

**DOCKETED NUMBER**

**PROPOSED RULE: PR-1,2,50,51,52,54,60,70,73,76&110  
(66 FR 19610)**

1217

**DOCKETED  
USNRC**

**September 20, 2001 (2:57PM)**

**OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF**

Before the  
**United States Nuclear  
Regulatory Commission**

PUBLIC COMMENTS OF THE  
NATIONAL WHISTLEBLOWER CENTER AND THE  
COMMITTEE FOR SAFETY AT PLANT ZION

**Public Comments on the NRC Proposed Rule:  
Changes to Adjudicatory Process  
66 Federal Register pp. 19609-19671  
(April 16, 2001)**

**COMMENTS ON THE PROPOSED RULE**

Stephen M. Kohn  
Michael D. Kohn  
David K. Colapinto  
Mary Jane Wilmoth  
Christopher J. Wesser  
National Whistleblower

Legal  
Fund

Defense and Education  
3238 P Street, N.W.  
Washington, D.C. 20007  
(202) 342-1902 (Phone)  
(202) 342-1904 (Fax)

## COMMENTS ON THE PROPOSED RULE

---

The National Whistleblower Center and the Committee for Safety at Plant Zion respectfully submit these comments to the "Proposed Rule" regarding "Changes to Adjudicatory Process" filed by the U.S. Nuclear Regulatory Commission ("NRC") in the *Federal Register* on April 16, 2001. This Comment is filed in accordance with 66 *Federal Register* No. 95, pp. 27045-27046 (May 16, 2001), in which comments on the Proposed Rule were permitted to be filed on or before September 14, 2001.

### SUMMARY AND OVERVIEW

When the Atomic Energy Act ("AEA") was passed nearly fifty years ago, Congress and the Atomic Energy Commission clearly intended for any person who resided close to a nuclear power plant to have the statutory right to participate in public hearings on whether a license permitting the operation of the nuclear facility should be granted. Affected members of the public were granted a right to a hearing, in which they could question the safety-related determinations of the utilities that would profit from nuclear power. These members of the public were given the right to fully participate in licensing decisions made by the federal regulatory authorities.

In its April 16, 2001 Proposed Rule,

the NRC is requesting authority to eliminate this longstanding right. The NRC's Proposed Rule is inconsistent with Congressional intent, is in violation of the Atomic Energy Act and Administrative Procedure Act, and will result in the elimination of one of the most important safety-related regulatory procedures -- the interested American citizen. For the reasons set forth below, the Proposed Rule should be rejected in its entirety.

For years, no one questioned the legal right of persons who resided in close proximity to nuclear power plants to fully participate in on-the-record licensing hearings prior to the NRC's issuance of a license to operate the local nuclear power plant. For example, in 1954, when amendments to the AEA were being debated in Congress, one of the Act's principal sponsors was very clear about the necessity of full and fair public hearings on any decision by the government to grant a license to any person to operate a nuclear power facility: "I wish to be sure that the Commission has to do its business out of doors, so to speak, where everybody can see it . . . a hearing should be required." 100 Cong. Record 9999-10000 (remarks of Sen. Anderson).

In 1975, over twenty years after the passage of the AEA, the newly formed Nuclear Regulatory Commission unanimously recognized that public participation in the NRC's adjudicatory process was a "vital ingredient" in ensuring that the NRC "discharge" its "important duties" in protecting public safety. *Northern*

*States Power Company*, 1 NRC 1, 2 (1975). Likewise, in 1981 the NRC Commission issued a Policy Statement in which it sought to "emphasize" that licensing hearing had to be "fair," "produce a record which leads to high quality decisions" and conducted in a manner which would "protect the public health and safety and the environment." *Statement of Policy on Conduct of Licensing Proceedings*, 13 N.R.C. 452 (1981).

However, in the mid-1980's powerful special interests initiated intense lobbying efforts to weaken the public hearing process. For example, NRC Chairman Nunzio J. Palladino readily conceded that "industry representatives have complained" about the public hearing process" and wanted the process changed in order to establish "stability." Prepared Testimony of NRC Chairman, House of Representatives Committee on Energy and Commerce, Subcommittee on Energy Conservation and Power, *NRC Licensing Reform* (Sept. 23, 1983).

NRC Commissioners, both individually and collectively, withdrew their earlier endorsements of the public hearing process. In 1983, the NRC commenced a "case-by-case" process to incrementally "move away from" the traditional hearing process Congress intended. 66 *Federal Register* 19609, 19610 (April 16, 2001). In 1989 the NRC approved a rulemaking which considerably raised the burdens on citizen-intervenors. 54 *Federal register* 33168 (August 11, 1989).

In 1995, in an unprecedented action, the nuclear power industry opposed President William Clinton's nomination of a distinguished former NRC attorney to the NRC Commission. S. Hearing 104-57 (February 16, 1995). This nomination was blocked due to special interest fears that the nominee was supportive of public participation and meaningful oversight of the industry. After this nominee was successfully blocked, the Commission further retreated from any support for public participation in the NRC licensing process.

In 1998 the NRC issued a Policy Statement which marked a major departure from rulings on public hearings. *Statement of Policy on the Conduct of Adjudicatory Proceedings*, 48 NRC 18 (August 5, 1998). This Policy Statement was passed in anticipation of citizen opposition to the desire of nuclear power utilities to increase the operating life of existing nuclear power plants from 40 years to 60 years. There were obvious major safety issues implicated by extending the operating lives of nuclear plants, such as the impact of corrosion and vibration on containment vessels, well documented electrical wiring issues and a host of aging issues. Fearing that members of the public who resided within the evacuation zone of these plants would request safety hearings on the life extension issues, the NRC's Policy Statement significantly reduced the rights of impacted citizens to obtain licensing hearings.

In fact, due to the restrictive

rules set forth in the Policy Statement, no public hearings have been held on license extension issues. Every attempt by local citizens or public interest groups which reside within the evacuation zone to intervene and obtain public hearings on license extension issues has been uniformly rejected by the Commission. See, *In the Matter of Duke Energy Corp. (Oconee Nuclear Station, Units I, II and III)*, LBP-98-33 (1998); *In the Matter of Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant Units I & II)*, 48 NRC 325 (1998); *In the Matter of Florida Power and Light Company (Turkey Point Units III & IV)*, ASLB No. 01-786-03-LR, ASLB Order Denying Intervention (Feb. 26, 2001).

On April 16, 2001, the NRC published a new Proposed Rule, entitled "Changes to Adjudicatory Process." This Proposed Rule would codify the limitations placed on public participation contained in the 1998 Policy Statement. However, the propose rule would go even further. For the first time in its history the NRC proposed formal rules based on an explicit rejection of the public's right to an "on-the record" hearing adjudicating nuclear safety issues.

By formally rejecting the public's right to an on-the-record hearing, many of the critical elements of due process which had been accepted in NRC hearing over the past 45 years were eliminated, including the right to conduct any discovery and the right of a party to cross examine opposing witnesses.

"On-the-record" hearings also require that the administrative agency take into consideration the "necessity of the parties" in resolving procedural matters. 5 U.S.C. § 554(b)(3). Again, by arguing that no such hearings are required, the NRC is also attempting to enact numerous procedural rules and "fast track" procedures which render it practically impossible to ever obtain a hearing on the merits and meaningfully participate in a safety proceeding.

The current NRC Commission concedes that its predecessor organization, the Atomic Energy Commission "took the official position" that "on-the-record" hearings were "required" under the Atomic Energy Act. 66 *Federal Register* at 19611. Despite the nearly fifty-year tradition of holding "on-the-record" hearings, and the significant legal authority which supports a finding that such proceedings are required under the law, the current NRC has proposed a rule which would abolish the right to a meaningful "on-the-record" hearing in almost every NRC safety proceeding in which members of the public may participate.

Apparently, industry groups recognize the farcical nature of the proposed "informal" hearing process. Thus, the nuclear industry has insisted upon the preservation of the right to an "on-the-record" hearing when their interests are at stake. Specifically, if the NRC attempts to take an "enforcement action" against a utility due to allegations that the utility committed

criminal wrongdoing or violated essential safety procedures, the utility would retain the right to an "on-the-record" hearing. The Proposed Rule recognizes this double standard, and permits on-the-record hearings when the industry requests them in enforcement actions, but eliminates such hearings when an affected member of the public requests such a process in a safety proceeding.

The proposed rules are illegal under the Administrative Procedure Act, and directly prevent affected members of the public from defending their Constitutionally-protected interests. The proposed rules should be rejected in their entirety, and the NRC should guarantee meaningful public participation by adopting simple, user-friendly procedural rules modeled on the Federal Rules of Civil Procedure.

#### COMMENTS

##### **I Citizen Intervention has Protected the Public Safety.**

In 1954, during the Senate debates on the Atomic Energy Act, one of the law's principle sponsors, Senator Anderson, strongly endorsed the public's right to participate in nuclear licensing hearings. Consistent with that Congressional intent, the NRC's General Counsel, in a 1989 memorandum, recognized that "the AEC and later the NRC, have long interpreted Section 189 as requiring formal hearings for licensing proceedings. Formal hearings were required from the start under AEC

regulations . . . . [the AEC and NRC were] consistent in their view that Section 189 require(d) that licensing hearings be formal, trial-like hearings in conformance with the on-the-record provisions of the APA." *OGC Analysis of Legal Issues relating to Nuclear Power Plant Life Extension*, p. 35.

The licensing hearing process was recognized as an essential aspect of the AEA's safety regime. The procedures not only protected the personal rights of individuals who resided close to nuclear power plants and wanted to protect their own health and private property, but citizen intervenors established a long record of identifying major safety problems.

For example, twenty years ago, an NRC judicial panel strongly recognized the fact that citizen participation in licensing hearings frequently assisted the NRC in protecting the public safety. In fact, the NRC judges recognized that "substantial safety and environmental issues" were first raised by the citizen-intervenors:

Public participation in licensing proceedings not only can provide valuable assistance to the adjudicatory process, but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and

environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.

*Gulf States Utility Co.,*  
ALAB-183-RAI-74-3, slip op. at 10-12  
(March 12, 1974).

Seven years later, the NRC's Special Inquiry Group ("*Rogovin Report*") which investigated the Three Mile Island accident also recognized the important role citizen intervenors have played in protecting the public safety:

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.

*Rogovin Report*, pp. 143-44.

After investigating the causes of the Three Mile Island accident, the blue ribbon Rogovin Commission recognized that citizen participation in the hearing process was a "necessary goal" of the regulatory process, inasmuch as citizen intervenors had proven to be a "catalyst"

for identifying important safety issues.

In addition to the formal findings of the Rogovin Commission, the public record is replete with examples of where citizen intervenors have significantly contributed to the public safety. For example, in a 1983 Congressional hearing, a "far-from-complete" list of intervenor contributions to public safety was outlined by one of the witnesses. The public hearing process permitted citizen intervenors to raise the following issues at nuclear plants around the United States:

1. St. Lucie No. 2 - an intervenor raised the issue of how the reliability of the off-site power grid would affect the adequacy of the design for the onsite power system, leading to hearings which resulted in protective changes to the plant design, improved personnel training programs, and procedures for station operation during blackouts. See *In the Matter of Florida Power & Light Co.*, 12 N.R.C. 30 (July 30, 1980).
2. Prairie Island Nos. 1 and 2 - where an intervenor raised the issue of steam generator tube integrity, the utility voluntarily undertook improvements in the steam generator system - improvements which the Appeal Board specifically noted were applicable to other PWRs. See *In the Matter of Northern States Power Co.*, 4 N.R.C. 169 (Sept. 2, 1976).

