

August 27, 2003

SECY-03-0151

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

SUBJECT: DENIAL OF PETITION FOR RULEMAKING SUBMITTED BY OHIO CITIZENS
FOR RESPONSIBLE ENERGY, INC. (DOCKET NO. PRM -9-2)

PURPOSE:

To obtain Commission approval to publish in the *Federal Register* notice of denial of the petition for rulemaking (PRM-9-2) submitted by Ohio Citizens for Responsible Energy, Inc. (OCRE).

BACKGROUND:

On February 10, 1994, OCRE filed a petition for rulemaking under 10 CFR 2.802. OCRE subsequently filed an amendment to the petition on April 11, 1994. OCRE is a private, not-for-profit organization incorporated under the laws of the State of Ohio that specializes in research and advocacy on nuclear safety issues. This organization also supports the right of meaningful public participation in the regulation of nuclear facilities.

The Petitioner requests that the Nuclear Regulatory Commission (NRC) amend 10 CFR Part 9, "Public Records," by adding a subpart E entitled "Public Right of Access to Licensee-Held Information." The subpart would include requirements addressing public access to licensee-held documents including draft documents, subject to exceptions necessary to protect certain sensitive information such as personal information, proprietary information, safeguards information, identity of confidential sources, and classified information. The proposed rule would include appeal procedures if a requester were not satisfied with a licensee's response to a request for information. Under OCRE's proposal, the requester could appeal the matter to an Administrative Judge (AJ) on the Atomic Safety and Licensing Board Panel. The AJ's decision would be final and not further appealable.

NRC published a *Federal Register* notice on June 13, 1994 (59 FR 30308), announcing receipt of the petition and requesting public comments on the suggested amendments. The petition was docketed as PRM-9-2.

CONTACT: Maria E. Schwartz, OGC
415-1888

DISCUSSION:

The Petition

OCRE's primary concern is that licensee-held documents that are not submitted to NRC are not accessible by members of the public and may contain information that the public would find useful for participating in NRC proceedings. OCRE asserts that rulemakings as well as NRC bulletins and generic letters instruct licensees to send conclusory statements to NRC while retaining documentation and analyses at licensees' facilities. Such information, retained onsite by licensees for NRC inspection purposes, is not retained by NRC in docket files, nor is it placed in the NRC's Public Document Room (PDR) unless it is included in an NRC inspection report. In the case of documents retained by the licensee but not submitted to the NRC, a member of the public could not obtain the information under the Freedom of Information Act (FOIA) (current through Pub.L. 108-23) since the documents do not constitute "agency records" as defined in the Paperwork Reduction Act of 1995 (PRA) (Pub.L. 104-13). OCRE asserts that this trend in NRC's regulatory practice is reducing the amount of information to which the public has access. OCRE believes that when NRC proposes to reduce the number of licensee reports required to be submitted to the NRC, the NRC should take into consideration that, while NRC may have access to these reports, the public will not because these reports will not be placed in the NRC's PDR. As a result, OCRE contends the public will not be able to participate fully in the regulatory process since the public will not be able to evaluate the potential health and safety problems that may be contained in these documents. OCRE is concerned that this will also restrict the public's effective participation in the NRC hearing process as provided for under the Atomic Energy Act of 1954, as amended (AEA). In addition, OCRE argues that this result will promote an atmosphere where public distrust of nuclear energy will grow, eroding the public's confidence in NRC's regulatory program and fostering a perception of coziness with the regulated industry.

OCRE acknowledges that the primary reason for its petition for rulemaking is not to protect or enhance the public health and safety *per se*; rather, it is intended to support public participation by extending public access to information in the exclusive possession of licensees. To accomplish this, OCRE proposes that 10 CFR Part 9 be amended to require licensees to provide "any record relevant to NRC-licensed or regulated activities" subject to certain exceptions where disclosure would constitute a clearly unwarranted invasion of personal privacy or would disclose proprietary, safeguards or classified information.

NRC received 27 comment letters and an additional letter responding to those comments from OCRE. Of the 27 responses, three endorsed the petition. These commentors included a public interest group and members of the public. Twenty-four commentors opposed the petition. These commentors were primarily utilities or representatives of utilities. Based on its review of the amendment requested by OCRE and the comments received on this petition for rulemaking, the staff concludes that there are several legal and policy considerations associated with the petition which warrant its denial.

Basis for denying the Petition

The scope of the requested regulatory requirement is overly broad and would allow access without a showing of need to almost all of a licensee's records including documents the NRC requires licensees to retain onsite for inspection purposes, as well as drafts and other

documents which, even if relevant to NRC activities, are not required to be maintained by licensees. OCRE does not define its use of the word “relevant” in the context of the petition. However, in the context of NRC regulation, a very broad range of licensees’ records may arguably be relevant to NRC activities. OCRE’s petition relies heavily on NRC’s authority under the AEA to access and, if it chooses, obtain permanent custody of such records. In the possession and control of the NRC, these documents become “agency records,” and, in accordance with FOIA and the agency’s implementing regulations in 10 CFR Part 9, such records are available for public inspection and copying upon request by any person. Therefore, if granted, the petition would arguably amount to an unprecedented and legally questionable extension of the FOIA to apply to records which an agency could have obtained. The United States Supreme Court considered this issue for purposes of FOIA in Forsham v. Harris, 445 U.S. 169 (1980), and concluded that Congress could not have intended FOIA to embrace documents that the federal government has the right of access to, as this would include an extraordinary large number of private documents.

