

No. 04-1145

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., et al.,  
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,  
Respondents,

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NATIONAL WHISTLEBLOWER CENTER, et al.,  
Intervenors.

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Petition For Review of the Final Rule Issued  
By the Nuclear Regulatory Commission

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BRIEF FOR INTERVENOR  
NATIONAL WHISTLEBLOWER CENTER AND  
COMMITTEE FOR SAFETY AT PLANT ZION

---

Stephen M. Kohn  
Court of Appeals Bar Number 96636  
National Whistleblower Legal  
Defense and Education Fund  
3233 P Street, NW  
Washington, D.C. 20007  
Phone: (202) 342-1902  
Phone: (202) 342-6980  
Fax: (202) 342-6984

Dated: June 7, 2004

Attorney for the Intervenor

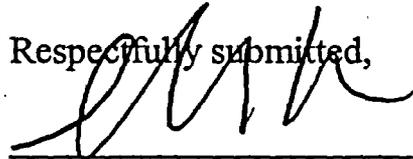
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC. )  
  ) *Petitioner,* )  
  )   ) **Docket No. 04-1145**  
  ) **v.** )  
  ) )  
UNITED STATES OF AMERICA, et al., )  
  ) *Respondents.* )

**NATIONAL WHISTLEBLOWER CENTER'S  
CORPORATE DISCLOSURE STATEMENT**

The National Whistleblower Center is a 501(c)(3) not-for-profit corporation.  
The National Whistleblower Center has no parent corporation and is not owned,  
wholly or in part, by any publicly-traded corporation.

Respectfully submitted,



Stephen M. Kohn  
Court of Appeals Bar Number 96636  
National Whistleblower Legal  
Defense and Education Fund  
3233 P Street, NW  
Washington, D.C. 20007  
(202) 342-1902 (Phone)  
(202) 342- 6980 (Phone)  
(202) 342-6984 (Fax)

Attorney for Intervenor National  
Whistleblower Center

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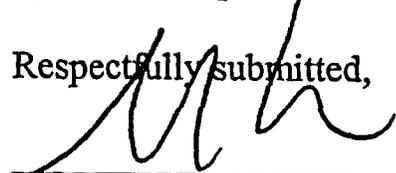
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UNITED STATES OF AMERICA, et al. )  
*Respondents.* )

**COMMITTEE FOR SAFETY AT PLANT ZION'S  
CORPORATE DISCLOSURE STATEMENT**

The Committee for Safety at Plant Zion is a not-for-profit voluntary association. The Committee for Safety at Plant Zion has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

Respectfully submitted,

  
\_\_\_\_\_  
Stephen M. Kohn  
Court of Appeals Bar # 96636  
National Whistleblower Legal  
Defense and Education Fund  
3233 P Street, N.W.  
Washington, D.C. 20007  
(202) 342-1903  
(202) 342-6980  
(202) 342-6984

Attorney for Intervenor Committee  
for Safety at Plant Zion

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## **REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Intervenors, NWC and CSPZ, respectfully request oral argument. This appeal concerns an issue paramount to nuclear safety and public interest: whether citizens who reside within the NRC-recognized hazard zone of a nuclear power plant (a 50-mile radius of the plant) have a right to a "formal, on the record" hearing under the Administrative Procedure Act (APA), 5 U.S.C. § 554-558, and § 189(a) of the Atomic Energy Act (AEA) in order to adjudicate contested safety or security issues. An oral presentation of the facts and law relevant to this case would benefit the court and clarify whether Congress intended the adjudicatory hearings to be "formal, on the record" proceedings.

## STATEMENT OF JURISDICTION

This case arises from a petition for review of a Final Rule issued by the respondent United States Nuclear Regulatory Commission entitled "Changes to the Adjudicatory Process," which was published in the Federal Register on January 14, 2004 at 69 *Federal Register*, 2182. This court has jurisdiction under 28 U.S.C. §§ 2342, 2343, 2344 and F.R.A.P. 15.

## STATEMENT OF THE ISSUES

The issue presented in this case is whether the adjudicatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 554-558, applies to licensing hearings under Section 189(a) of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1)(A) and 5 U.S.C. § 558 .

## STATEMENT OF THE CASE

On April 16, 2001 the U.S. Nuclear Regulatory Commission ("NRC") published a proposed rule entitled "Changes to the Adjudicatory Process" in the *Federal Register*. The National Whistleblower Center (NWC) and the Committee for Safety at Plant Zion (CSPZ) filed a timely response to the proposed rule on September 14, 2001 in accordance with 66 *Federal Register* No. 95, 27045-27046 (May 16, 2001). The NRC published the final rule on January 14, 2004 in the *Federal Register*. See Nuclear Regulatory Commission, Final Rule, 69 *Federal*

*Register* 2182 (January 14, 2004). On January 27, 2004, the Citizens Awareness Network, Inc. filed a timely petition for review. The NWC and the Committee for Safety at Plant Zion (CSPZ) filed a timely motion to intervene on February 12, 2004. 28 U.S.C. §2348, FRAP 15(d). On April 28, 2004 this Court consolidated the CAN appeal with an appeal of the NRC's rule filed by Public Citizen Critical Mass Energy and Environmental Program and the Nuclear Information and Resource Service. Pursuant to the order of this Court, the NWC's brief was due to be filed on or before June 7, 2004.

#### **STATEMENT OF THE FACTS**

On June 30, 1954 the Joint Committee on Atomic Energy issued Senate Report No. 83-1699, which recommended significant amendments to the Atomic Energy Act of 1946. S. Rep. No. 83-1699, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3456 (hereinafter, "Senate Report"). With minor revisions, the bill recommended by the Joint Committee was enacted into law as the Atomic Energy Act of 1954. P.L. 83-703. 42 U.S.C. 2011 (1996).

Among the many changes to America's nuclear policy enacted in the 1954 Act was the creation of a licensing process in which the federal Atomic Energy Commission ("AEC") would grant "Atomic Energy Licenses" to "facilities which utilize or produce special nuclear material." Senate Report, *reprinted in* U.S.C.C.A.N. at 3474-75. The AEC licenses could be granted "subject to

regulation by the Commission in the interest of the common defense and security and in order to protect the health and safety of the public.” *Id.* at 3475. Likewise, the Commission was prohibited from granting any such licenses when the “issuance of such a license would be inimical to the common defense and security or the health and safety of the public.” *Id.*

In adopting a licensing procedure for authorizing the civilian use of atomic energy, Congress specifically provided for the application of the Administrative Procedure Act in governing Commission adjudication of licensing decisions. *Id.* at 3484.

As originally introduced in the Senate by Senator Hickenlooper and in the House by Representative Cole, the original 1954 Act mandated that the “provisions of the Administrative Procedure Act” apply to “all” actions by the Atomic Energy Commission. *Study of AEC Procedures and Organization in Licensing of Reactor Facilities*, p. 68, (Apr. 1957) (citing H.R. 8862 and S. 3323, *reprinted in* Addendum) (hereinafter “AEC Study”). When initially introducing the bill into the House, Representative Cole explained that “normal administrative procedures” would apply the Commission actions under the new law. *Id.* The only modification to the APA requirements related to Commission adjudication of “national security” and “restricted data” concerning atomic energy. *Study*, at 68-69, *reprinted in* Addendum.

The Joint Committee report approving the 1954 law contained the reference to the Administrative Procedure Act set forth in the original proposal. Specifically, Chapter 16 of the proposed 1954 Act set forth the “procedures and conditions for issuing licenses” under the Atomic Energy Act. Senate Report, *reprinted in U.S.C.C.A.N. at 3483-84.*

The first provision of Chapter 16 specifically made the Administrative Procedure Act applicable to “all agency actions.” Senate Report, *reprinted in U.S.C.C.A.N. at 3483.* The second provision of Chapter 16 set forth the criteria the AEC should follow in making licensing decisions. *Id.* In this regard, the Commission would require specific information in any “application for a license” so as to “assure the Commission” that the granting of the license would “protect the health and safety of the public.” *Id.* The last provision of Chapter 16 provided for “judicial review” of any final order of the AEC in a manner consistent with the Administrative Procedure Act. *Id.* at 3484.

The original legislative proposals for the 1954 Atomic Energy Act did not explicitly mention hearings, but indicated that the actions of the Commission were to be subject to the requirements of the APA. William C. Parler, NRC General Counsel, *OGC Analysis of Legal Issues Relating to Nuclear Power Plant Life Extension* (January 13, 1989), J.A. at 798 (hereinafter, “NRC General Counsel Analysis”).

One witness suggested that Congress incorporate "express language requiring hearings" in order to ensure that APA-style hearings be required under the Act:

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, *cited in* NRC General Counsel Analysis, J.A. at 807-08.

Additionally, the Special Committee on Atomic Energy of the Association of the Bar of City of New York submitted a supplemental written statement on the proposed 1954 amendments which also recommended explicit reference to a hearing requirement be incorporated into Chapter 16 of the 1954 law in order to ensure that formal hearings be required under the law:

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 be 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, *cited in* NRC General Counsel Analysis, J.A. at 808.

