September 13, 2001

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE") ON PROPOSED RULE, "CHANGES TO ADJUDICATORY PROCESS," 66 FED. REG. 19609 (APRIL 16, 2001)

In this notice the NRC has proposed sweeping changes to its rules of practice. The main thrust of these changes is to limit the use of discovery and cross-examination in NRC proceedings. OCRE is opposed to these rule changes.

Discovery and cross-examination are linchpins of American jurisprudence and have long been considered the essence of due process of law. They have been part of the NRC's adjudicatory process for nuclear plant licensing (and that of the NRC's predecessor agency, the AEC) for decades. Such a fundamental change in the hearing process which diminishes the rights of citizens should be prompted by only the most compelling of circumstances. But the NRC has identified no such compelling reasons for its proposed rule. In fact, the NRC has utterly failed to provide a reasoned justification for its proposed rule. Vague assertions that the NRC is looking to "improve" its hearing process to "enhance" its the effectiveness cannot meet any reasonable definition of need for these substantial changes. In short, the NRC has not demonstrated that the process is broken, so it should not be trying to "fix" it.

As a participant in the October 1999 workshop, at which the public interest participants were unified in their opposition to these proposed changes, I find it appalling that the NRC has disregarded the concerns of the stakeholders which will be the most adversely affected by these changes.

In NUREG-0545, "Seminar Report on the Public Hearing Process for Nuclear Power Plants," held June 26-27, 1978, at page 85, then NRC Executive Legal Director Howard Shapar stated:

> A second important perception of the Staff report is that there is no need for any massive change in the Commission's rules of practice, in Part 2, in order to make the hearing process more effective.
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> It concludes that the existing rules in Part 2 are soundly based on legal principles under the APA and decisional law, that

they reflect a reasonable balance between expedition and fairness, and that they provide all the tools the licensing boards need in order to get the job done efficiently.

As a matter of fact, some of the rules, particularly those relating to discovery, take the Federal Rules of Civil Procedure as their model.

Given such a strong declaration in defense of the current process by the NRC in the past, the burden is on the agency to demonstrate what has changed to warrant the sweeping changes now proposed. Has the APA or the FRCP been changed?

Still others in the NRC in the past have voiced their support for the hearing process, which includes full, formal on-the-record hearings with discovery and cross-examination:

Former NRC Commissioner Peter Bradford before the House Committee on Energy, 1983:

The current NRC adjudicatory process was developed as a part of a bargain from which the nuclear power industry gained a great deal in the late 1950s. In return for accepting extensive federal hearings, the industry was exempted from any state or local regulation of radiological health and safety and received the limitations on liability that are set forth in the Price-Anderson Act. Thus, citizens in any community in which a nuclear facility was to be located - gave up both local regulations of the facility and the additional financial and safety assurances that normal insurance industry operations would have brought. In return they got a commitment to the full panoply of trial-type procedures as part of the federal licensing process.

[Note: this linkage of hearing procedures with the Price-Anderson Act is corroborated by industry attorney Gerald Charnoff in NUREG-0545, page 101.]

The Rogovin Report on Three Mile Island, 1980:

Intervenors have made an important impact on safety in some instances - sometimes as a catalyst in the prehearing stage of proceedings, sometimes by forcing more thorough review of an issue or improved review procedures on a reluctant agency. More important, the promotion of effective citizen participation is a

necessary goal of the regulatory system, appropriately demanded by the public.

Memorandum from Chief Judge B. Paul Cotter, Jr. of the Atomic Safety and Licensing Board, to NRC Commissioners, May 1, 1981:

(1) Staff and applicant reports subject to public examination are performed with greater care; (2) preparation for public examination of issues frequently creates a new perspective and causes the parties to reexamine or rethink some or all of the questions involved; (3) the quality of staff judgement is improved by a hearing process which requires experts to state their views in writing and then present oral examination in detail . . . and (4) Staff work benefits from two decades of hearing and Board decisions on the almost limitless number of technical judgements that must be made in any given licensing application.

As one who has been an intervenor in operating license and amendment proceedings, I find the present procedures most empowering to citizens. The right of discovery is especially essential for placing the intervenor on equal footing with the license applicant and NRC staff. As an intervenor I had full access, through discovery, to internal plant documents such as inspection and nonconformance reports and audits. I even had access to proprietary documents if I signed a protective agreement. These are documents that the NRC staff has access to, but which are not released to the public. This level of scrutiny is necessary to force the license applicant to prove its facility complies with the applicable regulations, rather than merely accepting conclusory assertions and promises that the plant will be safe.

Finally, I would note that the Regulatory Flexibility Act certification made by the NRC for this proposed rule is fundamentally flawed in that it only considers impacts on licensees and license applicants. This proposed rule will have a significant adverse economic impact on small not-for-profit nuclear safety advocacy organizations, such as OCRE, and public interest law firms. This proposed rule will greatly hamper the effectiveness of such entities. Sadly, one can only conclude that that is the real purpose of this proposal.

Respectfully submitted.

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