

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 04-1145

CITIZENS AWARENESS NETWORK, INC.,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,

Respondents.

Case No. 04-1359

PUBLIC CITIZEN CRITICAL MASS ENERGY AND

ENVIRONMENT PROGRAM, et al.,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,

Respondents.

ON PETITIONS TO REVIEW AN ORDER OF THE
U. S. NUCLEAR REGULATORY COMMISSION

BRIEF OF INTERVENOR
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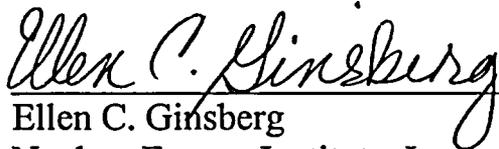
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DATED: July 13, 2004

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Nuclear Energy Institute, Inc. ("NEI") hereby files this Corporate Disclosure Statement. NEI, a not-for-profit 501(c)(6) corporation, is a trade association representing the nuclear energy industry. NEI's objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world. NEI does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in NEI.

Respectfully submitted,



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JURISDICTIONAL STATEMENT

Citizens Awareness Network, Inc. (“CAN”), Public Citizen Critical Mass Energy and Environment Program (“Public Citizen”), and Nuclear Information and Resource Service (“NIRS”) (collectively “Petitioners”), each seek review of the final rule¹ issued by the United States Nuclear Regulatory Commission (“NRC” or “Commission”), revising the agency’s procedures governing hearings under Section 189.a of the Atomic Energy Act of 1954, as amended (“Act” or “AEA”).² CAN filed its petition in this Court; Public Citizen and NIRS originally filed their joint petition in the U.S. Court of Appeals for the District of Columbia Circuit, which petition was transferred to this Court on March 3, 2004. On April 28, 2004, this Court ordered that the two petitions be consolidated for review.

Jurisdiction to undertake judicial review is found under the Administrative Orders Review Act, or Hobbs Act.³ Respondent-Intervenor NEI, as well as the National Whistleblower Center (“NWC”) and the Committee for Safety at Plant Zion (“CSPZ”) (collectively “Petitioner-Intervenors”), moved to intervene

¹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

² 42 U.S.C. § 2239(a).

³ 28 U.S.C. § 2341, *et seq.*

pursuant to the Hobbs Act,⁴ and by Order of March 10, 2004, this Court admitted NEI, NWC and CSPZ as intervenors.

On June 14, 2004, the Commonwealth of Massachusetts, and the States of New Hampshire, Connecticut, New York, and California (collectively “Amici”) jointly filed a brief in this proceeding as amici curiae in support of Petitioners.

NEI has a clear interest in the instant case sufficient to support standing. NEI’s members include all companies licensed to operate commercial nuclear power plants in the United States, entities holding NRC licenses for possession and use of radioactive materials, and suppliers of equipment and services to the nuclear industry. All of these entities are required to apply for, maintain and terminate licenses or request other regulatory approvals for which an opportunity for hearing will be offered. NEI is responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic and technical issues. NEI filed extensive comments on the proposed rule on behalf of the nuclear energy industry,⁵ and regularly engages in litigation on behalf of its members when generic regulatory or other matters affecting the nuclear industry are at issue.

⁴ *Id.* § 2348.

⁵ *See* NEI “Comments on Proposed Changes to NRC’s Rules of Practice” (Sept. 14, 2001) (hereinafter “NEI Comments”). (Joint Appendix (“JA”) 831.)

NEI's interest in the instant proceeding is further demonstrated by the following: (1) NEI members holding NRC licenses for power reactors have applied for 2,103 license amendments since the beginning of 2000, and a rate similar to the historic average of 400-plus license amendments per year can be expected to continue; (2) 10 NEI power reactor members have been granted 26 renewed NRC licenses in the past three years; 17 NEI power reactor members currently are in the process of seeking a renewed license; and eight NEI power reactor members have formally notified the NRC of their intent to apply for license renewal (six in 2004 and two in 2005); and (3) six vendor members of NEI have announced their intent to apply for design certification of new standard reactor designs. For each of the three types of licensing actions described above, the revised regulations at issue in this proceeding would govern the conduct of the hearing.

NEI members will be harmed if the NRC fails to conduct effective and efficient adjudicatory proceedings. NEI members will directly bear the economic and other costs resulting from the inefficiency and delay associated with the more formal, trial-type hearing procedures used for most licensing actions under 10 C.F.R. Part 2 of the NRC's regulations prior to their revision. The revisions to Part 2 were promulgated because the agency wanted to avoid needless delay and other

costs for all litigants, including the NEI members whose licensing requests were at issue. As stated by the NRC in adopting the regulations:

The Commission believes that there is a need to take some action to improve the management of the adjudicatory process to avoid needless delay and unproductive litigation. Using less formal hearing processes with simplified procedures for most types of proceedings along with a requirement for well-supported specific contentions in all cases can improve NRC hearings, limit unproductive litigation, and at the same time ease the burdens in hearing preparation and participation for all participants.⁶

STATEMENT OF ISSUES PRESENTED FOR REVIEW

NEI agrees with the issues presented for review as articulated in the “ISSUES PRESENTED” portion of the brief for the United States of America and the NRC (collectively “Federal Respondents”).

STATEMENT OF THE CASE

NEI agrees with the “STATEMENT OF THE CASE” as presented in the brief for Federal Respondents.

⁶ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2188 (emphasis added).

STATEMENT OF THE FACTS

Based on Section 189.a(1)(A) of the AEA,⁷ which requires the NRC to “grant a hearing upon the request of any person whose interest may be affected” by nuclear licensing proceedings, the NRC and its predecessor, the Atomic Energy Commission (“AEC”), have used formal, trial-type hearing procedures in reactor licensing cases and other proceedings.

In commentary accompanying publishing of the final rule at issue in this case, the Commission noted that, over the years, it became concerned that the adjudicatory hearing process prescribed in Subpart G of 10 C.F.R. Part 2 of its regulations was not as effective as it could be. Beginning with case-by-case actions in 1983 and, eventually, the adoption of a final rule in 1989, the Commission moved away from the trial-type adversarial format for resolving technical issues concerning license applications to possess and use radioactive materials. According to the Commission’s recitation of its experience, in most instances, trial-type adjudicatory procedures were “not essential to the development of an adequate hearing record” and all too often “resulted in protracted, costly proceedings.” The NRC adopted more informal procedures in the regulation of radioactive materials “with the goals of reducing the burden of litigation costs, and enhancing the role of the presiding officer as a technical fact

⁷ 42 U.S.C. § 2239(a)(1)(A).

finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties.”⁸

With the adoption of new regulations in 1989, most of the NRC’s licensing proceedings – those for the possession and use of nuclear material – were conducted under more informal procedures. Despite the improvements made in 1989, the Commission subsequently concluded that, while some of the original objectives were achieved, there were also certain “aspects of the more informal procedures that [] continued to prolong proceedings without truly enhancing the decision-making process.” Based on its experience – and looking forward to future proceedings to consider applications for new facilities, to renew nuclear power plant operating licenses, to accommodate restructuring of the electric utility industry, and to license waste storage facilities – the Commission concluded that it should “reassess its hearing processes to identify improvements that [would] result in a better use of all participants’ limited resources.” In pursuit thereof, and as a foundation for possible rule changes, the Commission developed a Policy Statement on the hearing process and initiated a reexamination of that process together with the requirements of the AEA.⁹

⁸ See generally Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2182.

⁹ See generally *id.*

The 1998 Policy Statement¹⁰ provided “specific guidance for [NRC] Licensing Boards and presiding officers on methods to use, when appropriate, for improving the management and timely completion of proceedings.” Among other things, the Policy Statement urged Licensing Boards and presiding officers to establish schedules for deciding issues and reminded them of their “authority to set schedules, resolve discovery disputes, and take other action required to regulate the course of the proceedings.”¹¹

In addition, in late 1998, the NRC Office of the General Counsel (“OGC”) began a reexamination of the Commission’s adjudicatory practices as conducted under the AEA and NRC regulations, as well as a review of the Administrative Procedure Act (“APA”) and a review of the practices of federal courts and other agencies. This endeavor was documented in a Commission paper¹² which was made available to the public. The paper concluded that, “except for a very limited set of hearings – those associated with the licensing of uranium enrichment facilities – the AEA [does] not mandate the use of a ‘formal on-the-record’ hearing

¹⁰ Policy Statement: Update, Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872 (Aug. 5, 1998), *also reported at Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

¹¹ *See generally* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2182-83.

¹² SECY-99-006, “Re-Examination of the NRC Hearing Process” (Jan. 8, 1999). (JA 1.)

within the meaning of the APA,”¹³ and that “the Commission [has] substantial latitude in devising suitable hearing processes that would accommodate the rights of participants.”¹⁴

Following issuance of the OGC paper, the agency conducted a workshop on the NRC hearing process involving participants from states, citizen groups, the academic community, the nuclear industry, the administrative judge community, and the NRC staff.¹⁵ Transcripts from the workshop were kept and made available to the public, and the Commission addressed the major comments that were offered.¹⁶ Thereafter, the Commission initiated the rulemaking which is the subject of the instant case.