Thereafter, the bill was amended and specific reference to a hearing requirement was introduced into Chapter 16 of the Act. *See*, H.R. 9757. Section 181, S. 3690, section 181, reprinted in 1 Legislative History at 624-25. 728-29 respectively, *cited in* NRC General Counsel Analysis, J.A. 809.

The only discussion on the topic 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, *cited and quoted in* NRC General Counsel Analysis, J.A. at 809-11 .

In analyzing this discussion between major sponsors of the AEA, the NRC General Counsel, in a 1989 memorandum, opined that Senator Anderson's 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." NRC General Counsel Analysis, J.A. at 812.

The NRC General Counsel further explained how 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." NRC General Counsel Analysis, J.A. at 812 (quoting Administrative Procedure in Government Agencies. S. Doc. No. 8, 77th Cong., 1st Sess. at 43).

On July 16, 1954 Senator Hickenlooper introduced a "committee amendment" incorporating the specific language mandating hearings in contested licensing proceedings as had been suggested above. When introducing the amendment, Senator Hickenlooper stated as follows:

Mr. President, this section reincorporates the provisions for hearings formerly made 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 hearing are to be held. The section also incorporates the former provisions of section 189 dealing with judicial review . . .

Study at 73.

The 1954 Act was amended along the lines suggested by Senator Anderson. In section 189 of Chapter 16, specific reference was made to a right to hearings in contested nuclear licensing proceedings. The final language approved by Congress in the 1954 law stated as follows:

Sec. 189. Hearings and Judicial Review—

a. In any proceeding under this Act, for the granting, suspending, revoking, or amending 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 licenses . . . *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.*

b. Any final order entered in any proceeding of the kind specified in subsection a. above shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950 (ch. 1189, 64 Stat. 1129), and the provisions of section 10 of the Administrative Procedure Act, as amended.

Section 189 of P.L. 83-703 (emphasis added).

Regarding such parties “whose interest may be affected” by nuclear licensing proceedings, the NRC has stated that:

The [Nuclear Regulatory] Commission has long applied contemporary judicial concepts of standing to determine whether a petitioner for

intervention has a sufficient interest in a proceeding to be permitted to intervene as a matter of right. As we observed in our 11/23/94 M & O (at 3-4), to establish standing a petitioner must show that the subject matter of the proceeding will cause an "injury in fact" to the petitioner and that the injury is arguably within the "zone of interests" protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act, as amended. We also observed that a group or organization such as GANE may, inter alia, establish its standing through the interests of its members.

*In re: Georgia Institute of Tech.*, 41 N.R.C. 281, 287 (1995) (citations and internal quotations omitted).<sup>1</sup>

Additionally, Section 10 of the APA, codified as 5 U.S.C. §§ 701-06, provides for judicial review in the Court of Appeals. 5 U.S.C. § 706.

Section 189 was not amended after 1954 in any manner which substantially altered the initial hearing requirements intended by Congress. 42 U.S.C. § 2239 (1996).

Immediately after the passage of the 1954 Act, both its sponsors and the Atomic Energy Commission interpreted the Act as mandating formal APA hearings.<sup>2</sup> The first hearing regulations published by the AEC in 1956 mandated

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<sup>1</sup> The finding that the petitioner was sufficiently within the reactor's zone of danger, and thus had standing, was based upon a showing of the potential for the reactor's "dangerous emissions" to reach the petitioner. *Id.* at 287.

<sup>2</sup> In the NRC's rule making order, the current NRC concedes this historical fact. *See* 69 Fed. Reg. at 2184 (recognizing "early interpretation" that "formal, on-the-record hearings" were required) and 2192 ("long-standing Commission position" that formal APA hearings, "at least with respect to reactor licensing" were required).

APA-style hearings on the record in all contested licensing matters. *See* Addendum.<sup>3</sup>

In 1956 the Joint Committee on Atomic Energy requested its staff to conduct an internal study on nuclear licensing procedures. AEC Study at v-vi. As recognized by the U.S. Supreme Court in its first decision on a nuclear licensing matter, this Joint Committee played an authoritative role in interpreting the Congressional intent behind the 1954 Act. *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 409 (1961). The Supreme Court specifically gave weight to the study as representative of the Joint Committee for which it gave deference. *Id.*

In that *AEC Study*, the staff of the Joint Committee on Atomic Energy set forth in detail the legislative history and intent behind Chapter 16, sections 181 and 189 of the Act. The report reprinted the legislative history behind the application of the Administrative Procedure Act and the hearing requirements to the Atomic Energy Act. *See* Study at 19 (staff analysis), 63-65 (legislative history).

The Joint Committee staff noted that the administrative policy justifying formal on-the-record hearings under the APA was fully applicable to the hearing requirements under the Atomic Energy Act. *Id.* at 19-25. The staff quoted

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<sup>3</sup> These regulations, codified in 10 C.F.R. Part 2, remained substantially in-place until the NRC's January 14, 2004 new rule.

directly from the 1941 Attorney General Committee's study on administrative procedure, which identified the "two principal" "situations" in which formal on-the-record adjudications "should be employed:"

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.

*Study*, p. 19-20, quoting *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong. 1st sess., at p. 43.

According to the Joint Committee staff, both of the circumstances set forth in the Attorney General Committee report were fully applicable to nuclear licensing proceedings. Nuclear licensing decisions had "far reaching importance to many interests and therefore" warranted "formal public proceedings:"

Applying these general standards, the licensing of reactors could be considered to be of far reaching importance to many interests and therefore to warrant formal public proceedings. Similarly, the denial of an application for a reactor license might be regarded as the type of situation in which the differences between private interests and public officials required settlement though formal proceedings including a public hearing.

*Id.*

The staff also identified the Federal Communication Act as a law which was “especially pertinent” to understand the types of hearings required under the Atomic Energy Act, based on part on Congress’ reliance on that Act as a model, as “revealed in the legislative history of the Atomic Energy Act.” Study at 20.

The Federal Communication Act was interpreted by the U.S. Supreme Court as requiring formal on-the-record hearings. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Following the 1957 Joint Committee *AEC Study*, the extensive record (both within the AEC, the NRC and the Joint Committee) on this matter consistently supported the view that the Administrative Procedure Act (including its adjudicatory provisions) were fully applicable to the Atomic Energy Act of 1954 and that the AEA required APA-style formal hearings in licensing proceedings. NRC General Counsel Analysis, J.A. at 826-30.

On April 16, 2001 the NRC published a Proposed Rule which, for the first time since the passage of the Atomic Energy Act of 1954, proposed radical changes to the basic adjudicatory rules governing licensing proceedings which had been initially published by the AEC as 10 C.F.R. Part 2 in 1956. 66 Fed. Reg. 19609 (Apr. 16, 2001). The National Whistleblower Center and the Committee for Safety at Plant Zion filed a detailed “joint comment” opposing the Proposed Rule.

J.A. at 751; 69 Fed. Reg. 2190 (Jan. 14, 2004). An additional 1,420 comments were also received by the NRC also opposing the Proposed Rule. *Id.* The NRC received nine comments in support of the Proposed Rule. *Id.* In addition to the public comments, the NRC's Atomic Safety and Licensing Board filed comments both supporting the 1989 opinion of the General Counsel, and opposing most of the adjudicatory changes to the rule. J.A. 97, 551.

On January 14, 2004 the NRC published its Final Rule, entitled "Changes to Adjudicatory Process; Final Rule. 69 Fed. Reg. 2182 (Jan. 14, 2004). The Final Rule substantially enacted the Proposed Rule. It affirmed the position of the Nuclear Regulatory Commission that "on-the-record hearings are not required under the Atomic Energy Act," except in certain limited circumstances not relevant to this appeal. *Id.* at 2192. Based on its legal assumption that the Administrative Procedures Act's adjudicatory mandates did not apply to most NRC licensing proceedings, the Commission approved a complex, hybrid hearing structure. On the one hand, the Commission granted some APA-style adjudicatory rights to public utilities and other license holders when they sought to defend themselves against NRC enforcement actions which could interfere with their licenses. *Id.* at 2240; see § 2.310 (permitting broader hearing rights in "enforcement matters" in which a licensee could face severe sanction). On the other hand, the opportunity for local residents who resided or owned property within the recognized evacuation

zone of a nuclear facility were significantly reduced, and the APA-mandated rules governing such adjudications were either eliminated or made discretionary. *Id.* at 2267; 10 C.F.R. Subpart L.

Under these rules, most public licensing proceedings would be conducted under “subpart L.” For example, Subpart L governs proceedings for granting, amending or renewing licenses. *Id.* at 2240; 10 C.F.R. § 2.310(a) (Jan. 14, 2004).

Additionally, in Subpart L proceedings, the NRC could determine that it “expected” the hearings to last “no more than two days” and could force the participants in those proceedings to comply with the “fast-track” procedures set forth in another subpart codified as “Subpart N.” *Id.* at 2241; 10 C.F.R. § 2.310(h).