3. North Anna Nos. 1 & 2 - where intervenor identified unsatisfactory turbine disks, Appeals Board held hearings on likelihood disks would break and strike vital facility structure components, leading to redesign by manufacturer. See *In the Matter of Virginia Elec. & Power Co.*, 11 N.R.C. 189 (Feb. 11, 1980).
4. San Onofre Nos. 2 & 3 - where intervenor raised issue of plant zoning assignment, Appeal Board review of construction permit uncovered fact low-population zone assigned in construction permit did not meet Commission standards. See *In the Matter of So. Cal. Edison Co.*, 1 N.R.C. 383 (April 25, 1975).
5. Palisades / Dresden - intervenors' participation led to upgraded radioactive effluent treatment systems. NRC Licensing Reform at 253-54 (Testimony of the Union of Concerned Scientists).
6. Humboldt Bay - where intervenor raised issues pertaining to plant's ability to withstand earthquake, show cause petition filed to shut down plant because it was not, in fact, adequately protected. NRC shut plant down and Staff recommended substantial redesign, but Pacific Gas & Electric chose instead to decommission unsafe plant. *Id.*
7. Byron - intervenors proposed and obtained better evacuation plan,

greater protection from radiation exposure for workers, additional tests to achieve better data on plant foundation, and reinspection of several construction practices and facilities. *Id.*

8. Pilgrim 2 - where intervenors submitted contention stating a need to consider alternate sites, NRC totally revamped its site review process; where intervenors raised issue of lack of need for power, plant canceled due to lack of need for power. *Id.*
9. Turkey Point - intervenors successfully gained requirements that replaced steam generators be stored in a safer place, and won reduced radiation exposure for workers. *Id.*
10. Indian Point - intervenors' concerns about seismic activity led to utility funding a network of monitoring stations near local fault. *Id.*
11. Ravenwood / Newbold Island - intervenors' concerns about inability to evacuate plants led to re-siting away from heavily-wooded areas. *Id.*
12. Zion - intervenor who was a welder in plant raised safety issues pertaining to quality of welds; achieved a re-examination and repair of faulty welds. *Id.*

13. Kewaunee - intervenor settled proposed intervention on condition that utility would make improvements in control room. *Id.*
14. Zimmer / Midland / South Texas - intervenors and whistleblowers exposed quality assurance breakdowns; revelation led to NRC's issuing stop-work orders and extensive repairs to plants. *Id.*

See, e.g. NRC Licensing Reform at 253-54 (Testimony of the Union of Concerned Scientists)..

Just as public participation has uncovered significant and severe threats to public health and safety, intervenors have identified concerns which went unheeded, only to lead to trouble down the road. As noted in the 1983 Congress hearings on NRC Licensing Reform:

Unfortunately, there have also been many cases where intervenors' concerns were ignored, only to resurface in the form of actual utility (and ultimately ratepayer) costs, with a *much higher price tag than if the problems had been dealt with when the intervenors raised them.*

*Id.*, at 254 (emphasis supplied). Among plants where intervenors' concerns were ignored, leading to much higher costs of repair later on are:

1. Diablo Canyon - where intervenors

spent three years attempting to raise issues of plant design and construction quality assurance, NRC suspended plant's low-power license after only two months. The utility ultimately admitted that it had relied on "backward blueprints," a mistake which led to a re-verification program that turned up hundreds of additional problems, and ultimately cost the utility the price of over 7000 plant modifications, including a total re-design of the seismic structures and components.

2. Three Mile Island No. 2 - after intervenors challenged viability of emergency and evacuation plans, said plans were found to fail completely during incident at Three Mile Island.
3. Seabrook - intervenors repeatedly challenged the financial ability of plant's lead owner, but were ignored. Plant's owner ultimately voted to lower work on plant to lowest feasible level, and wound up with second lowest utility bond rating in the nation. Plant's cost skyrocketed from \$973 million to between \$5.24 and \$8 billion.
4. Shoreham - intervenors raised issue of difficulty of evacuation area where plant was located. Several years later, public and local government outcry over whether plant should even be operated at that location led to a closure of the

plant and major costs to the taxpayers.

5. Black Fox - intervenors predicted probable failure of non-safety related equipment and questioned whether failure could hinder plant's safe shutdown. Months after intervenors were ignored, with licensing board ruling in utility's favor, equipment intervenors had identified failed, with valve stuck open that aggravated the Three Mile Island incident.

*Id.*, NRC Licensing Reform at 254-55.

Perhaps the prototypical example of the benefit of meaningful public participation occurred at the Comanche Peak plant. In 1986, a former member of the NRC's *Ad Hoc* Committee For Review of Nuclear Reactor Licensing Reform Proposals, recounted for Congress the important role intervenors at Comanche Peak played in nuclear safety:

There is a long history of recognition by the NRC itself of the importance of the public in assuring that nuclear plants are built and operated safely.

...

At the Comanche Peak plant...[the citizen intervenor] identified and pursued major flaws in the quality assurance/quality control program for design and construction.

...

Both applicants and the NRC Staff had previously argued that these problems did not exist and that Comanche Peak was ready for an operating license. . . .

Now the growing volume of deficiencies has forced Texas Utilities Electric Company to announce an indefinite postponement in its scheduled date for completion of construction because of repairs required to bring this plant into compliance with NRC regulations. The only protection the public had from the operation of this dangerous and illegally constructed plant was a citizen intervenor.

Public Participation in Nuclear Licensing  
at 119-120.

Likewise, where the utility and regulators had ignored intervenors at the Midland and Zimmer plants, the same story unfolded:

Citizen intervenors were the only parties that initially pressed the issue of the breakdown of QA/QC at the plants. Only through the persistence of these citizen intervenors against the massive opposition of the utility and, for some time, the NRC Staff, did the Commission eventually conclude that neither plant, if allowed to operate, could

*provide adequate protection for  
the public health and safety.*

*Id.* (emphasis supplied).

In 1986, directly following the tragic accident at Chernobyl, Rep. Markey, the Chairman of the House Subcommittee on Energy Conservation and Power, publicly remarked on early NRC proposals to erode the public participation requirements of the AEA. Rep. Markey reminded the nation of the importance of public participation in the nuclear regulatory process:

For the price of accepting an extensive federal hearing process, the nascent nuclear industry purchased an exemption from any state or local regulation of radiological health and safety, and also received a limitation on liability through the Price-Anderson Act. As a result, citizens were denied not only local regulation of this potentially threatening facility, but also denied the assurances that they would receive full compensation for any damages. The payoff to the local citizens was a commitment to the full panoply of trial-type procedures established as part of the federal licensing process. I have some concern that elements of the proposal before us trample on that historical

record, and seek to renege on the original concessions made by the industry.

See Remarks of Hon. Edward J. Markey, Public Participation in Nuclear Licensing, H. Rep. Comm. On Energy and Commerce; Subcomm. On Energy Conservation and Power (April 30, 1986) at 2-3.

Congressman Markey's remarks are timely today. If the Proposed Rule is enacted, the public will lose all of the benefits previously obtained through meaningful public participation. Meaningful public participation is needed to properly address the new issues facing nuclear power. For example, there are scores of issues related to the NRC's decision to extend the operating life of existing nuclear power plants from 40 years to 60 years. As of today, every attempt to obtain a hearing on the numerous safety-related aging issues have been rejected. Under the Proposed Rule, the very right to an on-the-record hearing in license renewal cases will be lost. Additionally, major issues regarding containment safety and the vulnerability of spent fuel pools to terrorist attack have never been subject to public safety hearings. If the NRC's Proposed Rule is adopted, the American people will lose one of the most important safety-nets protecting the public from the hazards of atomic energy.

## **II The Administrative Procedure Act Applies to Licensing Proceedings.**

The NRC's Proposed Rule would explicitly exempt most hearings from the procedural requirements set forth in the Administrative Procedure Act's ("APA") rules on adjudication. Under its proposal, the NRC seeks to establish a broad rule that Section 189 of the Atomic Energy Act ("AEA") is exempt from the hearing requirements set forth in the APA. Ignoring any legislative restrictions on its discretion, the NRC rule seeks to establish a hearing regime which could never meet APA standards. This includes such unprecedented proposals as a prohibition on discovery, a prohibition on a party's right to cross-examine a witness and granting the NRC authority to create so-called "fast track" hearings, in which all safety issues must be fully considered within 60-90 days.

The NRC's proposal to exempt its hearings from the adjudicatory rules set forth in the APA is not supported by the legislative history of the AEA and is illegal.

When Congress amended the original Atomic Energy Act in 1954, it included an explicit recognition of the public's right to participate in safety-related hearings which would be conducted in order to ensure that nuclear power was safe. The public's right to participate in the hearing process is secured under Section 189 of the AEA, 42 U.S.C. § 2239(a)(1)(A). *See, e.g. Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444, n.12 (D.C. Cir. 1984). *Accord.*, William C. Parler, NRC General Counsel, *OGC Analysis of*

*Legal Issues Relating to Nuclear Power Plant Life Extension*  
(January 13, 1989) (attached hereto).

The public's right to participate in nuclear licensing proceedings was adopted as part of a historic compromise. See Remarks of the Hon. Edward J. Markey, *Public Participation in Nuclear Licensing*, House of Representatives Committee on Energy and Commerce, Subcommittee on Energy Conservation and Power (April 30, 1986), pp. 2-3. Although Congress permitted public hearings under the AEA, Congress broadly *prohibited* state regulation of nuclear safety matters. In fact, Congress completely pre-empted the states from regulating nuclear safety issues. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). Thus, state, local and municipal governments were prevented from passing nuclear safety laws, but in exchange, citizens who may be adversely impacted by a federal decision to permit the operation of a nuclear power plant would be permitted the right to fully participate in the hearing process in which the federal government would render a licensing decision.

Since the passage of the AEA, the right to public participation has generally adhered to the following process: If a utility or other company desired to operate a nuclear power plant (or otherwise engage in activities in which radioactive materials would be handled), they would apply to the NRC for a license granting them permission to engage in this conduct. The NRC would post notice that the license application has been filed. Thereafter, any member of the affected public could request a hearing as to whether the license should be granted. Under NRC case law, there are a variety of methods to demonstrate that one's safety may be impacted by the granting of such a license. Generally

speaking, if a member of the public resided within the 50 mile evacuation zone of a proposed nuclear installation, that member of the public would have sufficient "standing" to request the hearing.

Although persons who may have their life or property harmed by a nuclear accident were prevented from raising safety challenges to state or municipal authorities, they could seek a hearing before the NRC in order raise safety-related challenges to a proposed nuclear installation.

Even though the public's right to a hearing is secured under the Atomic Energy Act, the NRC Commission has challenged the longstanding procedural safeguards which were first published in 1956. Atomic Energy Commission, "Rules of Practice," p. 304 of the *Federal Register* (February 4, 1956). During the first 30 years private nuclear power production, the NRC, the utilities and the impacted public all generally agreed that the public hearing process was required to resemble court-hearings. The utility requesting a license to operate a nuclear installation would have to demonstrate before a three-judge panel that they could operate the installation safely. The NRC staff and citizen "intervenor" (*i.e.*, persons who resided within the evacuation zone) were permitted to fully participate in this licensing proceeding, and citizen-intervenors could raise safety-related issues.

The three NRC judges (two chosen for technical expertise and one selected as a qualified attorney-judge), would preside over cases as the Atomic Safety and Licensing Board ("ASLB"). They were shielded from improper lobbying under rules prohibiting *ex parte* communication, and were required to conduct the licensing proceedings in accordance with the due process rules which cover judicial proceedings.

The hearings would be transcribed, parties could present documentary or oral evidence, witnesses would be placed under oath and would be subject to cross-examination, the parties could conduct discovery and, at the end of the proceeding, the three judges would be required to issue a written decision, based on the evidence presented by the parties. The decision of the ASLB could be appealed to the NRC Commissioners.

However, the Commissioners were prohibited from being lobbied by special interest groups regarding the cases which were subject to the hearing process, and had to conduct their review of ASLB decisions much in the manner that an appellate court reviews the decisions of lower courts. Finally, if any party to the hearing process disagreed with the ruling of the NRC, they could appeal that ruling to the U.S. Court of Appeals, and, eventually, to the U.S. Supreme Court.

Although persons who resided or owned property surrounding nuclear power installations were prevented from seeking safety protections from state and local authorities, under the AEA, they were permitted to have the NRC conduct hearings and issue judicially-reviewable determinations on all safety related concerns.

The underpinning of these safety proceedings was the Administrative Procedure Act ("APA"), 5 U.S.C. 554-558. The APA set forth the minimum rules necessary to conduct public hearings on matters in which Congress had determined that impacted persons had a right to an APA-style hearing. Although the APA is a statute of general application to numerous federal administrative proceedings, for over 30 years it was virtually uncontested that members

of the public who resided within the evacuation zone of a nuclear facility had a right to such a hearing whenever a corporation or a person sought permission to obtain a license to operate a nuclear facility.