Subsequent to the submission of the petition, the PRA was enacted, the objective of which is to reduce government paperwork burdens imposed on the private sector and increase opportunities for public comment on the merits of each new and extended information collection proposal. In addition, the Clinton Administration’s 1993 National Performance Review (NPR), the objective of which was to improve management of government by focusing on core mission competencies and service requirements. This initiative included, among other things, improving government management of communication technology, e.g., information collections.¹ In keeping with these objectives, the Commission has been assessing reporting and recordkeeping requirements in order to identify those requirements which can be reduced in scope or eliminated without impacting NRC’s ability to fulfill its mission to ensure public health and safety. Further, NRC has worked to develop more effective and efficient methods of providing information to the public in order to enhance public participation in the regulatory process. This process has included the development of the Agency-wide Document Access and Management System (ADAMS) and the NRC’s Public Document Reading Room, i.e., <http://www.nrc.gov/reading-rm/adams.html>, which provides access to additional links containing information regarding the regulation and management of nuclear materials.

Petitioner’s requested amendment to the current regulatory requirements could also create a significant and unnecessary administrative and economic burden on licensees without justification, since granting the petition is not necessary to maintain safety. Providing access to draft and other preliminary documents may cause licensees to expend resources defending and explaining matters that would otherwise be unnecessary once appropriate reviews were completed. Consequently, such resources would not be available to address substantive safety issues. It could also have a chilling effect on employees of licensees who may be reluctant to

¹ This initiative has more recently evolved into the development of E-GOV which uses improved internet-based technology to make it easy for citizens and business to interact with the government, saving the taxpayer dollars while streamlining citizen-to-government communications. In 1998, the Government Paperwork Elimination Act (GPEA) (Pub.L. 105-277) was enacted to, among other things, help citizens gain one-stop access to existing Government information and services and increase Government accountability to citizens.

document information that might be perceived as adverse to their employers resulting in less candid and frank self-assessments and “lessons learned” analyses.

The requested amendment of 10 CFR Part 9 is also contrary to efficient regulatory oversight of NRC licenses. For several years, NRC has been engaged in activities to move toward a risk-informed approach to regulation. Petitioner’s request would impose, however, additional and substantial burdens on regulated entities without a safety basis. This request would impose additional and substantial burdens on the Commission’s adjudicatory activities as well. The appeal process provided by the petition would require administrative judges to determine whether: 1) a record can be the subject of a search; 2) reproduction fees are reasonable; and 3) a licensee’s response is timely. However, the petition would not allow the Commission to review the decisions of its subordinate AJs.

Finally, staff disagrees with OCRE’s position that if this petition is not granted, the public cannot fully participate in the NRC hearing process as provided for under the AEA. The AEA, as implemented by the Commission’s regulations, provides the opportunity for a hearing to any person whose interests may be affected by a proposed licensing action. A broad range of information and documents pertinent to licensing actions is available to the public for use in the hearing process. This information includes a docket file containing the documents on which the NRC staff bases its review and assessment of the licensing action in question. This information is available in the PDR and online, and must be kept up to date.² To that end, the database for the web-based version of ADAMS is updated once daily, usually after midnight East coast time. Staff is satisfied that, given the information which NRC makes available to the public, routine access to licensee-held documents envisioned by OCRE’s petition, is not necessary for effective participation in the hearing process.

Timing of Resolution of this Petition:

Several factors contributed to the delay in completing the resolution of this petition. The petition was submitted for consideration during a period which coincided with legislative and executive branch directives, e.g., the PRA and NPR, which required the NRC and other federal agencies to move toward greater use of electronic technology for operational efficiency and information dissemination, and toward further reductions in unnecessary reporting and recordkeeping requirements. During this period the Commission was also exploring and developing options to optimize public communication and responsiveness to the public. This effort included agency policy initiatives such as the development of the enhanced participatory rulemaking for radiological criteria for decommissioning which included setting up an electronic bulletin board providing status updates on all pending petitions, exploring interactive concepts such as RuleNet, routinely holding workshops for particularly complex or controversial rulemakings, and by the late 1990s, the development of a Commission Paper entitled “Public Communications Initiative (DS1-14) (SECY-98-089) supporting recommendations to enhance NRC’s interaction

²Although the terrorist events of September 11, 2001 led NRC to remove a large volume of documents from routine public access in order to conduct a deliberate and systematic review of that material, the agency staff has completed a substantial portion of that review and has restored much of the material to the website and to ready access in the PDR.

with the public. It was in this environment that ADAMS was conceived which was intended to provide, among other things, more timely releases of documents to the public. When OCRE submitted its petition in 1994, recognizing the contribution the public makes to the regulatory process and the importance of public confidence in that process, it appeared appropriate to delay resolution of the petition in order to consider the impacts, real and perceived, that these internally and externally-driven initiatives would have on the Petitioner's request. Unfortunately, the petition was submitted as many of these initiatives were just getting underway. Thus, resolution of the petition has been deferred for several years in order to consider it in light of the agency's public communications initiatives and efforts to use electronic technology to disseminate information and enable the public's access to documents the agency relies on in making licensing and regulatory decisions. The Office of the General Counsel did, however, contact the petitioner in 2000, to discuss the delay in the issuance of a determination to grant or deny the petition, and again in April 2003.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection. The Office of the Chief Information Officer has reviewed this Commission paper for information technology and information management implications and concurs in it. Other program offices reporting to the EDO have concurred in the paper.

