatory proceeding.

Under the special procedures, a presiding officer may not use information subject to a protective order in making any decision in the pending adjudicatory proceeding unless all parties to the pending adjudication have been accorded access to the information and given an appropriate opportunity to address that information. Once all parties to the pending adjudication have been given such an opportunity, either with or without conditions, the presiding officer may use the information in reaching a decision. When information is made available but only under certain reasonable conditions, a party may be unwilling to examine the information because the party does not wish to accept the conditions under which it is proffered. The fact that a party does not choose to avail itself of information to which access is permitted subject to certain reasonable conditions cannot be used to bar the presiding officer from relying on that information in reaching a decision. A presiding officer is under no obligation by reason of these special procedures to accord parties to a pending adjudication unconditional access to all information. Once the opportunity for conditional access has been provided and notwithstanding the fact that it may have been declined, the presiding

officer may use the information in making a decision in the pending adjudicatory proceeding.

#### 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.

#### Backfit Statement

The final rule is not a backfit under 10 CFR 50.109. Preparation of a backfit analysis is not necessary because the final rule imposes no requirements on licensees.

#### Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.)



### Regulatory Flexibility Act Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this final rule will not have a significant economic impact upon a substantial number of small entities and that therefore a regulatory flexibility analysis need not be prepared. These procedural amendments provide a mechanism for the orderly resolution of conflicts respecting the obligation of NRC offices to disclose information deemed relevant and material to a pending adjudication and the need by those same offices to protect information which would reveal the identity of a confidential informant. The final rule does not impose any obligations on entities regulated by the NRC, including any regulated entities that may fall within the definition of "small entities," as set forth in section 601(3) of the Regulatory Flexibility Act, or the NRC size standards (50 FR 50241, December 9, 1985) or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards in regulations issued by the Small Business Administration and codified in 13 CFR Part 121. Since the impact of this rule is confined to the NRC, the rule does not fall within the purview of the Regulatory Flexibility Act.

### List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power

plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

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 Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Part 2.

#### PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239).

Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.781, 2.795k also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Sections 2.790, 2.795j also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended, (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1859 (42 U.S.C. 2021j).

2. In § 2.730, a new paragraph (i) is added to read as follows:

§ 2.730 Motions.

\* \* \* \* \*

(i) The provisions of § 2.730(a) through (h) are not applicable to motions filed pursuant to §§ 2.795a through 2.795k.

3. In § 2.740, paragraph (b)(1) is revised to read as follows:



§ 2.740 General provisions governing discovery.

\* \* \* \* \*

(b) Scope of discovery. \* \* \*

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For the purposes of this section, privileged matter includes information subject to a protective order issued under the special procedures in §§ 2.795a through 2.795k. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

\* \* \* \* \*

4. In § 2.781, paragraph (a) is revised to read as follows:

§ 2.781 Separation of functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except--

(1) In accordance with the special procedures in §§ 2.795a through 2.795k of this part;

(2) As witness or counsel in the proceeding;

(3) Through a written communication served on all parties and made on the record of the proceeding; or

(4) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

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5. In Subpart G, immediately following § 2.790, a new center heading and new sections 2.795a through 2.795k are added to read as follows:

Special Procedures for Resolving Conflicts Concerning  
the Disclosure or Nondisclosure of Certain Sensitive  
Information in Licensing Proceedings

§ 2.795a Applicability of special procedures; official file.

(a) Sections 2.795a through 2.795k specify procedures for resolving conflicts concerning the disclosure or nondisclosure of information relating to the identity of a confidential informant or obtained during an investigation or inspection and deemed relevant and material to a pending adjudication. These procedures apply to all NRC offices. The procedures are to be used when, in accordance with the Commission's board notification policy or pursuant to a request from a presiding officer, an NRC office may be required to produce information in a pending adjudication, the disclosure of which, without a protective order, would reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection.

(b) As used in §§ 2.795a through 2.795k, the term "presiding officer" includes an administrative judge, an administrative law judge, an Atomic Safety and Licensing Board, and an Atomic Safety and Licensing Appeal Board.



(c) Unless and until publicly released, all documents required by or relating to the special procedures in §§ 2.795a through 2.795k shall bear the docket number and title of the proceeding, be marked "Not For Public Disclosure--Protected Under 10 CFR §§ 2.795a-2.795k," and be transmitted to the Secretary in sealed double envelopes for deposit in the protected section of the official docket file.