Subpart L sets forth “informal hearing procedures” for citizen intervenors who reside within the evacuation zone of a NRC licensed facility. 69 Fed. Reg. at 2267-70. Meaningful discovery is not permitted. 69 Fed. Reg. at 2268; 10 C.F.R. § 2.1203. Parties have no right to cross examine any witness. 69 Fed. Reg. at 2268; 10 C.F.R. § 2.1204.<sup>4</sup> At the hearing, the “only” person

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<sup>4</sup> Not only are parties not permitted, as a matter of right, to cross examine any witness, but should a party seek to file a motion seeking leave to conduct cross examination, any such motion must be accompanied with a complex set of proofs and a “cross examination plan.” This plan must identify all issues for which cross examination is sought, must set forth the “objective” to be obtained from any such examination, and must provide the “line of questions” for which cross examination

permitted to orally question any witness is the “presiding officer or the presiding officer’s designee.” 69 Fed. Reg. at 2269; 10 C.F.R. § 2.1207(b)(6). Because parties have no right (or ability) to question a witness, a party seeking to have a witness questioned must submit proposed questions, in writing, to the “presiding officer” well in advance of the hearing. *Id.* The “presiding officer” can pick and choose which questions provided by the party (if any) he or she will ask. *Id.* The decision to ask or not ask any question provided by a party is left within the “discretion officer.” *Id.*

The party must submit all testimony, rebuttal testimony, and proposed questions in writing well before the hearing date. 69 Fed. Reg. at 2269; 10 C.F.R. § 2.1207(a). At the hearing itself, parties may *not* file a motion or request to submit any follow-up questions for the presiding officer to ask a witness, regardless of what a witness may say on the stand. 69 Fed. Reg. at 2269; 10 C.F.R. § 2.1207(b)(6) (“No party may submit proposed questions to the presiding officer at

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is sought. *Id.* at 2268, , 10 C.F.R. 2.1204. Every time a party seeks to cross examine any witness, a new motion must be filed, along with a new written “cross examination plan.” Even if a party complies with this very difficult and time consuming procedure, the ability to conduct any cross examination - regardless of how limited, still resides within the discretion of the NRC. In order to even request permission to conduct a cross examination, a party must file a complex and extensive “cross examination plan,” which not only must identify all issues for which cross examination is sought, it must also set forth the “objective” to be obtained from any such examination and must also provide the “line of questions” for which cross examination is sought. *Id.*

the hearing except upon the request by, and in the sole discretion of, the presiding officer”).

Citizen intervenors were also prohibited from using any aspect of the adjudicatory process, such as “discovery, proof, argument” or any other “means in any adjudicatory proceeding” from challenging any “rule or regulation” of the Commission. 69 Fed. Reg. at 2247; 10 C.F.R. § 2.335(a).

Other aspects of the Final Rule are consistent with these provisions in that they create significant procedural obstacles which render any form of public participation in an adjudicatory proceeding extremely difficult or impracticable. *See e.g.*, 69 Fed. Reg. at 2238-40, 10 C.F.R. § 2.309 (inordinately difficult and complex procedures imposed merely for requesting the right to participate in a Subsection L hearing). Significantly, both the NRC’s Chief Administrative Law Judge and one NRC commissioner were critical of the revised 10 C.F.R. § 2.309. J.A. at 556, 589.

The changes set forth in Final Rule, including Subpart L, were justified by the NRC part of its “regulatory approach” to ensure that its “review processes and decision making are open, understandable, and accessible to all interested parties.” 69 Fed. Reg. at 2182. According to the Commission, the complex, costly, time consuming and ineffective procedures set forth in Subpart L of the Final Rule, are consistent with its recognition of the “fundamental

importance” of “public participation in the Commission’s adjudicatory processes.”

*Id.*

### STANDARD OF REVIEW

The issue of whether formal, “on the record” hearings are required in contested licensing proceedings involves examining the meaning of the Administrative Procedures Act’s (APA) provisions. See 5 U.S.C. § 558(c) (formal hearing requirements apply to agency licensing decisions); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978); *Dantran v. United States Dept. of Labor*, 246 F.3d 36, 48 (1st Cir. 2001). The Nuclear Regulatory Commission’s (NRC) interprets the APA as entitled to “no special deference,” *Dantran*, 246 F.3d at 48 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50, 108 L.Ed. 2d 585, 110 S. Ct. 1384 (1990)).

As explained by the U.S. Supreme Court in *Wong Yan Sung v. McGrath*:

The Administrative Procedure Act . . . is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached thorough consideration if its purposes as disclosed by its background.

*McGrath*, 339 U.S. 33, 36, 70 S. Ct. 445, 94 L.Ed. 616 (1950).

In *McGrath*, Justice Jackson explained the background of the AFA. This recognized that Congress had expanded the role of federal administrative agencies,

and that the decisions of these agencies, which include the Atomic Energy Commission (and the Nuclear Regulatory Commission), would “have a serious impact on private rights.” Consequently, administrative “power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.” *McGrath*, 339 U.S. at 36-37 (1950)

“Because the...APA applies to all agencies and is not administered by any one in particular, deference to the interpretation by any particular agency is inappropriate.” *Dantran*, 246 F.3d at 48 (internal citations and quotations omitted). Therefore, this Court must review, *de novo*, any NRC interpretation of the scope of coverage of the APA. Furthermore, the NRC is not entitled to any deference whatsoever when interpreting that Act.

### **SUMMARY OF THE ARGUMENT**

The APA, 5 U.S.C. § 554-558, applies to licensing proceedings under Section 189(a) of the AEA. The 1954 amendments to the AEA include three specific references that fully support this position. First, Congress decided to use licensing proceedings as the administrative mechanism to authorize civilian utilization of atomic energy resources. The APA contains a specific provision governing procedures mandated in federal licensing proceedings. *See*, 5 U.S.C. § 558(c). Section 558(c) requires that all administrative licensing proceedings

governed by the APA provide the on-the-record procedures set forth in 5 U.S.C. §§ 556 and 557.

Second, Section 181 of Chapter 16 of the Atomic Energy Act of 1954 mandated that the APA apply to "all" agency action under that law. Thus, without any doubt 5 U.S.C. § 558(c) (which incorporates by reference 5 U.S.C. §§ 556 and 557) governs AEA agency licensing decisions.

Third, at the time the Atomic Energy Act of 1954 was passed, Congress clearly intended the Commission to conduct on-the-record hearings as required by the APA. In order to ensure that the Act granted the Commission the statutory authority to conduct such hearings, Section 189 of the Act was amended to include specific authority for the Commission to conduct such hearings.

The statute guarantees that any person whose "interest may be affected" by an NRC licensing proceeding may obtain a contested formal hearing in any Commission proceeding adjudicating the "granting, suspending, revoking, or amending of any license..." 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), Joint Appendix, pg. 777.

In the Final Rule issued January 24, 2004, the NRC reversed the nearly 50-year-old practice of the AEC and the NRC and eliminated the right of most “interested persons” to obtain a formal hearing on contested safety matters in nuclear licensing adjudications. The NRC’s Final Rule is inconsistent with congressional intent and fails to conform to the requirements set in the Atomic Energy Act and APA.

### ARGUMENT

I. UNDER THE CONTROLLING PRECEDENTS OF THIS CIRCUIT FORMAL HEARINGS ARE REQUIRED UNDER THE ATOMIC ENERGY ACT IN CONTESTED SAFETY AND SECURITY RELATED LICENSING PROCEEDINGS.

The seminal case regarding the applicability of APA formal hearing requirements pursuant to administrative statutes is *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978) which states that the exact words of “on the record” are not exclusively required to trigger the formal hearing process mandated under the Administrative Procedure Act (APA). *Seacoast* was a dispute over whether the Environmental Protection Agency (EPA) Administrator’s point-source water discharge effect findings, on the basis of which discharge permits are granted, must be made at “on the record” hearings. Although the Federal Water Pollution Control Act of 1972 (FWPCA), which gives the EPA Administrator the

duty to make such factual findings, does not use the words “on the record,” the First Circuit clearly stated that the APA required such hearings:

[at] the outset we reject the position.. that the precise words “on the record” must be used to trigger the APA. The Supreme Court has clearly rejected such an extreme reading even in the context of rule making under §553 of the APA. See *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245(1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757(1972).

*Id.* at 876 (footnote omitted).

The court did not focus on the precise wording of the FWPCA, instead basing its analysis *exclusively* on the meaning of the APA when unanimously holding that “on the record” hearings are required. *Id.* at 876-77:

The Supreme Court has said, “Determination of adjudicatory procedures of (the Administrative Procedure Act’s) coverage may well be approached through consideration of its purposes as disclosed by its background.” *Wong Yan Sung vs. McGrath*, 339 U.S. 33, 36 (1950).

*Id.* at 876 (emphasis added).

Under *Seacoast* a court must review the “substantive nature of the hearing Congress intended to provide” in order to determine whether such hearings were within the intent of the APA’s “on-the-record” hearing mandate. *Id.*, 876.

The *Seacoast* approach was favorably cited by the Supreme Court in *Steadman v. SEC*, 450 U.S. 91, 97 n. 13 (1981), where the Court indicated that the

“substantive content of the adjudication” was critical in determining whether the “on-the-record” requirement of the APA was applicable.