Application of formal, trial-type adjudicatory procedures to administrative proceedings has long been the subject of scholarly criticism.¹⁷ As a matter of practice, a trial-type hearing is not necessarily the best method for deciding matters in technical controversy.¹⁸ In adopting the new regulations pursuant to the

¹³ See 5 U.S.C. §§ 554, 556 and 557.

¹⁴ See generally Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2183.

¹⁵ See *id.* at 2187-88.

¹⁶ See Proposed Rule, Changes to Adjudicatory Process, 66 Fed. Reg. 19,610, 19,616 (Apr. 16, 2001). (JA 614, 620.)

¹⁷ See, e.g., 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01 (1958); 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 9.3, 9.10 (3d ed. 1994).

¹⁸ See 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.3, p. 575 (4th ed. 2002).

rulemaking, the Commission acted both to better accommodate the various types of licensing and regulatory activities undertaken by the agency, and to focus the limited resources of all parties and the NRC itself.

The NRC sought to achieve this result by providing for greater use of informal hearing procedures in its adjudications, including those for reactor licensing. 10 C.F.R. Part 2, Subpart C, of the final rule contains the rules of general applicability for NRC adjudicatory hearings. It sets forth, among other things, the criteria to be used by the Commission to select the appropriate hearing procedures (“track”) for the particular licensing action that is the subject of the proceeding.¹⁹ The various hearing track options include 10 C.F.R. Part 2, Subparts G, J, L, M, N, and O.²⁰

Subpart G, the most formal procedures which were previously used for reactor licensing hearings, now will be used for those matters for which an “on the record” adjudication is specifically called for by statute (licensing of uranium enrichment facilities) and for those proceedings for which the NRC has determined, as a matter of policy, that there is a reason to employ more formal hearing procedures, i.e., initial authorization for the construction of a high level waste (“HLW”) geologic repository, and initial issuance of a license to receive and

¹⁹ See 10 C.F.R. § 2.310.

²⁰ Petitioners, Petitioner-Intervenors, and Amici do not appear to object to the criteria or procedures applicable to the various subparts, other than Subpart L.

possess HLW at a HLW repository; enforcement matters (unless the parties agree to use more informal hearing procedures); and parts of nuclear plant licensing proceedings where the presiding officer finds that resolving a particular contention requires an evaluation of eyewitness credibility on the occurrence of a past activity, or the motive or intent of a party or eyewitness.²¹

Subpart L, which previously was limited to the grant, renewal or licensee-initiated amendment of a materials license, an operator license or a senior operator license, and the amendment of a reactor license following permanent removal of fuel to an authorized facility, now applies to all licensing proceedings (including reactor licensing) unless the use of other procedures (i.e., under Subparts G, J, M, N or O) is specifically called for. Through the instant rulemaking, the NRC also revised Subpart L to “(1) [s]hift the focus of Subpart L to informal oral hearings, (2) require submission of contentions, and (3) provide the opportunity to pose questions indirectly to witnesses by proffering proposed questions to the presiding officer.”²² The Commission explained in the following terms why it developed Subpart L:

[T]he Commission does not believe that a large number of NRC hearings involve factual disputes for which the expanded panoply of discovery procedures in Subpart G are necessary. Nor does the Commission believe that there are a large number of hearings where the credibility of eyewitnesses is an issue with respect to either the

²¹ See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2191.

²² *Id.* at 2213.

occurrence of a material past event, or the motive or intent of a party, such that cross-examination is an appropriate tool for issue resolution. On the other hand, the Commission believes that if the presiding officer has the opportunity to examine the witnesses, the presiding officer will be able to gain a better understanding of the testimony, and efficiently oversee the development of evidence relevant to the resolution of the contested matter in the hearing.”²³

Thus, Subpart L provides for licensing proceedings using more informal hearing procedures, some of which have not been used in Commission proceedings previously. These include requiring parties to identify contentions early in the adjudicatory process, to make initial disclosures early in the process rather than allow effectively unrestricted discovery, and to provide for cross examination to be conducted, in most cases, by the presiding officer. The Commission did not eliminate cross examination in Subpart L, but has constructed an approach that provides for its more limited use unless a clear need can be shown for a party to conduct cross examination. Moreover, Subpart L has a contention-by-contention feature, applicable to nuclear plant licensing proceedings, allowing the presiding officer to use Subpart G procedures in prescribed circumstances.²⁴ In sum, the NRC’s modification of its longstanding adjudicatory practices continues to allow parties, once admitted, to actively and fully participate in the agency’s licensing processes to assure that public health and safety are adequately protected.

²³ *Id.*

²⁴ *See id.* at 2191.

SUMMARY OF THE ARGUMENT

In their brief, Federal Respondents consider the substantive legal issues raised in Petitioners,' Petitioner-Intervenors' and Amici's briefs. Herein, NEI addresses particular aspects of those issues.

1. Petitioners claim that the NRC, in promulgating the revisions to 10 C.F.R. Part 2, violated the AEA and the APA when it permitted the use of more informal hearing procedures in agency licensing than had been previously used. This position cannot be sustained because the language of the AEA does not call for an "on the record" hearing pursuant to Section 5 of the APA, 5 U.S.C. § 554, and the legislative history of the AEA does not shed light on Congress' intent in this regard.
2. Section 189.a of the AEA does not distinguish among the proceedings for which a formal hearing must be held, and Petitioners have not offered any basis for requiring formal hearings for some licensing actions but not others.
3. The APA does not independently require a formal hearing for NRC licensing proceedings despite Petitioner-Intervenors' contrary argument citing Section 9 of the APA, 5 U.S.C. § 558(c). This Court has already rejected this argument.

4. *Chevron* deference should be accorded to the NRC’s decision to promulgate regulations providing for the use of informal hearing procedures in licensing proceedings. Using the language of Section 189.a as the predicate for its action, the agency’s construction of its organic statute is permissible. Moreover, despite Petitioners’ claims that an agency such as the NRC is not due *Chevron* deference for an interpretation of the APA, a statute with government-wide applicability, the NRC is only interpreting the AEA. The NRC’s interpretation affects only whether the APA provision for “on the record” hearings applies, not how those provisions are to be applied.
5. Amici’s claim that the revised regulations conflict with Section 274 of the AEA (which allows states to regulate the use of by-product, source, and small quantities of special nuclear fuel) should be rejected. This claim was neither raised as part of the rulemaking proceeding nor raised by the parties in this proceeding. Under facts such as these, this Court has rejected efforts by amici to introduce new issues or those not properly preserved for appeal.
6. Amici’s argument that license renewal hearings must be formal and “on the record” should be similarly rejected. The Commission’s regulation, 10 C.F.R. Part 54, strictly confines a hearing on a license renewal application to the issue of whether a plant’s continued operation – in the period of renewed operation – will be inimical to public health and safety or the common

defense and security, and whether associated environmental impacts have been appropriately evaluated.²⁵ Amici's challenge with respect to license renewal is nothing more than a poorly disguised attack on Part 54. It is not properly before this Court as part of this rulemaking and is untimely as a challenge to Part 54, which was promulgated almost a decade ago, in 1995.

7. Even if the requirements for a formal hearing contained in Sections 5, 7 and 8 of the APA, 5 U.S.C. §§ 554, 556 and 557, were to apply, which they do not, the NRC's Subpart L regulations applicable to reactor and other licensing proceedings satisfy those APA requirements.
8. Petitioners, Petitioner-Intervenors and Amici argue, among other reasons, that the NRC's actions are "arbitrary and capricious," in that they are a precipitous reversal of fifty years of NRC adherence to formal adjudicatory procedures and are not adequately explained. These contentions and the others they put forward simply are not correct. The NRC's revisions to 10 C.F.R. Part 2 are consistent with the direction the agency has taken over the past two decades, which has been to move toward more informal proceedings for various agency actions, including licensing. Further, the NRC's bases for taking this action are rational and well explained. They have been adopted in a deliberative process in which the issues were

²⁵ See 10 C.F.R. § 54.29.

thoroughly ventilated, both in public meetings and through the opportunity for written comment on the relevant Policy Statement and on the proposed rule.

9. Petitioner CAN claims that the adoption of the revisions to 10 C.F.R. Part 2 violates the First and Fifth Amendments of the U.S. Constitution because the final rules “effectively eliminate or curtail [CAN’s] rights to a formal hearing in agency licensing and license amendment proceedings, including the right to present and examine witnesses and cross examine witnesses of opposing parties, and, generally, by issuing rules that provide lesser hearing rights to [CAN] than the hearing rights the agency provides to its licensees.”²⁶ Neither the facts nor case law sustain CAN’s constitutional grievances. As a factual matter, Part 2’s more informal procedures equally apply to all parties. The law is clear that generalized health, safety and environmental concerns, such as those claimed here, do not constitute liberty or property subject to the Fifth Amendment protection.

²⁶ CAN Pet. at 1-2. *See also* CAN Br. at 15-29.

ARGUMENT

I. Standard of Review

The standard of review pertinent to each issue presented in this case is set forth in the “Standard of Review” section of the “ARGUMENT” portion of the brief for Federal Respondents.

