

Rulemaking Comments

From: Anthony Z. Roisman [arisman@nationallegalscholars.com]
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Attached are comments on the proposed Part 2 Amendments originally noticed in the Federal Register on February 28, 2011. Please contact me if you have questions or if the attachments are not readily accessible. The Law Review Article is incorporated by reference in the comments and attached to be part of the record for the rulemaking.

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**COMMENTS ON
PROPOSED
AMENDMENTS TO ADJUDICATORY PROCESS
RULES AND RELATED REQUIREMENTS
(76 FED. REG. 10781)**

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MARCH 28, 2011

INTRODUCTION¹

When the current version of Part 2 was adopted in 2004 the Commission stated:

The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient.

69 Fed.Reg. 2182 (Changes to Adjudicatory Process) January 14, 2004 ("2004 SOC"). No fair observer of the contested hearings that have occurred since that time, particularly those involving license renewal, would say that the current version of Part 2 achieves that laudable goal. Rather, the process is marked by a chaotic hurricane of pleadings addressed, for the most part, not to the merits of the safety and environmental issues that are the appropriate focus of such hearings, but to the whether issues sought to be raised by the public meet procedural requirements such that the issues are appropriate for consideration in a hearing. The meat of the hearing, i.e. the activities that address the merits of issues such as pre-filed testimony, proposed areas of cross-

¹ Mr. Roisman is an attorney and has represented parties before the Atomic Energy Commission and the Nuclear Regulatory Commission since 1969. He was the lead counsel for an intervening public participant in the construction permit applications for proposed Consumers Power reactors in Midland, Michigan, the proposed Public Service of New Hampshire reactors in Seabrook, New Hampshire, the Clinch River Breeder Reactor in Oak Ridge, Tennessee and in the operating license applications for Indian Point Unit 2, in Buchanan, New York and Vermont Yankee in Vernon, Vermont. He has been involved in several relicensing proceedings. He also represented public participants in numerous matters before the AEC and NRC including the rule-making hearings regarding ECCS criteria, worker radiation exposure, and the standards for implementation of the National Environmental Policy Act by the AEC. A number of these matters were eventually resolved in Federal Court where Mr. Roisman was lead counsel including Calvert Cliffs Coord. Cttee v. AEC and NRDC v. NRC (GESMO). He has written law review articles regarding NRC practices and procedures and has presented his views in meetings sponsored by the NRC including the Regulatory Information Conference. He was a Member, Nuclear Regulatory Commission Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals - 1982-83 and a Member, Nuclear Regulatory Commission Advisory Panel on Atomic Safety and Licensing Board Nominations - 1980-85. His full CV is attached. The views expressed here are Mr. Roisman's, and not his clients.

examination, motions for summary disposition and the hearings themselves, consume relatively little time compared to the time spent on addressing contention admissibility and the timeliness of new or amended contentions.

When the Commission announced the current proposed amendments to Part 2 it stated:

This proposed rule would make changes to the NRC's adjudicatory process that NRC believes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

76 Fed. Reg. 10781 (February 28, 2011). However, while that goal is laudable, the proposed changes do little, if anything, to achieve it and fail to address the fundamental problems that plague the NRC licensing hearing process. License renewal hearings provide ample proof of the failure of the current Part 2 regulations to "promote fairness, efficiency, and openness" and, in fact demonstrate that the current Part 2 regulations are unfair, inefficient and lack transparency.