The Proposed Rules represent a radical departure from past procedure and established agency practice. The NRC is proposing to eliminate all APA-required procedural safeguards, and create a hearing process which is unfair, impractical and impotent. The NRC's proposal that APA-mandated procedural protections be eliminated in NRC hearings is the most radical proposal contained in the Proposed Rule. If approved, this radical proposal would then permit the NRC to enact other procedural impediments which would undermine the hearing process, including a ban on discovery and a prohibition on a party's right to cross-examine witnesses.

The fact that the Proposed Rule fundamentally contradicts the intent of the United States Congress is thoroughly demonstrated by the NRC's former General Counsel, who in 1989 conducted a comprehensive in-house review of the issue. On January 13, 1989 the NRC General Counsel issued a thorough legal analysis in memorandum form in which it concluded that "the legislative history...strongly indicates that Congress intended the hearings afforded by Section 189(a) in power reactor licensing cases to be 'on the record...'" After evaluating the Atomic Energy Act's legislative history, and the history of the Joint Committee of Congress on Atomic Energy, the General Counsel concluded that "Congress understood that formal hearings were required, at minimum, in contested power reactor licensing hearings under Section 189."

Both the legislative history of the Atomic Energy Act and case law support the General Counsel's conclusion.

The fact that Section 189 hearings must be conducted pursuant to the requirements of the APA is well established in the detailed history of the Joint Committee of Congress on Atomic Energy ("Joint Committee"). The interpretations of the Joint Committee are extremely significant in understanding the scope of the Atomic Energy Act. As the U.S. Supreme Court recognized in its first licensing hearing case, *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 81 S.Ct. 1529 (1961), "particular weight" must be given to the "construction" of the law provided by the Joint Committee which, at the time, had a "special duty" to review matters related to the conduct of the Atomic Energy Commission. See, e.g. 367 U.S. at 408.<sup>1/</sup> Significantly, the NRC's former General Counsel identified a report of the Joint Committee, which held that "without question, in contested cases," formal hearings were required.

The General Counsel also quoted, at length, comments by Senator Anderson, one of the principal sponsors of the Atomic Energy Act. Senator Anderson clearly set forth the "rationale for requiring" nuclear licensing hearing to be conducted in accordance with the APA.

---

<sup>1/</sup> The Court's approach in *Power Reactor Development Corp.* is consistent with the Court's long history of giving particular respect to "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," as were the Joint Committee with relation to the nascent Atomic Energy Act. See, e.g. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358 (1933).

According to the Senator:

"...when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that information on which action is to be based may be tested, answered if necessary, and recorded...where the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy."

Thus, the Atomic Energy Act's framers clearly understood that hearings under the Act should be on the record.

The detailed reasoning and analysis set forth by the NRC General Counsel, especially in light of the history of the Commission's prior public positions on this issue, provides a compelling argument on this issue.

If, after reviewing the General Counsel's position, there is any doubt whatsoever concerning the APA's applicability in this matter, the Supreme Court's holdings in *Power Reactor Development Co. v. International Union*, 367 U.S. 396 (1961) should forever dispose of this question. In that case, the Court recognized that "Congress contemplated a step-by-step procedure" in licensing proceedings. In understanding what exactly was required under each step of this exacting procedure, the Court gave "particular weight" to the "construction" of the law provided by the Joint Committee. *Id.*, 367 U.S. at 408.

Specifically, the Court reviewed a number of Joint Committee reports and statements, including the 1957 "Study

of AEC Procedures and Organization in the Licensing of Reactor Facilities." Given the "peculiar responsibility and the place of the Joint Committee on Atomic Energy in the statutory scheme," the Supreme Court found that the history contained in this document reflected a "*de facto* acquiescence in and ratification of the Commission's licensing procedure by Congress." *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 409 (1961).

The 1957 study explicitly identified by the Supreme Court as properly reflecting Congress' intent behind its passage of the AEA, provides controlling support for the proposition that Congress intended the APA to apply to hearings held under Section 189. In this 1957 study, the Joint Committee clearly assumed that the APA was fully applicable the public hearing requirements of the AEA. The Joint Committee also held that nuclear licensing proceedings had "far reaching importance to many interests" and thus constituted the type of adjudication which "warrant formal public proceedings."

Based on the requirement that NRC hearings be held in a manner consistent with that Administrative Procedure Act, the NRC should withdraw its Proposed Rule. Furthermore, the NRC should formally recognize that "on-the-record" requirements are mandatory in all hearings conducted under Section 189 of the Atomic Energy Act.

### **III The Proposed Rules are Deficient**

#### **A. General Comments**

The Proposed Rule states that, in revising 10 C.F.R. Part 2, the NRC intended to "improve the effectiveness and efficiency of NRC's hearing process, and better focus and utilize the limited resources of all involved." 66 Fed. Reg. at

19618. If the Commission is serious about "streamlining" its procedures and making them more user-friendly – thereby enhancing public participation – it should withdraw its Proposed Rules.

Moreover, the Proposed Rule does not correct any of the problems created by the NRC Commission when it amended its hearing rules in 1989. Three years before the 1989 amendments, NRC Commissioner James K. Asselstine warned against NRC efforts to dilute citizen participation in nuclear safety hearings. In a letter to the Chairman of the U.S. Senate Committee on Energy and Natural Resources, Commissioner Asselstine warned against proposals to restrict public participation. He noted that such efforts would "place a very high threshold on the ability of a member of the public to obtain a hearing. Asselstine Letter, p. 3 (April 17, 1986). He noted how a "thicket of obstacles" would make it "impossible" for people who reside close to nuclear plants to obtain a fair hearing:

As a practical matter, this thicket of obstacles will make it impossible for people living close to a plant to obtain a hearing on issues . . . which are of greatest concern to them. I am opposed to these new obstacles to state and public participation in our licensing proceedings. I believe that the smooth operation of the licensing system does not require the public's hearing rights to be artificially restricted.

*Id.*

Unfortunately, Commissioner Asselstine's words ring even more true today. Since 1989 the NRC has restricted hearing rights. The current 10 C.F.R. Part 2 is exceedingly difficult for lay persons to understand, and a challenge for

non-expert attorneys to master. Part 2 is bound up in complex rules relating or referring to other complex rules and includes incredibly high burdens with complex tests for things that should be simple, like extending the time to file documents, or for determining when "late-filed" materials should be accepted. The proposed rules, on the one hand, add to these complications. On the other hand, the proposed rules all but eliminate the remaining important procedural rights. Thus, even if a member of the public could meet the "very high threshold" and obtain a hearing, the hearing itself would be meaningless.

Moreover, if there is ever an actual hearing on a petition to intervene in a license renewal proceeding, the fact that the rules in Part 2 are so complex, coupled with the incredible amount of discretion claimed by the Commission, will lead to increased costs of litigation. As putative intervenors and other parties raise legal challenges on issues that would not even be issues under a reasonable, simplified code of procedural and adjudicatory rules, unnecessary costs rise.

The Commission has failed to take a hard look at simplifying its rules. For example, the Federal Rules of Civil Procedure – which would be APA-compliant, and would streamline its processes in a far less restrictive way than do the proposed rules - could have served as a model for honest reforms of the hearing process. Instead, the proposed rules will thwart public participation, and the Commission has failed in its duty to seek a better alternative. The Commission has also failed to identify the unnecessary costs of litigation that arise under its current rules and which will likely radically increase under the proposed rules.

**B. Specific Comments**

The National Whistleblower Center has identified the following additional problems -- including those which raise APA violations -- with specific aspects of the NRC's Proposed Rule:

1. **Proposed § 2.309(b)** – Proposed § 2.309(b) relates to the time to file a petition to intervene and list of contentions, and, in operating license renewal proceedings, allows the petition to be filed on the later of (i) the time provided in the notice or established by the presiding officer of the ASLB; or (ii) 45 days from the date of publication of the notice.

**COMMENT** – The amount of time the Commission wishes to provide putative intervenors to file their petition and contentions is unreasonably short. The 45-day limit is an unreasonable and arbitrary number, which bears no relationship to the actual, reasonable amount of time it takes to analyze an application or other evidence (if any), retain experts (if possible), and file admissible contentions. As set forth in National Whistleblower Center's Comment to § 2.309(f), *infra*, to date, no putative intervenor in a license extension case, has been able to file even one admissible contention under the current scheme in § 2.714. Even the National Whistleblower Center, which had more resources at hand in the *Calvert Cliffs* proceeding than any other putative intervenor in a relicensing proceeding to date, and which was given approximately 55 days in that proceeding to submit its contentions, was unable to properly review the application and formulate admissible contentions under this regime. Now, under the new regime, the maximum time appears to be 45 days. Given the

Commission's historical refusal to extend deadlines in the operating license renewal cases, and the new tenor within the Commission of speed over actual opportunity to participate, the National Whistleblower Center believes it highly unlikely the Commission will ever establish a date for filing the petition to intervene that is longer than the 45-day option provided in proposed § 2.309(b)(ii). All of the evidence to date demonstrates that 45 days – even 55 days – is too short a period for putative intervenors to be able to marshal the necessary resources, analyze an application and submit admissible contentions in most licensing proceedings, including license renewal or extension proceedings. Because there is no contrary evidence, the Commission's position on the amount of time it "should" take an intervenor to formulate admissible contentions is pure speculation. As such, the 45-day limit is arbitrary. Because the Commission has completely failed to acknowledge that its current scheme – which is less restrictive than the proposed scheme – is inadequate and does not give petitioners enough time to really participate by formulating admissible contentions, the Commission's step of tightening the rules is arbitrary, capricious, an abuse of discretion, and otherwise violates the APA.

2. **Proposed § 2.309(c)** – Proposed § 2.309(c) incorporates the contention support requirements of existing § 2.714.

**COMMENT** – The Commission should consider adding a provision to proposed § 2.309(c) which would allow an intervenor to outline a concern it may have and to state a specific schedule that it will follow to investigate the merits of that concern and to

determine if it is worth pursuing. That is, there should be a provision which allows intervenors to investigate concerns – which may turn into contentions – without having to exhaust all of their resources to do so at the same time it files its contentions. Such a provision could include requirements similar to those used in proceedings under subpart L for filing "Areas of Concern." This idea is consistent with the Federal Rules of Civil Procedure, which permit concerns to be stated quite broadly at first. This idea is, however, more rigorous than the Federal Rules, because it requires the intervenor to develop and state a process by which its concern can be resolved.

3. **Proposed § 2.309(f)** – Proposed § 2.309(f)(1) would contain a requirement that "a request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised."

**COMMENT** – Proposed § 2.309(f) imposes a burden upon citizen-intervenors which even groups with extraordinary resources will not be able to meet. Currently, petitions to intervene must be filed within a deadline established in the notice of opportunity for intervention. *See, e.g.* § 2.714(a)(1). Once the deadline passes, the ASLB will issue an order establishing the proceeding's schedule. Among the items included in that schedule will be either a 'special prehearing conference,' *see* § 2.715a, or a general 'prehearing conference.' Pursuant to current § 2.714(b)(1), putative intervenors are then given until "not later than" fifteen days before the 'special' or general 'prehearing conference' to submit an amended petition, including the intervenor's

proposed contentions. To date, no group has successfully petitioned to intervene in an operating license renewal proceeding, all of which have been run in conjunction with the "guidance" set forth in the Commission's *Statement of Policy on the Conduct of Adjudicatory Proceedings*, CLI-98-12 (August 5, 1998). The reason every putative intervenor to date has failed is because the time provided under the current scheme for analyzing the application and other available evidence (if any), retaining experts (if possible), and formulating contentions is simply not sufficient. The NRC's response to that allegation -- *i.e.*, that it is untrue, or that the putative intervenors have been unreasonable, is not acceptable. The only evidence the NRC has before it to determine how much time is necessary to allow citizens to meaningfully participate by being able to formulate contentions comes from the license renewals that have occurred to date, and all have been failures for citizens' ability to meaningfully participate. Because there is simply no evidence to show that the current scheme provides sufficient opportunity to citizens, or that all of the citizens who have attempted to intervene to date have failed through some fault of their own, the NRC has no reasoned basis upon which it can hold that the current regime adequately provides an opportunity for meaningful public participation. Now, despite the fact that not one single citizen or group of citizens has been able to formulate even one admissible contention in a nuclear plant operating license renewal proceeding -- beginning with the denial of the National Whistleblower Center's own petition in the *Calvert Cliffs* proceeding in 1998 -- the Commission wishes to make it even more difficult for citizens to

participate. Proposed § 2.310(f) would severely shorten the time for an intervenor to file contentions, by requiring proposed contentions to be submitted at the same time as the petition to intervene. It appears, then, that the Proposed Rule would completely remove putative intervenors' ability to use the time period between the filing of a petition to intervene and fifteen-day deadline prior to the prehearing conference, as they currently can. History has proven, without exception, that the current amount of time is simply not long enough for putative intervenors. For the NRC, without justification, to change the current rule (which itself is not sufficient) in a more restrictive way, is an unreasoned abuse of discretion and violated the APA. Additionally, under the current scheme, the deadline for intervenors' proposed contentions is tied to the date of the prehearing conference, which is a malleable date that can be altered by order of the Board (with Commission approval), if circumstances so dictate. Under proposed § 2.309(f), there is simply no leeway – putative intervenors are given a fixed, unmovable time to file their petition and proposed contentions. To the extent the Proposed Rule offers no way to adjust the time for filing proposed contentions, when necessary, the rule would violate the APA's mandate that schedules be fixed with due consideration of the convenience and necessities of the parties and their representatives.