II. The Revisions to 10 C.F.R. Part 2 Are Consistent with the Atomic Energy Act of 1954

A. Section 189.a of the Atomic Energy Act of 1954 Does Not Mandate an “On the Record” Hearing Pursuant to the Administrative Procedure Act

The general provisions of the AEA authorize the Commission to “establish by rule, regulation, or order, such standards and instructions . . . as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.”²⁷ These broad prescriptions are consistent with Congress’ conferring on the NRC expansive authority and wide latitude in carrying out its mission. Congress enacted “a regulatory scheme which is virtually unique in the degree to which broad

²⁷ 42 U.S.C. § 2201(b).

responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”²⁸

Section 182.a of the AEA empowers the NRC to issue a license for a production or utilization facility²⁹ if the NRC finds that the proposed utilization or production of the special nuclear material “will provide adequate protection to the health and safety of the public.”³⁰ This section is indicative of the “significant discretion” Congress afforded the NRC “in determining what information is necessary to support the various findings required in the licensing process.”³¹

Section 189.a(1)(A) of the AEA, which governs the regulation and licensing of facilities and nuclear materials, provides:

In any proceeding under this [Act], for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . 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.³²

Petitioners’ arguments confuse the NRC’s historical practice of conducting trial-type adjudicatory hearings for the licensing of commercial nuclear facilities with

²⁸ *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

²⁹ A commercial nuclear reactor is a utilization facility.

³⁰ 42 U.S.C. § 2232(a).

³¹ *Nuclear Info. & Res. Serv. v. NRC*, 969 F.2d 1169, 1175 (D.C. Cir. 1992) (hereinafter “*NIRS II*”).

³² 42 U.S.C. § 2239(a)(1)(A).

the AEA's actual requirements. The plain language of the AEA requires only that "a hearing" be offered for licensing determinations. The Act neither describes the content of the hearing to be held nor provides any direction regarding the manner of its conduct.³³ Thus, the Act does not preclude the NRC from establishing procedures to focus the limited resources of both the agency and the parties in a more efficient manner, and to more effectively develop a record for decision-making. Under the AEA, the NRC may adopt whatever hearing procedures it deems appropriate for facility licensing so long as they are consistent with the agency's statutory obligation "to promote the common defense and security or to protect health or to minimize danger to life or property."³⁴

The formal hearing procedures of the APA only become applicable to agency adjudications if the agency's governing statute – the AEA in this case – mandates an "on the record" hearing.³⁵ The AEA does not specify that the NRC's hearings on reactor licensing are to be conducted "on the record" pursuant to 5 U.S.C. §§ 554, 556 and 557. More than 30 years ago, the Supreme Court held, in two seminal cases, that a statutory requirement for a hearing did not conclusively

³³ *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 (D.C. Cir. 1990) (hereinafter "*UCS II*").

³⁴ AEA § 161.b, 42 U.S.C. § 2201(b).

³⁵ See AEA § 181, 42 U.S.C. § 2231; 5 U.S.C. § 554(a).

determine that Congress intended the agency to hold “on the record” hearings.³⁶

While these decisions were rendered in the context of rulemaking and not adjudication, subsequent decisions have applied the same reasoning to a statutory hearing requirement for adjudication.³⁷

Existing precedent in this Circuit, i.e., *Seacoast Anti-Pollution League v. Costle*³⁸ and *Dantran, Inc. v. U.S. Dep’t of Labor*,³⁹ does not require a statute to

³⁶ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972).

³⁷ See, e.g., *Friends of Earth v. Reilly*, 966 F.2d 690, 693 (D.C. Cir. 1992) (holding that certain Environmental Protection Agency proceedings did not constitute an “adversary adjudication” under the Equal Access to Justice Act – and thus were not “on the record” proceedings under 5 U.S.C. § 554 – in part because the environmental statute at issue required only a “public hearing” and did not “expressly require either that the withdrawal hearing be ‘subject to section 554’ or that the hearing be ‘on the record;’” also noting that its decision did not turn exclusively on the absence of these “magic words” and that “what counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural components”) (quoting *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 448-49 (D.C. Cir. 1989) (emphasis in original)). See also, e.g., *R.R. Comm’n of Tex. v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985) (“A fundamental and well-recognized distinction exists between a requirement that an agency provide a ‘hearing’ and a requirement that an agency provide a ‘hearing on the record.’ Formal proceedings do not attach to a requirement of a ‘hearing;’ such proceedings would obtain only on the requirement of a ‘hearing on the record’”); *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 536 (D.C. Cir. 1978) (“In this case the Shipping Act itself does not provide for a hearing ‘on the record,’ and nothing in the terms of the statute or its legislative history indicates that a trial-type hearing . . . was intended”).

³⁸ 572 F.2d 872 (1st Cir. 1978).

³⁹ 246 F.3d 36 (1st Cir. 2001).

specify an “on the record” hearing in order to find that the statute prescribes one.⁴⁰ In determining whether a statutory requirement for a hearing mandates an “on the record” hearing, this Court reviews the statutory language, legislative history and regulatory context to determine Congress’ clear intent.

As there is no question that the statutory language of Section 189.a of the AEA only specifies that “a hearing” be conducted,⁴¹ *Seacoast* and *Dantran* suggest that the inquiry next turn to the legislative history associated with that section. Contrary to Petitioners’, Petitioner-Intervenors’ and Amici’s inferences regarding

⁴⁰ *Cf.*, e.g., *Ardestani v. INS*, 502 U.S. 129 (1991) and *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004). In *Ardestani*, the Supreme Court found that administrative deportation proceedings were not “adversary adjudications” under the Equal Access to Justice Act and, thus, were not subject to the “on the record” requirements of the APA. Justice O’Connor opined:

The “strong presumption” that the plain language of the statute expresses congressional intent is rebutted only in “rare and exceptional circumstances,” . . . when a contrary legislative intent is clearly expressed. . . . In this case, the legislative history cannot overcome the strong presumption “that the legislative purpose is expressed by the ordinary meaning of the words used. . . .” [A]ny ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language

502 U.S. at 135-36, 137 (citations omitted). The *Shoshone* decision offers similar guidance, stating that “[t]he language of the statute is the best indication of Congress’s intent.” 364 F.3d at 1345 (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)).

⁴¹ See *Siegel*, 400 F.2d at 785. The Court of Appeals for the D.C. Circuit ruled nearly 40 years ago that Section 189.a does not prescribe “either in terms or by clear implication” that hearings held under that section be “on the record.” *Id.*

statements made by various members of Congress, the legislative history of the AEA does not offer sufficient insight on the Section 189.a hearing requirement such that Congress' unequivocal intent may be divined.

For example, Petitioners and Petitioner-Intervenors quote at length statements made by Senator John Anderson during 1954 congressional debates on the AEA amendments to the 1946 Act.⁴² Petitioners pay much attention to Senator Anderson's expressed concern that, although the bill being considered made the APA applicable to the Atomic Energy Commission, the APA, by itself, would not require formal hearings.⁴³ If any inference is to be drawn from Senator Anderson's statements, it should not be that posited by Petitioners. Rather, it is notable that the comments of Senator Anderson did not carry the day, as Congress enacted the Atomic Energy Act of 1954 with Section 181 applying the APA but Section 189.a requiring only "a hearing." Moreover, one could cite both the House and Senate Committee reports pertinent to the 1962 amendments (to the 1954 Act) for the proposition that Congress resolved the debate in favor of informal hearing procedures based on the following statement of the Joint Committee on Atomic Energy:

To the extent that the legislative history of the 1957 amendments may not be clear, it is expressly stated here that the committee

⁴² See Public Citizen and NIRS Br. at 20-21; CAN Br. at 25, 44-45; Petitioner-Intervenors Br. at 6-10, 29-30.

⁴³ 100 CONG. REC. 10,000 (1954).

encourages the Commission to use informal [hearing] procedures to the maximum extent permitted by the Administrative Procedure Act.⁴⁴

The Joint Committee further added that it did not believe it necessary to incorporate specific language in the legislation requiring informal hearing procedures since it had previously pointed out the “desirability” of and the “legal latitude afforded the Commission to follow such procedures.”⁴⁵

The U.S. Court of Appeals for the Seventh Circuit engaged in an in-depth review of the legislative history of the AEA when it addressed whether the NRC could adopt informal hearing procedures for licensing radioactive materials.⁴⁶ As part of its decision approving the adoption of informal hearing procedures, the court concluded that nothing in the legislative history of the AEA definitively evidenced Congress’ intent:

Thus despite the fact that the statute required the Commission to grant a hearing to any materially interested party, there is no indication that Congress meant the hearing to be a formal one. Similarly, the legislative history of the 1957 and 1962 amendments to the AEA shows little concern with the procedures required by the hearing provision in the first sentence of Section [189.a].⁴⁷

⁴⁴ H.R. REP. NO. 87-1966, at 6 (1962); S. REP. NO. 87-1677, at 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2207, 2212.

⁴⁵ H.R. REP. NO. 87-1966, at 6; S. REP. NO. 87-1677, at 6, *reprinted in* 1962 U.S.C.C.A.N. at 2213.

⁴⁶ *See City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

⁴⁷ *Id.* at 642 (emphasis added) (footnote omitted).