RECOMMENDATION:

That the Commission:

Approve publication of the attached Notice of Denial of Rulemaking Petition in the Federal Register and the issuance of the attached letter of denial to the petitioner.

/RA/

Karen D. Cyr
General Counsel

Attachments:

1. *Federal Register* Notice
2. Letter to OCRE's representative, Ms. Susan Hiatt

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

[Docket No. PRM-9-2)

Ohio Citizens for Responsible Energy, Inc.

Denial of a Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of a petition for rulemaking

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by the Ohio Citizens for Responsible Energy, Inc. (OCRE). The petition has been docketed by the Commission and assigned Docket No. PRM-9-2. The Petitioner requested that NRC amend 10 CFR Part 9, "Public Records," by adding a subpart E entitled "Public Right of Access to Licensee-Held Information." This subpart would provide for public access to licensee-held documents, subject to limited exceptions, and include appeal procedures. The NRC is denying the petition because the additional recordkeeping and reporting proposed by the Petitioner is not necessary to protect the public health and safety or to ensure effective public participation in NRC adjudicatory hearings on licensing actions, and is contrary to internally and externally-driven initiatives to reduce unnecessary recordkeeping and reporting requirements.

ADDRESSES: Copies of the petition for rulemaking, the public comments received, the Petitioner's response to these comments, the NRC's letter of denial to the Petitioner, and the congressional letters are available for public inspection and/or copying for a fee in the NRC Public Document Room, One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852-2738.

These documents are also available on NRC's rulemaking website at <http://ruleforum.llnl.gov>. For information about the interactive rulemaking website, contact Ms. Carol Gallagher, (301) 415-5905 (e-mail: CAG@nrc.gov).

FOR FURTHER INFORMATION CONTACT: Maria E. Schwartz, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Telephone: (301) 415-1888; or MES@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 10, 1994, OCRE, the petitioner, filed a petition for rulemaking under 10 CFR 2.802 with the NRC. The Petitioner subsequently filed an amendment to the petition on April 11, 1994. The Petitioner is a private, not-for-profit organization incorporated under the laws of the State of Ohio that specializes in research and advocacy on nuclear safety issues. The Petitioner also supports the right of meaningful public participation in the regulation of nuclear facilities.

The Petitioner requests that the NRC amend 10 CFR Part 9, "Public Records," which addresses the public's right of access to information held by NRC. The Petitioner proposes an additional subpart E to Part 9 entitled "Public Right of Access to Licensee-Held Information,"

which would provide for public access to licensee-held documents including draft documents, subject to exceptions necessary to protect certain sensitive information such as personal information, proprietary information, safeguard information, identity of confidential sources, and classified information. The proposed rule would include appeal procedures if a requester was not satisfied with a licensee's response to a request for information. Under the Petitioner's proposed appeal process, the requester could appeal the matter to an Administrative Judge (AJ) on the Atomic Safety and Licensing Board Panel. The AJ's decision would be final and not further appealable.

The petition was docketed as PRM-9-2. NRC published a notice that announced the receipt of the petition and requested public comments on the suggested amendments in the Federal Register on June 13, 1994 (59 FR 30308). NRC received 27 comment letters and an additional letter responding to those comments from OCRE. Of the 27 responses, three endorsed the petition. These commentors included a public interest group and members of the public. Twenty-four commentors opposed the petition. These commentors were primarily utilities or representatives of utilities.

II. Discussion

The Petitioner's primary concern is that licensee-held documents are not accessible by members of the public and may contain information that the public would find useful in participating in NRC proceedings. The Petitioner asserts that rulemakings in the 1993-94 time frame as well as NRC bulletins and generic letters issued over the period 1988-94, instruct licensees to send conclusory statements to NRC while retaining documentation and analyses at licensees' facilities. Such information retained onsite by licensees for NRC inspection purposes is not retained by NRC in docket files, nor is it placed in NRC's Public Document Room (PDR) unless it is included in an NRC inspection report. In these circumstances, the information

cannot be obtained under the Freedom of Information Act (FOIA) (current through Pub.L. 108-23) because it does not constitute "agency records" as defined in the Paperwork Reduction Act of 1995, (PRA) (Pub.L. 104-13). The Petitioner asserts that this trend in the NRC's regulatory practice reduces the amount of information to which the public has access. The Petitioner believes that when NRC proposes to reduce the number of licensee reports required to be submitted to NRC or retained by licensees, NRC should take into consideration that while NRC may have access to these reports or information based on its status as the regulator of the licensee, the public does not because these reports and information will not be placed in the PDR. As a result, the Petitioner contends the public will not be able to participate fully in the regulatory process since the public will not be able to evaluate potential health and safety problems contained in these documents. The Petitioner is concerned that this result will undermine the public's effective participation in NRC's regulatory process. The Petitioner is also concerned that this will restrict the public's effective participation in NRC hearing process as provided for under the Atomic Energy Act of 1954, as amended (AEA). In addition, the Petitioner argues that this result will promote an atmosphere where public distrust of nuclear energy will grow, eroding the public's confidence in NRC's regulatory program and fostering a perception of coziness with the regulated industry.