For example, the Indian Point relicensing proceeding, commenced on August 1, 2007 with the filing of a Notice of Opportunity for Hearing in the Federal Register. 72 FR 42134. However, the portion of the hearing that will address the merits of the issues raised will not begin until June 19, 2011 when under the ASLB Scheduling Order, pre-filed direct testimony from the intervenors will be due. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010). Thus, the preliminary, essentially non-substantive, skirmishing over the admissibility of contentions and amended or new contentions took 46 months. By contrast, from the point where the real meat of the hearing begins - filing of testimony - until completion of the hearings and filing of all post-hearing pleadings will take approximately 11 months assuming the hearings last three weeks and do not begin until 60 days after all pre-hearing filings occur. *Id.* The time spent on the preliminary matters related to

admissibility of contentions and the timeliness and appropriateness of new or amended contentions is not substantively productive - i.e. resolution of such issues as to whether an amended basis is timely or a contention contains sufficient specificity and basis to be admitted - and represents an enormous expenditure of time and money by all parties, an expenditure that falls particular hard on the public which does not have an economic incentive to justify expenditures and is not funded by taxes and licensing fees.

The core of the problem is that hearings are noticed when the application is still in a state of flux and before any of the work by Staff has been completed. As the applicant refines and completes the application - often adding dozens of application amendments - and as the Staff publishes draft and final impact statements and draft and final safety evaluations - new documents are disclosed and new issues are raised, compelling the conscientious intervenor to seek to amend existing contentions and their bases or to add new contentions. No one suggests that the additional work done by the applicant or by the Staff is not valuable. However, each of those changes by applicant and staff are done without any limitation or adverse consequence to them. Thus, for example, an applicant is not penalized for waiting until long after its application has been accepted for filing by Staff, to identify the particular elements of an aging management plan that it has known for years it would have to provide but that was not particularized in its application. Staff uses requests for information (RAIs) to fill in gaps in the application and each response can raise new and previously unknown issues. Again, no one suggests Staff should not seek this information or that their efforts are not productive. But, since there is no adverse consequence to either Staff or applicant when relevant information is produced in dribs and drabs during the hearing process and such serialized production of data forces an intervenor to refine

existing contentions or file new ones - a process which produces immediate objections from Staff and applicant as to virtually every proposed new or amended contention - intervenors are compelled to expend their limited resources to make their case over and over again because of the application and review process utilized by applicants and Staff.

A glaring example of the chaos created by the current system is well-summarized by the Commission in its opinion last year in *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17 (July 8, 2010) where it noted:

The procedural history of Contentions 2, 2A, 2B, and 2C is lengthy and muddled – due, in large part, to Entergy’s multiple revisions to the relevant portions of its license renewal application as it responded to multiple Staff inquiries and, in a related vein, Entergy’s apparent lack of precision as to the specific subsection of section 54.21(c)(1) with which it sought to comply for the components at issue.

Id. at 23. Entergy’s “multiple revisions” and “lack of precision” compelled the intervenor to file four separate versions of essentially the same contention, each of which filings was vigorously opposed as either untimely, failing to meet the requirements of 10 C.F.R. § 2.309(f)(1), or both. But Entergy suffered no consequences for its sloppy and dilatory tactics while the intervenor was forced to expended a substantial amount of its limited resources just to get one issue heard and eventually had to abandon legal representation and pursue the case *pro se*. Such a result, which is repeated over and over again in hearings under the current version of Part 2, is not consistent with the Commission’s oft expressed commitment to full and effective public participation. This commitment was acknowledged by former Chairman Dale Klein, who stated that the NRC “continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are

made in consultation with the public, our Congress, and other stakeholders.”² He continued, “[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible.”³

The adverse effect of the current process on effective public participation cannot be overstated. When virtually every contention and every amendment to a contention produces a deluge of opposition from both applicants and Staff, all focused on whether the procedural technicalities of 10 C.F.R. § 2.309(f) have been met, the ability of the public to participate effectively is essentially destroyed and the value of their contribution on the merits of relevant issues is diminished dramatically. For a general analysis of the inherent unfairness of the current Part 2 regulations see “Regulating Nuclear Power in the New Millennium (The Role of the Public)” Roisman, *et al.* Pace Environmental Law Review, Volume 26 (Summer 2009) Number 2 at pp. 317-363 which is incorporated herein by reference and attached hereto.