Additional discussion in the decision counters Petitioners' and Petitioner-Intervenors' contentions that the legislative history of the AEA, and some statements by persons within the NRC (including various General Counsel) as to the type of hearing it was required to hold, are determinative in this context. The court noted that the AEC had promulgated regulations that provide for formal hearings on request in all licensing cases.⁴⁸ However, the court further explained:

The agency did not indicate whether the formal hearings were a matter of discretion or statutory mandate. In 1957, the Act was amended to add the second sentence of Section [189.a], mandating a hearing on certain applications for construction permits even when uncontested. Again, the type of hearing to be held was left undefined. After the 1957 amendment took effect, there was a significant amount of criticism of the AEC for overformalizing the licensing process. The staff of the Joint Committee on Atomic Energy published a report criticizing the AEC for going "further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures."⁴⁹

Finally, this Court has found adjudicative proceedings used, for example, in Environmental Protection Agency licensing, to be "the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended."⁵⁰ Other courts, however, have reached the opposite conclusion. For example, in *R.R. Comm'n of Tex. v. United States*, the court held that the Interstate Commerce Commission was not required to hold a formal, "on the record" hearing pursuant to

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added) (citation omitted).

⁵⁰ *Seacoast*, 572 F.2d at 876.

the APA even when the operative statute called for a “full hearing,” and even assuming, *arguendo*, that the hearing was adjudicatory in nature.⁵¹ In *U.S. Lines v. Fed. Mar. Comm’n*,⁵² the court found that a hearing requirement in the Shipping Act permitting the Federal Maritime Commission to grant certain exemptions from antitrust laws was not required to be an “on the record” hearing even though the court characterized the nature of the case before the Commission as “quasi-adjudicatory.”⁵³ The court found that this kind of quasi-adjudicatory agency action was not intended by Congress to require a formal hearing under the Shipping Act.⁵⁴ The same finding is justified in this case, as nothing in the statutory framework of the AEA or its legislative history evidences a clear intent by Congress to preclude the NRC from modifying its hearing procedures as it has done.

B. Section 189.a of the Atomic Energy Act of 1954 Does Not Distinguish Among the Proceedings for Which “a Hearing” Must Be Held

Accepting Petitioners’ arguments, formal, trial-type hearings would be required for virtually all NRC proceedings. This untenable outcome stems from the fact that Section 189.a of the AEA calls for “a hearing” in the case of “any proceeding under this [Act], for the granting, suspending, revoking, or amending of

⁵¹ 765 F.2d 221, 227 (D.C. Cir. 1985) (citing *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1499 n.39 (D.C. Cir. 1984)).

⁵² 584 F.2d 519, 536-37, 539 (D.C. Cir. 1978).

⁵³ The court described the hearing as “quasi-adjudicatory” because the agency was “required to adjudicate the rights of certain named parties to an exemption from the antitrust laws.” *Id.* at 539-40.

⁵⁴ *U.S. Lines*, 584 F.2d at 536-37.

any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation”⁵⁵ No distinction is either expressed or implied between or among proceedings – be they for the grant or amendment of reactor licenses, issuance or amendment of materials licenses, rulemakings, or otherwise. Moreover, every court that has addressed the issue has found that the “hearing” prescribed by Section 189.a need not be a formal one involving the full panoply of trial-type procedures.⁵⁶ Petitioners offer no reason why the identical words of a statute should be read as requiring formal, trial-type proceedings in the case of some licensing actions, and allowing informal procedures in others. Thus, accepting Petitioners’ position would logically result in requiring formal, adjudicatory procedures in all cases. This, however, is contrary to established law.

C. 5 U.S.C. § 558(c) Does Not Mandate “On the Record” Hearings Pursuant to the Administrative Procedure Act

In addition to Petitioner-Intervenors’ arguments regarding the meaning of “a hearing” in Section 189.a of the AEA, Petitioner-Intervenors argue that another

⁵⁵ 42 U.S.C. § 2239(a)(1)(A) (emphasis added).

⁵⁶ See, e.g., *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983) (formal, adjudicatory hearing procedures not required by Section 189.a of AEA in materials license amendment proceeding); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (formal, adjudicatory hearings not required by Section 189.a of AEA for licensing of certain types of used nuclear fuel storage facilities).

provision of the APA – 5 U.S.C. § 558(c) – provides a separate basis, independent of 5 U.S.C. § 554, for the Court to mandate that the NRC hold “on the record” hearings for nuclear reactor licensing. This argument, however, has been specifically rejected. The issue was clearly addressed and settled in *City of West Chicago*:

The First, Fifth and Ninth Circuits rejected the Section 558(c) analysis of this Circuit, *see Seacoast*, 572 F.2d at 878 n.11 and *Marathon Oil*, 564 F.2d at 1260-1261 n.25; *see also Taylor v. District Engineer, United States Army Corps of Engineers*, 567 F.2d 1332, 1337 (5th Cir. 1978). After reconsideration, we have decided herein to abandon our position in *Train* insofar as we relied on APA Section 558(c) to order a formal hearing. *See Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074-1075 (7th Cir. 1982). We now agree with the First, Fifth and Ninth Circuits that Section 558(c) does not independently provide that formal adjudicatory hearings must be held. “It merely requires any adjudicatory hearings mandated under other provision of law to be set and completed in an expeditious and judicious manner.” *Marathon Oil*, 564 F.2d at 1260-1261 n.25.⁵⁷

D. The NRC Should Be Accorded *Chevron* Deference in This Case

Petitioners and Amici argue that the NRC’s decision to use informal hearing procedures is not entitled “*Chevron*” deference.⁵⁸ Under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*,⁵⁹ courts must engage in a two-step analysis to determine whether an agency’s statutory interpretation is entitled to deference.

⁵⁷ *City of West Chicago*, 701 F.2d at 644 (emphasis added).

⁵⁸ NIRS and Public Citizen Br. at 30-31; CAN Br. at 34; Amici Br. at 14-16.

⁵⁹ 467 U.S. 837 (1984). In *Chevron*, the Supreme Court reviewed an Environmental Protection Agency regulation which defined a term within the

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁶⁰

Applying the *Chevron* step one analysis, Section 189.a of the AEA "provides no unambiguous instruction as to how the 'hearing' is to be held."⁶¹

When a court proceeds to the second step of *Chevron*, the question it must address is whether the agency's action is based on a permissible construction of the statute.⁶² A permissible agency interpretation, for example, one not in conflict with the statute's plain language,⁶³ is entitled to deference.⁶⁴ In addition, when a

Clean Air Act. The question was whether the agency's definition was based upon a reasonable construction of the statutory term.

⁶⁰ *Id.* at 842-43 (footnotes omitted).

⁶¹ *NIRS II*, 969 F.2d at 1173 (emphasis in original).

⁶² *Chevron*, 467 U.S. at 843; *see also, e.g., Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 5 (1st Cir. 1998).

⁶³ *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988).

⁶⁴ *See, e.g., Penobscot Air Servs. v. FAA*, 164 F.3d 713, 719 (1st Cir. 1999).

court is “confronted with alternative sensible readings of an ambiguous statute,” *Chevron* requires the court “to adopt the [interpretation] the agency presents.”⁶⁵

Under *Chevron*, an administrative agency’s exercise of delegated authority “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁶⁶ The *Chevron* Court stated:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.⁶⁷

The Supreme Court recently acknowledged in *United States v. Mead Corp.* that “a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”⁶⁸ Congress provided the NRC with precisely this authority to develop hearing procedures. The Court assumes that “Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a

⁶⁵ *Bush-Quayle '92 Primary Comm., Inc. v. Fed. Election Comm'n*, 104 F.3d 448, 453 (D.C. Cir. 1997) (citing *Chevron*, 467 U.S. at 844).

⁶⁶ *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁶⁷ *Chevron*, 467 U.S. at 843-44 (footnote omitted).

⁶⁸ 533 U.S. 218, 229 (2001) (emphasis added). In *Mead* the Court listed other examples of instances in which courts have applied *Chevron* deference to agency rulemakings. *Id.* at 230-31 n.12.

pronouncement of such force.”⁶⁹ In enacting Section 161(b) of the AEA,⁷⁰ Congress expressly authorized the NRC to develop procedures for the conduct of its hearings as part of its “performance of its functions,” of which licensing clearly is one. A rulemaking of the sort conducted by the NRC to modify 10 C.F.R. Part 2 is just such a formal administrative procedure.

Petitioners Public Citizen and NIRS specifically claim that *Chevron* deference does not apply to interpretations of statutes “administered by multiple agencies.”⁷¹ The statement is correct, but it does not support Petitioners’ argument in this instance. Here, the NRC is entitled to deference under *Chevron* because the Commission is interpreting Section 189.a of the Atomic Energy Act, its organic statute. The AEA is highly specialized in its content. The NRC is solely responsible for the implementation of Section 189.a of the AEA. Critically, the agency’s interpretation of the AEA controls only whether the APA provisions regarding “on the record” hearings apply. The interpretation of Section 189.a in no way interprets any substantive provision of the APA.

Public Citizen’s and NIRS’s attempted analogy to the facts of *Dantran, Inc. v. U.S. Dep’t of Labor*⁷² does not hold.⁷³ Therein, the Department of Labor argued

⁶⁹ *Id.* at 230 (footnote omitted).

⁷⁰ 42 U.S.C. § 2201(b).

⁷¹ Public Citizen and NIRS Br. at 31.

⁷² 246 F.3d 36 (1st Cir. 2001).