The Petitioner acknowledged that the primary reason for this petition for rulemaking is not to protect or enhance the public health and safety; rather, it has been designed to ensure effective public participation by extending public access to information in the possession of licensees. To accomplish this, the Petitioner proposes to amend 10 CFR Part 9 to require licensees to provide "any record relevant to NRC-licensed or regulated activities" subject to exemptions necessary to protect certain sensitive information such as personal information,

proprietary information, safeguards information, identity of confidential sources, and classified information.

Legislative and Executive Branch directives, e.g., the PRA and the Clinton Administration's 1993 National Partnership for Reinventing Government (NPR), were initiated at approximately the same time that OCRE submitted its petition to NRC for consideration. These initiatives required federal agencies, including NRC, to move toward a less expensive and more efficient federal government. Phase II of NPR included a directive requiring agencies to focus on core mission competencies and service requirements and to review their current programs to identify areas that could be eliminated, including, among other things, areas that are particularly relevant to OCRE's petition, i.e., deleting obsolete regulations and improving government management of communications technology which included a review of the need for, and use of, various information collections. The objectives of the PRA include reducing Government-required recordkeeping and reporting requirements, a greater use of electronic technology for operational efficiency and information dissemination, and a concerted effort, using information technology, to improve government management of information collections.³

In addition to these external initiatives, there were ongoing internal agency initiatives such as the establishment of NRC's Regulatory Review Group which, in 1993, provided a report to the Commission focusing on key areas in which changes in the way the NRC conducted business could significantly reduce stakeholder and NRC costs without adversely affecting the level of safety at operating nuclear power plants. The report recommended moving toward more

³ This initiative has more recently evolved into the development of E-GOV which uses improved internet-based technology to make it easy for citizens and business to interact with the government, saving the taxpayer dollars while streamlining citizen-to-government communications. In 1998, the Government Paperwork Elimination Act (GPEA) (Pub.L. 105-277) was enacted to, among other things, help citizens gain one-stop access to existing Government information and services and increase Government accountability to citizens.

performance-based requirements and proposed efficiencies in the area of reporting requirements. Based on those recommendations, NRC assessed reporting and recording requirements in order to identify those requirements which could be reduced in scope or eliminated without impacting NRC's ability to fulfill its mission regarding the protection of the public health and safety.

In cases where NRC has made a determination to reduce or eliminate a requirement, NRC first considered the impact on public health and safety. If there would be no direct impact on public health and safety, NRC next considered the reduced administrative burden on licensees and the extent to which the proposed elimination will deprive the public of health and safety information. In all cases, an existing requirement cannot be reduced or eliminated arbitrarily. Before regulations containing reporting requirements which NRC determines to be obsolete, unnecessarily burdensome, too prescriptive or to overlap or duplicate other regulations, can be removed, NRC must follow the administrative process for rulemaking which provides an opportunity for comment by members of the public. In this way, NRC seeks to maintain a balance between elimination of recordkeeping and reporting requirements which are burdensome and do not substantially contribute to providing a basis for its licensing and regulatory actions, and making the basis for its decisions transparent to stakeholders.

The PRA requires federal agencies to, among other things, ensure that information technology is acquired, used, and managed to improve performance of agency missions, including the reduction of information collection burdens on the public. This includes evaluating whether proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information has practical utility. Recently, in conformance with the objectives of this Act, NRC amended its "Reporting Requirements for Nuclear Power Reactors and Independent Spent Fuel Storage Installations at Power Reactor

Sites,” (65 FR 63769 (October 25, 2000)), to better align the reporting requirements with NRC’s needs for information to carry out its safety mission (e.g., extending the required initial reporting times for some events, consistent with the time at which the reports are needed for NRC action) and to reduce unnecessary reporting burden, consistent with NRC’s needs (e.g., eliminating the reporting design and analysis defects and deviations with little or no risk or safety significance (65 FR 63778-9)).

Subject to the need to protect safeguards and national security-related information, commercial nuclear facility licensing and regulation should be transacted publicly. In that regard, the NRC had made available substantial amounts of information for public review on its website, which since 2000 and the development of its Agency-wide Document Access and Management System (ADAMS) has provided this information in a more searchable form at NRC’s Public Document Reading Room, i.e., <http://www.nrc.gov/reading-rm/adams.html>. These documents, which include substantial amounts of information relevant to licensing decisions, e.g., the license application, as well as changes thereto, correspondence between the licensee and NRC,⁴ and inspection reports, are available in ADAMS and continue to also be available in the PDR. NRC also has a comprehensive set of reporting requirements which have had the benefit of public comment and have been promulgated in accordance with the Administrative Procedure Act after careful consideration as to whether NRC needs to obtain licensees’ records and information to carry out NRC’s public health and safety responsibilities. The Petitioner has apparently discounted the fact that many of the documents which are the subject of the petition for rulemaking are those which NRC has determined are unnecessary for NRC to possess in order

⁴Although the terrorist attacks of September 11, 2001, led to the NRC’s decision to remove material from its website, the agency, after conducting a deliberate and systematic review of that material, has now restored most of the material to the website.

to protect the public health and safety, or has determined may be kept onsite at licensees' facilities for NRC inspection purposes but are not required to be submitted to NRC. In addition, much of the information which is of interest to the Petitioner and being retained onsite by licensees may also be available to members of the public because it is contained in, or has been relocated to, other documents that have been submitted (as part of applications or in response to requests for additional information) and are placed in ADAMS' Public Document Reading Room and/or the PDR.