§ 2.795b Requirement to disclose relevant and material information.

In accordance with the Commission's board notification policy, information deemed relevant and material to a pending adjudication shall be disclosed to the parties to the adjudication by the NRC office having the information unless the information would reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection. When an NRC office has information which it deems relevant and material to a pending adjudication but which could reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection, the NRC office shall request the presiding officer by motion to issue a protective order imposing conditions upon the manner in which the information is disclosed or withholding the information from disclosure.

§ 2.795c Motion for protective order; notice of motion.

(a) A motion for a protective order to impose conditions on or to withhold disclosure of information shall be addressed to the presiding officer by the NRC office having the information. At the time a motion is made and

without revealing the substance of the information subject to the motion, the NRC office shall notify the parties to the adjudication and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, that a protective order to impose conditions on or to withhold disclosure of information has been requested.

(b) A motion for a protective order may be made orally or in writing, may include a request for an in camera oral presentation without other parties present, and shall include the following information, as appropriate:

(1) A brief description of the nature of the information subject to the motion;

(2) A brief explanation why the information is relevant and material to the pending adjudication;

(3) A brief statement whether the information was obtained from a confidential informant or during an ongoing investigation or inspection;

(4) An explanation of the basis of the motion for a protective order to impose conditions on or to withhold disclosure of the information, including a brief explanation why and to what extent disclosure of the information without a protective order will reveal the identity or otherwise compromise a confidential informant or will prejudice an ongoing investigation or inspection;

(5) The proposed relief requested.

§ 2.795d Consideration of motion by presiding officer; procedure.

(a) A motion from an NRC office for a protective order to impose conditions on or to withhold disclosure of information shall be considered by the presiding officer in camera without other parties present.

(b) The presiding officer may require or permit the NRC office making the motion to make an in camera oral presentation. Attendance at an in camera oral presentation shall be limited exclusively to the presiding officer, to appropriate NRC personnel, to any witness appearing at the request of the NRC office or the presiding officer, and to a court reporter. The presiding officer shall notify all parties to a pending adjudication of the occurrence of any in camera oral presentation. The notice shall state the purpose of the in camera oral presentation and the approximate date a ruling concerning the disclosure or nondisclosure of the information subject to the presentation may be expected. The identity of any witness and the substantive content of the information shall not be disclosed. If an in camera oral presentation is conducted, a verbatim transcript shall be made.

§ 2.795e Determination to grant or deny motion for protective order; requirement for Commission review.

(a) After consideration of a motion from an NRC office for a protective order to impose conditions on or to withhold disclosure of information, including any in camera oral presentation, and after finding that the



information subject to the motion is both relevant and material to the pending adjudication, the presiding officer shall determine, in light of the Commission policy favoring full disclosure, whether disclosure of the information without a protective order could adversely affect the ability of the NRC to protect the identity of a confidential informant or to complete an investigation or inspection and whether and to what extent the information should be withheld from disclosure or only disclosed subject to conditions.

(b) Every ruling requiring disclosure of the identity of a confidential informant shall be certified to the Commission for review. Pending Commission review, the order of the presiding officer shall be stayed.

(c)(1) If the presiding officer grants the motion, the presiding officer shall issue a protective order withholding disclosure of the information or conditioning its release, as appropriate.

(2) If the presiding officer determines that the motion should be denied in whole or in part, the presiding officer shall notify the NRC office submitting the motion of the intent to order disclosure. The notice of intent to order disclosure shall specify the nature of the information to be disclosed, the terms and conditions of any proposed order and the basis for the conclusion that prompt disclosure is required. The notice of intent shall state a reasonable time by which the NRC office must submit a statement of objection or concurrence.

(3) If the NRC office concurs in the disclosure specified in the notice of intent and if the disclosure does not reveal the identity of a confidential informant, the presiding officer shall issue the order proposed.

(4) If the NRC office objects to the disclosure specified in the notice of intent and any such objection is disallowed, the presiding officer shall promptly certify the objection, the ruling disallowing the objection and the accompanying record required by § 2.795f to the Commission for in camera review without other parties present. The order of the presiding officer shall be stayed pending Commission review.

(d) The presiding officer shall promptly notify all parties to the pending adjudication and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission that a ruling relating to the disclosure or nondisclosure of information has been issued or has been certified to the Commission for in camera review without other parties present. A notice of certification shall state the reason for the certification, the certification date, and that, in accordance with § 2.795f, any party to the adjudication may file a timely brief with the Commission.