As a threshold matter, in reviewing the “substantive content of the adjudication,” the *Seacoast* line of cases draws a distinction between rulemaking proceedings and adjudicatory proceedings. The words “on-the-record” in the enabling statute are generally more important in the context of rulemaking proceedings than adjudicatory proceedings. *Central and Southern Motor v. ICC*, 582 F.2d 113, 120, n. 2 (1st Cir. 1978). In the context of adjudicatory proceedings (the type of proceeding at issue in this case) Congress intended the APA formal hearing requirements to apply to proceedings that involve “specific factual findings with potential for serious impact on private rights.” *Dantran v. United States Dept of Labor*, 246 F.3d 36, 46 (2001).<sup>5</sup> *Accord.*, *Seacoast v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978).

It is unquestionable that NRC licensing proceedings require specific factual findings and have the potential for serious impact on private rights. As explained in the 1957 Joint Committee Staff Report, the Attorney General standards regarding when “on-the-record” hearings should be required under the APA were fully

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<sup>5</sup> As in *Seacoast*, this Court in *Dantran* did not dwell on the presence or absence of the magic words “on the record,” *id.* at 46, but instead, focused its analysis on the meaning of the APA concluding the absence of the exact wording did not prevent an “on the record hearing.” *Id.* at 47-48.

applicable to nuclear licensing proceedings. Nuclear licensing decisions had far reaching importance to many interests and therefore” warranted “formal public proceedings:

Applying this general standards, the licensing of reactors could be considered to be of far reaching importance to many interests and therefore to warrant formal public proceedings. Similarly, the denial of an application for a reactor license might be regarded as the type of situation in which the differences between private interests and public officials required settlement though formal proceedings including a public hearing.

*Joint Committee Study*, p. 812 (reprinted in Addendum).<sup>6</sup>

In addition, the *Joint Committee Study* also identified the fact that the Atomic Energy Act’s hearing procedures were modeled on the Federal Communications Act of 1934:

“An analysis of the public hearing requirements of the Federal Communications Act is especially pertinent for two reasons. First, it is revealed in the legislative history of the Atomic Energy Act that the two-step procedure of obtaining first a construction permit and thereafter an operating license was borrowed from the Communications Act.”

*Joint Committee Study of AEC Procedures* at 20 (Addendum).

The Federal Communications Act was as one of the models used when creating the AEC. *Joint Committee Study of AEC Procedures* at 21

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<sup>6</sup> The NRC’s General Counsel, in his 1989 memorandum, also cited directly to this authority as justification for holding that the ‘on-the-record’ requirements of the APA applied to the AEA. Joint Appendix, p. 812.

(Addendum) (“It is thus evidence that the FCC procedure is comparable to the first procedure followed by the AEC.”).

Hearings under the Communications Act were interpreted to be ‘on-the-record’ despite that fact that the Act did not use those magic words. In *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956), the Supreme Court reasoned that “the Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation” and held:

“agree[d] that a ‘full hearing’ under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

Finally, a 1955-56 law review article, published by a member of the Atomic Energy Commission’s Office of General Counsel, repeated these very same arguments and explained why “sections 5, 7 and 8 of the Administrative Procedure Act” applied to the Atomic Energy Act, and why “formal adjudicatory hearings must” be conducted in contested licensing proceedings:

Section 189a of the Atomic Energy Act is the provision governing the grant of headings . . . affecting licensing. It provides opportunity for hearing in both adjudicative cases (*e.g.*, the granting or revoking of licenses) and sublegislative matters (*e.g.*, the issuance of rules dealing with the activities of licensees). It is silent respecting an ‘on the record’ requirement for hearings. Nothing in the text or history of section 189 indicates that Congress intended to depart from the dichotomy under the Administrative Procedure Act between

adjudication and sublegislation. The AEC has therefore quire properly followed the accepted interpretation that an 'on the record' requirements is implied in adjudicative proceedings, but not in sublegislative proceedings involving rule-making.

Herzel H.E. Plaine, "The Rules of Practice of the Atomic Energy Commission," 34 *Texas L. Rev.* 801, 811-12 (1955-56).

Under this Court's decision in *Seacoast* it is unquestionable that nuclear licensing hearings were "exactly the kind of quasi-judicial proceedings for which the adjudicatory procedures of the APA were intended." 572 F.2d at 876.

## II. SECTION 558 OF THE ADMINISTRATIVE PROCEDURE ACT APPLIES IN NRC LICENSING PROCEEDINGS

Section 181 of the Atomic Energy Act provides additional support regarding the applicability of the APA to "on-the-record" hearing requirements in NRC licensing proceedings. Section 181 states that "[t]he provisions of the APA...shall apply to *all agency action* taken under this Act..."

Significantly, the APA contains a specific section which relates directly to licensing determinations. Section 558(c) of the APA provides that:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title...

5 U.S.C. §558(c).

Under the Atomic Energy Act, Congress mandated that the APA apply to agency licensing proceedings. By enacting §181 of the Act, Congress intended § 558(c) to apply to agency licensing proceedings. Even without the § 81 mandate, this Court has recognized that Congress has ‘assumed that most licensing would be governed by §§ 556 and 557.’ *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, n. 11 (1st Cir. 1978). *Accord.*, *United States Steel Corp. v. EPA*, 556 F.2d 822, 833 (7th Cir. 1977).

III. THE NRC’S OWN GENERAL COUNSEL CONCLUDED IN HIS INVESTIGATION THAT THE APA DOES APPLY TO THE NRC PROCEEDINGS.

On January 13, 1989, the NRC General Counsel issued a detailed legal analysis entitled “OGC Analysis of Legal Issues Relating to Nuclear Power Plant Life Extension.” After a careful review of congressional intent behind the Atomic Energy Act, the General Counsel concluded that it was “clear from the extensive legislative history” of the AEA that “Congress understood that formal hearings were required at minimum in contested power reactor licensing hearings under Section 189.” After fully evaluating Section 189(a) and the applicable controlling legal standards, the General Counsel concluded that the legislative history . . . strongly indicate(s) that Congress intended the hearings afforded by Section 189(a)

in power reactor licensing cases to be on the record.” In other words, the AEA hearings were controlled by the APA.

The NRC’s General Counsel 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, J.A. p. 759.

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.<sup>7</sup>

The General Counsel also quoted comments by Senator Anderson, one of AEA’s principal sponsors. Senator Anderson clearly set forth the “rationale for requiring” nuclear licensing hearings to be conducted in accordance with the APA. According to Senator Anderson

When the investigation and the possible resulting action are of such

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<sup>7</sup> The interpretations of the Joint Committee are extremely significant in understanding the scope of the AEA. 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 AEC. See, e.g. 367 U.S. at 408.

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 framers of the AEA understood that hearings under the Act should be on the record. J.A. p. 776

After evaluating the Atomic Energy Act's legislative history and the history of the Joint Committee, the General Counsel concluded that 'Congress understood that formal hearings were required, at minimum, in contested power reactor licensing hearings under Section 189.' J.A. p. 774

#### IV. THE NRC RULES HAVE NO RATIONAL BASIS IN LAW OR FACT

Even assuming that the APA and AEA did not mandate APA-style hearings in contested nuclear safety hearings in which local residents are parties, the NRC abused its discretion by not articulating a sufficient reason to justify radical changes in its prior adjudicatory structure. The agency's action in promulgating such standards may be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A), *Citizens*

*to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed. 2d 136 (1971).

Nothing on the record in the rulemaking proceedings provides any basis that would rationalize why APA-mandated procedural rights should not be maintained in contested NRC licensing hearings. Rather, the record demonstrated, without contradiction, how local residents' input significantly enhances the public interest when they are permitted to use the basic tools essential to the established American truth-finding adjudicatory tradition.

The uncontested record in the NRC rulemaking proceeding demonstrated that the APA licensing hearing procedures originally adopted by the Atomic Energy Commission in 1956 not only protected the personal rights of individuals who resided close to nuclear power plants and wanted to protect their own health and property, but also how citizen interveners established a long record of identifying major safety problems that served the public interest. J.A. p. 759

As stated in the NRC's Public Comment, without contradiction, the NRC has, in the past, emphasized the importance of public participation. The newly formed NRC, in 1975, unanimously recognized that public participation in the NRC's adjudicatory process was a "vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us." *Northern*

*States Power Company*, 1 NRC 1, 2 (1975). Similarly, the NRC issued a Policy Statement in 1981 that sought to "emphasize" that licensing hearings 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).

J.A. p. 754

Thirty 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." See *NWC Public Comment*, , JA 757. In fact, the NRC judges recognized that "substantial safety and environmental issues" were first raised by the citizen-interveners.

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 intervener.

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

J.A. p. 759-760

Seven years later, the NRC's Special Inquiry Group, which investigated the Three Mile Island accident, also recognized the important role that citizen

intervenors have played in protecting 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. Joint Appendix, p. 670.