III. Summary of the Public Comments

The notice of receipt of the petition for rulemaking invited interested parties to submit written comments concerning the petition. The NRC received 27 comment letters and an additional letter responding to those comments from OCRE. Of these, three letters from private citizens and the Clean Water Fund of North Carolina, an environmental group, favored granting the petition. Twenty-four letters opposing the petition were sent primarily by utilities or representatives of utilities such as Nuclear Energy Institute (NEI) and Nuclear Utility Backfitting and Reform Group (NUBARG). Many of the letters contained comments that were similar in nature. The following section summarizes, by issue, the public comments received and provides responses to those comments.

Comment 1. Licensee-held information should not be withheld from the public.

Of those responding in favor of granting the petition, one private citizen pointed out that the petition is justified because it is illegal and unfair that the public does not have access to licensee-held information. Another private citizen agreed with that position but pointed out that the petition, as written, is too general with respect to the scope of records covered by the proposal and suggested that the scope be limited to the records used by the licensee to support a docketed submittal (i.e., those records which could have been included with the submittal).

That commentor also noted that any proposed change to 10 CFR Part 9 must not interfere with the handling of licensee-prepared records as proprietary information. The Clean Water Fund of North Carolina supported the Petitioner's view that limiting public access to information increases public cynicism regarding the regulation of nuclear energy.

NRC Response:

NRC is not preventing or limiting public access to licensee-held information necessary for NRC to fulfill its mission to protect public health and licensing decisions. Applicants for an NRC license and licensees provide this information to NRC under the agency's requirements, See, e.g., 10 CFR 30.6, 30.32 and 10 CFR 50.4, 50.33, 50.34, 50.90, which set out certain NRC license application requirements; 10 CFR 50.72 and 50.73, which require nuclear power reactor licensees to immediately notify NRC when certain conditions arise, followed by written event reports; and, licensee reports sent in response to NRC requests for additional information as part of a specific licensing or regulatory action. This information is submitted on the docket for the particular licensee and, except when it contains safeguards, personal information or other information that may be protected from public disclosure under 10 CFR 2.790, is placed in the PDR where it is available for public inspection and copying⁵ and, in most instances, is available in electronic form through NRC's ADAMS Public Document Reading Room, discussed above. In this way, the public has access to very large amounts of relevant licensee information. In addition, NRC allows licensees to retain specified records onsite for inspection purposes. Although NRC has the right to access these records or obtain them permanently, NRC has determined that it is not necessary, under most circumstances, for licensees to submit this

⁵NRC has restored access to a large volume of licensing and regulatory materials that were removed from its website and PDR for review and screening following the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon.

information to NRC. To require the submission of information and documents beyond those that NRC determines it needs to have submitted for its regulatory function would be contrary to the objectives of the PRA. Finally, general information held by a licensee but not required to be retained or submitted for NRC's regulatory purposes is the property of the licensee. Absent an NRC determination that such information must be submitted to NRC in order for NRC to carry out its statutory and regulatory obligations, but the AEA does not provide NRC with the authority to require that licensees provide such information to a third party.

Comment 2. The petition would, in effect, modify the FOIA without Congressional action.

Several of the commentors endorsed NEI's comment that the proposed petition for rulemaking would expand the NRC's current requirements for granting public access to licensee documents. They believe that the proposed rulemaking, without Congressional action, would modify the FOIA by making the statute applicable to entities other than government agencies and to records other than those within a government agency's control. In addition, most commentors believe that the petition challenges the Congressional delegation of authority to the NRC by giving access to almost all of a licensee's internal documents, including those which the NRC has determined can be retained onsite, as well as those which NRC believes are unnecessary for it to possess or obtain access to in order to protect the public health and safety.

NRC Response:

NRC believes the requested amendment is overly broad and, if granted, would allow access to almost all of a licensee's internal documents including drafts and other documents without a showing of need. The petition requests access to "any record relevant to NRC licensed or regulated activities held by a possessor." In the context of NRC regulation, a very broad range of licensees' records may arguably be "relevant" to NRC activities. OCRE's petition relies heavily on NRC's authority under the AEA to access and, if it chooses, obtain permanent

custody of such records. Section 161o. of the AEA, for example, provides NRC with the authority to require reports and recordkeeping, and to require licensees to maintain these documents for inspection purposes, for specified activities and studies, and activities under licenses issued pursuant to the AEA, "as may be necessary to effectuate the purposes of" the AEA.