The following proposal offers a solution to some of the problems created by the current Part 2 regulations without abandoning the Commission’s goal of making the “hearing process more effective and efficient”. Unlike the proposed amendments currently before the

² Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), <http://www.nrc.gov/reading-rm/doc-collections/commission/>; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), <http://www.nrc.gov/reading-rm/doc-collections/commission/>; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), <http://www.nrc.gov/reading-rm/doc-collections/commission/>.

³ Klein, *supra* note 1, at Slide 11.

Commission, these proposed amendments address fundamental problems with Part 2. The essence of these proposals is to initiate the opportunity for public participation in the process at the same time as the applicant initiates its efforts to obtain a license, license amendment or any other relief or benefit from the NRC, but to postpone the date on which contentions must be filed until both applicant and Staff have completed their work and attested to that fact. The only criteria for admission as a party would be "standing" and once admitted a party would be entitled to see all documents relevant to the application whether in the possession of Staff or the applicant, to attend all meetings, to listen in on all phone calls and to initiate its own meetings and phone calls with the Staff. Within 30 days after applicant and Staff have attested to the completion of their work, contentions would be due. The current rules for contention admissibility would be tightened to require essentially all bases and all supporting evidence, except expert witness reports, to be submitted with a proposed contention. Shortly after contentions, if any, had been admitted, direct testimony, including expert witness reports, would be due and the current practice for moving from that point to hearings would be followed.

Under this approach there would be no incentive for an applicant to delay submitting all the information it intends to use to support its application and no reason for Staff to publish draft and final impact statements or safety reports until they had finished all of their work. Intervenors, having had access to all the relevant data would have no excuse for not fully presenting their case at the time they file their contentions, with the exception of expert witness reports which would await, but only by 30 days, the Board ruling on admissibility of a contention. The net effect would be that resources of intervenors, applicant and Staff would be devoted primarily to the merits of concerns raised by intervenors and much less money would be

spent on lawyers arguing over substantively irrelevant procedural technicalities. By involving intervenors in the process from the outset and imposing upon them the obligation to be knowledgeable about all the information developed during the completion of the application and NRC Staff review, there is a greater probability that issues raised as contentions will be focused on real substantive concerns and not merely on the lack of details in an application which is now often the basis for initial contentions. In addition, intervenor participation in the application and Staff review process provides ample opportunities for concerns to be addressed directly among the parties and without the formality of the hearing process, thus saving the hearing process for those issues on which the parties genuinely are unable to reach agreement.

One added advantage of the approach proposed is that the ASLB will not spend its resources on resolving non-substantive disagreements about timing of filings and the admissibility of multiple iterations of essentially the same contention. The ASLB, once it rules on standing, might be called upon to resolve a dispute about access to data during the completion of the application and Staff reviews, but such disputes are unlikely to occur if the final regulation is clear and the Commission's Statement of Considerations expresses the Commission's strong policy in favor of open access to all relevant documents. In addition, such disputes could be handled by a single ASLB member performing much the same function as a Federal Magistrate does in Federal District Court litigation.

What follows are proposed regulations to accomplish the goals outlined above. If the Commission is favorably inclined to the basic approach proposed here, these proposed regulations would benefit from more careful drafting that 1) makes the language more precise and 2) modifies other regulations that would be impacted by these proposed changes. In

addition, should the Commission decide to proceed along the lines suggested, republishing the proposed amendments to Part 2 to allow fuller participation from industry, public and governmental intervenors and NRC Staff licensing hearing participants would be beneficial. No participant in the current licensing process favors the current chaos. These proposals offer one, but not the only, option to address that chaos. For now, these are the only proposals before the Commission that address the most pressing fundamental problems in Part 2.

At the end of these proposed changes are a few comments on the current proposed changes to Part 2.