⁷³ Public Citizen and NIRS Br. at 30-31.

that a debarment proceeding under the McNamara-O'Hara Service Contract Act of 1965 was not an "adversary adjudication" as defined under the Equal Access to Justice Act, and thus was not an "on the record" proceeding under 5 U.S.C. § 554 of the APA. It was DOL's interpretation of the Equal Access to Justice Act – a statute indeed applied by many government agencies and one with which DOL arguably does not have special expertise entitling it to deference – that this court rejected.⁷⁴

While deference generally does not inure under *Chevron* if an agency interprets a statute that relates to matters outside of the agency's expertise (as can be said of the Department of Labor's interpretation of the Equal Access to Justice Act described in *Dantran*), that patently is not the case before this Court. The NRC has only interpreted its own statute as the predicate for its changes to 10 C.F.R. Part 2.

Although Petitioners also urge the court to define "a hearing" under Section 189.a of the AEA as an "on the record" hearing under the APA, to do so would "disregard the deference due an agency in the interpretation of its own organic statute by pouring content into the term 'hearing,'" ⁷⁵ a judicial act clearly disfavored under *Chevron*. It would also fly in the face of the Supreme Court's "admonition" in *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*,

⁷⁴ *Dantran*, 246 F.3d at 47-48.

⁷⁵ *NIRS II*, 969 F.2d at 1174.

Inc.,⁷⁶ “against the judicial fashioning of administrative procedures that neither Congress nor the agency has sanctioned.”⁷⁷

E. Amici’s Atomic Energy Act of 1954 Section 274 and License Renewal Hearings Arguments Should Not Be Heard

1. AEA Section 274

Amici argue that the “NRC’s position is contrary to the AEA, taken as a whole and in light of its legislative history”⁷⁸ because, *inter alia*, the revised regulations conflict with AEA Section 274.⁷⁹ Section 274 sets forth the framework for a state to act as an “Agreement State.”⁸⁰

The Court should reject Amici’s claim regarding Section 274 of the AEA. This claim was not raised either as an issue in the rulemaking proceeding before the agency or by Petitioners or Petitioner-Intervenors in this proceeding. That Amici are not permitted to raise new arguments before an appeals court is well established. For example, in *Lane v. First Nat’l Bank of Boston*, this Court held:

We ordinarily refuse to consider points on appeal which were not advanced below. . . . We see no grounds to retreat from the steadfast application of this praxis today. Certainly, the mere fact that the amici, like the cavalry riding belatedly to the rescue, briefed and argued their waiver theory before us does not change the case’s

⁷⁶ 435 U.S. 519 (1978).

⁷⁷ *NIRS II*, 969 F.2d at 1174.

⁷⁸ Amici Br. at 18.

⁷⁹ 42 U.S.C. § 2021.

⁸⁰ An “Agreement State” refers to a state that has signed an agreement with the NRC allowing the state to regulate the use of by-product, source, and small quantities of special nuclear fuel within that state.

fundamental posture. Amici are allowed to participate on appeal in order to assist the court in achieving a just resolution of issues raised by the parties. We know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore. . . . Respect for orderly procedure demands that we decline the amici's unsolicited invitation to expand the scope of review . . . beyond the borders of the question which we originally certified.⁸¹

The *Lane* decision cites another decision⁸² which rejected arguments by an amicus because they were not made before the agency below (which, in that case, was the Federal Trade Commission) or by the petitioners in their appeal. Therefore, the court ruled that the amicus' argument was not properly before it. As Amici's Section 274 argument in this case presents the same issues – failure to raise the issue before the agency and failure of a party to raise it on appeal – it should yield the same result.

⁸¹ 871 F.2d 166, 175 (1st Cir. 1989) (citations omitted). *See also, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n.22 (1st Cir. 1994) (“In the court of appeals, amici cannot usurp the litigants’ prerogative and introduce new issues or issues not properly preserved for appeal.”). Note that in that case, the Commonwealth of Massachusetts was one of the amici. *See also, e.g., Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir. 1993); *Baker v. City of Concord*, 916 F.2d 744, 755 (1st Cir. 1990) (“We have ruled before, and today reiterate, that on appeal, an amicus may not interject into a case issues not briefed or argued by the litigants.”).

⁸² *Nat’l Comm’n on Egg Nutrition v. FTC*, 570 F.2d 157, 160 n.3 (7th Cir. 1977).

2. License Renewal Hearings

Amici argue that proceedings involving hearings on the renewal of operating licenses for nuclear power plants should be formal and “on the record.”⁸³ Amici state that “when aging plants are being relicensed, States may wish to inquire about the condition of these plants, either through cross-examination or discovery.”⁸⁴

Amici misconceive the scope and purpose of the Commission’s license renewal regulations. Contrary to what Amici would have this Court believe, the scope of a license renewal hearing under 10 C.F.R. Part 54 is confined to whether a licensee can demonstrate that it has adequate aging-management controls in place to ensure that continued operation of the plant – in the period of renewed operation – will not be inimical to public health and safety or the common defense and security, and that associated environmental impacts have been appropriately evaluated.⁸⁵ The Commission emphasized this point when it issued Part 54:

The Commission continues to believe that aging management of certain important systems, structures, and components during this period of extended operation should be the focus of a renewal

⁸³ The Commission’s regulations governing operating license renewals are found in 10 C.F.R. Part 54. 10 C.F.R. § 2.310(a) applies the Subpart L procedures to license renewal hearings except in the limited circumstances where resolution of a contested matter required “resolutions of issues of material fact relating to the occurrences of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter,” in which instance Subpart G formal procedures may be used. *Id.* § 2.310(d).

⁸⁴ Amici Br. at 4.

⁸⁵ See 10 C.F.R. § 54.29.

proceeding and that issues concerning operation during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review (which would not occur if the licensee chooses not to renew its operating license).⁸⁶

This portion of Amici's challenge to the Commission's new Part 2 regulations is nothing more than a thinly veiled attack on limitations of the scope of license renewal established previously in Part 54. It is not within the scope of the rulemaking at issue in this case, and the time to seek judicial review of Part 54 has long passed – Part 54 became effective almost a decade ago, in 1995. Thus, Amici's argument is not properly before this Court.

III. The Procedures of 10 C.F.R. Part 2, Subpart L, Comply with the Administrative Procedure Act's "On the Record" Hearing Requirements

Petitioners, Petitioner-Intervenors and Amici also overstate the impact of the changes to the NRC's hearing procedures on the public's "right" to participate in licensing proceedings. Petitioners, Petitioner-Intervenors and Amici would have this Court believe that the changes to 10 C.F.R. Part 2 literally strip them of an otherwise unfettered right to participate in NRC licensing proceedings.⁸⁷

⁸⁶ Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,481 (May 8, 1995) (emphasis added).

⁸⁷ As discussed in Section V, *infra*, Petitioner CAN goes so far as to claim that, in the context of a nuclear reactor licensing proceeding, the failure to be given an opportunity to conduct its own cross examination, the imposition of a more limited, but more clearly defined discovery regime, and the requirement to submit at least one contention, wrenches away from the public a constitutionally guaranteed right to formal hearing procedures.

In fact, Subpart L complies with the procedural requirements of Sections 5, 7, and 8 of the APA, 5 U.S.C. §§ 554, 556 and 557, and goes further in offering many of the features of a trial-type hearing not even mandated by the APA. Said another way, even if the “on the record” requirements of the APA were to apply – which they do not – Subpart L meets each of the requirements and goes well beyond the requirements set forth in those sections. Petitioner-Intervenors and Amici also pointedly ignore that those formal hearing features that have been limited or substantially modified in Subpart L – conduct of discovery and cross examination by the parties – are not unconditionally required by the APA. The APA provisions pertinent to these procedures are permissive (discovery) or conditioned (cross examination).

5 U.S.C. § 554 requires that “[p]ersons entitled to notice of an agency hearing” be informed of “(1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.”⁸⁸ 10 C.F.R. §§ 2.104 and 2.312 satisfy these requirements. 10 C.F.R. § 2.104(e) states that “[t]he Secretary will give timely notice of the hearing to all parties and to other persons, if any, entitled by law to notice,” and it specifically identifies the individual licensing actions upon which the Secretary will transmit a notice of hearing. 10 C.F.R. § 2.312 tracks the other

⁸⁸ 5 U.S.C. § 554(b)(1)-(3).

requirements of 5 U.S.C. § 554, particularizing that the order or notice of hearing will state: the nature, time and place of the hearing (the time and place of which are to be fixed “with due regard for the convenience of the parties or their representatives, the nature of the proceeding and the public interest”), the “legal authority and jurisdiction under which the hearing is to be held,” and the “matters of fact and law asserted or to be considered.” In addition, 10 C.F.R. § 2.312 provides for a statement describing the specific hearing procedures/subpart to be applied.

5 U.S.C. § 556(b) identifies those individuals or bodies who are permitted to preside at an “on the record” hearing. Under this provision, a hearing may be presided over by the agency itself, one or more members of the body that comprises the agency, or an administrative law judge.⁸⁹ The provision also states, however, that its dictates in regard to the presiding officer do not supercede the conduct of certain proceedings wherein other boards or employees are “specially provided for by or designated under statute.”⁹⁰ Section 191 of the AEA provides for the use of Atomic Safety and Licensing Boards to conduct administrative hearings.⁹¹ 10 C.F.R. § 2.313(a) provides that a Licensing Board, appointed

⁸⁹ 5 U.S.C. § 556(b)(1)-(3).

⁹⁰ *Id.* § 556(b).