4. **Proposed § 2.309(h)** – Proposed § 2.309(h) proposes that the applicant/licensee and NRC staff (and any other party) be afforded twenty-five days after the service of a petition to intervene to file an answer thereto. The Commission specifically requests

comments "on whether the proposed time limits for replies and answers should be expanded."

**COMMENT** – At the outset the National Whistleblower Center notes that, curiously, the Commission requests comment on "expanding" the time for the applicant/staff to file an answer (as well as for petitioners to file a reply), but the Commission does not specifically request comments on whether that time should be shortened. So, in a rulemaking where the new procedures are specifically designed to make the process faster, the Commission has an interest in whether the applicant/staff (and, to a much lesser extent, the petitioner) should receive more time to file an answer (or reply). The Commission's concern is particularly curious in light of the fact that it does not specifically request comments on proposed § 2.309, *supra*, which considerably shortens the time for putative intervenors to file contentions. It is National Whistleblower Center's position that the Commission's bias in favor of time limits which aid the applicant/staff and neglect of flexible time limits that aid the petitioner, is an abuse of discretion. That said, the National Whistleblower Center believes that the Commission should permit its licensing boards to reasonably extend a due date, if good cause exists. This allows for flexibility, given the unique nature of each application, petition, and/or set of contentions may be taken into account. To the extent proposed § 2.309(h) imposes an inflexible time limit on procedures, without a provision that allows the Board to extend such time when circumstances so dictate, violates the APA's mandate that all scheduling matters must take into account the conveniences and necessities of the parties and their

representatives.

5. **Firm Schedules / Milestones** – The Commission invites comment on whether it should propose additional changes to Part 2, to provide for rules which establish firm schedules, or "milestones," for the conduct of adjudicatory proceedings. *See, e.g.* 66 Fed. Reg. at 19620.

**COMMENT** – Along with its request for comments specifically related to "milestones," the Commission invites comment on its oversight of "slippages" or delay in schedules. *See, e.g.* 66 Fed. Reg. at 19625. The National Whistleblower Center is firmly opposed to "milestones," firm schedules, or coercive oversight of "slippages" in schedules. No appellate court in our system regularly seeks to control the timing of proceedings in the court below the way the Commission tries to do here. The codification of "guidance" on "milestones" or firm schedules – making them mandatory – would lead to an inflexible regime which would violate the APA's mandate that, in scheduling matters, due regard be given to the conveniences and necessities of the parties or their representatives. Moreover, fixed "milestones" and coercive oversight of schedule "slippages" would actually engender delay in the proceeding, while the Commission stepped in to "correct" the delay, or while the parties raised new issues in litigation based on the "slippage."

6. **The Commission's False Claim that Petitioners Are Able To Meet Contention Requirements** – The Commission claims that "Petitioners generally have been able to meet the current specific contention

requirements and the Commission would not expect the application of those requirements to informal proceedings to adversely affect public participation." 66 Fed. Reg. at 616.

**COMMENT** – The Commission’s claim is false. When the current contention rules were first imposed, they faced vigorous opposition by citizens’ groups. Since those rules were tightened by the Commission’s 1998 *Statement of Policy on the Conduct of Adjudicatory Proceedings*, no petitioner in a nuclear operating license renewal proceeding has been able to formulate and submit an admissible contention. The National Whistleblower Center fully explains this in its Comments to § 2.309(b) and § 2.309(f), *supra*.

7. **Limits on Cross Examination** – The Commission notes that the proposed changes place limitations on cross examination, including only allowing the presiding officer to conduct cross-examination. *See, e.g.* 66 Fed. Reg. 19616. The Commission goes on to state that full cross-examination is not the most effective means to develop the record. *Id.*, 66 Fed. Reg. 19620.

**COMMENT** – The Commission’s proposals and conclusions are erroneous. There should be no limits, whatsoever, on cross-examination. Cross-examination is the very heart of the truth-finding process. There is simply no better way to get at the truth and develop an accurate record. Notably, cross-examination is only the final stage of a person’s testimony, which, without cross examination, remains untested. Cross-examination is

the only way to truly test the witness's credibility and to probe the veracity of the witness's testimony. Moreover, under the Commission's proposed rules which allow only the presiding officer to conduct cross-examination, a party loses the ability to both question and, if necessary, rehabilitate its own witness. Cross-examination is the most cherished due process right, in the adversarial setting, in Anglo-Saxon law, and to take away that right flies in the face of all our system is about. While the proposed rules do provide for the opportunity to "suggest" questions to the presiding officer, it would seem that repeated pauses to provide "suggestions," or to raise arguments when a "suggestion" is not followed, would engender more delay than allowing a party to properly cross-examine a witness. Additionally, cross-examination is absolutely essential in the case of expert witnesses. Because important issues of safety often turn on the testimony of experts, parties who are prepared by qualified experts themselves must be allowed full cross-examination to test the scientific theories expert witnesses offer. Finally, the Commission claims to have weighed the "drawbacks" of allowing full cross-examination, *see, e.g.* 66 Fed. Reg. at 19620, but the only possible "drawback" could be that cross-examination takes time. In proceedings involving nuclear safety issues and the health and safety of the public, the time used for cross-examination of an expert witness, for example, can never be a more important consideration than the need to get at the truth and develop a full and accurate record. Accordingly, the Commission's conclusion with respect to the "drawbacks" of cross-examination are unreasoned and are thus

arbitrary, capricious, an abuse of discretion and not otherwise in accordance with the law.

8. **The Parties' Exchange of Documents** – The Commission notes that under the Proposed Rule, there will be early witness-identification and document disclosure between the parties in every case.

**COMMENT** – This is a good first step, similar to limited provisions of Federal Rule of Civil Procedure 26, but falls far short of what is needed. What the Commission does not say is that Fed. R. Civ. P. Rule 26 only begins with initial disclosures and mandatory discovery, but goes on to provide for unlimited additional document requests, the right to depose witnesses (including the ability to depose more witnesses on a showing of "good cause"), the right to propound interrogatories (including the right to propound additional interrogatories on a showing of "good cause"), the right to inspect property, the right to early discovery of expert witness reports and ultimate discovery of all expert evidence. Because trial is about learning the truth, Fed. R. Civ. P. Rule 26 allows for the discovery of literally anything that could lead to the discovery of admissible evidence. This rule is followed in all of the federal courts and many of the state courts – in cases big and small. Here, where nuclear safety is always an issue, the Commission should adopt the full panoply of truth-finding techniques provided by Fed. R. Civ. P. Rule 26.

9. **Discretionary Intervention** – Under proposed § 2.309, if a petitioner fails to establish standing as of

right, a presiding officer will be allowed to consider the petitioner's request for "discretionary intervention."

**COMMENT** – Before granting so-called discretionary intervention, the NRC must warn the parties to the proceeding of the likelihood that the proceeding would be merely advisory and not subject to judicial review. Although the Commission's idea appears useful and designed to help the public, it is not. Without an actual finding of standing – which allows intervention as of right – a party may have no right to judicial review, for the Article III courts cannot hear a case where a party lacks standing. The end result of this rule will be that parties granted discretionary intervention status will be misled into using precious resources to participate at the ASLB level, but will have wasted those resources because they will never be able to gain judicial review of issues they raise.

10. **Federal Register Publication** – The Commission notes that, for some proceedings, a Federal Register notice will not be published.

**COMMENT** – The Commission should not, under any circumstances, eliminate Federal Register publication. All notices should be published in the Federal Register, for two key reasons. First, for those with no Internet access, the Federal Register is the only place they have to receive notice. Second, the Federal Register publications give excellent specific guidance to those looking for it and, to those not specifically looking for it, brings to their attention issues they may have otherwise missed. It is simply a

sound policy, which should not be changed.

11. **Contentions in Informal Proceedings** – The Commission proposes extending the contention requirement to informal proceedings under Subpart L, which would do away with the current "Areas of Concern" mechanism. *See, e.g.* 66 Fed. Reg. at 19623.

**COMMENT** – The National Whistleblower Center opposes requiring contentions in order to be admitted as a party in informal proceedings. The Commission's conclusions about "protracted paper litigation over ill-defined issues" could be assuaged by taking the less restrictive step of clarifying the "Areas of Concern" procedure, rather than forcing the public to bear the increased cost of formulating admissible contentions.

12. **"Fast-Track" Procedures** – Proposed § 2.310 sets forth the criteria for selecting from among varying types of hearing procedures, including "fast-track" procedures.

**COMMENT** – There should be no "fast-track" procedures. First, all hearings in some way implicate a change to a license. The license is based upon an established safety plan. A provision which allows "fast-track" procedures either supposes that there will be no safety issue involved, or that the safety issue will be of minimal importance. Both of these premises are flawed. There will always be a safety issue involved, because any modification to a license involves modifying the circumstances accounted for by the existing safety plan. As well, where public

health and safety is involved, there are no issues of minimal importance. Second, while it may ultimately turn out that an issue can be resolved quite easily, to create a "fast-track" process which pre-supposes easy solutions invites disaster and guarantees that the issues will never receive a full and proper airing.

13. **Interlocutory Review** – Proposed § 2.323 allows any party to file with the presiding officer a "petition for certification of issues for early Commission review and guidance." *See, e.g.* 66 Fed. Reg. 19625.

**COMMENT** – The Commission should entirely do away with interlocutory review of issues. Both federal and state courts have done away with liberal use of provisions like these, because interlocutory review tends to greatly increase expense and delay proceedings. Significantly, this provision invites industry parties, with their significantly greater resources, to abuse public participants by drawing out proceedings – essentially bleeding public participants of their limited resources – by raising all kinds of issues for certification. While all of the issues an industry party might raise may not ultimately be certified for review, they can at least file the petition, which forces the public participant to expend scarce resources in response.

14. **Designation of Presiding Officer** – Proposed § 2.313 allows the Commission to "provide in the notice of hearing that one or more members of the Commission, or an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the matter shall preside."

**COMMENT** – Proposed § 2.313 allows the

Commission to hand-pick a presiding officer. This procedure violates due process and invites an abuse of process. The selection of judges should be random. Specifically, this section permits the Commission to choose a presiding officer based on their judgment of whether that person will be a "team player" and produce a desired outcome. While the Commission may, one would presume, refrain from making choices motivated by that desire, the regulations permit it. Regulations such as this should be neutral and should require the principled choice of presiding officers without regard to a particular desired outcome. In the Article III courts, assignment of judges is a process of random selection. This type of random selection both generally assures an unbiased decision-maker and fosters the public's confidence in the judiciary. These are the principles which underlie the federal judicial disqualification statute, 28 U.S.C. § 455, and upon which our ideas about a fair tribunal are based. The NRC should settle for no less.

15. **Administrative Procedure Act** – The Proposed Rule eliminates the requirement that NRC hearings under Section 189 of the Atomic Energy Act be conducted in accordance with the Administrative Procedure Act. Moreover, the rules grant the Commission with broad discretion in setting the amount of procedural rights a party may be afforded, depending on how the Commission categorize a petition.