PROPOSED CHANGES TO 10 C.F.R. PART 2

PROPOSED 10 C.F.R. § 2.100A

Prior to filing an application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval and prior to contacting any employee or contractor of the NRC regarding such an application, an applicant shall file a formal notice with the NRC of its intention to file such an application, including the nature of the intended application and scope of the application, and shall publish at least a ½ page notice of intent in all daily newspapers of general distribution within the area where the facility involved is, or may be, located, with at least three national daily newspapers and on its website for a period of at least one month. The content of the notice shall be prescribed by NRC Staff and shall have as its purpose the widest possible disclosure of the applicant's intent and the nature of the intended application.

PROPOSED 10 C.F.R. § 2.100B

Upon receipt of a notice of intent pursuant to 10 C.F.R. § 2.100A, NRC Staff shall determine if the notice meets all the requirements and intent of that Section and once such a determination is made it shall have published in the Federal Register and in the same newspapers as those used by the applicant in complying with 10 C.F.R. § 2.100A, and as frequently, at least a ½ page notice of opportunity to participate in the NRC regulatory process with regard to such proposed action. The notice shall require that all persons who wish to participate in any way in the regulatory process with regard to such proposed action must file, within 30 days of the publication of the notice in the Federal Register and the newspapers, a request to participate. Such a request to participate must demonstrate that the proposed participant meets the requirements of 10 C.F.R. § 2.309(d).

PROPOSED 10 C.F.R. § 2.308A

Upon filing of the Federal Register Notice prescribed by 10 C.F.R. § 2.100B, the Commission shall designate an Atomic Safety and Licensing Board Panel to determine whether any request for participation filed is 1) timely and 2) meets the requirements of 10 C.F.R. § 2.309(d). Any person that meets those requirements shall be deemed a “participant” and shall have all the rights and responsibilities identified in 10 C.F.R. § 2.308B. The Atomic Safety and Licensing Board Panel may consider untimely filings for participant status but shall not grant such requests unless good cause is shown why the proposed participant could not have learned of the proposed action and filed a timely request to participate and, if granted participant status, the participant must take the proceeding as it finds it including the need to meet any filing requirements regarding documents and the need to comply with any time limits imposed by these regulations or the Board.

PROPOSED 10 C.F.R. § 2.308B

Once a person is determined to be a participant within the meaning of 10 C.F.R. § 2.308A, they shall have the following rights and responsibilities:

1. The participant shall receive a copy of all documents generated, received, reviewed or relied upon by an applicant, its employees, contracts or experts and by the NRC Staff or any contractor of the NRC Staff, with regard to the intended application or any issues relevant to the determination of the application within one week of when the document was generated, received, reviewed or relied upon;
2. The participant shall receive advance notice of all meetings and phone calls between the applicant, the NRC Staff or any contractor of the NRC Staff or the applicant, with regard to the intended application or the application itself and the participant shall have the right to listen in on any such call or be an attendee at any such meeting. NRC Staff may limit the number of representatives of the participant who may attend such meetings but not to less than two. These rights shall not include the right to actively participate in the call or meeting unless NRC Staff or the applicant request such participation.
3. The participant shall provide a copy to NRC Staff and the applicant of all documents with regard to the intended application or any issues relevant to the application generated, received, reviewed or relied upon by it, its employees, experts or contractors within one week of their generation, receipt, review or reliance upon the document.
4. The participant shall have the right to request either phone calls or meetings with NRC Staff with regard to the intended application or any issues relevant to the application and such requests shall be granted absent good cause for denial. An applicant may participate in any of

these meetings or calls to the same extent a participant can participate in meeting or calls pursuant to 2. above.

PROPOSED 10 C.F.R. § 2.308C

A notice of opportunity for a hearing shall be filed within 30 days after the following conditions have been met. If there is a dispute regarding whether conditions have been met, an Atomic Safety and Licensing Board Panel shall resolve the dispute:

1. Applicant files a final and complete application for the requested action, files a certification, signed by a duly authorized officer of the applicant, that the applicant has no present intent to file any additional information in the form of amendments to the application AND NRC Staff files a final Safety Evaluation Report (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to any safety issues related to the proposed application; AND
2. Applicant files a final and complete Environmental Report for the requested action, files a certification, signed by a duly authorized officer of the applicant, that applicant has no present intent to file any additional information in the form of amendments to the Environmental Report AND NRC Staff files a Final Environmental Impact Statement or Supplemental Final Environmental Impact Statement (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to, or amendments to, the FEIS or FSEIS regarding any environmental issues related to the proposed application.