In the context of the current rule, the initial NRC Office of General Counsel review of the law and policy governing licensing hearings fully supported a continuation of the prior APA-style formal hearing process. JA 798. The NRC's Chief Administrative Law Judge likewise supported a continuation of those procedures. JA 97. Finally, even Former NRC Chairman Meserve raised concerns in his comments about the Proposed Rule. He asserted that it is "not necessarily the case" that informal procedures are more efficient than formal procedures than formal procedures; it is also "not necessarily the case" that a formal process is slow. See Commissioner Comments on SECY-00-0017 (February 16, 2001). JA, p. 582. Meserve stated

The objective of a hearing is to provide a record that provides the basis for a sound, well-reasoned, and fully informed decision. For some matters, the best way to obtain that record is by means of the illumination that a formal procedure allows.

See *Id.* Meserve concluded that the limitation on formal hearings to cases with a large number of complex issues is too restricting as even a single issue can create a complex case that would benefit from a formal process. JA, p. 582.

The public record is awash with examples where citizen interveners have significantly contributed to public safety, both in the courts and in private company's policies. A "far-from-complete" list of numerous significant contributions to public safety was compiled in a 1983 Congressional hearing. When interveners' concerns have gone unheeded it has led to a 'much higher price tag than if the problems had been dealt with when the interveners raised them' *NRC Licensing Reform at 253-54 (Testimony of the Union of Concerned Scientists)*. JA, p. 762-769.

A letter written by Mr. Naiden, AEC General Counsel, to Mr. Ramey, Executive Director of the Joint Committee on September 6, 1961, asserted Section 189(a) of the AEA "explicitly requires a hearing on the record conducted in accordance with the APA" and for the "Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirements." *Kerr McGee Corp. (West Chicago Rare Earth's Facility), CLI-82-2, 15 NRC 232 (1982)* (Commissioner Bradford dissenting).

Soon after the tragic accident at Chernobyl, Rep. Edward J. 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. He emphasized the importance of formal public hearings

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.

Remarks of Rep. 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, JA, p. 768-69.

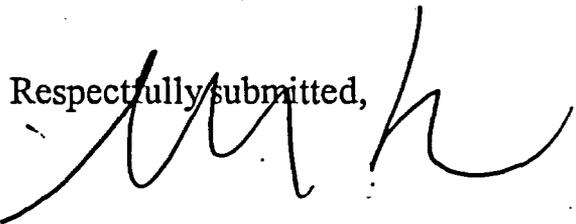
There is simply no rational reason whatsoever to implement the costly, complex and inefficient rules proposed by the NRC. APA-styled hearings served the very purposes identified by Congress and the Joint Committee when Section 189 was enacted into law. The NRC's proposal will not serve the interests of public participation and create a cumbersome and ineffective hearing process

unprecedented in American administrative law. Simply stated, under the new rules there would be no meaningful public participation in NRC safety hearings. There will be no adjudicatory method for local residents who reside next door to an operating or proposed nuclear power plant to challenge any contested safety or security concerns.

## CONCLUSION

For the reasons stated above, the Final Rule of the Nuclear Regulatory Commission should be vacated. The NRC should be permanently enjoined from implementing this regulation and any administrative procedures which do not comply with 5 U.S.C. § 558 in contested licensing proceedings under the AEA or procedures which do not fully comply with 5 U.S.C. §§ 554-557 in contested nuclear safety-related or security-related proceedings.

Respectfully submitted,



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Stephen M. Kohn  
Court of Appeals Bar Number 96636  
National Whistleblower Legal  
Defense and Education Fund  
3233 P Street, NW  
Washington, D.C. 20007  
(202) 342-1902 (Phone)  
(202) 342- 6980 (Phone)  
(202) 342-6984 (Fax)

Attorney for Intervenors National  
Whistleblower Center and Committee for  
Safety at Plant Zion

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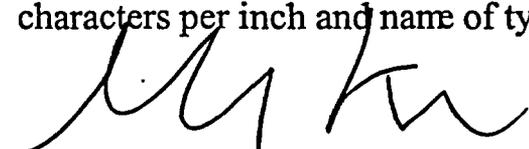
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Stephen M. Kohn  
Court of Appeals Bar Number 96636

Attorney for Intervenors NWC and CSPZ

Dated: June 7, 2004

## ADDENDUM

1. A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, Joint Committee on Atomic Energy(April 1957).

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85th Congress }  
1st Session }

JOINT COMMITTEE PRINT

U.S. Congress, Joint Committee on Atomic Energy

A STUDY OF AEC PROCEDURES AND  
ORGANIZATION IN THE LICENSING  
OF REACTOR FACILITIES



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## PART II. PUBLIC HEARINGS ON REACTOR LICENSE APPLICATIONS

The first problem raised by Senator Anderson's letter of August 9, 1956 to Mr. Strauss (see Introduction, p. 1) was whether the Atomic Energy Act should be amended to require that a public hearing be held in some or all cases before the grant or denial by the Commission of a construction permit or a facility license.

The purpose of such a requirement would be to obtain an open forum in which matters of reactor safety and comparative merits of competing applications could be thoroughly aired and made known to the public, even in noncontested cases.

### PRESENT PUBLIC HEARING REQUIREMENTS OF THE ATOMIC ENERGY ACT AND THE ADMINISTRATIVE PROCEDURE ACT

No constitutional question would seem to be raised by the present statutory hearing provisions, since the Supreme Court has held that due process requirements are met when opportunity for a hearing is provided before final agency action,<sup>1</sup> and the Atomic Energy Act meets this constitutional standard. The question pursued is whether, for policy reasons, the Atomic Energy Act should provide for hearings in some cases even when not specifically requested by an interested party.

The Atomic Energy Act, at the present time, requires only that there be provided an *opportunity* for a hearing, as opposed to the automatic holding of a hearing, before action is taken by the Commission on an application for a construction permit or a facility license. Thus section 189a of the act provides that:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or a construction permit \* \* \* 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 proceedings. [Italic added.]

This lack of a requirement of a public hearing in AEC licensing proceedings is unaffected by the applicability of the Administrative Procedure Act.<sup>2</sup>

<sup>1</sup> *United States v. Illinois Central R. R. Co.*, 291 U. S. 457 (1934). See more detailed discussion on constitutional law, and applicable statutory provisions, including those of other Federal agencies, in *Requirements of Hearings in Administrative Adjudication*, by Prof. J. Forrester Davison, appendix 15.

<sup>2</sup> Sec. 181 of the Atomic Energy Act provides that the provisions of the Administrative Procedure Act shall apply, except when classified information is involved when the Commission shall establish "parallel procedures." See sec. 181 reprinted in appendix 1. Before the AEC may *revoke* a license, it is required by sec. 186b of the act to follow the provisions of sec. 9 (b) of the Administrative Procedure Act, which requires notice of the deficient "facts or conduct," opportunity for compliance, and a hearing upon request. However, even in cases of revocation, the AEC may, under sec. 186c, recapture the nuclear materials, and enter upon and operate the facility prior to complying with the special revocation procedures if the Commission finds the case "to be of extreme importance to the national security or the health and safety of the public." During the floor debate in amending the Atomic Energy Act in 1954, Senator Anderson indicated that he favored public hearings on all reactor applications. See Legislative History, appendix 2, sec. 189, pp. 72-73.

If a hearing is held, the extent to which it can be conducted in public is limited by statute when restricted data or defense information are involved. Section 181 provides that in such cases

the Commission shall provide by regulation for such *parallel procedures* as will effectively safeguard and prevent disclosure \* \* \* *with minimum impairment* of the procedural rights \* \* \*. [Italics added.]

In the first public hearing held by the AEC in the licensing program, it developed that restricted data was involved. The AEC then issued regulations providing for the use of parallel procedures.<sup>3</sup> Whether hearings held pursuant to such regulations would satisfy the requirements of a public hearing has yet to be determined. The recent action of the Commission in announcing declassification of a "broad range of information necessary to the design, construction and operation of civilian power reactors \* \* \*" may reduce the extent to which parallel procedures need to be invoked in the future.<sup>4</sup>

*Requirements of notice of licensing actions or hearings*

The value of a public hearing, particularly in a new field such as this, may depend in large part on the issuance of public notice of proposed action in advance of issuing the license or holding the hearing.

Section 182b provides for extensive notice and publication requirements<sup>5</sup> in commercial license proceedings under section 103. However, applicants are not required to apply for construction permits and facility licenses under section 103 until the Commission has made a finding of "practical value" for that type of facility,<sup>6</sup> and to date the Commission has made no such finding. As for section 104 licenses, which include all facility licenses issued to date, there are no direct provisions concerning notice to be given before issuing a license, except that section 104b provides that in issuing licenses under that subsection the Commission shall impose regulations and terms which "will be compatible with the regulations and terms of license which would apply" in the event that a section 103 license should later be issued for that type of facility. However, to date the AEC has not followed the notice and publication requirements of section 182b in issuing construction permits or facility licenses under section 104.<sup>7</sup>

AEC REGULATIONS AND PRACTICES

The Commission has promulgated regulations in which opportunity for a public hearing is provided, either before or after the Commission has taken initial action in granting or denying the application. Under section 2.102 of the AEC regulations the Commission may:

1. Take the action of granting or denying the application, subject to a proper request within 30 days for a hearing by the applicant or by an intervener; or

<sup>3</sup> See excerpts from amendment to pt. 2 (published in Federal Register Dec. 8, 1956), appendix 3.