§ 2.795f Record for Commission review; briefs.

(a) Every information disclosure ruling certified to the Commission for in camera review pursuant to § 2.795e will be accompanied by a record which shall consist of the information provided to the presiding officer in camera,

all documents filed with the presiding officer by the NRC office making the motion for a protective order, including any statements of concurrence or objection, the transcript of any in camera oral presentation, the presiding officer's notice of intent to require disclosure, statement of reasons why the information should be disclosed, and information disclosure ruling.

(b) Within ten days after the presiding officer issues an order certifying an information disclosure ruling to the Commission for in camera review, the NRC office may file a brief with the Commission in support of its objections to disclosure. The NRC office shall notify all parties to the adjudication that an NRC brief has been filed, but need not serve a copy of the NRC brief on the parties to the pending adjudication. Within seven days after service of the NRC notice, any party to the pending adjudication may file a brief with the Commission.

§ 2.795g Commission review.

(a) Every information disclosure ruling certified to the Commission for review under § 2.795e, together with the accompanying record and any briefs, shall be considered by the Commission in camera without other parties present. Upon its own initiative or upon request by the NRC office making the motion for a protective order, the Commission may conduct an in camera oral presentation without other parties present on any matter certified to it for review under § 2.795e.



(b) After review of the certified information disclosure ruling, the accompanying record and any briefs, the Commission shall decide whether to affirm, reverse, or amend the ruling. The Commission order may include any terms or conditions deemed necessary or appropriate.

§ 2.795h Consent to disclose information; notice.

(a) The NRC office seeking a protective order under § 2.795c shall notify the presiding officer or the Commission, as appropriate, and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission when (1) the office no longer objects to the disclosure of all or part of the information; (2) the inspection or investigation to which the information subject to the order relates is completed; or (3) there is any other change in the status of the protected information.

(b) Information which an NPC office has consented to release shall be disclosed to the parties and made available for inclusion in the public record of the pending adjudication unless the information relates to the identity of a confidential informant or unless the Commission has ordered otherwise. The identity of a confidential informant may only be released by order of the Commission.

§ 2.795i In camera record deemed sealed pending further order.

(a) Whenever the presiding officer under § 2.795e, or the Commission under § 2.795g, issues a protective order to impose conditions on or to withhold

disclosure of information, the in camera record on which the order is based shall be deemed sealed pending further order.

(b) No part of any in camera record containing information pertaining to the identity of a confidential informant may be included in the public record of a pending adjudication or be made publicly available in any other way except pursuant to Commission order.

(c) After notice by the appropriate NRC office that objection to the disclosure of information has been withdrawn, or that an investigation or inspection has been completed, and subject to the requirement in paragraph (b) of this section and to any other exemption from mandatory public disclosure that may validly be claimed under the Commission's regulations, including any exemption that may be available under § 2.790 or §§ 9.5, 9.61 or 9.95 of this chapter, the presiding officer or the Commission, as appropriate, shall order the in camera record unsealed and the information made available for inclusion in the public record of the pending adjudication.

§ 2.795j FOIA request for release of protected information; release determination review.

(a) The Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, upon notice by an NRC office that information subject to an FOIA request is also subject to a protective order issued under § 2.795e or § 2.795g, shall promptly notify the presiding officer or the Commission, as appropriate.

(b) Upon notification of an FOIA request for release of protected information, the presiding officer or the Commission, as appropriate, shall review the bases for issuance of the protective order and determine, in the light of any exemptions that may validly be claimed under the provisions of the Freedom of Information Act and the Commission's regulations, whether the information in whole or in part should continue to be protected or whether and under what conditions it may be released.

§ 2.795k Prohibition against use of information subject to protective order.

Information subject to a protective order to withhold disclosure may not be used by the presiding officer in making any decision on the merits on any issue in controversy in the pending adjudication unless all parties to the pending adjudication have been accorded access to the information either with or without conditions.

Dated at Washington, D.C., this \_\_\_\_\_ day of \_\_\_\_\_, 1987.

For the Nuclear Regulatory Commission

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Samuel J. Chilk  
Secretary of the Commission



Enclosure 3.