When in the possession and control of NRC, documents become "agency records," and, in accordance with FOIA and the agency's regulations, such documents are available for public inspection and copying upon request by any person. The petition, if granted, would arguably amount to an unprecedented and legally questionable extension of the FOIA by granting access to private documents of regulated entities that are not "agency records" (as defined in the PRA) and are not required for NRC regulation and licensing. The FOIA applies to every record which an agency has, in fact, obtained; and not to documents which merely could have been obtained. The United States Supreme Court considered this issue in Forsham v. Harris, 445 U.S. 169 (1980) and concluded that Congress could not have intended FOIA to embrace documents that the federal government has the right of access to, as this would include an extraordinarily large amount of private documents.

Comment 3. There are many administrative costs associated with information requests.

Commentors stated that there are many administrative costs associated with information requests. Most commentors believe that since the subject of a request does not have to be well defined, nor is a stated purpose for the search required, it is likely that many licensees would have to create or recreate their filing systems at a substantial cost to accommodate broad requests. This cost would, in turn, be passed on to consumers. One commentor, the Mayo Clinic, stated that "the petition would result in increased licensee efforts and costs with no benefit nor increase in safety for society. These additional costs would need to be passed on to

customers who would gain nothing. In particular, medical licensees would be forced to pass these costs onto patients while at the same time reacting to federal health care initiatives to reduce costs." One licensee (Commonwealth Edison) estimated that any one request costs anywhere from \$1,500 to \$3,000, and would clearly require dedicated resources to this proposed effort.

NRC Response:

NRC agrees with the general comments and assertions that the requirements proposed by the Petitioner would result in some, possibly substantial, administrative costs for licensees to respond to requests for documents. A licensee's process would likely include provisions for: 1) receipt, acknowledgment, and tracking of the request; 2) evaluation of the request to determine if it will require a document search effort, and, if so, the nature and scope of the search; 3) conducting a search including interactions with document custodians; 4) reviewing collected materials and screening for "relevance" or other bases for non-disclosure such as trade secrets or privileged information; and 5) reproduction and transmittal of responsive documents. Since the documents which can be requested are "any record," there are likely to be significant administrative burdens and costs for locating and compiling the requested information for reproduction. The cost could include dedicating personnel to this task. In addition, unlike the FOIA, the petitioner's proposal does not provide for the recovery of the costs associated with searching and reviewing documents.

Granting the petition could adversely impact the effectiveness of NRC by increasing the burden on the Commission's adjudicatory activities without a corresponding enhancement of safety. The appeal process provided by this petition would require AJs to be called upon to determine if a record can be the subject of a request, if reproduction fees are reasonable, and if the licensees' responses are timely. The proposal would strain the existing resources of the

Atomic Safety and Licensing Board Panel. It might also necessitate seeking additional resources for NRC which might be difficult to obtain in the absence of a safety justification. The petition does not provide for effective Commission oversight of the AJs that is afforded other adjudicatory matters; indeed, the Petitioner's proposal that the AJs' decisions would be final and would not be appealable or subject to review by the Commission, undermines the Commission's ability to effectively monitor and administer its adjudicatory processes. The Commission's regulations require licensees to provide full disclosure of information that NRC has determined is necessary for it to fulfill its mission to protect the public health and safety. OCRE's petition does not explain how its proposed document access and appeal process would enhance NRC's ability to accomplish that mission.

Comment 4. OCRE has not provided a specific purpose for the information other than wanting access to it.

Several commentors stated that OCRE has not provided any specific reason for needing to review the onsite information it is requesting other than its belief that the public should have access to this information. The Petitioner has pointed out that the requested access is not directly for protection of the public health and safety. The commentors' criticisms further questioned whether OCRE is not casting public citizen groups into the role of providing oversight of NRC's regulatory program.

NRC Response:

NRC recognizes the important contribution the public makes to NRC's regulatory process. To facilitate public involvement, NRC has developed more effective and efficient methods of providing information to the public in order that the public can be more fully informed on the licensing and regulatory process and issues associated with these activities. With the improvement of communication technology since the submittal of OCRE's petition, NRC has

developed ADAMS, as discussed above, that provides access to documents relevant to its licensing decisions, as well as additional links containing information regarding the regulation and management of nuclear facilities and materials to facilitate public participation in the regulatory process. A newly created "Homepage" and improved "search engines" were added in 2000 and have been updated recently, making "navigation" of this information easier. NRC is satisfied that the access to licensee-held documents envisioned by OCRE's petition is not necessary to participate in the hearing process, given the voluminous amounts of information available to the public regarding NRC's licensing review and regulatory decisions. For example, Subpart L of 10 CFR Part 2, "Informal Procedures for Adjudications in Materials and Operator Licensing Proceedings," contains provisions that allow any person whose interest may be affected by a proceeding for the grant, renewal, or licensee-initiated amendment of a license subject to Subpart L, to file a request for a hearing. Subpart L also requires the Secretary of the NRC to maintain a docket for each adjudication under this subpart, commencing with the filing of a request for a hearing, which includes the request for a hearing and other related documents, as well as a hearing file consisting of the application for a license or amendment, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application. The NRC staff has a continuing duty to keep the hearing file up to date with respect to these materials and to make them publicly available for inspection and copying, as well as providing them to the appropriate parties to the adjudication. To that end, the database for the web-based version of ADAMS is updated once daily, usually after midnight East coast time. In the more formal NRC adjudications, additional discovery tools are available and these can provide access to much of the information and many of the documents in the licensee's sole possession that the Petitioner seeks through its petition for rulemaking. In view of the extensive provisions for

access to relevant information and documents in NRC's hearing procedures in 10 CFR Part 2⁶ NRC strongly disagrees with the Petitioner's assertion that without the proposed rule, the public's effective participation in NRC's hearing process will be restricted.