<sup>4</sup> The Commission put into effect on December 6, 1956, a new Declassification Guide intended to permit declassification of much reactor technology. See AEC 21st Semiannual Report (January 1957), at p. 64.

<sup>5</sup> Sec. 182b reads:

"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, to municipalities, private utilities, public bodies, and cooperatives within transmission distance authorized to engage in the distribution of electric energy and until it has published notice of such application once each week for four consecutive weeks in the Federal Register, and until four weeks after the last notice."

<sup>6</sup> See sec. 102 of the Act, reprinted in appendix 1.

2. Issue a notice of proposed action, allowing 15 days thereafter for filing request for hearing; or

3. Order a public hearing, after providing "timely" notice and specification of the issues.<sup>9</sup>

The Commission has taken the position that whichever of the above three courses is followed, the proceeding is not complete until the opportunities for hearing have expired, or if a hearing is scheduled, until the hearing has been held and final action taken by the Commission on the basis of the record.<sup>9</sup>

Prior to December 28, 1956, the AEC uniformly chose to follow the first procedure of taking its action first, subject to a request for a hearing within 30 days. In one case, that of the PRDC, a request was made for hearing by an intervener, which the Commission granted.<sup>10</sup>

In such a situation, where the Commission has taken initial action, and then granted a request for a hearing, the status of the construction permit during the period of the hearing may assume unusual importance, since the interval may be many months. If the permit continues in effect during that period, substantial construction may have taken place and yet the permit is subject to ultimate cancellation and substantial loss to the applicant. On the other hand if the permit is automatically suspended during the period of the hearing, substantial time could be lost in the private development program, in the event the application is finally granted. In the PRDC case, after protests were received and the hearing scheduled, the AEC took the position that it had the authority to maintain the construction permit in effect, pending the outcome of the hearing, and the applicant accordingly commenced construction.<sup>11</sup>

Since December 28, 1956 the Commission has uniformly followed the second procedure of issuing a notice of proposed action allowing 15 days for filing requests for a hearing.<sup>12</sup> The status of the construction permit, in the event a hearing is requested and scheduled, has not yet been determined.

To date the Commission has never followed the third procedure of ordering a public hearing after timely notice and specification of the issues.

#### PUBLIC HEARING REQUIREMENTS AND PRACTICES OF OTHER AGENCIES

Before examining the merits of these three procedures in the light of the characteristics of the atomic energy program, some preliminary guidance is provided by a reference to public hearing requirements and practices of other Federal agencies.

In so doing one may consider the applicability to the atomic program of the reasons of public policy that led to the requirement of public hearings in some or all circumstance.

As a general matter of administrative policy and practice, the 1941 report of the Attorney General's Committee, appointed to study administrative procedure in Federal agencies, stated that formal

<sup>9</sup> Sec. 2.102 is reprinted in appendix 3.

<sup>10</sup> See memorandum of Commission published Oct. 9, 1956, concerning hearing on PRDC application, appendix 7E.

<sup>11</sup> See AEC order, dated Oct. 8, 1956, granting hearing, appendix 7D.

<sup>12</sup> The AEC order of Oct. 8, 1956, denied the intervener's motion to suspend the construction permit pending the outcome of the hearing. See appendix 7D.

<sup>13</sup> See Notice of Proposed Action, issued by AEC, concerning proposed research reactor near Princeton N. J., appendix 14B.

adjudication procedures involving a public hearing should be employed in two principal types of situations:

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 the 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 do decide the controversy.<sup>13</sup>

Applying these general standards, the licensing of reactors could be considered to be of far reaching importance to many interests and therefore to warrant formal public proceedings. Similarly, the denial of an application for a reactor license might be regarded as the type of situation in which the differences between private interests and public officials required settlement through formal proceedings including a public hearing.

#### *Federal Communications Commission*

An analysis of the public hearing requirements of the Federal Communications Act is especially pertinent for two reasons. First, it is revealed in the legislative history of the Atomic Energy Act that the two-step procedure of obtaining first a construction permit and thereafter an operating license was borrowed from the Communications Act. Secondly, the license application procedures specified by the Federal Communications Act were extensively amended by the Congress in 1952 to require more formalized procedures by the FCC in passing upon applications. These so-called McFarland amendments therefore represent a recent consideration by the Congress of the procedures to be required of one Federal agency in initial licensing.

*Competing applications.*—The Supreme Court has interpreted the Communications Act to require that when applications have been received from two or more parties for the same facility, consolidated hearings must be held.<sup>14</sup>

The concept of competing applications is perhaps not as clearcut in the case of applications to the AEC for licenses as in the case of applications to the FCC. However, if there should be a shortage of nuclear fuel, or if there should someday be many reactor applications in a given locality or for a given site, special provisions for formalized comparative proceedings may be in order.

*Single applications.*—When a single application is received by the FCC, it may grant the construction permit or license without holding a hearing. But if no hearing is held prior to the grant, the 1952 McFarland amendments establish a protest procedure where parties affected may challenge it in formal protest within 30 days, and the

<sup>13</sup> Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong. 1st sess., at p. 43.  
<sup>14</sup> *Ashbecker Radio Corp. v. Federal Communications Commission*, 326 U. S. 327 (1945).

Commission must enter findings on these protests, and a hearing is thereafter held.<sup>15</sup>

These amendments of the Communications Act had been based on a congressional decision to formalize the proceedings in the issuance of construction permits and licenses and to provide a greater opportunity for public hearings. Under the 1952 amendments, in case of protest, the construction permit was automatically suspended for the duration of the hearings. Further amendments in 1956, however, authorized the FCC to continue the permit in effect if it determined that the continued authorization was necessary to the maintenance or conduct of an existing service, or otherwise in the public interest.<sup>15</sup>

It is thus evident that the FCC procedure is comparable to the first procedure followed by the AEC, but with the difference that under the Communications Act the construction permit does not ordinarily continue in effect pending the outcome of a hearing. The greater complexity of reactor construction and the need for rapid private development in the atomic field provide a factual basis for continuing in effect the construction permit during the hearing period. On the other hand, the extensive commitment of private funds in the interim is a factor which could make the decision to deny the application a more difficult one for the AEC than the FCC.

In the two-step process of construction permit and license to operate, the first stage is clearly the more critical of the two in FCC licensing. Once the construction permit is granted, the operating license is issued largely as a matter of course, whereas in the case of the AEC a very specific determination is required, particularly as to the issue of reactor safety, before the operating license is issued. However the legislative history of both acts indicate that the two-step procedure was adopted to prevent expensive unauthorized construction prior to an application for a license, which might thereafter be denied.

One final distinction between the FCC and the AEC is the greater formality of the FCC in the case of denials of a license application. If the FCC intends to deny the application, it must first notify the applicant stating the reasons for its proposed denial and giving him an opportunity to amend his application to meet agency objections. Then, if the FCC still decides that the application should be denied, it must schedule a formal hearing, after notice to the applicant and all other interested parties.<sup>16</sup> In the case of the AEC no distinction is made between procedures in granting and denying applications.

*Federal Power Commission.*—To the extent that the issuance of an AEC construction permit may be considered analagous to the issuance of a certificate of public convenience and necessity, it should be observed that public hearings are required by the Natural Gas Act for such certificates authorizing the construction or extension of natural gas facilities. The legislative history indicates that representatives of industries producing fuels competing with natural gas desired public hearings and formalized procedures in order to be assured of "full participation" in the Commission deliberations on applications for natural gas line extensions.<sup>17</sup>

*Shortened procedures.*—Other agencies have adopted hearing procedures providing for "shortened" or abbreviated proceedings, the

<sup>15</sup> 47 U. S. C. A., sec. 309 (c).

<sup>16</sup> 47 U. S. C. A., sec. 309 (b).

<sup>17</sup> See Natural Gas Act Amendments, Hearings before the House Committee on Interstate and Foreign

## CHAPTER 19. MISCELLANEOUS

\* \* \* \* \*

"SEC. 271. AGENCY JURISDICTION.—Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power.

"SEC. 272. APPLICABILITY OF FEDERAL POWER ACT.—Every licensee under this Act who holds a license from the Commission for a utilization or production facility for the generation of commercial electric energy under section 103 and who transmits such electric energy in interstate commerce or sells it at wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act.

"SEC. 273. LICENSING OF GOVERNMENT AGENCIES.—Nothing in this Act shall preclude any Government agency now or hereafter authorized by law to engage in the production, marketing, or distribution of electric energy from obtaining a license under section 103, if qualified under the provisions of section 103, for the construction and operation of production or utilization facilities for the primary purpose of producing electric energy for disposition for ultimate public consumption.

## APPENDIX 2

## EXTRACTS FROM LEGISLATIVE HISTORY OF CERTAIN SECTIONS OF THE ATOMIC ENERGY ACT OF 1954

As indicated in the Introduction, there were a number of developments between August of 1954 and August of 1956 which, in the opinion of Chairman Anderson, made a reappraisal of AEC facility licensing procedures appropriate at this time. For purposes of background, there have been collected in this appendix certain extracts from and references to the 1954 legislative process, including hearings before the Joint Committee, Joint Committee bills, Joint Committee reports, proposed amendments, and floor debate.<sup>1</sup> Since this study primarily concerns facility rather than materials licenses, this appendix makes reference only to portions of the legislative history dealing primarily with facility or reactor licensing.