Comparative Text Identifying Differences  
Between Proposed and Final Rule

Comparative Text Identifying Differences  
Between Proposed and Final Rule

New text underlined. Deleted text lined through. (Note: The underlined words "in camera" and the underlined subheadings in § 2.740(b) are not new text.)

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. 522 and 553, the Nuclear Regulatory Commission is ~~proposing to adopt~~ adopting the following amendments to 10 CFR Part 2.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS.

1. The authority citation for Part 2 is revised to read as follows:

Authority: Sections 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L.

97-415, 96 Stat. 2073 (42 U.S.C. 2239). § Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). ~~Sections 2.360-2.369 also issued under Pub. L. 97-415, 96 Stat. 2071 (42 U.S.C. 2132).~~ Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.719, and 2.795k also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Sections 2.790 and 2.795j also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1859 (42 U.S.C. 2021j).

2. In § 2.730, a new paragraph (i) is added to read as follows:

§ 2.730 Motions.

\* \* \* \* \*

(i) The provisions of § 2.730(a) through (h) are not applicable to motions filed pursuant to §§ 2.795a through 2.795k.

3. In § 2.740, paragraph (b)(1) is revised to read as follows:

§ 2.740 General provisions governing discovery.

\* \* \* \* \*



(b) Scope of discovery. \* \* \*

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For the purposes of this section, privileged matter includes information subject to a protective order issued under the special procedures in §§ 2.795a through 2.795k. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

\* \* \* \* \*

4. In §-2,780, paragraph-(a)-is-revised-to-read-as-follows:

§-2,780--Ex-parte-communications:

(a)--Except-as-provided-under-the-special-procedures-in-§§-2,795a through-2,795k-or-in-paragraph-(e)-of-this-section, neither-(1) Commissioners, members-of-their-immediate-staffs, or-other-NRG officials-and-employees-who-advise-the-Commissioners-in-the-exercise-of their-quasi-judicial-functions-will-request-or-entertain-off-the-record except-from-each-other, nor-(2)-any-party-to-a-proceeding-for-the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation-of-a-license-or-permit, or-any-officer, employee, representative, or-any-other-person-directly-or-indirectly-acting-in behalf-thereof, shall-submit-off-the-record-to-Commissioners-or-such staff-members, officials, and-employees, any-evidence, explanation, analysis, or-advice, whether-written-or-oral, regarding-any-substantive matter-at-issue-in-a-proceeding-on-the-record-then-pending-before-the NRG-for-the-issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation-of-a-license-or-permit.--For-the purposes-of-this-section, the-term-"proceeding-on-the-record-then pending-before-the-NRG"-shall-include-any-application-or-matter-which has-been-noticed-for-hearing-or-concerning-which-a-hearing-has-been requested-pursuant-to-this-part.

\* \* \* \* \*

4. In § 2.781, paragraph (a) is revised to read as follows:

§ 2.781 Separation of functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except--

(1) In accordance with the special procedures in §§ 2.795a through 2.795k of this part;

(2) As witness or counsel in the proceeding;

(3) Through a written communication served on all parties and made on the record of the proceeding; or

(4) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

\* \* \* \* \*

5. In Subpart G, immediately following § 2.790, a new center heading and new sections 2.795a through 2.795k are added to read as follows:



SPECIAL PROCEDURES FOR RESOLVING CONFLICTS CONCERNING  
THE DISCLOSURE OR NONDISCLOSURE OF CERTAIN SENSITIVE INFORMATION  
IN LICENSING PROCEEDINGS RELATING TO AN NRC INVESTIGATION OR  
INSPECTION OR TO THE IDENTITY OF A CONFIDENTIAL INFORMANT  
AND DEEMED RELEVANT AND MATERIAL TO A PENDING ADJUDICATION

§ 2.795a Applicability of special procedures; official file.

(a) Sections 2.795a through 2.795k specify procedures for resolving conflicts concerning the disclosure or nondisclosure of information relating ~~to an investigation or inspection or~~ to the identity of a confidential informant or obtained during an investigation or inspection and deemed relevant and material to a pending adjudication. These procedures apply to all NRC offices. The procedures are to be used ~~whenever an NRC office may be required~~ when, in accordance with the Commission's board notification policy or pursuant to a request from a presiding officer, an NRC office may be required to produce information in a pending adjudication, the disclosure of which ~~and the NRC office having the information believes that disclosure of the information~~ without a protective order, would prejudice an investigation or inspection or reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection.

