RAS 7342

February 6, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

February 9, 2004 (3:30PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Exelon Generation Company, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007

PETITIONERS' OPPOSITION TO EXELON'S APPLICATION FOR NEW ADJUDICATORY PROCESS

Petitioners Environmental Law & Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen hereby respond to Applicant's Motion to Apply New Adjudicatory Process (January 16, 2004). Exelon Generation Company LLC seeks the Nuclear Regulatory Commission's approval to apply the newly promulgated Part 2 regulations, which are not yet in effect, to this proceeding. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (January 14, 2004).

The new Part 2 provisions are not scheduled to go into effect until mid-February. The new rule radically alters the scope and nature of hearings, and it was fully appropriate for the Commission to provide a 30-day period before the rule went into effect. Applicants have given no particular reason to impose the new schedule here, other than they think that the new rule is better for their interests than the longstanding former rule. The Commission should honor its own 30-day grace period in the schedule for the new rule that was set forth in the Federal Register notice.

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There is no reason to believe that the new rule will make the Clinton Early Site Permit proceeding more effective or efficient. Petitioners are unaware of any other Early Site Permit cases that have been litigated previously. Given the novelty of the proceeding and the potential complexity of the issues that have been raised by Petitioners, it is evident that a formal hearing will be a more effective and efficient means of resolving the parties' disputes.

The new rule is on appeal before the United States Court of Appeals for the First Circuit, and there is reason to believe that the appeal may succeed on the merits. See Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission (II), Petition for Review, Docket No. 04-1145 (1st Cir., January 27, 2004). The Commission's own General Counsel has explained in a 1989 memorandum (attached hereto) that the legislative history of Section 189 of the Atomic Energy Act clearly indicates that Congress intended that provision to require formal hearings – this view renders invalid the informal hearings called for in the new rule. See Union of Concerned Scientists v. Nuclear Regulatory Commission, 735 F.2d 1437, 1445 n. 12 (D.C. Cir. 1984) (lengthy dictum in support of the view that Section 189 requires formal, on-the-record hearings).

The Commission concedes in the preamble to its new rule that, until recently, the Commission had taken a consistent and strong position that formal hearings were statutorily required. 60 Fed.Reg. 2182, 2183. See Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C.Cir. 1968) (describing Commission's position that requiring formal hearings in licensing proceedings is contemplated by the Administrative Procedure Act). The preamble then attempts to conjure up support for a reversal of that sound position where none exists.

The two U.S. Supreme Court cases that the Commission relies heavily upon, United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) and United States v. Fla. E. Coast

Ry. Co., 410 U.S. 224 (1973), are on their face wholly inapplicable. They pertain to rulemaking hearings rather than adjudicatory hearings, and expressly draw that distinction, as have countless other authorities.

In view of the real likelihood that the new rules could be struck down, it makes no sense for the Commission to proceed under them and risk the possibility that it will be required later to repeat the hearing under the old rules. The more prudent course of action is to follow the regulation as written, including the 30-day grace period.

For the foregoing reasons, petitioner ELPC requests that Exelon's motion to apply the new 10 C.F.R. Part 2 rules to this proceeding be denied.

Respectfully submitted,

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February 6, 2004

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 then 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 (l) 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.[9]

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 Hickelooper, agreeing with Sen. Pastore, proposed a "corrective amendment which clarifies the situation." 100 Cong. Rec. 10,171 (July 16, 1954),

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[9] 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.

reprinted in 2 Legislative History at 3175. Senator Hickelooper 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(1). 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 mote 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:[10]

> If, at least thirty (30) days prior to the expiration of an 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,[11] 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 advantage would be gained by not holding a public hearing.[12]

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.

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

11/ 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.

12/ 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 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).

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

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[13] 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).

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:

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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 pl3n 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.[14]

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 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., 1t 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

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[14]/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)

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.[15] The 1962 amendments accomplished two things. First, they amended section 189a by deleting the requirement that hearings be held at the operating license stage (the second sentence of Section 189a as amended in 1957), and substituting the following[16]:

> 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 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

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

16/Apparently, one reason that Congress decided to relax the mandatory hearing requirement in the 1957 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 long.. 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).

> 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, ans 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.
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> 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.[17] 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 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

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[17]/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, 87th Cong., 2d Sess. 27-28 (1962).

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 IT95. 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 ou@ 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 e 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.

CERTIFICATE OF SERVICE

I certify that on January 26, 2003, copies of the foregoing PETITIONERS' OPPOSITION TO EXELON'S APPLICATION FOR NEW ADJUDICATORY PROCESS were served on the following by e-mail and overnight mail:

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