⁹¹ 42 U.S.C. § 2241.

pursuant to Section 191 of the AEA, or, if a single presiding officer is appointed, an administrative law judge will preside over Subpart L hearings.

5 U.S.C. § 556(c) sets out eleven actions a presiding officer may take “[s]ubject to published rules of the agency.” 10 C.F.R. § 2.319 empowers the presiding officer to take most of these actions and, in addition, the NRC has imbued the presiding officer with additional powers to further ensure the integrity of the proceeding.⁹² The introductory section of 10 C.F.R. § 2.319 explains that the NRC has provided all of the powers to enable the presiding officer to carry out his or her “duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.”

5 U.S.C. § 556(d) states in pertinent part:

A party is entitled 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. In rule making or determining claims for money or benefits or applications for initial licenses an agency

⁹² Additional powers specified in 10 C.F.R. § 2.319 include the power to examine witnesses (*id.* § 2.319(i)); the power to reopen proceedings for receipt of additional evidence (*id.* § 2.319(m)); the power to appoint special assistants (*id.* § 2.319(n)); and the power to take any other actions that are consistent with the AEA, the Commission’s regulations, and the APA, 5 U.S.C. §§ 551-558 (*id.* § 2.319(r)). Although 10 C.F.R. § 2.319 does not specifically empower the presiding officer to inform the parties of alternative methods of dispute resolution (*see* 5 U.S.C. § 556(c)(7)) or to require that a representative of each party be present at settlement conferences (*see* 5 U.S.C. § 556(c)(8)), the “catch-all” provision of 10 C.F.R. § 2.319(r) undoubtedly permits a presiding officer to take these actions.

may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Subpart L hearings are to be “oral hearings” unless the parties unanimously agree to a hearing consisting of written submissions.⁹³ 10 C.F.R. § 2.1207(a)(1) permits parties to submit “[i]nitial written statements of position and written testimony with supporting affidavits on the admitted contentions,” unless limited by the subpart or the presiding officer. As to the opportunity to present rebuttal evidence, 10 C.F.R. § 2.1207(a)(2) allows parties to submit, within a 20-day period, “[w]ritten responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants.”

Finally, despite Petitioners’ claim that they have been denied the right of cross examination, Subpart L specifically provides for questioning of witnesses, but by the presiding officer.⁹⁴ This, however, is one of the approaches envisioned under the APA, as the APA itself clearly vests in the presiding officer discretion to decide whether to allow cross examination, subject to whether it is “required for a full and true disclosure of the facts.”⁹⁵ Although Subpart L generally does not permit the parties to engage in the actual questioning of witnesses, a party may submit, in written form, questions the party would like the presiding officer to ask

⁹³ 10 C.F.R. § 2.1206.

⁹⁴ *Id.* § 2.1207(a)(3).

⁹⁵ 5 U.S.C. § 556(d).

the witness regarding his or her initial or rebuttal testimony.⁹⁶ This arrangement not only is legally permissible, but this Court has affirmatively stated that “[a] party to an administrative adjudicatory hearing does not have an absolute right to cross-examine witnesses,”⁹⁷ and other courts have agreed.⁹⁸

Importantly, in those circumstances in which a party believes it can demonstrate that cross examination by the party is necessary, Subpart L offers the opportunity to file a motion making such a request.⁹⁹ The standard to be applied to such a motion is whether “cross-examination by the parties is necessary to ensure the development of an adequate record for decision.”¹⁰⁰ Subpart L’s standard clearly comports with Section 556(d) and with judicial precedent providing that the “need” for cross-examination must be shown by the party seeking it.¹⁰¹

⁹⁶ 10 C.F.R. § 2.1207(a)(3)(i)-(ii).

⁹⁷ *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 (1st Cir. 1978).

⁹⁸ *See, e.g., Calvin v. Chater*, 73 F.3d 87, 91 (6th Cir. 1996) (“A full and true disclosure of the facts can sometimes be achieved without cross-examination, obviously.”); *Sierra Ass’n for Env’t v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984) (“[C]ross-examination is not an absolute right under 5 U.S.C. § 556.”) (citing *Cent. Freight Lines, Inc. v. United States*, 669 F.2d 1063 (5th Cir. 1982)); *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 498 F.2d 718, 723 (D.C. Cir. 1974) (“Even in a formal adjudicatory hearing under the APA, however, cross examination is not always a right.”).

⁹⁹ *See* 10 C.F.R. § 2.1204(b)(1). In those instances in which the presiding officer grants a motion requesting that the party be permitted to cross examine a witness, Subpart L also requires the party to file and follow a cross examination plan. *See id.* §§ 2.1204(b)(2), (b)(3).

¹⁰⁰ *Id.* § 2.1204(b)(3).

¹⁰¹ *See Seacoast*, 572 F.2d at 880 n.16. *Seacoast* also stressed that “[t]he plain language of 5 U.S.C. § 556(d) limits that right to instances where cross-

Insofar as discovery is concerned, Subpart L requires the development of a hearing file (application and amendments, NRC environmental impact statement or assessment, and any NRC report and correspondence related to the proposed action) upon which proposed contentions for hearing may be based.¹⁰² In a Subpart L hearing, the parties are also required to make certain mandatory disclosures under 10 C.F.R. § 2.336. This provides for extensive discovery and is similar to that offered pursuant to Rule 26 of the Federal Rules of Civil Procedure.

Subpart L also comports with 5 U.S.C. § 557 concerning decisions and *ex parte* communications. Subpart L provides for post-hearing proposed findings of fact and conclusions of law.¹⁰³ This satisfies 5 U.S.C. § 557(c). At the close of a Subpart L hearing, the presiding officer is required to issue an initial decision, which decision may be subjected to Commission review upon the filing of a petition,¹⁰⁴ and in so doing, meets the requirements of 5 U.S.C. § 557(b). In addition, Subpart L specifies that a party may request that the Commission stay the effectiveness of the NRC staff's actions on a licensing matter involved in a hearing

examination is 'required for a full and true disclosure of the facts.'" *Id.* at 880 (quoting 5 U.S.C. § 556(d)).

¹⁰² See 10 C.F.R. § 2.1203.

¹⁰³ See *id.* § 2.1209.

¹⁰⁴ See *id.* §§ 2.1210, 2.1212.

under Subpart L.¹⁰⁵ Finally, with respect to *ex parte* communications, 10 C.F.R. § 2.347 clearly parallels the provisions of 5 U.S.C. § 557(d).

IV. There Is a Rational Basis for the Revisions to 10 C.F.R. Part 2

Petitioners Public Citizen and NIRS and Petitioner-Intervenors allege that there is no rational basis for the NRC's action to revise its hearing procedures applicable to nuclear power plant licenses and amendments. Public Citizen and NIRS claim that the new rules are a "reversal" of a longstanding NRC position;¹⁰⁶ they are "conclusory;"¹⁰⁷ better case management could accomplish the same ends;¹⁰⁸ the new rules improperly limit cross examination of experts;¹⁰⁹ by implementing more informal hearing procedures the NRC is "reneging on a historic bargain;"¹¹⁰ and the NRC's reasons for retaining formal hearings in HLW repository proceedings apply equally to reactor licensing hearings.¹¹¹ At bottom, these parties are merely challenging a Commission policy determination that was carefully considered by the agency, and fully described to the public during its consideration.

¹⁰⁵ See *id.* § 2.1213.

¹⁰⁶ Public Citizen and NIRS Br. at 14.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.* at 36-40.

¹¹⁰ *Id.* at 34.

¹¹¹ *Id.* at 35-36.

Despite Petitioners' protestations to the contrary, the NRC has not "reversed course after nearly a half-century of precedent."¹¹² Even if that were the case, Petitioners themselves recognize that agencies may ""refine, reformulate or even reverse their precedents in the light of new insights and changed circumstances"" so long as the agency "provide[s] an explanation establishing that the change is reasonable."¹¹³

The changes to 10 C.F.R. Part 2 at issue simply represent the most recent step in the NRC's evolutionary – not revolutionary – approach to improving the efficiency of its hearing process and to using less formal procedures for various agency actions, including Section 189.a hearings. In most cases, the agency's actions have been subjected to judicial review and withstood challenge. For example, in *Siegel v. AEC*,¹¹⁴ the court found that the NRC had the authority to implement informal rulemaking procedures; in *UCS II*,¹¹⁵ the court upheld the validity of the 1989 regulations designed to expedite adjudicatory proceedings and heighten pleading requirements; in *Kelley v. Selin*,¹¹⁶ the court upheld the NRC's decision to approve the storage of nuclear waste in casks at a plant site without

¹¹² *Id.* at 32.

¹¹³ *Id.* (citations omitted).

¹¹⁴ 400 F.2d 778 (D.C. Cir. 1968).

¹¹⁵ 920 F.2d 50 (D.C. Cir. 1990).

¹¹⁶ 42 F.3d 1501 (6th Cir. 1995).

conducting an adjudicatory hearing; in *City of West Chicago*,¹¹⁷ the court declined to require the NRC to conduct a formal hearing on a materials license application; and in *NIRS II*,¹¹⁸ the court upheld the NRC's regulations governing the opportunities for a hearing after completion of construction and before operation of a new nuclear power plant. Although not the subject of litigation, the NRC also previously promulgated informal hearing procedures for Subpart M of 10 C.F.R. Part 2, which apply to hearings on a proposed transfer of licenses, including those for power reactors.¹¹⁹ Thus, the agency has been moving steadily and consistently in the direction of greater efficiency and informality in implementing a variety of its regulatory actions, and this movement has occurred over a lengthy period of time.