(b) As used in §§ 2.795a through 2.795k, the term "presiding officer" includes an administrative judge, an administrative law judge, an Atomic Safety and Licensing Board, and an Atomic Safety and Licensing Appeal Board.

(c) Unless and until publicly released, all documents required by or relating to the special procedures in §§ 2.795a through 2.795k shall bear

the docket number and title of the proceeding, be marked "Not For Public Disclosure - Protected Under 10 CFR §§ 2.795a - 2.795k," and be transmitted to the Secretary in sealed double envelopes for deposit in the protected section of the official docket file.

§ 2.795b Requirement to disclose relevant and material information.

In accordance with the Commission's board notification policy, information relating to an investigation or inspection or to the identity of a confidential informant and deemed relevant and material to a pending adjudication shall be disclosed to the parties to the adjudication by the NRC office having the information unless the information would reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection. When an NRC office has information which it deems relevant and material to a pending adjudication but which could reveal the identity of a confidential informant or prejudice an ongoing investigation or inspection, the that NRC office shall requests the presiding officer by motion to issue a protective order imposing conditions upon the manner in which the information is disclosed or withholding the information from disclosure, because disclosure without a protective order would prejudice an inspection or investigation or reveal the identity of a confidential informant.

§ 2.795c Motion for protective order; notice of motion.

(a) A motion for a protective order to impose conditions on or to withhold disclosure of information shall be addressed to the presiding officer by the NRC office having the information. At the time a motion is

made and without revealing the substance of the information subject to the motion, the NPC office shall notify the parties to the adjudication and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, that a protective order to impose conditions on or to withhold disclosure of information has been requested.

(b) A motion for a protective order may be made orally or in writing, may include a request for an ex-parte in camera oral presentation, without other parties present, and shall include the following information, as appropriate:

(1) A brief description of the nature of the information subject to the motion;

(2) A brief explanation why the information is relevant and material to the pending adjudication;

(3) A brief statement ~~indicating how the information relates to an inspection or investigation and the status of the inspection or investigation, including the estimated time of completion,~~ whether the information was obtained from a confidential informant or during an ongoing investigation or inspection;

~~(4) -- A statement that the information reveals the identity of a confidential informant;~~

~~(5)~~ (4) An explanation of the basis of the motion for a protective order to impose conditions on or to withhold disclosure of the information, including a brief explanation why and to what extent disclosure of the information without a protective order will ~~compromise or impede the conduct of an investigation or inspection,~~ or reveal the



identity or otherwise compromise a confidential informant; or will  
prejudice an ongoing investigation or inspection;

~~(6)~~ (5) The proposed relief requested.

§ 2.795d Consideration of motion by presiding officer; procedure.

(a) A motion from an NRC office for a protective order to impose conditions on or to withhold disclosure of information shall be considered by the presiding officer in camera without other parties ~~other-than-the-NRC~~ staff present.

(b) The presiding officer may require or permit the NRC office making the motion to make an ex-parte in camera oral presentation. Attendance at an ex-parte in camera oral presentation shall be limited exclusively to the presiding officer, to appropriate NRC personnel, and to any witness appearing at the request of the NRC office or the presiding officer, and to a court reporter. The presiding officer shall ~~promptly~~ notify all parties to a pending adjudication of the occurrence of ~~when~~ any ex-parte in camera oral presentation, ~~will-be-held.~~ The notice shall state the purpose, ~~time, and place~~ of the ex-parte in camera oral presentation and the approximate date a ruling concerning the disclosure or nondisclosure of the information subject to the presentation may be expected. The identity of any witness and the substantive content of the information shall not be disclosed. If an ex-parte in camera oral presentation is conducted, a verbatim transcript shall be made.

§ 2.795e Determination to grant or deny motion for protective order; requirement for Commission review.

(a) After consideration of a motion from an NRC office for a protective order to impose conditions on or to withhold disclosure of information, including any ex-parte in camera oral presentation, and after finding that the information subject to the motion is both relevant and material to the pending adjudication, the presiding officer shall determine, in light of the Commission policy favoring full disclosure, whether disclosure of the information without a protective order could adversely affect the ability of the NRC ~~to conduct an investigation or inspection fully and adequately or~~ to protect the identity of a confidential informant or to complete an investigation or inspection and whether and to what extent ~~all or part of~~ the information should be withheld from disclosure or only disclosed subject to conditions.

