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Office of the Secretary
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Washington, DC 20555

ATTENTION: Rulemakings and Adjudications Staff

Comments of Nuclear Information and Resource Service (NIRS) Regarding the United States Nuclear Regulatory Commission Proposed Rulemaking on Changes to the Adjudicatory Process

To whom it may concern:

I am submitting comments on the U.S. Nuclear Regulatory Commission (NRC) proposed rule as published in the Federal Register, April 16, 2001, Vol. 66 at pages 19609-19671 regarding changes to the adjudicatory process for NRC licensing hearings (10 CFR Part 2).

The Commission is proposing to make sweeping changes to the agency's hearing procedure regulations, most notably by replacing formal adversarial trial-type hearings with informal legislative-type hearings. Under the proposed rule, informal hearings would become the default proceeding for virtually all initial reactor licensing, license extensions, license amendments except for reactor licensing cases involving "a large number of very complex issues." The Commission has stated that the revisions are needed to "streamline" the licensing process to provide a more cost efficient, flexible and expeditious proceeding. The proposed rule would maintain one formal track hearing process (Subpart G) and provide three informal tracks (Subpart L, M, and a new Subpart N). A new Subpart C is proposed to consolidate all general hearing procedures for all adjudications as a "starting point."

Under the proposed Subpart C proceedings, public intervenors on license applications must file contentions at the same time as the request for hearing and petition for leave to intervene. The standard for specificity of contentions is also raised from the submission of a list of "areas of concern" as currently permitted for informal hearings under Subpart L.

The Subpart L informal hearings for reactor and materials licenses would have limited discovery and no cross-examination by the parties. Subpart N hearings are proposed for "fast track" proceedings through an oral hearing with written statements rather than written pleadings, briefs or motions.

I adamantly oppose the proposed rule change as fundamentally undemocratic and a violation of the public's due process in licensing hearings regarding health and safety. While the NRC's stated goal in the proposed rule change is to conduct its regulatory activities more effectively and at less cost to all parties, the proposed activity is unmistakably directed to economically benefit the nuclear industry through an expedited licensing process where

meaningful public participation is systematically curtailed or eliminated.

The Rulemaking Constitutes an NRC Promotional Activity for Industry

Since Three Mile Island and Chernobyl, the public is well aware of the need for close scrutiny of the nuclear industry in all its aspects because so much is at stake. In a just and conservative licensing environment, public interest groups and potentially affected communities have meaningful access to independently investigate and formally participate in hearings within a licensing process that is "full, fair and efficient." An NRC decision-making process that prioritizes public health and safety should welcome such involvement from public interest groups and impacted communities. Unfortunately, the continued need for this independence is underscored by evidence that the NRC already has abdicated its role as an impartial regulator in critical areas. This is clearly evidenced as early as the investigative report to the Subcommittee on General Oversight and Investigations, Committee on Interior and Insular Affairs, U.S. House of Representatives December, 1987 entitled "NRC Coziness With Industry: Nuclear Regulatory Commission Fails to Maintain Arms Length Relationship with the Nuclear Industry." Based on the congressional investigation and hearings, the Subcommittee identified five significant instances in which the NRC failed to maintain a proper regulatory relationship with the nuclear industry. I contend that the NRC and the regulated industry have maintained this "cozy" and collaborative relationship to relax and dismantle safety regulations and ease enforcement actions as part of on-going cost-benefit licensing actions for industry.

I assert that the proposed NRC rulemaking is simply a new manifestation of this same cozy relationship between the federal licensing agency and the license applicants. The NRC rulemaking is evasive in its speech, but its agenda is clear: to eliminate meaningful public participation and intervention in the licensing hearing process to the exclusive benefit of the nuclear power industry.