*Section 181. The Administrative Procedure Act and "parallel procedures"*

Section 181 states that the provisions of the Administrative Procedure Act shall be applicable, with the proviso that in proceedings involving classified information, the Commission shall provide by regulation for "parallel procedures" to safeguard the information with "minimum impairment of the procedural rights."

The Administrative Procedure Act had been made generally applicable by section 14 of the original Atomic Energy Act of 1946, and there appears to have been little legislative public discussion of this continued requirement.

<sup>1</sup> All footnote references in this appendix unless otherwise identified will be to the three-volume work entitled "Legislative History of the Atomic Energy Act of 1954" (GPO, 1955), hereafter referred to as "Legislative History."

However, the "parallel procedures" concept was developed during the 1954 legislative process.

As originally introduced (H. R. 8862 by Mr. Cole in the House on April 15, 1954, and S. 3323 by Senator Hickenlooper in the Senate on April 19, 1954), section 181 read as follows:

SEC. 181. GENERAL.—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. In determining whether or not an act of the Commission would be an "agency act" the fact that the national security and the common defense require the fact, or facts essential to that act to be kept secret shall not be considered. For those agency acts which can be made public, the full regular administrative procedures shall be followed. For those agency acts which cannot be undertaken in public, the Commission shall provide by regulation for identical procedures except that they shall not be made public.<sup>2</sup>

On April 15, 1954; at the time he introduced H. R. 8862, Mr. Cole made a statement on the floor of the House in which he said:

In addition, normal administrative procedures have been established as far as possible consonant with the requirements of secrecy in the field because of common defense and security.<sup>3</sup>

The Joint Committee held hearings in May and June 1954 on the bills which had been introduced in April, and on June 30, 1954, Mr. Cole and Senator Hickenlooper introduced identical new bills, H.R. 9757 and S. 3690, respectively. The Joint Committee report accompanying the new bills stated:

Section 181 makes the provisions of the Administrative Procedure Act applicable to all agency actions of the Commission. Where publication of data involved in agency action is contrary to the national security and common defense, then identical secret procedures are required to be set up within the Commission. The Commission is required to grant a hearing to any party materially interested in any agency action.<sup>4</sup>

On July 16, 1954, Senator Hickenlooper offered in the Senate an amendment to substitute an entire new section 181 to his bill. This amendment was a committee amendment, and was agreed to without debate, and is the language now contained in section 181 of the act. At the time of introducing his amendment, Senator Hickenlooper said:

Mr. President, the change in section 181 relating to the Administrative Procedure Act is to provide the Commission with a little more flexibility in dealing with procedures than was provided in this section in the bill. This proposal requires the Commission, where restricted data and defense information are concerned, to establish parallel procedures

<sup>2</sup> Legislative History, pp. 161 and 237.

to those regularly employed. But the procedures are such as to protect against the wrongful dissemination of restricted data and defense information while at the same time preserving as many of the normal procedures as is possible. The section in the bill required the Commission to have identical but secret proceedings.<sup>6</sup>

On July 24, 1954, Mr. Cole offered the same committee amendment substituting a new section 181 on the floor of the House which was agreed to without debate.<sup>6</sup>

*Section 182a and b. License applications and notice*

Section 182a concerns license applications and sets forth the matters which shall be included in the application. Section 182b provides that notice to certain parties and publication in the Federal Register shall be required before the Commission may issue a facility license under section 103.

There was little public discussion concerning section 182a. The language appearing in the first bills introduced in April (H. R. 8862 and S. 3323) remained substantially unchanged during the legislative process.

The bills introduced on June 30, 1954 (H. R. 9757 and S. 3690), contained, for the first time, subsection 182b concerning notice and publication on section 103 license applications. As contained in these bills, subsection b only required notice to "such regulatory agency as may have jurisdiction over the rates and services of the proposed activity."<sup>7</sup>

In the report of the Joint Committee on H. R. 9757, Mr. Holifield and Mr. Price stated separate views. As to section 182b they said:

Section 182b, providing for due notice to the public before the issuance of any license for utilization or production facilities which generate commercial power, is lacking as to both breadth of notice required and provision of specific procedures in connection with license applications to assure full protection of the rights of interested parties. It also lacks specific recognition of those interests whose rights may be affected by Commission action or whose participation may be in the public interest.

To cure these deficiencies, where generation of nuclear-electric power is the primary purpose involved, we believe the section should be amended to provide that notice of applications shall also be sent to municipalities, and to public and cooperative electric systems within transmission distance; that, in case of protests, conflicting applications, or proposals for special conditions, interested parties shall be accorded opportunity for intervention, hearing, petition for rehearing, and appeal, in general accord with the procedures now prevailing under Federal power legislation; and that the Commission may admit as parties interested States, State commissions, municipalities, public and cooperative electric systems, or representatives of interested consumers or

<sup>6</sup> Legislative History, p. 3175. On July 16, 1954, Senator Hickenlooper also introduced an amendment, which was agreed to, substituting a new sec. 189, containing a provision concerning hearings similar to that formerly contained in the last sentence of sec. 181 of S. 3690. See Legislative History, pp. 3174-3175, and

security holders, or any competitor of a party to such proceedings, or any other person whose participation may be in the public interest.<sup>8</sup>

After discussion by Mr. Holifield in the House,<sup>9</sup> and Senators Humphrey<sup>10</sup> and Gore<sup>11</sup> in the Senate, this was broadened to require notice also on section 103 applications to "municipalities, private utilities, public bodies, and cooperatives within transmission distance authorized to engage in the distribution of electric energy."<sup>12</sup>

As to this addition of a broader notice requirement, the report of both conference committees contains the following statement:

#### NOTICE OF LICENSES

The House bill contained a provision requiring the Commission to give notice of proposed licenses under section 103 to those within transmission distance who might be engaged in the distribution of electricity. The Senate amendment required that notice be given to private utilities as well as to those persons included within the House provision. The conference substitute retains the Senate language with a minor amendment.<sup>13</sup>

In addition, identical amendments to section 182 were offered by Mr. Holifield in the House and by Senators Humphrey and Magnuson in the Senate, to provide in certain situations for hearings similar to those held by the Federal Power Commission on applications for licenses. However, since the language concerning opportunity for hearing eventually was placed in section 189 of the act, those amendments will be discussed infra in the discussion concerning section 189.

#### *Section 185. Construction permits*

Section 185 of the act concerning construction permits was unchanged during the legislative process and contains the language set forth in the original bills introduced in April in each House (H. R. 8862 and S. 3323).

During the hearings before the Joint Committee, several witnesses referred to the fact that a license under section 103 or section 104 would not necessarily follow after construction even though a construction permit had been issued under section 185.<sup>14</sup>

In their statement of separate views on H. R. 9757, Mr. Holifield and Mr. Price stated:

Section 185, providing for the issuance of construction permits to applicants whose applications are otherwise satisfactory to the Commission, should be specifically subject to the same procedural safeguards, assuring interested parties full opportunity for notice, hearings, and appeal before issuance, as are provided in connection with the issuance of licenses under section 182. We believe that the section should be amended to make the same procedure specified in

<sup>8</sup> Legislative History, p. 1118.

<sup>9</sup> Legislative History, pp. 2348-2350.

<sup>10</sup> Legislative History, p. 3373.

<sup>11</sup> Legislative History, p. 3454.

<sup>12</sup> Present language in sec. 189b of the Act.

<sup>13</sup> Legislative History, pp. 1510 and 1562.

<sup>14</sup> Legislative History, pp. 1757, 1861, and 2051.

section 182 mandatory before construction permits are issued.<sup>15</sup>

Identical amendments were introduced by Mr. Holifield<sup>16</sup> in the House and by Senator Humphrey<sup>17</sup> and Senator Magnuson<sup>18</sup> in the Senate to add the following language to section 185:

And no construction permit shall be issued by the Commission until after the completion of the procedures established by section 182 for the consideration of applications for licenses under this Act.

During the debate on section 185 in the Senate, on July 23, 1954, Senator Jackson spoke in favor of Senator Humphrey's proposed amendment as follows:

As the bill now stands, the Atomic Energy Commission could issue a permit for the construction of a nuclear power facility before a license is finally granted by the Commission. If this procedure were followed, a licensee could proceed with construction of a facility and invest large sums before the Commission had an opportunity to complete the processing of the license application.

Under such a procedure, the Commission could completely circumvent the carefully devised provisions of the bill relating to the issuance of licenses, for it is doubtful whether the Commission would fail to issue a license to a corporation which had already made substantial investments, pursuant to the authority granted it by the construction permit.

The amendment by the Senator from Minnesota which I have quoted above is therefore essential if we are to prevent the circumvention of the license procedures contained in the act.<sup>19</sup>

Senator Humphrey on July 26, 1954, withdrew his amendment after Senator Hickenlooper referred to the committee amendment specifying that applications for construction permits would be treated in the same manner as applications for licenses.<sup>20</sup> The proposed amendment was not discussed nor adopted in the House.