**COMMENT** – As set forth in Part II of this Comment, the Administrative Procedure Act ("APA"), as a matter of law, applies to all NRC hearings permitted or required under Section 189 of

the Atomic Energy Act. Consequently, the recommendation that the NRC establish rules which are not fully consistent with the APA is illegal and constitutes an abuse of discretion.

16. **Commission Control over a Proceeding** – Section Proposed § 2.313 allows the Commission to "provide in the notice of hearing that one or more members of the Commission, or an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the matter shall preside."

**COMMENT** –Additionally, in Section I(C) of its Notice, the Commission describes public comments that were offered in response to its *Statement of Policy on the Conduct of Adjudicatory Proceedings*, CLI-98-12 (August 5, 1998). Therein, the Commission expresses its sense of its role in monitoring licensing boards: "The Commission has been carefully monitoring all licensing board proceedings to ensure that they are being appropriately managed to avoid unnecessary delay. The Commission, through its Policy Statements and case-specific orders, has been encouraging licensing boards to issue timely decisions consistent with the boards' independence in performing their decision making functions. The Proposed Rule explicitly addresses case management and would require the presiding officers/boards to notify the Commission when there is non-trivial delay in completion of the proceeding. The Commission wishes to emphasize, however, that the Commission's oversight of licensing boards with respect to case management is not intended to intrude on the independence of licensing boards in discharging their independent

decision making responsibilities." 66 Fed. Reg. at 19616.

In practice, the Commission's oversight of licensing boards – particularly its emphasis on speed – has made it difficult to assemble complete factual records, has caused delays and has increased the costs of litigation. In contrast to the control the Commission often exerts in order to speed the process along, the presiding officer is usually in the best position to assess the progress of a proceeding and strike the proper balance between the need for information and the need for expedition. All of the proposed rules which permit the Commission to interfere or control the adjudicatory process should be eliminated, beyond the limited circumstances in which courts generally accept an interlocutory appeal.

17. **Section 9b of the Administrative Procedure Act** – The Proposed Rule eliminates the requirement that NRC hearings under Section 189 of the Atomic Energy Act be conducted in accordance with the Administrative Procedure Act ("APA"). However, the Proposed Rule did not reference Section 9b of the APA, 5 U.S.C. § 558 in its discussion of the APA.

**COMMENT** – Section 9b of the APA directly applies to requests for licenses or license renewals. Since the NRC is a licensing authority, any procedure to grant, suspend, or renew a license must be adjudicated in accordance with Section 9b. This section, read *in tandem* with other provisions of the APA, requires full "on-the-record" style hearings in licensing proceedings. Moreover, Section 9b independently mandates that NRC licensing hearing

shall be conducted with "due regard for the rights and privileges of all the interested parties or adversely affected persons." 5 U.S.C. § 558(c). The Proposed Rules violate Section 9b of the APA. As set forth above, the procedures recommended under the Proposed Rule clearly do not take into consideration the "rights and privileges" of intervenors who have "standing" to raise health and safety issues.

### CONCLUSION

Under the Proposed Rules, if a person resides directly next to a nuclear power plant and has direct evidence of safety issues which could result in his or her death, that person would not have the right to an "on-the-record" hearing adjudicating that safety issue. They could be forced to either sell their property (perhaps at a major loss) or suffer adverse health effects (including death), without *ever* having the opportunity to a meaningful hearing on the contested safety issue.

In no other area of public safety or environmental protection are the rights of citizens so radically curtailed. Given the safety and environmental risks posed by nuclear power - which arise from aging issues, design flaws, human error or terrorist action - the inability of members of the public who reside within the evacuation zone of these plants to defend their property and health through normal due process procedure, not acceptable.

For the foregoing reasons, the Commission should reject, in its entirety, the rule proposed by NRC staff. The Commission should make it perfectly clear that the APA rules governing adjudications cover all licensing proceedings under Section 189 of the Atomic Energy Act. Moreover, the

Commission should mandate that the adjudicatory rules which existed prior to the 1998 Policy Statement are now applicable to all NRC hearings.

Respectfully submitted,

---

Stephen M. Kohn  
Michael D. Kohn  
David K. Colapinto  
Mary Jane Wilmoth  
Christopher J. Wesser  
National Whistleblower Legal  
Defense & Education Fund  
3233 P Street, N.W.  
Washington, D.C. 20007  
(202) 342-1902  
(202) 342-6984 (Fax)

Attorneys for the National  
Whistleblower Center and the  
Committee for Safety at Plant  
Zion

September 14, 2001

**APPENDIX**

MEMORANDUM FOR: Victor Stello  
Executive Director for Operations

FROM: William C. Parler  
General Counsel

SUBJECT: OGC ANALYSES OF LEGAL ISSUES  
RELATING TO NUCLEAR POWER PLANT LIFE  
EXTENSION

The Office of the General Counsel has prepared three memoranda (enclosed) which identify and analyze the important legal issues relating to applications to extend the operating life of nuclear power plants beyond the original forty-year term of the initial operating licenses.

Based upon the Atomic Energy Act of 1954 and the relevant legislative history, we de that life extension should be accomplished through the grant of renewed (new) operating licenses rather than through amendment of existing operating licenses to extend the expiration date. We also conclude that an opportunity for a formal adjudicatory hearing to resolve issues-in-controversy should be provided in conjunction with an application for license renewal. These and other procedural topics are discussed in the memorandum entitled, "Procedural Issues Relating to Nuclear Power Plant License Renewal." The life extension rulemaking should address each of the procedural subjects discussed in our memorandum. We emphasize that whether (and under what conditions) nuclear power plants may be safely operated beyond the original forty year license term is a

scientific and engineering determination which should be made without regard to the purely legal question of the form of the license. The scope and criteria for staff review of life extension requests, and the scope of requested life extension hearings, is unaffected by whether the application or proceeding is for an "amendment", a "renewal license", or something else. The life extension rulemaking should specify the technical requirements and standards which must be met by each application for license renewal. Otherwise, the review and proceeding will be open ended.

As discussed in the memorandum "Need for Antitrust Review at Nuclear Power Plant License Extension," no antitrust review by the Attorney General is required at the time of license renewal.

With regard to environmental issues in our memorandum, "Need for EIS/EA in Support of Nuclear Power Plant License Renewal Rulemaking," we conclude that either: a) an environmental assessment (EA) followed by either a finding of no significant impact or by an environmental impact statement (EIS), as appropriate; or (b) an (EIS) must be prepared to support the life extension rulemaking. Such an EA or EIS could be expanded to cover generic environmental impacts (i.e. those which are common to all or a majority of sites) thereby eliminating, or reducing the scope of required site-specific environmental analyses.

William C. Parler  
General Counsel

Enclosures:  
As stated

## PROCEDURAL ISSUES RELATING TO NUCLEAR POWER PLANT LICENCE RENEWAL

### I. INTRODUCTION

The NRC's decision to assess whether and under what conditions nuclear power plants should be permitted to operate beyond forty years raises a number of procedural issues. Perhaps the most salient of these issues is the nature of the license for life extension, *viz.*, whether a renewed operating license should be issued, or whether the existing license should be amended to extend the expiration date. Other procedural topics include the nature and timing of hearings, the earliest and latest dates for filing extension applications, the earliest date that the NRC can approve an application, and the length of a renewed license. The analysis of these issues is complicated by the fact that nuclear power plants have been licensed under both Section 103 and Section 104b of the Atomic Energy Act of 1954 (AEA).

After reviewing the AEA, its legislative history, as well as relevant case law, it is our view that life extension should be accomplished through the grant of renewed operating licenses, rather than through amendment of existing operating licenses to extend the expiration date, regardless of whether the existing operating licenses were issued pursuant to Section 103 or Section 104b.

We wish to emphasize that the form of the license with respect to life extension does not affect the substantive issues raised by life extension, *viz.*, whether and under what technical conditions/restrictions/prerequisites should life extension be permitted for nuclear power plants. It cannot be stressed too strongly that the determination whether nuclear power plants may be safely operated beyond the original 40 year term of a license is a scientific and engineering determination. More importantly, this determination should be made without regard to the purely legal question of the form of the license.

An opportunity for prior hearing is generally required in connection with the grant of a renewed license. However, one potentially negative impact of a hearing on the timeliness of the licensing process is dissipated by Section 9b of the Administrative Procedure Act, 5 USC 551-559 (APA) and 10 CFR 2.109, which permit a licensee with an operating license to continue operation of its facility until final agency determination of the renewal request, if the renewal request is timely filed. It is also our position that any hearings which may be held to resolve any issues in controversy should probably be formal adjudicatory hearings. These and other matters are discussed in more detail below.

## II. DISCUSSION

### A. FORM OF LICENSE

\* \* \*

### B. HEARINGS

#### 1. Necessity for Hearings

Section 189 of the AEA is the only section of the AEA dealing with hearing rights. Hence, if there is a right to hearing under the AEA, it must be found in that section. Section 189a (1) states:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c or 188, the Commission shall grant a hearing upon request of any person whose interest may be affected by the proceeding, and shall admit that person as a party to such proceeding.

Section 189 was drafted "with precision and specificity." Deukmejian, 751 F.2d at 1312 (D.C. Cir. 1984) . As recounted by the Court in Deukmejian, the original bills to amend the Atomic Energy Act of 1946 did not explicitly require any hearings, but merely indicated that the provisions of the APA "shall apply" to all agency actions. See Section 181 of H.R. 8862 and S.1323, reprinted in 1 Legislative History at 161-62 and 237-38, respectively. In hearings before the Joint Committee, several witnesses suggested that the legislation explicitly confirm a right to hearing.<sup>9</sup>

Subsequently, in the substitute House bill, H.R. 9757, and the substitute Senate bill, S. 3690. Section 181 was revised to provide that "the Commission shall grant a hearing to any party materially interested in any 'agency action.'" H.R. 9757, pp.84-85, S. 3690, pp.84-85, reprinted in 1 Legislative History at 624-25, 728-29.

Subsequently, the revised Section 181 was criticized by Senator Pastore as being "too broad, broader than it was intended to [be]." Senator Hickeloooper, agreeing with Sen. Pastore, proposed a "corrective amendment which clarifies the situation." 100 Cong.

---

<sup>2/</sup> See Hearings at 58, 64-65 (supplementary statement of E. Blythe Stason, Dean, University of Michigan Law School), 152-53 (supplemental written statement of Joseph Volpe, Volpe, Boesky and Skallerup, 348-49, 353 (supplementary written statement of F. K. McCune, General Manager, Atomic products Div., General Electric Co.), 416-17 (supplementary statement of the Special Committee on Atomic Power, Association of the Bar of the City of New York), reprinted in Legislative History at 1692, 1698-99, 1786, 87, 1982-83, 2077-78.

Rec. 10,171 (July 16, 1954), reprinted in 2 Legislative History at 3175. Senator Hickelooer further explained the purpose of the amendment as follows:

Mr. President, this section incorporates the provisions for hearings formerly part of section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held. The section also reincorporates the former provisions of section 189 dealing with judicial review. There is a slight change in wording merely to clarify the intent of Congress with respect to the extent of the applicability of the act of December 29, 1950 and the applicability of section 1 of the Administrative Procedure Act. (Emphasis added).

Id. The amendment created a new subsection (a) in Section 189.

Amending an operating license to extend the expiration date will clearly require an opportunity for hearing, since Section 189a specifically indicates that an opportunity for hearing must be provided in any proceeding to "amend" a license. This is true regardless of whether the operating license to be amended was issued under Section 103 or Section 104b.

However, whether the NRC is required by Section 189 to provide an opportunity for hearing if it issues a renewed Section 103 or Section 104b operating license is a different question. Beginning with the plain words of Section 189, we note that the term, "renewal" is not used in connection with the requirement for an opportunity for hearing.