Comment 5. The petition could have a negative impact on the public health and safety.

Several commentors pointed out that the petition for rulemaking could actually have a negative effect on public health and safety by producing a chilling effect on the development of utilities' self-assessments (which have been promoted by NRC) because the utilities fear that such documents could be used for purposes other than that for which they were intended.

NRC Response:

NRC agrees it is possible that granting the petition could discourage licensee self-assessment. NRC agrees that providing access to draft and other preliminary documents may have a chilling effect and discourage employees of licensees from documenting information that may be perceived as adverse to their employers, resulting in less candid and frank self-assessments and "lessons learned" analysis. It should be noted that NRC encourages self-assessments and licensee-initiated corrective actions and NRC would not want to impose unnecessary requirement that discourage these activities.

Comment 6. Some information now being retained by licensees is still available to members of the public through reports to the NRC which are placed in the NRC's Public Document Room.

⁶The NRC has proposed changes to the adjudicatory process 66 FR 19610 (April 16, 2001). The proposed changes would not affect the access to documents and information currently provided to the public.

One commentor, Westinghouse Electric Corporation, pointed out that in each case provided by OCRE, "there is voluminous information in the possession of the NRC and hence publicly available . . ." Westinghouse took the examples provided by OCRE where documents are now being retained onsite, and pointed out where the information that is being retained onsite is still being provided in other records that are sent to NRC and, thereafter, placed in the PDR.

Another commentor, BG&E, responded to OCRE's appraisal of the current situation, by pointing out that approximately 90% of the information that it will take out of its technical specifications will be transferred to publicly available documents, such as the Updated Final Safety Analysis Report and the Quality Assurance Plan, and the remaining 10% will be transferred to more appropriate, publicly available documents which are controlled by existing regulations.

NRC Response:

NRC agrees with the commentors that information retained on site often is provided in other records that are sent to NRC. Although some of this material may have been removed from its website and PDR after the terrorist attack of September 11, 2001, NRC has restored access to a large volume of licensing and regulatory materials that were removed.

Comment 7. OCRE is mischaracterizing the 1989 Rules of Practice and overstating the effects of not having access to the records sought.

OCRE stated that "without sufficient factual information to support admission of contentions, petitioners will never become interveners and will never have the right to discovery."

However, while the Rules of Practice will preclude a contention from being admitted where an intervener has no facts to support its position and NRC hearing practice does not permit discovery to frame contentions, allowing access to "any record relevant to NRC-licensed or regulated activities held by a possessor," would allow, as several commentors pointed out,

"litigation-type discovery against a licensee without filing a lawsuit and thus, without the legal safeguards designed to prevent 'fishing expeditions.'"

NRC Response:

The NRC disagrees with the Petitioner's position that if this petition is not granted, the public will not be able to fully participate in the NRC hearing process which is provided for under the AEA. The AEA, as implemented by the Commission's regulations, provides the opportunity for a hearing to any person whose interests may be affected by the granting, renewal, or licensee-initiated amendment of an NRC license. The NRC staff makes available for public inspection and copying, documents relevant to its licensing decisions electronically at the ADAMS Public Reading Room, discussed above, and/or in the PDR. These documents include the application, and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application. These documents provide the basis for the NRC's decision to grant, renew, or amend, a license, and are sufficient to permit a member of the public to make an informed decision as to whether the person desires to participate in the hearing process and to formulate appropriate contentions. See Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process 54 FR 33168 (August 11, 1989).

IV. Reasons for Denial

NRC recognizes the contribution the public makes to the regulatory process and the importance of public confidence in that process. However, based on the review of the amendment requested by OCRE and the comments received on this petition, NRC concludes that there are several legal and policy considerations associated with the petition for rulemaking which warrant denial of the petition. The specific reasons for denial are:

1. OCRE's request for access to licensee-held records is overly broad and would allow access to documents that the NRC requires licensees to maintain onsite for inspection purposes but generally does not require licensees to submit, as well as almost all of a licensee's internal documents including drafts and other documents which the NRC does not require licensees to maintain and on which NRC does not rely for NRC regulatory or licensing actions, even if they are, in some respect, relevant to NRC activities. Neither the AEA or the FOIA, which applies to records which an agency has, in fact, obtained, and not to records which merely could have been obtained, provide the NRC with the authority to require licensees to supply such documents to the public.
2. OCRE has not made a showing that supplementing the safety information which underlies and supports Commission action and is available to the public, would result in enhanced safety. In fact, granting the petition may have an adverse impact on safety. Resources that licensees would use to defend and explain matters would not be available to address substantive safety issues. Granting the petition may also have a chilling effect and discourage employees of licensees from documenting information that may be perceived as adverse to their employers resulting in less candid and frank self-assessments and "lessons learned" analysis. The access required by the petition could discourage licensee self-assessments and self-identification of the need for corrective action.
3. Without a corresponding enhancement of safety, the petition would create a significant but unnecessary administrative and economic burden on licensees without justification. Because the records which could be requested are "any record," such requests could significantly impact licensees which would be required to bear the cost of creating a system to assemble these documents as well as dedicating the administrative personnel

necessary to locate and compile the requested information for reproduction. Unlike FOIA, which allows for the recovery of the costs associated with searching and reviewing documents, the only cost which the petition allows is the cost of document production.