Petitioners, Petitioner-Intervenors and Amici also support their "reversal of position" argument by citing a 1989 memorandum from the then-General Counsel of the agency. Amici characterize this memorandum as "careful and detailed."¹²⁰ In contrast, the parties and Amici make little mention of the 1999 memorandum authored by the agency's current General Counsel, other than to point out, for example, that the more recent memorandum "advised the NRC that Section 189a

¹¹⁷ 701 F.2d 632 (7th Cir. 1983).

¹¹⁸ 969 F.2d 1169 (D.C. Cir. 1992).

¹¹⁹ See Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721 (Dec. 3, 1998).

¹²⁰ Amici Br. at 2.

does not mandate formal adjudicatory proceedings.”¹²¹ Petitioners, Petitioner-Intervenors and Amici try to make the case that one General Counsel’s memorandum should be given greater weight than another’s, but they do not provide this Court with any rationale for reaching that conclusion. The memorandum by the current General Counsel is equally thorough and detailed, and includes a comprehensive review of the same legislative history and other material as the earlier memorandum. Petitioners, Petitioner-Intervenors and Amici offer no basis for this Court to accord the earlier memorandum greater weight than the one written later, other than the fact that the earlier document offers an opinion in concert with the position Petitioners, Petitioner-Intervenors and Amici espouse.

Public Citizen and NIRS claim that the agency’s explanation is based on conclusory statements and that better case management could accomplish the same ends. This argument completely ignores the more than four decades of experience the NRC has had with its own licensing proceedings. Over that period, the inefficiency and inefficacy of formal adjudication became obvious. NRC adjudicatory hearings had become huge endurance contests, consuming enormous amounts of time and resources, creating significant delays, and with no ascertainable safety benefit. While no one feature of the formal process has been identified as the specific reason licensing hearings are so protracted, costly, and

¹²¹ Public Citizen and NIRS Br. at 7.

consume such enormous resources, decades of experience provide a rational basis for the NRC to reconsider the procedures used in its licensing processes and to make a lawful public policy determination to revise them.

NEI's comments on the proposed rule cited, for example, the operating license hearings for a nuclear power plant which spanned almost a decade and required hundreds of days of hearings, over 200 witnesses, some 60,000 pages of testimony and argument, virtually uncountable pages of documents, and hundreds of pages of initial, intermediate and final NRC licensing decisions. The end result was that opponents of the project were dismissed from the proceeding, and the license was issued.¹²²

NEI also cited another power plant licensing case, in which procedural and other preliminary matters delayed the actual start of the hearing by two years. Thereafter, three additional years were required to complete the process. In all, there were 55 days of actual hearings, almost 200 witnesses, over 18,000 pages of testimony and argument, thousands of additional pages of documentary materials, and initial and final decisions totaling over 300 pages. The purpose of the hearing was to determine if certain reactors should be shut down because they posed risks that were significantly larger than other nuclear plants in the United States. The hearings produced an answer to this root question that was in accord with NRC

¹²² See NEI Comments, at 5. (JA 835.)

staff and licensee safety evaluations that had been completed years before the hearings began.¹²³

These examples and numerous others demonstrate the essential problem with the Commission's prior hearing practice. It is inconceivable that Congress had this result in mind when it enacted the licensing hearing requirements of Section 189.a of the AEA. In addition, hearing delays of the magnitude experienced by the NRC are contrary to the requirement of the APA (expressly applicable to the NRC by Section 181 of the AEA¹²⁴) that the NRC complete action on license applications within a reasonable time.¹²⁵

Based on well-documented experience, better case management was clearly in order. However, the NRC rationally concluded that more precise regulations were also needed to solve the historic problems. Even considering only the amount of time it has taken to complete some reactor operating license proceedings, sound public policy would argue that the agency should have instituted a process that is far more efficient and streamlined, yet yields a record upon which an agency decision can be based and which is sufficient for judicial review. Although the NRC sought, through its 1998 Policy Statement, to improve its licensing process by encouraging the presiding officers/Licensing Boards to

¹²³ *See id.* at 5-6. (JA 835-36.)

¹²⁴ 42 U.S.C. § 2231. *See also* NEI Comments, at 2. (JA 836.)

¹²⁵ *See* 5 U.S.C. § 555(b).

engage in better case management, the Commission's decision to go further in 2004 with more focused and clearly defined procedures is a rational response to a continuing shortcoming of the agency's process.

The NRC had considerable bases to conclude that trial-type adjudicatory procedures, which included examination and cross examination of witnesses by the lawyers for each of the parties, are poorly suited to reaching decisions on the complex technical and scientific issues such as those involved in NRC proceedings. As NEI stressed in its comments on the rulemaking, when technical disagreements among scientists and engineers are thrust into a highly adversarial adjudicatory arena, resolving differences of opinion on the proper, objective application of scientific principles takes on the trappings of a trial to determine who is "telling the truth." Such an outcome is particularly inappropriate and counterproductive where credibility is not the issue; rather, science and technology are employed to objectively address matters pertaining to public health, safety, and the environment.¹²⁶

Moreover, and as is also pointed out *supra*, cross examination of the applicant's and intervenor's expert witnesses is available through submission of questions that will be propounded by the presiding officer. Further, where appropriate, parties may seek and be granted permission to conduct cross

¹²⁶ See generally NEI Comments, at 9-10. (JA 839-40.)

examination directly.¹²⁷ The agency's decision to vest more responsibility in the presiding officer does not "ignore[] the fact that citizen intervenors . . . often must use cross examination of industry experts to identify major safety problems."¹²⁸ The NRC's adopted approach represents a middle ground, striking a balance between the more traditional party-conducted cross examination and no cross examination.

Public Citizen's and NIRS's most pressing concern appears to be the perceived value of cross examination "to intervenors who lack the resources to submit their own expert testimony, but who have valid concerns about an applicant's case."¹²⁹ While it may be true that cross examination serves this end for intervenors, the purpose of cross examination is not to leverage one party's limited resources. The NRC addressed this issue in the final rule:

The presiding officer is responsible for overseeing the compilation of the record and for ensuring that the record is sufficiently clear and understandable to the presiding officer such that he or she can reach an initial decision. However, the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens.¹³⁰

The NRC emphasized that litigation should focus on genuine disputes, backed by affirmative supporting presentations.

¹²⁷ See 10 C.F.R. § 2.1204(b).

¹²⁸ Public Citizen and NIRS Br. at 36-37.

¹²⁹ *Id.* at 39 (quoting Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2195).

¹³⁰ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2213.

Moreover, while Petitioners, Petitioner-Intervenors and Amici elevate the importance of cross examination of expert witnesses, courts have actually and consistently ruled that cross examination is not required for the correct resolution of issues of expert opinion.¹³¹ Courts have confirmed actions by other agencies, which hold some form of hearings, but limit cross examination to pure factual issues rather than opinion issues,¹³² such as those that historically have been and are likely to be at issue in NRC licensing hearings. Thus, the NRC could have, as NEI's comments urged, limited cross examination in all licensing proceedings to material issues of motive, intent, credibility or details of past events.¹³³

Citing testimony given before Congress, Petitioners Public Citizen and NIRS refer to a "historic bargain" pursuant to which, "under the Price-Anderson Act, the nuclear industry was granted an exemption from state and local regulation and received limitations on liability in exchange for accepting extensive hearings under the federal licensing system."¹³⁴ In fact, there was no such "bargain," nor

¹³¹ See, e.g., *Buttrey v. United States*, 690 F.2d 1170, 1182 (5th Cir. 1982) ("Even if this case did depend upon conflicting scientific testimony, . . . the right of cross-examination provided by full trial-type procedures would probably serve little purpose. Many courts and commentators have concluded that cross-examination of scientific witnesses in a case of this sort is often, if not always, an exercise in futility.").

¹³² See, e.g., *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997); *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

¹³³ NEI Comments, at 10. (JA 840.)

¹³⁴ Public Citizen and NIRS Br. at 34.

could there have been. In the first place, the nature of Commission hearings was established by the AEA as originally enacted in 1954.¹³⁵ The Price-Anderson Act was not adopted until 1957, three years later.¹³⁶ Second, the Price-Anderson Act has nothing, whatever, to do with the degree of formality of NRC hearings.¹³⁷ The Price-Anderson Act was a means of assuring compensation to the public in the extremely unlikely event of a radiological release. Its enactment had nothing to do with hearings and, thus, there could be no bargain struck with formal hearings as the item the industry was willing to sacrifice. And, finally, although Petitioners cite statements by Commissioner Bradford and Congressman Markey,¹³⁸ the articulation by two individuals of a mistaken theory does not make it correct, even if repeatedly espoused.

Despite Petitioners' and Petitioner-Intervenors' claims otherwise, the NRC has fully explained its rationale for retaining formal adjudicatory hearings on the application to construct a HLW repository. The Commission explained that its action is not mandated by statute, but by policy considerations involving licensing this first-of-a-kind facility.¹³⁹ While the industry does not agree that the type of hearing procedures adopted should be affected by the level of controversy likely to

¹³⁵ See Pub. L. No. 83-703, § 189, 68 Stat. 919, 955 (1954).