PROPOSED 10 C.F.R. § 2.308D

After the Certification required by 10 C.F.R. § 2.308C an Applicant or the NRC Staff may file an amendment to the documents specified there only by leave of the Atomic Safety and Licensing Board and only upon demonstrating that it meets all of the following requirements:

- (i) The information upon which the amendment is based was not previously available and could not have been previously available;
- (ii) The information upon which the amendment is based is materially different than information previously available; and
- (iii) The amendment has been submitted within 15 days of the availability of the subsequent information or the subsequent information has been made available to the participants in the proceeding within 15 days of its availability and a request for an extension of time to file the amendment has been filed within 10 days of availability of the subsequent information with the Atomic Safety and License Board.

PROPOSED AMENDED 10 C.F.R. § 2.309(a)

(a) General requirements. *Within 45 days of the filings required by 10 C.F.R. § 2.308C, any person who has been determined to be a participant pursuant to 10 C.F.R. § 2.308A may request a hearing on the proposed application. The request shall specify the contentions which the person seeks to have litigated in the hearing. A person who has not been determined to be a participant pursuant to 10 C.F.R. § 2.308A may also seek a hearing but must meet all the requirements applicable to a participant and must take the proceeding as it exists.* In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of

paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition limited to the contentions it determines meet the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party. (Proposed changes shown in *italics*).

PROPOSED 10 C.F.R. § 2.309(c)(3)

If an untimely request for a hearing is accepted, the requestor shall take the hearing as it finds it and shall comply with all the obligations and time requirements applicable to a participant.

PROPOSED AMENDED 10 C.F.R. § 2.309(b)(3)

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than *forty-five (45) days* from the date of publication of the notice in the Federal Register; (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(e)

(e) Discretionary Intervention. The presiding officer may consider a request for *discretionary participation* when at least one requestor/petitioner has established standing. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to *lack standing to participate as a matter of right under paragraph § 2.308A* and (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek *participation* as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance: (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(1)

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(ii) Provide a *full explanation* of the basis for the contention;

(v) Provide a *full statement* of the alleged facts which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to *all the specific sources and documents that were produced pursuant to 10 C.F.R. §*

2.308B on which the requestor/petitioner intends to rely to support its position on the issue and identify all experts to be used in support of the position on the issue along with a copy of the CV of the expert and all publications by the expert relevant to the position to be taken by the expert;

(vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee *and/or NRC Staff* on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) and *the Final Environmental Impact Statement or Final Supplemental Environmental Impact Statement* that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application, FEIS or FSEIS fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief;

(vii) No contention of omission or failure to comply with NRC regulations or federal statutes may be filed unless either the alleged omission or failure has been identified by the Petitioner in written comments filed with regard to the Application, the draft Safety Evaluation Report, the draft Final or Final Supplemental Environmental Impact Statement during the time allowed for such comments or the Petitioner demonstrates it could not have known of the omission or failure until the filing of the final Application or the Final SER or the FEIS and FSEIS. (Proposed changes are shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(2)

(2) Contentions must be based on *all* documents or other information *made available pursuant to 10 C.F.R. § 2.308B*, at the time the petition is to be filed. The petitioner may amend contentions or file new contentions only with leave of the presiding officer upon a showing

that—

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In the event of an amendment to the Application, Safety Evaluation Report, Final or Final Supplemental Environmental that is allowed pursuant to 10 C.F.R. § 2.308D, amended or new contentions solely based on the § 2.308D amendment will be considered timely if filed within 90 days of the Board's Order allowing the § 2.308D amendment. (Proposed changes in italics).