(b) Every ruling requiring disclosure of the identity of a confidential informant shall be certified to the Commission for review. Pending Commission review, the order of the presiding officer shall be stayed.

(c)(1) If the presiding officer grants the motion, the presiding officer shall issue a protective order withholding disclosure of the information or conditioning its release, as ~~requested,~~ appropriate.

(2) If the presiding officer determines that the motion should be denied in whole or in part, the presiding officer shall notify the NRC office submitting the motion of the intent to order disclosure. The notice of intent to order disclosure shall specify the nature of the

information to be disclosed, the terms and conditions of any proposed order and the basis for the conclusion that prompt disclosure is required. The notice of intent shall state a reasonable time by which the NRC office must submit a statement of objection or concurrence.

(3) If the NRC office concurs in the disclosure specified in the notice of intent and if the disclosure does not reveal the identity of a confidential informant, the presiding officer shall issue the order proposed.

(4) If the NRC office objects to the disclosure specified in the notice of intent and any such objection is disallowed, the presiding officer shall promptly certify the objection, the ruling disallowing the objection and the accompanying record required by § 2.795f to the Commission for ex-parte in camera review, without other parties present. The order of the presiding officer shall be stayed pending Commission review.

(d) The presiding officer shall promptly notify all parties to the pending adjudication and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission that a ruling relating to the disclosure or nondisclosure of information has been issued or has been certified to the Commission for ex-parte in camera review, without other parties present. A notice of certification shall state the reason for the certification, the certification date, and that, in accordance with § 2.795f, any party to the adjudication may file a timely brief with the Commission.



§ 2.795f Record for Commission review; briefs.

(a) Every information disclosure ruling certified to the Commission for ex-parte in camera review pursuant to § 2.795e will be accompanied by a record which shall consist of the information provided to the presiding officer ex-parte in camera, all documents filed with the presiding officer by the NRC office making the motion for a protective order, including any statements of concurrence or objection, the transcript of any ex-parte in camera oral presentation, the presiding officer's notice of intent to require disclosure, statement of reasons why the information should be disclosed, and ~~the-presiding-officer's-order~~ information disclosure ruling.

(b) Within ten days after the presiding officer issues an order certifying an information disclosure ruling to the Commission for ex-parte in camera review, the NRC office may file a brief with the Commission in support of its objections to disclosure. The NRC office shall notify all parties to the adjudication that an NRC brief has been filed, but need not serve a copy of the NRC brief on the parties to the pending adjudication. Within seven days after service of the NRC notice, any party to the pending adjudication may file a brief with the Commission.

§ 2.795g Commission review.

(a) Every information disclosure ruling certified to the Commission for review under § 2.795e, together with the accompanying record and any briefs, shall be considered by the Commission in camera without other parties ~~other-than-the-NRC-staff~~ present. Upon its own initiative or upon request

by the NRC office making the motion for a protective order, the Commission may conduct an ex-parte in camera oral presentation without other parties present on any matter certified to it for review under § 2.795e.

(b) After review of the certified information disclosure ruling, the accompanying record and any briefs, the Commission shall decide whether to affirm, reverse, or amend the ruling. The Commission order may include any terms or conditions deemed necessary or appropriate.

§ 2.795h Consent to disclose information; notice.

(a) The NRC office seeking ~~upon whose motion the presiding officer or the Commission has issued~~ a protective order under § 2.795c imposing conditions on or withholding the disclosure of information shall notify the presiding officer or the Commission, as appropriate, and the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission when (1) the office no longer objects to the disclosure of all or part of the information; its objection to disclosure to the parties to the pending adjudication of all or any portion of the information subject to the order is withdrawn; when (2) the inspection or investigation to which all or any portion of the information subject to the order relates is completed; or when it learns of (3) there is any other change in the status of the protected information.

(b) Information which an NRC office has consented to release ~~may~~ shall be disclosed to the parties and ~~placed~~ made available for inclusion in the public record of the pending adjudication ~~without further order~~ unless the

information relates to the identity of a confidential informant or unless the Commission has ordered otherwise. The identity of a confidential informant may only be released by order of the Commission.

§ 2.795i ~~Ex-parte-in~~ In camera record deemed sealed pending further order.

(a) Whenever the presiding officer under § 2.795e, or the Commission under § 2.795g, issues a protective order to impose conditions on or to withhold disclosure of information, the ~~ex-parte~~ in camera record on which the order is based shall be deemed sealed pending further order.