4. The petition is contrary to efficient regulatory oversight of NRC facilities, as well as the legislative move to reduce unnecessary recordkeeping and reporting requirements. NRC has been engaged in activities to eliminate unnecessary requirements and to move toward risk-informed requirements which focus on safety matters. These internal agency initiatives have gone hand-in-hand with the objectives and requirements of the PRA. The documents which are the subject of the petition for rulemaking include documents that NRC has determined are unnecessary for NRC to fulfill its mission regarding the protection of the public health and safety and the common defense and security.
5. Granting the petition would adversely impact the effectiveness of the NRC by increasing the burden on the Commission's adjudicatory activities without a corresponding enhancement of safety. The appeal process provided by this petition would require AJs to be called upon to determine whether a record can be the subject of a request; whether reproduction fees are reasonable; and, whether a licensee's response is timely. This would increase the work load of NRC AJs which would affect the amount of time available for other cases. The petition does not provide for the Commission to review the decisions of its subordinate judges which undermines the Commission's ability to effectively monitor and administer its adjudicatory processes.
6. OCRE has not made a showing that without this amendment to 10 CFR Part 9 the public will not be able to fully participate in the NRC hearing process provided for under the AEA. The AEA, as implemented by the Commission's regulations, provides the

opportunity for a hearing to any person whose interests may be affected by the granting, suspending, revoking or amending of an NRC license or application to transfer control. The documents which provide the basis for an application to grant, renew, or amend, a license, are available in electronic form for viewing or downloading at the NRC's ADAMS Public Reading Room, <http://www.nrc.gov/reading-rm/adams.html>, or at the NRC's PDR for public inspection and copying. These documents are sufficient for a member of the public to make an informed decision as to whether the person desires to participate in the hearing process and to formulate appropriate contentions. The Commission is satisfied that, given the information that the NRC ensures is available to the public, the access to licensee-held documents that the petition requests is not necessary for meaningful participation in the hearing process.

V. Conclusion

In sum, granting the petition could create a significant administrative and economic burden on licensees and increased administrative burden on the NRC without a corresponding enhancement of safety. The potential but speculative benefits that might occur from public access to licensee-held documents are outweighed by the burden granting the petition would impose. Moreover, the Commission does not have the authority to require a licensee to provide

documents to members of the public that NRC has determined are not necessary to be kept as agency records to provide the basis for NRC's regulatory and licensing actions. The petition for rulemaking filed by OCRE, PRM-9-2, is denied.

Dated at Rockville, Maryland, this _____ of _____, 2003.

For the Nuclear Regulatory Commission,

Annette L. Vietti-Cook
Secretary of the Commission

Ms. Susan Hiatt
Director, OCRE
8275 Munson Road
Mentor, OH 44060-2406

Dear Ms. Hiatt:

This letter responds to the petition for rulemaking (PRM-9-2) that you submitted to the Nuclear Regulatory Commission (NRC) on behalf of the Ohio Citizens for Responsible Energy, Inc. (OCRE). The petition requested that the Commission amend 10 CFR Part 9, "Public Records," by adding a subpart addressing the public's right of access to information held by facility-licensees.

On June 13, 1994, NRC published a notice of receipt of the subject petition for rulemaking in the *Federal Register* (59 FR 30308) and requested comments from the public. We received 27 comment letters which we sent to you as well as an additional letter sent by OCRE in response to those comments. Although most respondents commented on the importance of public participation in the regulatory process and agree that public participation should be encouraged, these respondents disagree with OCRE's proposal as an effective means of accomplishing that objective.

NRC has considered OCRE's petition and the public comments received as well as OCRE's response to the public comments, and is denying the petition because the additional recordkeeping and reporting OCRE has proposed is not necessary to protect the public health and safety or to ensure effective public participation in NRC adjudicatory hearings on licensing actions, and is contrary to internally and externally-driven initiatives to reduce unnecessary recordkeeping and reporting requirements.

In particular, the Paperwork Reduction Act of 1995 requires federal agencies to assess their information collection requirements in order to identify those requirements where the burden can be reduced in scope or eliminated without affecting an agency's ability to fulfill its statutory mission. In making its determination on whether to eliminate any reporting requirements, NRC attempts to ensure that any deletions or modifications of regulatory requirements do not compromise its mission to protect the public health and safety. NRC also factors into its decision making process the views of the public, not only on the implications for public health and safety, but also on the specific value of the reporting requirements for the purpose of public information and participation in the regulatory process.

NRC agrees with you that public participation in the regulatory process enhances effective regulation and the NRC intends to continue to make available to the public, those licensing and regulatory documents that have a direct bearing on NRC's regulatory and licensing activities. However, for the reasons noted in the attached *Federal Register* notice, the Commission denies your petition.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosure:
Federal Register Notice Denying the Petition