COMMENTS ON CHANGES PROPOSED BY THE COMMISSION

Most of the proposed changes are technical modifications that will generally improve the hearing process. There are other similar changes that could be made to further clarify the process and improve fairness and efficiency. The following are a few examples of such potential improvements.

1. There is little reason to have separate language to describe the summary disposition process under Part G and Part L. It would be preferable to state that one set of criteria and one set of filing obligations applies regardless of the Part under which summary disposition is sought.
2. There is considerable confusion about the requirements of 10 C.F.R. § 2.323 regarding the time when motions need to be filed. The language would appear to apply to all motions but it

has been argued that the provision regarding the latest date by which a summary disposition motion must be filed allows summary disposition to be filed long after the “occurrence or circumstance from which the motion arises”. 10 C.F.R. § 2.323(a). Summary disposition motions have the potential to considerably delay the hearing process if filed late in the proceeding.

See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010) at 9 (“The Board finds that such motions for summary disposition, if filed late in the proceeding when the parties are heavily engaged in other tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serve to narrow the scope or expedite the resolution of the adjudicatory proceeding”).

Thus, such motions should be filed as early as possible. However, the 10 day filing date for motions is much too short even for routine motions, much less for summary disposition. For example, the obligation to consult imposed by § 2.323(b), if taken seriously, would be difficult to meet if a total of 10 days are allowed. The language of § 2.323(a) should be amended to set the time for filing motions at 30 days after the “occurrence or circumstance from which the motion arises” and it should be made clear that it applies to all motions. If there are motions that do not warrant that much time or need more time, the Board has the inherent authority to adjust the deadlines.

3. A problem has arisen with disclosures from the Staff in Subpart L proceedings. Staff obligations to provide document disclosures in Subpart L proceedings are controlled by 10 C.F.R. §§ 2.336(b), 2.1202(c) and 2.1203. Under these provisions the Staff is required to produce or identify by readily available location all the documents filed by the applicant, all the

documents - either pro or con - used in the review of the application and all the documents relevant to any admitted contention on which the Staff chooses to participate.⁴ Contrary to these clear obligations, Staff takes the position that documents generated by consultants to NRC are not subject to disclosure. The problem is well-illustrated by the experience in the *Indian Point* relicensing proceeding. First, Staff has chosen to participate as a party on all admitted contentions in the proceeding. Nonetheless, Staff document disclosures are limited to what it perceives to be its obligations under § 2.336(b) and do not include all documents and data compilations relevant to the contentions. For example, one of the admitted contentions relates to the AMP for buried piping. Staff has numerous activities ongoing regarding the problems with leaking underground pipes.

<http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html>. However, Staff has produced, at most, only the underground piping documents that its reviewers are looking at as part of the Indian Point license renewal process. Not only does that practice violate the clear mandate of § 2.1202(c) but it also rewards the Staff if its review is inadequate by allowing it to avoid producing or identifying a larger group of documents relevant to the contention which its reviewers should have examined.

Moreover, Staff often does not even meet its obligations, as narrowly defined by it in §

⁴ 10 C.F.R. § 2.1202(c) provides that once Staff chooses to participate as a party as to any contention it “shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate”. All parties are subject to the disclosure obligations of 10 C.F.R. § 2.336(a) which include the obligation to produce or identify by location “all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions” and thus, once Staff elects to participate as a party with respect to a contention, the obligations under § 2.336(a) apply, but only with regard to that contention. Pursuant to 10 C.F.R. § 2.3, the specific provisions of § 2.1202(c) supersede the language in § 2.336(a) that excludes Staff from § 2.336(a) obligations.