The critical question therefore is whether a proceeding for the grant of a "renewed license" is nevertheless a "proceeding for the granting . . . of any license" within the means of Section 189a. After all, an entirely plausible reason for the lack of specific reference to "renewals" in section 189a is that Congress must have understood that a "renewal license" is still a "license" and

therefore already covered by the statutory language. Moreover, as a conceptual matter, once a license expires, it normally ceases to have any further legal life or validity. If a "renewed" license is subsequently issued, it probably should be viewed as the "grant" of a new operating license for which an opportunity for hearing is provided under Section 189a(l). Another argument, in favor of providing an opportunity for hearing is that a contrary determination results in the anomalous situation whereby an opportunity for hearing is provided for less - important administrative actions (e.g., amendment), but is denied in the more significant action of license renewal. We therefore conclude that section 189a provides an opportunity for hearing regardless of whether the extension is accomplished by renewal license or amendment.

Section 9b of the Administrative Procedure Act (APA), 5 USC 558, which permits continued operation if a timely renewal application has been filed, should also be applicable whether the extension is accomplished by renewal or amendment. Section 558 provides, in pertinent part:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

10 CFR 2.109 sets the date for timely filing at thirty days before the expiration of the existing license:<sup>10</sup>

If, at least thirty (30) days prior to the expiration of an

---

<sup>10/</sup> Whether the thirty day timeliness cutoff is sufficient in the context of license renewal is discussed further in Section C.1 below.

existing license authorizing any activity of a continuing nature, a licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

Since a licensee who timely files a renewal application has the right to operate at least until any necessary hearing has concluded and a final agency decision has been reached,<sup>11</sup> the uncertainty and adverse financial impact on the licensee that would occur if it had to shutdown its facility and await a final decision on its renewal application may be avoided. Thus, little practical

---

<sup>11/</sup> Final agency action with respect to contested issues occurs 45 days after the issuance of an initial decision by the Atomic Safety and Licensing Board, unless an appeal is taken in accordance with 10 CFR 2.762 or the Commission directs that the initial decision be certified to it for issuance of a final decision in accordance with 10 CFR 2.770, 10 CFR 2.760(a). However, because the Director of NRC is responsible for resolving all uncontested issues and issuing the license, see 10 CFR 2.760(a), final agency action with respect to a renewal application does not occur until the Director either grants the renewal application, or issues a decision denying the application.

<sup>12/</sup> We do note that if it were possible to extend the term of a 104b license by amendment effective prior to the conclusion of a requested hearing under the "Sholly" provisions of Section 189, the utility might gain some financial or public relations advantage in being able to state that the extension

advantage would be gained by not holding a public hearing.<sup>12</sup>

#### 1. Formal v. Informal Hearings

If a hearing on a license renewal application is to be held, it remains to be determined whether that hearing to resolve contested issues should be a formal "on the record" hearing or an informal hearing. We believe that the better view is to require any necessary hearing be a formal one conducted in accordance with the "on the record" hearing requirements of the Atomic Energy Act.

Licensing is an "adjudication" under the APA.<sup>13</sup> However, the APA does not require formal hearing in any adjudication. Only those adjudications which are "required by statute to be

---

had been granted by NRC "subject to" the later hearing. However, under the Commission's Congressionally endorsed Sholly guidelines, the grant of a life extension would likely induce a "significant hazards consideration", and this precludes issuance of the amendment prior to a requested hearing. 10 CFR 50.91; 51 Fed. Reg. 7744 (March 6, 1986).

<sup>13/</sup> An "adjudication" is defined under the APA as the "agency process for the formulation of an order." APA, Section 2(d), 5 USC 551 (7). An "order", in turn is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than a rule but including license." APA, Section 2(d). 5 USC 551 (6). "Licensing" is the agency process "respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license." See also Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1021 (3rd Cir. 1974), citing Siegal v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968); City of West Chicago v. NRC, 710 F.2d 632, 641 n.7 (7th Cir. 1983).

determined on the record after opportunity for agency hearing" must be conducted in accordance with the formal hearing requirements of the APA. 5 USC 554(a), see U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972), citing Siegel v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968), U.S. v. Florida East Coast Ry., 410 U.S. 224 (1973). While a statute need not use the precise words. "on the record" in order to require a formal hearing, it must be evident that Congress intended to require a formal hearing. U.S. v. Allegheny-Ludlum Steel Corp., supra, 406 U.S. at 757, U.S. v. Florida East Coast Ry. supra, 410 U.S. at 234-38.

Section 189a, which is the only AEA provision on hearings, does not explicitly require "on the record" hearings:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding brought under the provisions of section 182, and in any proceeding for the payment of compensation, an award or royalties under Section 156, 186 (c) or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The legislative history of the AEA is not absolutely clear regarding whether Congress intended Section 189 hearings to be on-the-record hearings conducted in accordance with APA Sections 554, 556 and 557, but it does suggest that this might be the case. As discussed above in Section II.B.1, the original legislative proposals for the 1954 Atomic Energy Act did not explicitly mention hearings, but merely indicated that the actions of the Commission were to be subject to the requirements of the APA. At least one witness criticized the proposed legislation for its vagueness on the matter, and suggested that Congress be more explicit as to whether hearings were to be "on the record":

Section 181 of the committee print provides that "The provisions of the Administrative Procedure Act shall apply to all 'agency acts', as that term is defined in the Administrative Procedure Act, specified in this act." It further provides that "full regular administrative procedures shall be followed" for those acts of the Commission which can be made public. As you know, however, much of what happens under the Administrative

Procedure Act is dependent upon the basic legislation giving rise to the administrative procedure itself. Unless the basic legislation requires the licensing proceeding to be determined upon the record after opportunity for an agency hearing, the agency is not required to follow the provisions as to hearing and decision contained in Sections 7 and 8 of the Administrative Procedure Act.

I strongly recommend that any ambiguity which now exists with respect to the requirements of section 181 be eliminated. This might be done in one of two ways, either by writing into the section express language requiring hearings or through appropriate reference making Sections 7 and 8 of the Administrative Procedure Act applicable.

Supplemental Statement of Joseph Volpe, Volpe, Boesky, and Skallerup, Joint Committee Hearings, Vol. II, at 152-53, reprinted in Legislative History at 1786-87. The Special Committee on Atomic Energy of the Association of the Bar of City of New York also submitted a supplemental written statement on H.P. 8862 and S. 3323 which implicitly suggests that formal hearings be required:

Chapter 16. JUDICIAL REVIEW AND  
ADMINISTRATIVE PROCEDURE

Page 74, line 12: At the end of this sentence, the following words should be added: "and, unless otherwise provided, in every adjudication by the Commission under this act an opportunity for a hearing shall be afforded the parties to the adjudication."

Under the bill, it is not clear whether hearings are required. Unless hearings are to required, the hearing provisions of the Administrative Procedures Act will not come into play.

Hearings at 416-17, reprinted in Legislative History at 2050-51. Subsequently, H.R. 9757 and S . 3690 were introduced, which included for the first time a provision for hearings. See H.R. 9757. Section 181, S. 3690, section 181, reprinted in 1 Legislative History at 624-25. 728-29 respectively. However, neither bill indicated whether the hearings were to be formal, 'on-the-record' hearings. The only colloquy on the subject of hearings occurred between Senators Anderson and Hickenlooper:

Sen. Anderson.

I appreciate the suggestion of the able Senator from Iowa; but now that he has mentioned chapter 16, which provides for judicial review and administrative procedure, Section 181 reads in part as follows:

Sec. 181. General: The provisions of the Administrative Procedure Act shall apply to 'agency action' of the Commission, as that term is defined in the Administrative Procedure Act.

And so forth. I read that, and I thought It meant that the provisions of the Administrative Procedure Act in relation to hearings automatically become effective In connection with the granting of licenses by the Commission. But, unfortunately, the Administrative Procedure Act, when we read it - and again I say I read it as layman, not a lawyer - does not require a hearing unless the basic legislation requires a hearing. If the basic legislation does require a hearing, a hearing is required by the Administrative Procedure Act. But in this case, the basic legislation does not require a hearing, so the reference to the Administrative Procedure Act seems to me to be an idle one. I merely am trying to say that I believe these things should be carefully considered.

\* \* \* \*

Sen. Gore.

In whom is this discretionary authority vested?

Sen. Anderson.

In the Commission, I believe. As I have said, it may be that I have misread the bill; it may be that the bill requires a hearing. But because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everybody can see it. Although I have no doubt about the ability or integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take; and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.

Sen. Hickenlooper.

I wonder whether the Senator from New Mexico does not feel that sufficient protection is afforded in section 181 and in section 182-b. In that connection, I should like to have the Senator from New Mexico refer to section 182-a on page 85, beginning on line 9, from which I now read, as follows:

Upon application the Commission shall grant a hearing to any party materially interested in any "agency action."

So any party who was materially interested would automatically be afforded a hearing. upon application for one. Then, in Section 182-b this provision is found:

b. The Commission shall not issue any license for a utilization or production facility for the generation of commercial power under section 103, until it has given notice in writing to such regulatory agency, as may have jurisdiction over the rates and services of the proposed activity, and until it has published notice of such application once each week for four weeks in the Federal Register, and until 4 weeks after the last notice.

Sen. Anderson.

Mr. President. I may say to the Senator from Iowa that when in Committee we discussed this language. I thought it was sufficient. But I do not find myself able to tie the Administrative Procedure Act to this requirement of the bill. To return to section 181 and the portion on page 85 reading -

Upon application, the Commission shall grant a hearing to any person materially interested in any "agency action" -

Let me say I think it is important to tell who may be interested, and therefore the widest publicity is necessary. For example, if the Commission were going to grant a franchise to enable someone to establish a new plant inside the Chicago area, there might be many persons who might be interested, but they would not know that the matter was under consideration. I am trying to say that the people who are interested will not be reached unless they are given notice. I say again to the Senator from Iowa that nothing in the section may need changing. I am merely stating that, upon a second reading, some doubts arise, and I wonder what the section actually provides.

100 Cong. Rec. 9999-10000 (emphasis added), reprinted in 3

Legislative History at 3072-73. Senator Anderson's passing reference to a "formal record" in the midst of an extended argument that the legislation should explicitly address the need for formal hearings is some evidence that Congress intended Section 189 hearings to be formal and adversarial in nature at least in the case of nuclear power reactors. Indeed, Senator Anderson's stated rationale for requiring a "formal record" in power reactor licensing cases strongly resembles the rationale for requiring "on the record" hearings in the minds of the drafters of the APA:

One is when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government, is thought to require that proceedings be conducted publicly and formally so that information on which action is to be based may be tested, answered if necessary, and recorded. The other type is where the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy. [citing Administrative Procedure in Government Agencies. S. Doc. No. 8, 77th Cong., 1st Sess. at 43].

The 1957 amendments to the AEA, which required a mandatory hearing for both the construction permit and operating license, together with the AEC's use of trial-type procedures in uncontested hearings, resulted in increasing criticism of the licensing process. In 1960, the Chairman of the AEC initiated a study of the AEC's regulatory functions to identify possible improvements to the process or the AEC's organizational structure. See Atomic Energy Commission, Report on the Regulatory Program of the Atomic Energy Commission (February 1961) ("AEC Report"), reprinted in Staff of the Joint Committee on Atomic Energy. Improving the AEC Regulatory Process, 87th

Cong., 1st Sess. 399 (1961) ("1961 Study"). Shortly thereafter, the Chairman of the Joint Committee directed the Joint Committee Staff to prepare a similar study to assess the AEC's organization and regulatory procedures, and the impact of the 1957 amendments. See Staff of the Joint Committee on Atomic Energy, *Improving the AEC Regulatory Process*, 87th Cong., 1st Sess. (1961).

The AEC Study identified a number of problems with the structure of the AEC and recommended several solutions. See AEC Report, reprinted in 1961 Study at 400, 420-21. However, on the subject of hearings the AEC Study recommended only the "amendment of section 189 of the [AEA] to permit dispensing with mandatory public hearings prior to issuance of reactor operating licenses under certain prescribed conditions." Id. at 400. The AEC Study said with regard to mandatory hearings:

The Joint Committee might well consider amendment of section 189a of the act in order to permit the Commission to dispense with the mandatory public hearing prior to issuance of an operating license, on making a finding that the particular reactor presents no substantial novel safety questions. The finding would, of course, be appropriate only in the case of a well-established design and satisfactory conditions as to the site. Without depriving any interested person of the right to demand a public hearing prior to issuance of an operating license, this would tend to eliminate the delay and expense of a second hearing where a sufficiently proved design and conservative selection of a site combined to satisfy the Commission that such a course was safe.