Contrary to the NRC's aim in writing the proposed rule change, the public is entitled to full and meaningful participation in an on-the-record hearing process for the licensing of new reactors, the re-licensing of aging reactors and industry amendments to safety requirements of their operating license. The licensing process for the nuclear industry must be held accountable through on-the-record hearings with full public disclosure of potential safety issues and the guaranteed right to cross-examine witnesses on statements of fact in a trial-type proceeding. The NRC is charged to regulate the nuclear power industry for the public's health and safety. Preserving the public's ability to independently intervene with full due process in a licensing proceeding as a conservative check and balance is paramount to protecting that health and safety from an aging, cost-cutting and inherently dangerous industry.

As acknowledged by NRC in the Federal Register notice "For many years, the NRC did not depart from the longstanding assumption that the Atomic Energy Act requires on-the-record hearings" as applying to formal trial-type adversarial hearings. Indeed, the official position of the Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have historically held that on-the-record hearings are not merely permissible under the Atomic Energy Act but required.

The Commission now argues that the licensing process must be further "streamlined" to facilitate new applications from industry for new reactors, an increase in scheduling applications and hearings for reactor license extensions and license amendment applications on such issues as power uprates at operating reactors. In the Commission's view, restriction or elimination of public access to formal trial-type adversarial hearings to resolve technical, environmental and public safety disputes is the most expedient and cost-effective route to accommodate the expansion sought by the nuclear industry. I charge that this is an unacceptable abrogation of NRC's mandate to uphold public health and safety and an affront to the democratic process. Nuclear utilities have no "right" to a license, nor to a licensing process designed purely for their benefit. However, the public does have a right to participate effectively in major federal actions affecting their welfare.

The NRC's current effort to reinterpret statutory law under the Atomic Energy Act Section 189 in order to eliminate meaningful public participation through hearings is a procedural contortion of due process to compliment an industry agenda seeking guarantees in the license application process. The proposed actions would greatly complicate, restrict or eliminate the public hearing process to solely benefit the economics and expansion schedule of the nuclear industry that NRC is mandated to regulate. Such actions simultaneously constitute a blatant promotional activity on the part of the NRC for the licensed and regulated industry.

Public Confidence In NRC Decision-making Would Be Further Undermined

As described in the Federal Register notice, the legislative history on formal hearings in reactor licensing repeatedly demonstrates that, in establishing the reactor licensing process, the Atomic Energy Commission sought to provide public confidence in the process by incorporating formal public hearings. Formal public hearings before the AEC were negotiated as part of a "Grand Bargain" agreed upon between the States and the federal agency, where the right to formal state proceedings were given over in lieu of comprehensive formal hearings at the federal level. All licensing hearings for operational reactors to date have been held with the opportunity for a formal proceeding format. Additionally, in 1978, in keeping with its reactor licensing activities, the NRC declared that its hearing process for licensing a high-level radioactive waste (HLW) repository would also require formal proceedings. The Federal Register notice noted that the Commission and the Office of General Council have identified that "A change in the Commission position to permit the use of informal procedures authorizing construction of a HLW repository and the receipt and possession of HLW would not advance public confidence in the Commission's decision-making process with respect to repository licensing. Based on these considerations, the Commission intends to continue to require, in Sec. 2.310 (e) of the proposed rule, that the initial application for construction of a HLW repository, and initial authorization to receive and process HLW at the repository use formal hearing procedures of subpart G."

It is utterly irrational for NRC to use this logic to justify formal hearings for licensing of a high-level radioactive repository in order to build public confidence in its licensing process while "deformalizing" public participation in the decision-making process to generate more high-level nuclear waste through license extensions, new licenses and

license amendments for power uprates. The NRC's stated mission to build public confidence in the licensing and regulatory process is not be served by irrational action. In fact, the actions outlined in the proposed rule will further erode public confidence and widen public mistrust in the agency 's ability to be an impartial regulator focused on health and safety.

If there is one thing the NRC, and federal government generally, should be learning from the events of Seattle, Quebec, Prague, Genoa and elsewhere over the past several years, it is that when people are shut out of the process, they will take their grievances the only place they can: into the public arena of the streets. Adoption of this proposal would serve only to encourage large-scale protests-and their accompanying disruption-which surely would serve neither the needs of the nuclear industry nor of the NRC itself.