#### *Section 189. Hearings and judicial review*

Section 189a provides that the Commission shall grant a hearing upon request in certain proceedings, and section 189b provides that final orders in such proceedings shall be subject to judicial review.

As originally introduced, the April 1954 bills concerned only judicial review and had no provision concerning opportunity for a hearing. H. R. 8862 and S. 3323 originally provided:

SEC. 189. JUDICIAL REVIEW.—Any proceeding to enjoin, set aside, annul or suspend any order of the Commission shall be brought as provided by and in the manner prescribed in the Act of December 29, 1950 (c. 1189, 64 Stat. 1129), as amended. In the event that the final order of the Commission entered in accordance with the provisions of section 188 is different from the order entered by the

<sup>15</sup> Legislative History, p. 1119.

<sup>16</sup> Legislative History, p. 2348.

<sup>17</sup> Legislative History, p. 1183.

<sup>18</sup> Legislative History, p. 1209.

<sup>19</sup> Legislative History, p. 1209.

Commission before the petition to review was filed with the Review Board, the Commission may also appeal from the final order in accordance with the provisions of this section.

As indicated infra, the April bills contained a section 188 establishing a Review Board, but that section was omitted in the subsequent bills. The language in section 189 concerning hearings was added during the floor debate. As indicated in the discussion above concerning sections 181<sup>21</sup> and 182b,<sup>22</sup> similar language concerning opportunity for hearing on license applications appeared in section 181 of the June 30, 1954, bills, and in amendments introduced in both Houses to section 182b. These latter identical amendments were offered by Mr. Holifield in the House<sup>23</sup> and Senators Humphrey<sup>24</sup> and Magnuson<sup>25</sup> in the Senate and read as follows:

In case of protests or conflicting applications or requests for the establishment of special conditions in prospective licenses, the Commission shall, prior to issuance of any license, hold public hearings on such application or applications in general accordance with the procedures established in connection with consideration of applications for licenses under the Federal Power Act and interested parties shall have the same rights of intervention in such proceedings, application for rehearing, and appeal from decisions of the Commission as are provided in that act and in the Administrative Procedure Act. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, public or cooperative electric system, or any competitor of a party to such proceeding, or any other person whose participation may be in the public interest.

These amendments did not pass, but they brought comments from Senator Anderson on the floor of the Senate on July 14, 1954, as follows:

\* \* \* it appears to me we ought to have the fullest possible publicity in connection with the granting of the licenses.

While I am not trying to quarrel with the provision of the section, I believe it would be wise, so far as it could be done, to make provision so that the greatest possible amount of public good may result from the granting of the licenses. If enough provisions to safeguard that objective have been written into the bill, I am satisfied. If not, I think we ought to try our best to write sufficient provisions into the bill.<sup>26</sup>

Concerning the incorporation of the provisions of the Administrative Procedure Act, Senator Anderson said:

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

<sup>21</sup> See note 4.

<sup>22</sup> See note 5.

<sup>23</sup> Legislative History, p. 2548.

Administrative Procedure Act, when we read it—and again I say I read it as a layman, not as 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.<sup>27</sup>

Shortly later in the floor debate, Senator Anderson continued:

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 everyone 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.<sup>28</sup>

Senator Anderson concluded his remarks on the floor of the Senate as to hearings as follows:

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 would 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.<sup>29</sup>

On July 16, 1954, Senator Hickenlooper introduced the committee amendment to section 189 which is substantially similar to the language now contained in the act. At the time of introducing this amendment, Senator Hickenlooper made the following remarks:

Mr. President, this section reincorporates the provisions for hearings formerly made 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

<sup>27</sup> Legislative History, p. 3073.

is a slight change in wording merely to clarify the intent of Congress with respect to the extent the applicability of the act of December 29, 1950, and the inapplicability of section 10 of the Administrative Procedure Act.

I state that this is a procedural operation, and does not go to the fundamentals of the so-called cross-patenting provision, or any provision of that kind.<sup>30</sup>

The amendment as proposed by Senator Hickenlooper was agreed to. In the House, Mr. Cole introduced on July 24, 1954, a committee amendment which provided substantially the language incorporated in the final act, and this amendment was agreed to without debate.<sup>31</sup>

*Section 25a. Divisions of the Atomic Energy Commission*

As originally drafted, section 25 in H. R. 8862 and S. 3323 added an Inspection Division to the language contained in the previous act. Subsequently another subsection was added to establish an Office of General Counsel.

The main legislative development of interest to this study concerns the addition of language to establish a division or divisions "the primary responsibilities of which include the development and application of civilian uses of atomic energy." Originally, Mr. Holifield introduced in the House and Senator Humphrey in the Senate an amendment to establish "a division of civilian power application."

In the House on July 23, 1954, Mr. Cole spoke in opposition to this amendment as follows:

Mr. Chairman, I hesitate to oppose this amendment, because it sounds so good. However, I consider it to be a part and parcel of those amendments that have been and will be offered, all of which are designed to put the Federal Government and the Atomic Energy Commission in the business of generating electricity, which is totally foreign to the purposes of this bill as it is presently written.

Now, actually there is a Division within the Atomic Energy Commission that does the very thing which the gentleman from Illinois argues should be done by this Division which he proposes to create. There is a Reactor Division, a Reactor, Research, and Development Division. It is the function of that Division to encourage research and development in reactors which are designed to produce electrical energy.

Now to repeat what I have said earlier, if the time comes when some of these reactors prove to be practical and feasible and economical and the Congress wants to put the Federal Government in the power business by using these reactors, that is the time to create a Division of Civilian Application of Atomic Power. So while I say the objective and the thought of the amendment is quite laudable, it is untimely, and I ask that it not be accepted.<sup>32</sup>

The amendment was not adopted by the House.<sup>33</sup>

<sup>30</sup> Legislative History, pp. 3174-75.  
<sup>31</sup> Legislative History, p. 2955.  
<sup>32</sup> Legislative History, p. 2873.  
<sup>33</sup> Legislative History, p. 2912.

In the Senate, Senator Humphrey spoke in favor of his proposed amendment on July 22, 1954, as follows:

Mr. President, all kinds of licenses will be granted by the Commission. Needless to say, much of the preliminary work will have to be done by a responsible division of the Commission. A number of hearings will have to be held. Obviously there will have to be research and a consideration of the basic needs of the civilian economy in terms of use of atomic energy materials. Those atomic energy materials may be used for many purposes. They may be used for electric energy, to be sure, but also for other purposes. My amendment is a simple amendment. It makes it perfectly clear that in view of the impact of the proposed legislation, we should designate one part of the Atomic Energy Commission as a division for what we might call civil applications, in which division the Commission would be able to proceed forthwith with licensing and all the other details that come into that area of activity, and also to have a better organization in terms of the many uses of atomic energy.<sup>34</sup>

The amendment was tabled by the Senate on July 22, 1954.<sup>35</sup> On July 26, 1954, the Senate again considered this subject and at that time Senator Humphrey introduced his revised amendment which would establish "a division or divisions the primary responsibilities of which include the development and application of civilian power." Upon motion of Senator Hickenlooper, the word "power" was changed to read "uses," and the amendment was agreed to.<sup>36</sup> The conference committee agreed to this amendment.

*Section 188 of H. R. 8362 and S. 3323. Board of Review*

The bills as originally introduced contained a section 188 establishing a Board of Review. This section read as follows:

- SEC. 188. REVIEW BOARD.—There is hereby established a Review Board within the Commission to review, on petition, any action of the Commission in connection with—
- a. the granting or denial of any license or construction permit or any application to transfer control;
  - b. the revocation or modification of any license or construction permit;
  - c. the issuance or modification of rules and regulations dealing with the activities of licensees of production or utilization facilities; and
  - d. determinations of just compensation pursuant to the provisions of this Act.

The Review Board shall be composed of not less than one and not more than three members, selected by the President with the advice and consent of the Senate. Each member shall serve for a term of seven years, and shall be removable by the President only for inefficiency, neglect of duty, or malfeasance in office. Each member shall receive compensation at the rate of \$15,000 per annum, and shall be a citizen

<sup>34</sup> Legislative History, p. 3479.

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2004 a copy of the following "BRIEF FOR INTERVENOR NATIONAL WHISTLEBLOWER CENTER AND COMMITTEE FOR SAFETY AT PLANT ZION" was served by U.S. first class mail upon the following:

Steve Crockett, Attorney  
Office of General Counsel  
U.S. Nuclear Regulatory  
Washington, D.C. 20555

Ellen C. Ginsburg, Esq.  
Michael Bauser  
Nuclear Energy Institute, Inc.  
1776 I Street, N.W., Suite 400  
Washington, D.C. 20006-3708

Jon M. Block, Esq.  
Attorney for Citizens Awareness Network  
94 Main Street  
PO Box 566 Commission  
Putney, VA 05346-0566

Robert Oakley  
Appellate Section  
Environment and National  
Resources Division  
U.S. Department of Justice  
P.O. Box 23795  
Washington, DC 20026-3795

Michael Kirkpatrick  
Bonnie I. Robin-Vergeer, Esq.  
Public Citizen Litigation Group  
1600 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009



Stephen M. Kohn  
Court of Appeals Bar Number 96636