(b) No part of any ~~ex-parte~~ in camera record containing information pertaining to the identity of a confidential informant may be included in the public record of a pending adjudication or be made publicly available in any other way except pursuant to Commission order.

(c) After notice by the appropriate NRC office that ~~an inspection or investigation has been completed or that~~ objection to the disclosure of information has been withdrawn, or that an investigation or inspection has been completed, whichever is earlier, and subject to the requirement in paragraph (b) of this section and to any other exemption from mandatory public disclosure that may validly be claimed under the Commission's regulations, including any exemption that may be available under § 2.790 or §§ 9.5, 9.61 or 9.95 of this chapter, the presiding officer or the Commission, as appropriate, shall order the ~~ex-parte~~ in camera record ~~included~~ unsealed and the information made available for inclusion in the public record of the pending adjudication.



§ 2.795j FOIA request for release of protected information; release determination review.

(a) The Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, upon notice by an NRC office that information subject to an FOIA request is also subject to a protective order issued under § 2.795e or § 2.795g, shall promptly notify the presiding officer or the Commission, as appropriate.

(b) Upon notification of an FOIA request for release of protected information, the presiding officer or the Commission, as appropriate, shall review the bases for issuance of the protective order and determine, in the light of any exemptions that may validly be claimed under the provisions of the Freedom of Information Act and the Commission's regulations, whether the information in whole or in part should continue to be protected or whether and under what conditions it may be released.

§ 2.795k Prohibition against use of information subject to protective order.

Information subject to a protective order to withhold disclosure may not be used by the presiding officer in making any decision on the merits on any issue in controversy in the pending adjudication unless all parties to the pending adjudication have been accorded access to the information either with or without conditions.

Dated at Washington, D.C., this \_\_\_\_\_ day of \_\_\_\_\_ 1987.

For the Nuclear Regulatory Commission.

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Samuel J. Chilk  
Secretary of the Commission

1/13/87

Enclosure 4.

Federal Register Notice of Withdrawal of Proposed Rule

NUCLEAR REGULATORY COMMISSION

10 CFR PART 2

Adjudications; Special Procedures for Resolving  
Conflicts Concerning the Disclosure or  
Nondisclosure of Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Nuclear Regulatory Commission is withdrawing a proposed rule published in the Federal Register on May 22, 1985 (50 FR 21072.) In this rule, the Commission proposed amending its rules of practice to provide special procedures for resolving conflicts concerning the disclosure or nondisclosure of information relating to an NRC investigation or inspection not yet concluded or which would reveal the identity of a confidential informant and deemed relevant and material to an adjudication. The Commission has decided that in view of the few remaining licensing proceedings and the consequent limited number of occasions in which the proposed procedures might be used in those proceedings, an existing policy statement is an adequate means of resolving these conflicts and thus there is no need at this time to codify the proposed procedures.



DATE: This withdrawal is effective (insert date of publication of notice of withdrawal in the Federal Register.)

FOR FURTHER INFORMATION CONTACT: Jane R. Mapes, Senior Attorney, Rulemaking and Fuel Cycle, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone: (301) 492-8695.

SUPPLEMENTARY INFORMATION: In its Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings published in the Federal Register on September 13, 1984 (49 FR 36032-36034) the Commission reemphasized the importance and need for full disclosure of information in an adjudication so that all issues in controversy in the adjudication may be fully resolved. At the same time, the Commission recognized the need in certain circumstances to limit disclosure to avoid compromising an NRC inspection or investigation or to protect a confidential informant. In its policy statement, the Commission identified a procedure under which the NRC staff would provide an adjudicatory board with an explanation of the basis for its concern about disclosure and would present the information to the board in camera without other parties present. Recognizing that this procedure would be a departure from normal Commission practice, the Commission directed the staff to initiate a rulemaking proceeding.

Accordingly, on May 22, 1985, a notice of proposed rulemaking was published in the Federal Register (50 FR 21072-21077) proposing amendments to the Commission's rules of practice (10 CFR Part 2) that would provide special

ex parte in camera procedures for resolving conflicts concerning the disclosure or nondisclosure of information deemed relevant and material to an adjudication and relating to an NRC investigation or inspection not yet concluded or likely to reveal the identity of a confidential informant. On May 31, 1985 (50 FR 23138-23139) a correction notice was published. On July 26, 1985, the date for submitting comments on the proposed amendments was extended to August 23, 1985 (50 FR 30446-30447.)

