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OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

Office of Secretary
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

September 14, 2001

Attention: Rulemaking and Adjudications Staff

**COMMENTS OF PHILLIP GREENBERG IN OPPOSITION TO PROPOSED
NRC RULEMAKING TO EXCLUDE AND/OR ELIMINATE PUBLIC
PARTICIPATION IN THE PLANT LICENSING PROCESS**

Since 1975 I have been professionally involved in energy and environmental policy issues, first in nongovernmental organizations, then in state and federal government service, and most recently as a consultant and writer.

I am vehemently opposed to the Nuclear Regulatory Commission's (NRC) proposed Rulemaking described in Federal Register 04-6-01, Vol. 66, which changes the licensing hearing process for nuclear power reactors. These proposed changes would extend a pattern begun almost ten years ago when the nuclear power industry and its advocates—including the NRC--succeeded in lobbying Congress to adopt numerous licensing changes favorable to the industry, including so-called "one-step" licensing.¹ The overall effect of those changes, combined with the current proposal, would be to bar any meaningful public participation in the licensing process. Adoption of the proposed rule would effectively mean that the NRC has abandoned any pretense of fairness or equity in the licensing process and has skewed the regulatory process entirely in favor of applicants.

TEMPLATE = SECY-067

SECY-02

¹ See, for example, Congressional Research Service, Issue Brief 88090, "Nuclear Energy Policy," March 2001: "For many years a top priority of the nuclear industry was to modify the process for licensing new nuclear plants....The Energy Policy Act of 1992 largely implemented the industry's licensing goals."

The public's participation in the licensing process has a long and well-founded history. In the mid-1950s Congress established a two-stage licensing process for new nuclear plants, and mandated public hearings largely to compensate for the significant privileges and powers granted to the nuclear industry and the federal government.² The public's right of participation has already been severely curtailed by numerous prior NRC rule changes regarding such matters as site banking, standardized design reviews, and emergency planning, and by the 1992 Energy Policy Act.³ To adopt these proposed rules, which would effectively end any meaningful public participation, would be not only a betrayal of the public trust but it would also complete the NRC's efforts to reverse the will of the Congress that established these licensing procedures as a system of checks and balances within the nuclear regulatory system.

Moreover, past public participation has resulted in numerous positive contributions by intervenors to improvements in nuclear safety, both industry-wide and plant-specific. Despite a long history of hostility and procedural roadblocks from the NRC, its predecessor agency, the Atomic Energy Commission, and the NRC's licensing boards,⁴ the achievements of intervenors in raising and highlighting important safety issues has been recognized by both impartial studies and the NRC's own Rogovin Group.⁵ Barring such participation will ensure that these opportunities to identify potential safety problems and concomitant improvements will in the future be forever lost. This is shortsighted in the extreme, for it would sacrifice public safety in the service of the nuclear industry's desires for a contest-free licensing process.

The NRC's proposal to replace trial-type public hearings (Chapter 10 of the Code of Federal Regulation Part 2 Subpart G) with "informal" hearings (Subpart L) is a transparent attempt to transform the hearing process from even a semblance of an equitable forum into one which is merely an empty formality.

Essential components of the hearing process such as mandatory discovery of documents for the disclosure of opposing evidence and the right to cross-examine witnesses regarding statements of fact must be preserved to safeguard the public's right to

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See Eric Glitzenstein, "The Role of the Public In Licensing Nuclear Power Plants," in David P. O'Very, Christopher Paine, and Dan W. Reicher (eds.), *Controlling the Atom in the 21st Century*, Natural Resources Defense Council, Westview Press, Boulder, CO: pp. 151-191, especially pp. 157ff.

For an enumeration of such prior rule changes, see Phillip Greenberg, "Accidents and Public Acceptance," in John Byrne and Steven M. Hoffman (eds.), *Governing the Atom: The Politics of Risk, Energy and Environmental Policy*, Volume 7, Transaction Publishers, New Brunswick, NJ, 1996, pp. 161-162 and references therein.

³See Greenberg, 1996, p. 160 and references therein.

See Elizabeth S. Rolph, *Nuclear Power and the Public Safety*, Lexington Books (D.C. Heath & Co.), Lexington, MA, 1979, p. 123; and Mitchell Rogovin, *Three Mile Island: A Report to the Commissioners and the Public*, Nuclear Regulatory Commission, Special Inquiry Group, Mitchell Rogovin, Director, U.S. Government Printing Office, 1980, pp. 143-144.

participate, to be heard, and to contribute to the regulatory process. On-the-record public hearings have for decades been an essential part of the regulatory process, imperfect though it may have been. The NRC's mandate to protect public health and safety surely requires the Commission to leave intact these essential components of the process, through which witnesses are required to defend their assertions of fact in on-the-record depositions and cross-examination, documents are entered into evidence, and a formal hearing record is thus established. If the NRC chooses to do away with these protections, the Commission will not only deprive the public of the opportunity to participate in the process, but it will limit the ability of affected parties to seek appropriate judicial review.

The NRC's proposed rule changes would strip away the last remaining vestiges of meaningful public participation from a process that has long been acknowledged to be stacked against the public. Even NRC has recognized the latter fact. The 1980 report of the NRC's own Special Inquiry Group assembled in response to the accident at Three Mile Island stated "[I]nsofar as the licensing process is supposed to provide a publicly accessible forum for the resolution of all safety issues relevant to the construction and operation of a nuclear plant, it is a sham."⁶

The public's participation in the licensing process has long been sharply opposed by industry and by the Commission itself, despite evidence of its positive contributions. The NRC's adoption of the proposed rule would substantially undercut the ability of outside parties to raise relevant safety and related issues. This would complete the Commission's acquiescence to political and industry efforts to ride roughshod over the public in its efforts to reinvigorate the nuclear power industry.

As the NRC well knows, the last firm order for a nuclear power plant in the United States was placed in 1973, and every plant ordered subsequently has been cancelled. This is an industry that has failed the test of the marketplace for almost three decades. Many have observed that the federal government's efforts to favor and nurture this industry—including but not limited to substantial subsidies (roughly 60% of all federal energy research and development funding since 1948), special regulatory arrangements, and unique liability protection via the Price-Anderson Act—have been a primary contributor to the industry's decline, by shielding it from the crucible of the marketplace and hard technical and economic review. The net result has been a loss of confidence by the investment community and a public long mistrustful of nuclear power.

It would frankly be foolhardy of the Commission to bow to the efforts of the industry and its advocates to bolster the industry's fortunes by continuing down that same path in seeking to curtail the public's few remaining opportunities to participate in the licensing process. The present Commission appears to have forgotten that the NRC as presently

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Rogovin, 1980, p. 139.

established was formed precisely because the public and indeed the Congress had lost faith in its predecessor agency's commitment to fairness, equity, and objectivity in its regulatory responsibilities.

Ultimately, the question becomes one how energy technology decisions are to be made in this country. If the NRC chooses to adopt this rule, it will be favoring a decision process which favors the power of industrial and political interest groups over democratic process. Such a policy can only succeed in the short run.

I strongly urge the Commission to reject this rule in its entirety and to exercise its authority to protect due process rather than to favor the industry it is charged with regulating.

[original submitted electronically]

Phillip Greenberg
Private Citizen

September 13, 2001