The Rule Change Further Undercuts the Public's Due Process in Licensing Actions

Under the current proposed rule change, the move to "deformalize" licensing proceedings creates a number of unacceptable impacts on the public's right to due process.

Developing Contentions. Under the current practice as adopted in 1978, after filing a petition to intervene, intervenors generally have a month in which to familiarize themselves with the application and formulate "contentions" that describe and provide documented support for the concerns they wish to litigate. As a result of a 1989 rule raising the admissibility standard, it is already difficult to get contentions admitted for hearing. Under section 2.309(c) the proposed rule would make it even more difficult: intervenors would have to submit their contentions almost immediately after the publication of a hearing notice. Unlike nuclear utilities and the NRC staff, public intervenors-including state and local governments--do not routinely retain scores of full-time experts and often operate with considerably less financial resources for such things as prompt technical reviews. This gives intervenors virtually no time to review the application and draft contentions, and makes it practically impossible to hire expert witnesses to help them formulate contentions. The proposed rule would thus make the likelihood of contention dismissal much easier with greater frequency. Thus, it becomes unfairly difficult, and perhaps impossible, for intervenors to get a hearing. This is one of the most egregious provisions of the proposed rule. In fact, I note that the proposed requirement that contentions be included with the hearing petition is being reintroduced. The Commission has previously attempted to do this in Subpart G proceedings and abandoned it as unworkable. Whereas the previous practice provided for a 30-day window to submit both petition and contentions, the proposed rule provides 45-days. The additional 15-day provision does not constitute a reasonable and fair extension of a previously unworkable and abandoned practice.

For materials licensing cases, the proposed rule would also raise the standard for obtaining a hearing. Under the current rules, intervenors must simply state their "areas of concern." In setting this standard, the Commission reasoned that because the intervenors' formal hearing rights were eliminated in a Subpart L proceeding, it made sense to provide a more relaxed standard for admissibility. Under the proposed rule, an intervenor in a materials licensing case would have to submit contentions under the rigorous admissibility standard that was formerly applied only in formal

hearings. Thus, the NRC makes it harder to get even the informal hearing provided in Subpart L.
Discovery and Cross-examination. Under the current rules, parties are entitled to request documents, ask interrogatories, and depose the other sides' witnesses. The proposed rule at section 2.336 would cut back on discovery, reducing it to an exchange of "relevant" documents and eliminate interrogatories and depositions.

Under the current rule, the right to confront adverse witnesses at the hearing through cross-examination is guaranteed. In fact, it has long been a hallmark of NRC licensing cases that an intervenor can make his or her case entirely through cross-examination of adverse witnesses. This is crucially important for intervenors who lack the resources to submit their own expert testimony, but who have valid concerns about the adequacy of the applicant's case. Through effective party cross-examination, an intervenor can demonstrate that the license applicant has not met its burden of proving that the proposed license would protect public health and safety. The proposed rule seeks to move away from this publicly valuable role of cross-examination in the hearing process.
At the informal hearing, the right to cross-examination would be eliminated - instead, the presiding officer would be the sole questioner and would be provided written questions by the parties for direct and rebuttal testimony. The presiding officer would then have the discretion to decide whether to pose these questions to witnesses as proposed in section 2.1207(b)(7). This is destined to be extremely destructive to the level of public confidence in a fair, objective and complete hearing process. It is extremely difficult for a presiding officer to appear impartial and avoid aligning with one party or another. The adversarial process, as currently practiced, makes no such pretense.