¹³⁶ See Pub. L. No. 85-256, § 4, 21 Stat. 576, 576 (1957).

¹³⁷ See 42 U.S.C. § 2210.

¹³⁸ See Public Citizen and NIRS Br. at 34 (citing JA 704-05, 768-69).

¹³⁹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2204.

be associated with a licensing action,¹⁴⁰ the NRC also articulated other bases for its decision. For example, the NRC explained that, as a result of the unprecedented nature of a HLW repository licensing proceeding, it had, over the years, engendered “certain public expectations” with respect to a trial-type hearing.¹⁴¹ At bottom, the NRC made a public policy choice to “advance public confidence” in the HLW licensing process by offering the more formal hearing.¹⁴² That policy choice does not and should not pertain to all licensing cases.

Although Petitioners argue that the NRC’s rationale for retaining formal hearing procedures for HLW repository licensing applies to reactor licensing proceedings, the industry made an equally cogent argument in its comments encouraging precisely the opposite outcome.¹⁴³ The matters likely to be at issue in the Yucca Mountain HLW repository licensing hearing (e.g., technical feasibility of the above ground and repository facilities, appropriateness of siting, competence of construction, adherence to regulatory requirements), are wholly appropriate for 10 C.F.R. Part 2, Subpart L informal proceedings, wherein the presiding officer or Licensing Board has the responsibility for overseeing the compilation of a sound and clear record and reaching a timely decision. Thus, the Commission has made one choice among several legally sound choices available. While the industry

¹⁴⁰ See NEI Comments, at 11. (JA 841.)

¹⁴¹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2204.

¹⁴² *Id.*

¹⁴³ See NEI Comments, at 11-12. (JA 841-42.)

certainly would have preferred that the NRC conform the HLW hearing procedures to Subpart L licensing procedures, the NRC's action is nevertheless well within its authority and is a reasonable exercise of its discretion.

V. **The Procedures of 10 C.F.R. Part 2 Do Not Infringe on Petitioner CAN's Constitutional Rights**

Petitioner CAN argues that the revisions to 10 C.F.R. Part 2 violate the First and Fifth Amendments of the U.S. Constitution by providing for more informal licensing hearing procedures.¹⁴⁴ It is difficult to discern from CAN's brief precisely how the First Amendment rights of its members are implicated, and it is even less evident how they are violated. CAN seems to be claiming that the less formal hearing procedures of Subpart L preclude its members from exercising "the right to speak ones [sic] grievances and, more importantly, seek redress in a public forum in which one will be heard."¹⁴⁵ Despite the loftiness of the allegation, nothing in the case law CAN has cited, including *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe*,¹⁴⁶ can sustain CAN's First Amendment argument.

First Amendment protections do not extend to nuclear power plant licensing proceedings. CAN argues that the court's decision in *Volpe* somehow offers legal justification for its position otherwise. It does not. That case addressed whether certain citizens – those living in the District of Columbia – who were likely to be

¹⁴⁴ See CAN Br. at 15-29.

¹⁴⁵ CAN Br. at 16.

¹⁴⁶ 434 F.2d 436 (D.C. Cir. 1970).

affected by agency action could be excluded from exercising the right to a statutorily mandated hearing on the design and location of a federally financed highway or bridge.¹⁴⁷ More particularly, the question at hand in *Volpe* was not the form of hearing being offered, but whether the bridge at issue could be constructed without the agency complying with the hearing requirement. Despite CAN's efforts to encourage this Court to conclude that implementation of informal hearing procedures equals not providing for any hearing, *Volpe* is inapposite because 10 C.F.R. Part 2 not only provides for a hearing on a licensing application as required by the AEA, but the hearing offered complies with the APA requirements, and even includes features of a trial-type hearing that are beyond those which the APA would require.

CAN's second constitutional grievance is that 10 C.F.R. Part 2 violates the Fifth Amendment by unlawfully discriminating against members of the public who wish to challenge nuclear power plant license applications and amendments. CAN alleges that for those potential parties who "demonstrate standing, a material issue (controversy), and request a hearing – only the opponents are harmed by loss of

¹⁴⁷ *Id.* at 437. Although in *dicta*, the court made the statements quoted in CAN's Brief regarding the importance of the right of "effective participation in the political process" in a democracy, *see* CAN Br. at 16, the holding of the case is based on the court's interpretation of a statutory requirement in the Federal-Aid Highway Act of 1968, and two of the three judges (one concurring and one dissenting) found that the issue did not represent a constitutional question at all.

full, fair, ‘on the record’ public hearings.”¹⁴⁸ One need only review the rights afforded by and limitations of Subpart L to see that all parties’ rights are, in fact and in effect, the same.

As justification for its complaint that the NRC has improperly imposed limitations on opponents not imposed on applicants and “proponents,” CAN cites the Commission’s decision to vest responsibility to carry out cross examination in the presiding officer.¹⁴⁹ It should come as no surprise that this provision is likely to rankle litigators of all stripes, those who represent license applicants as well as those who represent opponents. Any dissatisfaction that lawyers naturally feel about giving up control of cross examination is borne by all sides equally, as counsel for license applicants is as interested in testing the testimony of intervenor witnesses and experts as counsel for intervenors is in testing those put forth by the license applicant. This discomfort, however, does not bear on the NRC’s legal authority to construct its hearing procedures.

In articulating its constitutional claims, CAN also takes issue with the requirement of Subpart L that at least one valid contention be proffered by a person in order to be admitted as a party.¹⁵⁰ However, the requirement for a contention to be filed in order to qualify for party status in Commission proceedings has long

¹⁴⁸ CAN Br. at 18-19.

¹⁴⁹ *See id.* at 19-20.

¹⁵⁰ *See id.* at 17-18, 52-54.

been an element of the agency's regulations, and was specifically upheld in *BPI v. AEC*.¹⁵¹ As the court concluded in *BPI*:

[T]he requirement of specification of contentions contained in 10 C.F.R. § 2.714(a) of the Commission's regulations is not inconsistent with the intention of Congress gathered from section 189(a) [of the AEA], when read with the authority of the Commission with respect to regulations granted by section 161(p) of the Act.¹⁵²

In addition, to the extent CAN complains that, in contrast to prior practice, there would be insufficient information available at the time contentions are now required, or inadequate opportunity to amend them as new information became available,¹⁵³ this charge, too, lacks merit. The new rules of procedure do not make substantive changes in this area. Considerable information will continue to be available to would-be parties to Subpart L proceedings at the time a petition for hearing is to be filed. This includes the license application itself, the supporting safety analysis report, and the environmental report.¹⁵⁴ Non-timely requests for hearing may be granted, as well as new and amended contentions filed, based on a showing of factors such as good cause (e.g., the prior unavailability of information) and the extent to which the issues sought to be raised would already otherwise be

¹⁵¹ 502 F.2d 424 (D.C. Cir. 1974).

¹⁵² *Id.* at 428.

¹⁵³ *See* CAN Br. at 53.

¹⁵⁴ *See* 10 C.F.R. § 2.309(f)(2).

considered through the participation of other parties.¹⁵⁵ Based on the foregoing, CAN's concern over the requirement for the specification of at least one litigable contention in order to be admitted as a party is unfounded.

Not only should CAN's constitutional arguments be disposed of on the bases described above, but established law also mandates rejection of CAN's constitutional claims. Less than a decade ago, this Court addressed the validity of a similar claim by CAN alleging a deprivation of due process in the context of another suit against the NRC.¹⁵⁶ In that decision, this Court stated that, from a generalized due process claim, it could not find that the NRC's actions – a refusal to grant CAN an adjudicatory hearing on decommissioning-related activities at a nuclear power plant – deprived CAN's members of life, liberty or property without due process of law.¹⁵⁷ Not only did this Court point out that CAN's due process claims suffered from being “overbroad, vague, and unaccompanied by factual support or analysis,” but the Court also affirmed that “generalized health, safety and environmental concerns do not constitute liberty or property subject to due process protections.”¹⁵⁸ In addition, the CAN Court concluded:

We simply cannot fashion a constitutional violation out of whole cloth on the basis of the kind of nonspecific and unsupported allegations raised by CAN here. Accordingly, we reject CAN's

¹⁵⁵ See 10 C.F.R. §§ 2.309(c), (f)(2).

¹⁵⁶ See *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995).

¹⁵⁷ *Id.* at 294.

¹⁵⁸ *Id.* (quoting *City of West Chicago v. NRC*, 701 F.2d 632, 645 (7th Cir. 1983)).

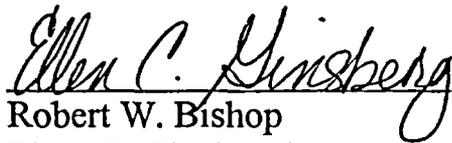
allegations that the NRC's actions violated its members' Fifth Amendment due process rights.¹⁵⁹

The same result is warranted in the instant case.

VI. Conclusion

For the foregoing reasons, both petitions for review should be denied

in toto.



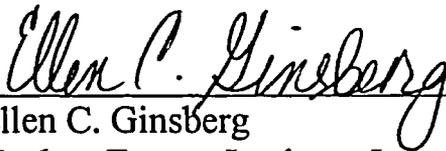
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¹⁵⁹ 59 F.3d at 294.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in 14 point font size and Times New Roman type style.



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