The Commission received nine letters of comment expressing the views of interested utilities, professional organizations, private counsel, intervenors and individual members of the public. No commenter was satisfied with the text of the rule as proposed. Most of the commenters recognized the Commission's need to withhold or otherwise protect information in order to protect a confidential source or to avoid compromising an ongoing investigation or inspection and the consequent necessity for in camera presentations. However, the commenters uniformly opposed using ex parte techniques to achieve that objective. The principal objections voiced by the commenters were that the proposed procedures are illegal, unnecessary, contrary to due process and unfair. One commenter stated that if the Commission's rules of practice were amended as proposed, decisions reached in proceedings in which the proposed procedures were used would be subject to a greatly increased risk of judicial reversal. In addition, the proposed amendments were faulted as bad public policy. Several commenters suggested alternative methods, dependent principally upon the use of protective orders, to achieve the objectives sought by the Commission.

Since publication of the notice of proposed rulemaking in 1985, the Commission has made certain decisions respecting its board notification policy and procedures which are expected to reduce significantly the occasions on which the proposed procedures would actually be used. For, as the Commission made clear when it promulgated its Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, the Statement and any implementing procedures only take over "once a determination has been made, under established board notification procedures, that information should be disclosed to the boards and public but OI [the Office of Investigations] or staff believes that the information should be protected." (49 FP 36032 at 36033, September 13, 1984, emphasis supplied.)

The Commission's board notification policy and procedures have been in effect for many years and serve an important purpose - to keep the boards and the Commission advised of matters which may need to be considered in making licensing and other regulatory decisions, particularly matters which present serious safety or environmental issues. Recently, the Commission directed significant changes in the manner in which its board notification policy and procedures are implemented. These changes were first enunciated by the Commission in a Memorandum and Order issued January 30, 1986 in Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3) Docket No. 50-382-OL, CLI-86-1, 23 NRC 1, affirmed sub. nom. Oystershell Alliance, et al. v. U.S. Nuclear Regulatory Commission, et al., No. 85-1182, U.S.C.A.D.C., September 9, 1986, \_\_\_\_ F.2d \_\_\_\_\_. Subsequently, at the express direction of the Commission, the changes in the manner in which the



Commission's board notification policy is being implemented were formally incorporated in NRR Office Letter No. 19, Revision 3, issued May 29, 1986. <sup>1/</sup> On June 3, 1986, the Executive Director for Operations directed other NRC staff offices to revise the implementation of their board notification policy and procedures consistent with Revision 3 of NRR Office Letter 19.

Under the Commission's board notification policy and procedures as now implemented, NRC offices and staff <sup>2/</sup> are only required to notify the boards when they are apprised of allegations and new information not previously submitted to the boards which are relevant and material to the issues in controversy in the proceeding. If the information is not relevant and material, the staff has no obligation to inform the boards. Moreover, under current practice, the facts on which an allegation is based must be substantiated and the implications drawn from those facts must be shown to be valid before any notification is made.

The above-described changes in the implementation of the Commission's board notification policy are expected to have the effect of severely limiting the circumstances in which the proposed procedures would be applicable. These circumstances are further limited by the fact that the number of pending

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<sup>1/</sup> This document is available for inspection at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C.

<sup>2/</sup> As used in this preamble, the term "staff" is intended to refer to all NRC offices.

adjudicatory proceedings is small and it is unlikely that large numbers of new proceedings will be initiated in the near future.

The Commission has reviewed its Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings in light of the above-described changes. On the basis of the guidance provided in the Policy Statement, the Commission has concluded that it could, using existing procedures, adequately protect information from disclosure in those very rare instances in which such protection might be needed. In view of the controversial nature of the proposed procedures and because it now appears that such procedures will seldom be used, the Commission has also concluded that codification of the proposed procedures in the Commission's rules of practice is not warranted.

Accordingly, for the foregoing reasons, the Commission hereby withdraws the notice of proposed rulemaking published on May 22, 1985 (50 FR 21072 - 21077), and terminates this rulemaking proceeding.

Dated at Washington, D.C., this \_\_\_\_\_ day of \_\_\_\_\_, 1987.

For the Nuclear Regulatory Commission

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Samuel J. Chilk  
Secretary of the Commission