The proposed rule places an extremely large burden on the presiding officer by assuming that the officer always will have a competent understanding and insight into the intent of a particular line of questioning. The concern is that the officer may not be competent to fairly select and eliminate questions designed to persuade with facts or develop controversy around issues. This concern is amplified by the highly-complex nature of many of the technical issues that are likely at some point to fall outside the education and experience of the presiding officer. To place such authority with the presiding officer is to potentially undermine the quality of a process to develop a full, fair, just and objective evidentiary record. Such a proposal effectively gags the intervenor and nullifies any intervenor advantage of expert consultation in the preparation of the cross-examination of adverse witnesses. While the proposed process by design speeds up the hearing, it effectively removes the public confidence that all the facts have been introduced and fairly reviewed in the particular matter of dispute. In fact, the proposed cross-examination process could have the opposite effect of slowing down the proceeding by overburdening the presiding officer so as to take considerably longer to question a witness through interpretation of submitted written questions from participating parties.

There is significant ambiguity with the procedure under proposed section 2.1207 for handling the parties' cross-examination written questions to the presiding officer. The rule is unclear as to whether these questions are to be filed and exchanged with the other parties. This raises the obvious problem that an adverse witness is telegraphed the questions in advance of

taking the stand and has the opportunity to offer an applicant-prompted and rehearsed response.

In glaring contrast to the agency's proposed actions to dismantle the due process afforded the public through the informal hearing process, the NRC maintains industry enforcement hearings as formal proceedings--affording industry every opportunity to exercise due process. Were NRC proposing to eliminate formal proceedings for enforcement actions, the industry would be as adamantly opposed to this rulemaking as are public stakeholders. The public interest community and the affected communities are no more willing to give up their due process than industry. The agency's discriminatory treatment between public and industry hearings on this aspect of the rule change is unequal justice.

CONCLUSION AND RECOMMENDATIONS
The NRC must completely abandon its current course as charted by this proposed rulemaking. The proposed rule does not meet the agency's goal of providing a "full, fair, and efficient hearing."

If the Commission seeks to reinterpret legislative history and law to reduce the cost of litigation to ALL parties and speed the disposition of licensing proceedings, it must seek such avenues without sacrificing core values and principles of justice. Central to such effort, NRC must proceed without dismantling the due process statutorily provided for ANY of the legitimate parties to include the affected public.

To do otherwise, NRC establishes an unjust, arbitrary and caprious licensing standard.

The federal court system has recognized flexibility in adjudicatory proceedings for federal courts without infringing upon the public's fundamental right to a meaningful hearing process. As an alternative to pursuing the proposed rule, NRC can explore the model set forth by the Civil Justice Reform Act of 1990 ("CJRA" of "the Act"). The CJRA was enacted in response to a perception that civil litigation in the federal court system cost too much and took too long. The Act serves to monitor all 94 federal district courts to implement civil justice expense and delay reduction plans to ensure just, timely, and inexpensive resolutions to civil disputes. (28 U.S.C. 471) The Act established a CJRA Advisory Group that involved litigants and members of the bar in a comprehensive review of the administration of civil justice. The advisory groups assessed their federal court dockets and proposed recommendations for reducing cost and delays. As the CJRA demonstrates, it is entirely possible to effectively manage case load and reduce cost in complex civil litigation while preserving such "core" values as due process, equal justice, judicial excellence, and the rule of law.

To the Commission's credit, the agency undertook two public meetings regarding the NRC hearing process on October 26 and 27, 1999. The meeting transcripts of participating stakeholders including litigant lawyers, public interest groups, members of the Atomic Safety and Licensing Board, NRC Office of General Counsel and licensees indicate that there is a tremendous resource available to NRC in an experienced advisory capacity that the agency has only superficially touched. Alternatively, the Commission can establish a licensing hearing advisory board made up equally of licensing process stakeholders to accomplish a fair, just and equitable reform of the

NRC licensing process.

As it is, however, the NRC's proposed rule flies in the face of democracy and simple access to justice. It is, frankly, un-American, and reads more like a proposal from Russia's Minatom than from a United States government agency. It is an embarrassment to the people of this country, and must be completely, deliberately, and quickly rejected in its entirety.

Thank you for the opportunity to bring these remarks to your attention.

Mindful of the enormous responsibilities which stand before you, I am,

Yours sincerely,
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