AEC Study, reprinted in 1961 Study at 410. According to the AEC, excessive formality in licensing hearings was not a concern:

Some question has been raised as to excessive formality in reactor licensing proceedings as presently conducted. The regulations of the Commission now permit, and even

encourage, the submission of evidence in written form, under 10 CFR Section 2.747(a). There is much to be said, in the present state of reactor operation, in favor of orally making a record full and explicit in the interests of disclosure to the public of the pertinent facts and considerations entering into the decision. A State or local public official or a member of the public attending a hearing may well be alerted by the testimony to the desirability of applying for leave to intervene. In a sense, therefore, the conduct of proceedings through oral testimony is an affirmative contribution to due process, as well as to greater public confidence in the Commission's licensing methods and in the regulated industry. It is possible that substantially less full presentation of testimony would be appropriate in some cases after there has been more experience in the operation of large power and test reactors. It seems clear that the major part of the preparation and expense which are sometimes attributed to the hearing and to evaluation by the staff and the Advisory Committee on Reactor Safeguards would have to be undertaken by the licensee in any event in order to plan and construct an efficient and safe plant.

Id. at 410-11. Thus, the AEC did not regard hearing formality as a problem.

Simultaneously, the Staff of the Joint Committee began preparing its report on AEC organization and procedures. In the course of preparing the 1961 Study the Joint Committee Staff sent two letters to the Commission requesting their views on, inter alia, the appropriateness of the AEC's use of formal, trial-like procedures in uncontested proceedings. See November 7, 1960 letter from James T. Ramey, Executive Director of the Staff of the Joint Committee to AEC Commissioner Loren K. Olsen, November 16, 1960 Letter from James T. Ramey to Commissioner Olsen. reprinted in 2 1961 Study at 575-78, 587, respectively. Consistent with the findings set forth in the AEC Study, the Commission replied in letters which supported the use of mandatory hearings at

the construction permit phase, and the use of formal, trial-type hearing procedures, in particular cross examination. See November 30, 1960 Letter from Commissioner Olsen to James T. Ramey December 22, 1960 Letter from Commissioner Olsen to James T. Ramey, reprinted in 2 1961 Study at 578-589.

Despite the conclusions of the AEC as expressed in the 1960 AEC Study and the two letters from Commissioner Olsen to the Joint Committee, the 1961 Study considered hearing formality to be a problem with respect to reactor licensing, but in the context of six other interrelated problems, viz.:

1. Duplication of effort involved in a reference to the ACRS of problems which have already been considered.
2. Overdependence on formal hearings before a hearing examiner as a means of reviewing determinations on applications by the staff and the ACRS.
3. The lack of provision for the review of staff approvals by a technically qualified body.
4. The inappropriateness of the present hearing procedure to secure the full benefit of scientific testimony and the technical judgments of the expert witnesses.
5. The lack of an independent technically qualified body to review staff appraisals of AEC and military reactors not subject to AEC licensing.
6. The lack of provision for a technically qualified body to review staff appraisals of AEC and military reactors not subject to AEC licensing.
7. The failure to give reality to the right of intervention by providing adequate public notice of the safety questions to be considered at public hearings.

Id. (emphasis added).

Only the 1961 Study's discussion of Item 4 contains any direct criticism of formal, trial-like hearing procedures:

A less apparent but nonetheless serious objection to the present process for facility licensing at the level beyond the ACRS review is that it is ill designed to secure the full benefit of scientific and technical expertise. . . There are a number of reasons why the present procedure of a formal hearing does not conduce to the effective use of highly qualified scientists and engineers as expert witnesses.

1961 Study at 51. The 1961 Study goes on to suggest that the problem could be solved in the context of a "different type of hearing, with more ready participation of scientific and technical witnesses, and with the responsibility for the decision after the hearing process resting on a technically-qualified person or group. . ." *Id.*<sup>14</sup>

To address these problems, the 1961 Study recommended formation of an Atomic Safety and Licensing Board within the AEC, and described how such a board would function. See 1961 Study at 69-75. The 1961 Study proposed that "informal" methods of conducting hearings be permitted, such as "roundtable exchanges", with easy participation by

---

<sup>14</sup>We also note that the background materials contained in the Appendix to the 1961 Study also do not focus on hearing formality as concern per se. See, e.g., 2 Improving the AEC Regulatory Process 423-557 (excerpts from Berman and Hydeman, Atomic Energy Research Project of the University of Michigan, The Atomic Energy Commission and Regulating Nuclear Facilities)

representatives of the applicant, the AEC staff, intervenors, and the Board, without the formality of successive witnesses on the witness stand." *Id.* at 72. Significantly, however, the 1961 Report did not propose abandonment of formal hearing requirements and in fact specifically refers to certain formal hearing requirements contained in the APA as continuing to be required. For example, the 1961 Report states that a formal record of a hearing would be required to be kept, and cross-examination would be permitted if necessary. Moreover, in license suspension or revocation, the 1961 Report avers that "the precautions prescribed by the Administrative Procedure Act should be carefully observed." *Id.*

Comments by the public on the 1961 Study were subsequently published in a separate volume in June. *See* Joint committee on Atomic Energy, Views and Comments on Improving the AU Regulatory Process, 87th Cong., 1st Sess. (1961) ("1961 Study Comments"). At this time, Professor Kenneth Culp Davis first presented his criticisms of the AEC's use of formal, trial-like procedures in licensing hearings. *Id.* at 23-32. Professor Davis did not support a change in the AEC's organizational structure. *Id.* at 23. Rather, he criticized "the tendency to use forms of adjudication when there is nothing to be adjudicated." *Id.* After discussing why trial procedures should not be used in uncontested cases, or in contested cases without issues of fact *Id.* at 24-28, and arguing against establishment of an Atomic Safety and Licensing Board. *Id.* at 28-30, Professor Davis lists a number of recommendations on hearing procedures.

Hearings on the issues raised in the 1961 Study were held by the Joint Committee in June 1961. *See* Radiation Safety and Regulation: Hearings Before the joint Committee on Atomic Energy, 87th Cong., 1st Sess. ("1961 Hearing Proceedings"). In general the witnesses repeatedly expressed concerns with the need for hearings at both the construction permit and operating license stage, the formality of hearings in uncontested proceedings, and the lack of technical and scientific backgrounds of decisionmakers at hearings. *See e.g.*, 1961 Hearing Proceedings at 262-268 (statement of George Trowbridge); 274, 276-79 (statement of William Kennedy, Counsel, Atomic Products Division, General Electric Co.), 281, 282-86 (statement of Arvin E. Upton, Secretary, Atomic Power Development Associates), 349-359 (statements of William Berman and Lee Hydeman, Co-Directors, Atomic Energy Research Project, University of Michigan Law School). 369-372 (statement of William Mitchell, legal consultant to the Staff of the Joint Committee for the 1961 Report). The issue of overformalization of the hearing process was focused most sharply in a panel discussion at the hearing involving Professor Kenneth Davis, Professor David Cavers, Commissioner

Olsen, Lee Hydeman and ACRS member Dr. Theos J. Thompson. Both Professor Davis' and Professor Cavers' primary criticisms were of the use of trial-type procedures in uncontested hearings. 1961 Hearing Proceedings at 373-74, 375. Commissioner Olsen contended that trial-type hearings were desirable, and in any case required by the 1957 amendments to the AEA Id. at 374-375. Thus began an argument over the nature of the 1957 amendments between the Commission and Professor Davis. Professor Davis disagreed with Commissioner Olsen during the panel discussion. Id. at 376. and later submitted a written statement and an article he authored from the American Bar Association Journal where he continued to criticize the use of trial-type procedures in proceedings, and presented a rebuttal to Commissioner Olsen's argument that the 1957 amendments required formal, on-the-record adjudicatory procedures. Id. at 419-24. The Commission responded with a September 6, 1961 letter by Neil Naiden, AEC General Counsel and enclosing a letter to the ABA Journal written by Commissioner Olsen.

Based upon these materials, it appears that formality in licensing hearings per se was not considered to be the primary regulatory problem facing the AEC. Rather, the concern was with the use of on-the-record, trial-like procedures for uncontested hearings. Moreover, this concern was part of a number of inter-related issues involving the structure and regulatory procedures of the AEC, in particular the requirement for mandatory hearings at both the construction permit and operating license stages, and the lack of technical and scientific backgrounds of hearing examiners at licensing hearings.

In response to the concerns identified in the two reports and at the 1961 hearings, identical legislation was introduced in the House and Senate (S. 2419, H.R. 8708). Hearings on the bills were held on April 17, 1962. As with the 1961 hearings, criticisms were generally directed at the use of mandatory hearings in uncontested proceedings and the lack of technical expertise on the part of the hearing examiner in resolving technical issues in licensing. See, e.g., AEC Regulatory Problems: Hearings on H.R. 12336 and S.

3491. Before the Subcommittee on Legislation of the Joint Committee of Atomic Energy, 87th Cong., 2d Sess. at 32, 34 (testimony of Herzel Plaine, Chairman, Special Committee on Atomic Energy Law, American Bar Association), 64-74 (testimony of Raoul Berger, Chairman, Administrative Law Section, American Bar Association). One exception was Professor Dean F. Cavers, one of the consultants to the Joint Committee Staff during preparation of the 1961 Study. Professor Cavers did argue that Section 189a did not require hearings to be on the record. *Id.* at 42. However, a fair reading of his testimony and a supplementary written statement discloses that his concerns did not rest solely upon the use of trial-like procedures. Rather, his statements disclose interrelated concerns about the need to assure open hearings, the futility of trial-like procedures in uncontested proceedings, the use of non-technical hearing examiners to conduct hearings, and the desire to avoid repetitious technical reviews by a licensing board after review by the AEC Staff and the ACRS. *Id.* at 40-58. Moreover, in a joint written statement with Mr. William Mitchell, Professor Cavers admits of the need for formal hearing procedures in cases where there are disputed matters of fact, and proposes that instead of a mandatory requirement for a formal hearing, that parties could request (or the Commission could order) that a hearing be conducted in accordance with the on-the-record provisions of the APA. *Id.* at 56-57.

Following the 1962 hearing, S. 3491 and H.R. 12336 were substituted for S. 9244 and H.R. 8708. S. 3491 was eventually passed and signed into law on August 29, 1962.<sup>15</sup> The 1962 amendments accomplished two things. First, they amended section 189a by deleting the requirement that hearings be held at

---

<sup>15/</sup> P.L. 87-615, 76 Stat.409 (1962).

<sup>16/</sup>Apparently, one reason that Congress decided to relax the mandatory hearing requirement in the 1957

the operating license stage (the second sentence of Section 189a as amended in 1957), and substituting the following<sup>16</sup>:

The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register, on each application under section 103 or 104b, for a construction permit for a facility, and on any application under section 104c, for a construction permit for a test facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of any request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction

---

amendments (so that hearings would only be required at the construction permit stage) on that rationale that safety concerns would be largely identified and resolved at the construction permit stage. See S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). R.R. No. 1966, 87th Cong., 2d Sess. 8 (1962). This is ironic, in light of the line of AEC and NRC cases which have approved the deferral of safety issues (including adequacy of design) to the operating license proceeding on the basis that until a plant begins operation, no threat to public safety exists. See Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396 (1961) Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2, ALAB-129, 6 AEC 414, 420 (1973) Washington, Public Power Supply System (WPPSS Nuclear Projects, Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1226-28 (1982).

permit or an amendment to an operating license without a hearing, but upon thirty day's notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty day's notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

Second, the 1962 amendments added a new Section 191a, which authorized the establishment of an Atomic Safety and Licensing Board:

Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each composed of three members, two of whom shall be qualified in the conduct of administrative proceedings, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, or any other provision of law, or any regulation of the Commission issued thereunder.

Thus, the 1962 amendments addressed the two significant problems identified by the 1961 Study and witnesses at the 1961 and 1962 hearings - the duplication of hearings attributable to the 1957 amendments' requirement for hearings at both the construction permit and operating license stage, and the lack of a technical background by the hearing examiner.

It has been suggested that the following discussion in the Senate and House Reports reflects Congress' understanding that Section 189a was never intended to require formal licensing hearings:

Members of the Special Committee on Atomic Energy Law of the American Bar Association, concerned over a trend toward judicialization in the AEC administrative process, had recommended that this legislation be amended to specifically authorize the Commission to use methods in addition to trial-type proceedings for the development of scientific and technical information affecting safety.

