

DOCKET NUMBER **PK-2**
PROPOSED RULE
(52 FR 20089) **(16)**

AKIN, GUMP, STRAUSS, HAUER & FELD

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

DALLAS OFFICE
4100 FIRST CITY CENTER
1700 PACIFIC AVENUE
DALLAS, TEXAS 75201-4618
(214) 969-2800

LONDON OFFICE
31 CECILIA STREET
LONDON, W. 1
(01) 409-1093

NORTHERN VIRGINIA OFFICE
3110 FAIRVIEW PARK DRIVE
SUITE 450
FALLS CHURCH, VIRGINIA 22042
(703) 876-5060

1333 NEW HAMPSHIRE AVENUE, SW -2 P4:27
SUITE 400

WASHINGTON, D.C. 20036

(202) 887-4000

WRITER'S DIRECT DIAL NUMBER 887-4500

AUSTIN OFFICE
2100 ONE CONGRESS PLAZA
111 CONGRESS AVENUE
AUSTIN, TEXAS 78701
(512) 499-6200

SAN ANTONIO OFFICE
1500 INTERFIRST PLAZA
300 CONVENT STREET
SAN ANTONIO, TEXAS 78205
(512) 270-0800

FORT WORTH OFFICE
2604 TEXAS AMERICAN BANK BUILDING
FORT WORTH, TEXAS 76102
(817) 336-1400

September 2, 1987

By Hand Delivery

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

Attention: Docketing and Service Branch

Dear Mr. Chilk:

On May 29, 1987, the NRC published for public comment proposed rules entitled "Informal Hearing Procedures for Materials Licensing Adjudications." 52 FR 20089. As counsel to several materials licensees who would be affected by the proposed rules, we would like to offer the following comments.

First, we are concerned that § 2.1231 of the proposed rules, which requires the NRC staff to assemble a hearing file for the use of the presiding officer and the parties, makes no provision for the protection of proprietary information in informal materials licensing proceedings. Section 9.5(a)(4) of the Commission's Freedom of Information Act regulations exempts from public disclosure "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential matter . . . which is customarily held in confidence by the originator." Sections 2.744 and 2.790 set forth procedures governing the protection and use of such information in formal adjudicatory proceedings conducted under 10 CFR Part 2, Subpart G of the Commission's rules.

Section 2.790(b) generally requires a balancing of the public and private interests involved, and authorizes the Commission to protect proprietary information from public

DSIC 10
Add. Paul Bollevick, H-1035
8709100209 870902
PDR PR
2 52FR20089 PDR

Mr. Samuel J. Chilk
September 2, 1987
Page 2

disclosure provided that the requirements of that section are followed. Section 2.744 provides for limited disclosure of proprietary information to the parties under a suitable protective order if the information is necessary to a proper decision in the proceeding and is not reasonably obtainable from any other source. Because informal materials licensing proceedings would be conducted under Subpart L rather than Subpart C of Part 2, the provisions of §§ 2.744 and 2.790 would not be applicable. Therefore, similar provisions are needed and essential to protect proprietary information in informal materials licensing proceedings. Many materials licensees could suffer irreparable injury if proprietary information were not protected in such licensing proceedings.

Section 2.1231 should be amended to make it clear that the hearing file shall not contain any information that is exempt from disclosure under § 9.5(a)(4). In addition, the Commission should specify how proprietary information is to be protected and, if absolutely essential to the resolution of the issues raised in the proceeding, disclosed for limited purposes under appropriate protections, in informal materials licensing hearings. This could be done either by making the provisions of §§ 2.744 and 2.790 specifically applicable to informal materials licensing proceedings; or by devising similar, albeit less formal procedures to govern the protection and limited disclosure of proprietary information in such proceedings.

Second, we are concerned that the time within which to request a hearing under § 2.1205(c)(2) is too long. That section provides that if no Federal Register notice relative to the application is published, a hearing request may be filed within 30 days after the requestor receives actual notice of a pending or completed licensing action or within one year after agency action granting the application, whichever first occurs. This provision leaves a licensee subject to a hearing request for up to a full year after the NRC has granted the application. This is unfair to materials licensees, and adds substantial unnecessary uncertainty regarding Commission action with respect to this category of licensees. Realistic business planning will be especially difficult in view of uncertainty regarding whether resources will have to be allocated to informal hearing procedures that may be begun a year or more after the licensing action is taken. In addition, after the passage of so much time,

Mr. Samuel J. Chilk
September 2, 1987
Page 3

circumstances may have changed considerably. To be most useful, a post-licensing hearing should be held fairly soon after the licensing action is taken; while the licensee and the NRC staff still have relevant information at hand and the technical and regulatory merits of the licensing action have not become unclear due to the passage of time.

Accordingly, we believe that the interests of licensees, as well as other interested persons, can be adequately protected by allowing a hearing request to be filed within a reasonable time after the licensing action has been taken; for example, within 90 or 120 days. Such a time frame would afford interested persons a reasonable opportunity to participate without adding the substantial uncertainties and inherent delays associated with the 12 month time frame permitted in the proposed rule. In that 12 months, the NRC staff would have reviewed and acted upon thousands of materials licensing applications, all of which would be potentially subject to the hearing provisions in the proposed rule. A shorter time within which to request a hearing would reflect an appropriate balance of the public and private interests involved.

Finally, it should be made clear in the final rule that any request for a hearing filed after the designated time frame would be more appropriately treated as a request under 10 CFR § 2.206 to institute a proceeding to modify, suspend, or revoke the license.

We appreciate this opportunity to comment on the proposed rules.

Sincerely,

Roy P. Lessy, Jr.

Roy P. Lessy, Jr.

Linda S. Gilbert

cc: Paul Bollwerk, OGC

LSG:tm

USNRC-DS

1907 SEP -9 A 9 37