The AEC has contended that the type of hearing procedures followed by the Commission is required to carry out the intent of the 1957 amendments to the Atomic Energy Act and their legislative history as well as the Administrative Procedure Act.

To the extent that the legislative history of the 1957 amendments may not be clear, it is expressly stated here that the committee encourages the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act.

\* \* \* \*

Having pointed out the desirability of informal procedures, and the legal latitude afforded the Commission to follow such procedures, the committee does not believe it necessary to incorporate specific language in the legislation requiring informal procedures.

S. Rep. No. 1677, p.6, H.R. Rep. No. 1966, p.6. However, immediately thereafter follows a long discussion of the "notwithstanding" clause in Section 191a, in which the Joint Committee expressed its view that the "great bulk of the [APA] will remain applicable, pursuant to section 181. . .", and that formal hearings are required "without question in contested cases. . ." Id. at 6-7 (discussed more fully in the next paragraph).

In our view, the implication is clear from the extensive legislative

history of the 1966 amendments that Congress understood that formal hearings were required at minimum in contested power reactor licensing hearings under Section 189, and that only in uncontested construction permit hearings were informal procedures permitted in power reactor cases.

Finally, the inclusion of the "notwithstanding" clause of Section 191a dispels any further doubt that Congress understood that formal, trial-like procedures are required for at least some cases under Section 189a. That clause states, "notwithstanding the provisions of section 7(a) and 8(a) of the Administrative Procedure Act," the Commission is authorized to establish an Atomic Safety and Licensing Board. Since Sections 7 and 8 of the APA (5 USC 556 and 557) are applicable only to on-the-record hearings, *see* APA Section 5, 5 USC 554, the exemption from the requirements Sections 7(a) and 8(a) which is continued in the first clause of Section 191a would not have been necessary unless the Atomic Safety and Licensing Board were to conduct formal, on-the-record hearings. The Senate and House reports clearly indicate the Joint Committee's view that power reactor licensing hearings were to be conducted in accordance with the APA's provisions for on-the-record hearings:

With respect to the effect of this legislation on the Administrative Procedure Act, a representative of the section on administrative law of the American Bar Association suggested that the application of section 1 (of the 1962 amendments, which added the provisions of Section 191a) should be limited to non-contested cases. Underlying this suggestion was his concern that the bill, because of the language "Notwithstanding the provisions of sections 7(a) and 8 of the Administrative Procedure Act," perhaps limited the applicability of important provisions of the Administrative Procedure Act.

First, it should be pointed out that this language is intended only to provide the Commission with specific authority to use a three man board to preside at hearings in lieu of a hearing examiner, and to permit final, as well as intermediate decisions to be made

by the board. It is probable that no reference to the Administrative Procedure Act is required. However, that act does state:

No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly (5 USC 1011).

Out of an abundance of caution, and at the suggestion of the Commission, the committee has referred to the Administrative Procedure Act in the language which initiates section 1 of the bill. To make the limited applicability of this language even more clear, the reference to section 8 of the Administrative Procedure Act, contained in H.R. 8708 and S. 2419, has been changed to specify section 8(a) of the act, concerning intermediate and final decisions.

The great bulk of the provisions of the Administrative Procedure Act will remain applicable, pursuant to section 181 of this act, and the only exceptions authorized by these amendments are to permit the Board to preside at hearings in lieu of a hearing examiner, and to permit the Board to render final as well as intermediate decisions.

With this explanation as background, the committee does not believe it necessary to limit the applicability of section 1 to noncontested cases. Without question, more formal procedures are required in contested cases, especially those involving compliance. However, as pointed out by one expert witness during the hearings, the technical skills of the Atomic Safety and Licensing Board might be especially valuable in a contested case. As noted earlier, this board is designed as a flexible experiment in administrative law and the Joint Committee does not deem it advisable to limit the use of the Board by the Commission without a full trial of its ability to function in varied types of cases (emphasis added).

S. Rep. No. 1677, 87th Cong., 2d Sess. At 6-7 (1962), H. Rep. No. 1966, 87th Cong., 2d Sess. at 6-7 (1962). We further note that the Senate and House Reports indicate that the inclusion of the "notwithstanding" clauses attributable to the concerns of a representative of the administrative law section of the ABA.<sup>17</sup> Significantly, the testimony of that representative, Mr. Raoul Berger, indicates that his concern was with the use of trial-type procedures in uncontested cases, but that the APA requirements for on-the-record adjudications should be adhered to in all contested hearings:

As I understand it Mr. Chairman, 14 out of 15 of you licensing cases have been uncontested. And the central problem appears to be whether trial-type hearings should be employed under section 7 and 9 of the Administrative Procedure Act in uncontested cases. We would agree that you should not employ trial-type proceedings in uncontested cases, because we believe that, except for rulemaking, required by statute to be made on the record after opportunity for hearing, the Administrative Procedure Act confined trial-type hearings to the adjudication of disputes between adversaries who present controverted issues . . . Plainly an uncontested case does not involve controversial issues and disputes between

---

<sup>17</sup>The identification of Mr. Raoul Berger, the representative from the ABA administrative law section, as the impetus for the "notwithstanding" clause is significant because AEC Commissioner Olsen also asked that an exception from APA sections 7(a) and 8(a) on different grounds. See AEC Regulatory Problems: Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 87<sup>th</sup> Cong., 2d Sess. 27-28 (1962).

adversaries, and in our judgment to use judicial trappings in that situation is incongruous and unnecessary.

Mr. Hosmer directed himself to the question, of public hearings, which is something entirely different. You can have a public hearing with all the publicity you want without making it a Judicial trial . . . However, and this is one of chief reasons I am here today, your bills draw no distinction between uncontested and contested cases and under the language employed they would exempt both contested and uncontested cases from the Administrative Procedure Act.

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 87th Cong., 2d Sess. 64-66 (1962). In light of the language of the Senate and House Reports quoted above, as well as the statement of Mr. Berger, it is our view that the inclusion of the "notwithstanding" clause in Section 191a reflects Congress' intent that the APA provisions for on-the-record adjudications are applicable to power reactor licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submissions and non-record Interviews.

Whatever may be concluded from the legislative history with regard to Congress' intentions as to the nature of Section 189 hearings, it is clear that the AEC, and later the NRC, have long interpreted Section 189 as requiring formal hearings for licensing proceedings. Formal hearings were required from the start under AEC regulations. As pointed out above, the 1960 letters from Commissioner Olsen to James T. Ramey, Executive Director of the Joint Committee, the Commissioner's testimony before the Joint Committee at the 1962 hearings, a letter from Neil D. Naiden, General Counsel of the AEC to Mr. Ramey, and a letter from Commissioner Olsen to the editor of the American Bar Association Journal are consistent in their view that Section 189 requires that licensing hearings be formal, trial-like hearings in conformance with the on-the-record provisions of the APA.

The AEC's position is also reflected in two legal memoranda prepared by OGC addressing hearing procedures. In an October 11, 1965 memoranda to the Commissioners on legal problems relating to the conduct of mandatory hearings, then General Counsel Joseph F. Hennessey concluded that the "requirement for a mandatory hearing imposed by section 189. . . is a requirement for an adjudication 'to be determined on the record after opportunity for agency hearing' subject to sections 5, 7, and 8 of the APA." *Id.* at 6. The following year, in an internal OGC note to

Mr. Hennessey, Mr. Howard Shapar concluded that formal, on-the-record hearings were contemplated by Congress, as evidenced by the legislative history for the 1957 and 1962 amendments. See Note from Howard Shapar to Joseph Hennessey (April 3, 1967).

More importantly, the NRC has asserted in litigation that Section 189a requires formal hearings in licensing adjudications. For example, in Siegel v. AEC, 400 F.2d 785 (D.C. Cir. 1968), the question before the D.C. circuit was whether Section 189 required formal hearings in association with rulemakings. The Court referred to the Commission's representation that it has:

invariably distinguished between [adjudication and rulemaking, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submissions and non-record interviews. [The Commission] Insists that this approach is contemplated by the Administrative Procedure Act, which applies to all agency action taken under the Atomic Energy Act.

Id. at 785. See also Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1199-1202 (D.C. Cir. 1984).

Although the NRC has taken the position that not every licensing hearing need be conducted in accordance with the formal requirements of the APA, the NRC's decisions in this regard have nonetheless acknowledged that formal hearings are required in at least some types of licensing proceedings. In Nuclear Fuel Services (Erwin, Tennessee), CLI-80-27, 11 NRC 799 (1980), the Commission decided that the APA, 5 USC 554(a) (4), and 10 CFR 2.77a exempts materials license proceedings involving the conduct of a military function from the requirements for a formal hearing. Id. at 802. Significantly, the Commission did not take the position that no formal hearings are required by Section 189. Rather, the Commission stated that Section 189a did not require formal adjudicatory hearings in "all licensing proceedings." Id., n.4. The choice of the word "all" instead of, the word "any",

implicitly acknowledges that a formal hearing is required for some licensing proceedings.

In Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI 82-2, 15 NRC 232 (1982), the Commission expanded upon its suggestion in NFS by definitively holding that formal hearings are not required by Section 189a in materials licensing proceedings. Again, the Commission did not rule out the possibility that Section 189a required formal hearings in other non-materials licensing proceedings:

Thus, we believe that the word "hearing" in section 189a can be interpreted as allowing an informal hearing in at least some licensing cases.

Id. at 254. And the discussion in note 27 of Kerr-McGee leaves the distinct impression that one type of proceeding requiring formal hearings are facilities licensing. The Commission's decision In Kerr-McGee was upheld by the 7th Circuit in City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). However, the 7th Circuit carefully limited its opinion to materials licensing proceedings:

Despite the fact that licensing is adjudication under the APA, there is no evidence that Congress intended to require formal hearings for all Section 189(a) activities.

Id. at 645 (emphasis added). Since the Kerr-McGee and the West Chicago Decisions, the Licensing Board and the Appeal Board have noted with approval the suggestion in Kerr-McGee that formal hearings are required by Section 189a in facilities licensing proceedings. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1671-76 affirmed, ALAB-788, 20 NRC 1102, 1178 (1984).

More significantly, in two cases the D.C. Court of Appeals has indicated in dicta that a formal hearing is required under Section 189a for licensing proceedings. See Union of Concerned

Scientists v. NRC, 735 F.2d 1437, 1444-45, n.12 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1984), Porter County Chapter v. NRC, 606 F.2d 1363, 1368 (D.C. Cir 1979).

In sum, Section 189a does not explicitly require a formal, trial-type hearing, but its legislative history does suggest that formal hearings are required for power reactor licensing cases. Section 191 and the legislative history of that strongly indicate that Congress intended the hearings afforded by Section 189a in power reactor licensing cases to be "on the record". The 7th Circuit has held that Section 189a does not require formal hearings in all licensing proceedings, but the decision was carefully limited to materials licensing. Also, the D.C. Circuit has twice suggested that formal hearings are required in facilities licensing proceedings and there has been a longstanding agency interpretation that Section 189a requires formal hearings in nuclear power plant adjudications - an interpretation which has not been directly challenged by the Commission's two decisions holding that there is no right to a formal hearing in materials licensing proceedings. To be sure, none of the legislative history or dicta in court decisions refer specifically to power reactor license renewals, and the language of Section 191 requires only that formal hearings be required in some cases. If contested renewal proceedings could be distinguished from contested construction permit and operating licensing proceedings in terms of their public safety importance or type of issues in dispute, it is possible that, as in City of West Chicago, supra, pg. 40, one could distinguish the legislative history and argue reasonably for informal hearings. However, based on discussions with Staff on the nature of life extension issues, we see no basis at this time for any distinctions. After weighing these considerations, it is our conclusion that hearings on contested issues in any proceeding for renewal of operating licenses should probably be formal, on-the-record hearings.

That the NRC may decide to require formal, on-the-record license renewal hearings does not mean that such hearings must be conducted under the procedures of 10 CFR Part 2, Subpart G,

Rules of General Applicability. As noted above, it is well-recognized that the NRC's rules of practice go well beyond the procedural requirements of the APA. For example, nothing in the APA requires the extensive discovery provided for in 10 CFR 2.740 through 2.744.

\* \* \*ā