2.336(b). In a recently released FSEIS for Indian Point Staff referenced work done for it by Sandia Laboratories in responding to an admitted contention related to deficiencies in the analysis of clean up costs associated with the SAMA analysis. *See NUREG-1437, Supplement 38, Vol. 1 at 5-4 and Vol. 3 at Appendix G pp. G-22 to G-29.* Sandia not only consulted with Staff but participated actively in the review of the information and prepared reports. Staff did not list any documents generated by Sandia in the course of this work in its Hearing File Index and has failed to produce any of the relevant documents for several months. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York Motion to Compel NRC Staff To Produce Documents Relied upon in Staff's Final Supplemental Environmental Impact Statement (4/22/11). Finally, at an earlier time in the hearing process, an intervenor had to resort to a Motion to Compel to require Staff to produce the computer code used by it, its consultants and applicant to conduct the SAMA analysis because Staff first refused to produce the code and then insisted it would only produce the code if the intervenor paid the \$1000 licensing fee imposed on commercial users of the government-developed and funded MAACS2 Computer Code. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York's Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee In Compliance with the National Environmental Policy Act and NRC Disclosure Regulations (1/10/10).

The Commission should clarify the discovery obligations of Staff in contested proceedings making clear that 1) Staff must comply with all the disclosure obligations 10 C.F.R. § 2.336(a), just like all other parties, with respect to any contention on which NRC Staff chooses to participate as a party; and 2) with regard to its obligations under 10 C.F.R. § 2.336(b)(3) Staff

must produce all documents in its possession or the possession of its experts or consultants that were reviewed and/or generated as part of the analysis of the application.

4. Under current hearing practice all parties are allowed to respond to any motion or pleading filed by any other party unless they have been consolidated with that party pursuant to 10 C.F.R. § 2.309(f)(3). This practice has created unnecessary pleadings that delay the resolution of issues. NRC Staff is never consolidated with another party, even if they are on the same side of an issue, and thus is allowed to file a brief in support of a pleading of any other party. Public and government intervenors who have not adopted contentions are also free to file briefs in support of the pleadings of other parties. These “support” pleadings are either redundant, merely stating, in slightly different form, what the proponent has already stated or raise new arguments, in which case the opponents of the initial pleading are given an opportunity to file a supplemental opposition, thus prolonging the process. However, in light of the consultation obligations imposed by 10 C.F.R. § 2.323(b), all parties are aware of a pleading before it is filed and have an opportunity to consult regarding the merits of the pleading. A party that supports a proposed pleading can provide its input and suggestions to the proponent before the pleading is filed, thus obviating the need for a separate filing. The regulations should be amended to indicate that pleadings in support of motions are allowed only if the support pleading is making a new point and only if the filer of the supporting pleading attests that it attempted to have the proponent of the motion include the point in the initial pleading. A similar rule should apply to pleadings in opposition, requiring parties who are taking the same position in opposition to a pleading to file a single brief. This will cut down on redundant pleadings and substantially eliminate the need for supplemental pleadings.

RESPONSE TO SPECIFIC QUESTIONS

- (a) Would applying NRC staff disclosures under § 2.336(b)(3) to documents related only to the admitted contentions aid parties other than the NRC staff by reducing the scope of documents they receive and review through the mandatory disclosures?

As the previous discussion indicates, NRC Staff is not currently meeting its disclosure obligations. Reducing those obligations so that their current disclosure practices more closely conform to the regulations is unwarranted. In addition, no documents are actually “produced” but merely listed on logs with ML numbers and members of the public are only burdened by Staff failure to fully produce all relevant documents and by the production of documents on logs that are often excessively cryptic. If NRC Staff would improve the quality of the information provided on the logs, the task of reviewing Staff disclosures would be simplified and expedited.

NRC Staff has a public function which will only be further diminished by reducing their disclosure obligations. Staff antipathy to disclosing the documents it generates, reviews and relies upon in doing its work is inconsistent with the Commission’s frequently expressed desire for improved public participation and transparency. If Staff would organize its efforts around discrete issues and maintain running logs of the documents being used by personnel addressing those issues, whether within licensing activities or not, a task made much easier as a result of computers and electronic documents, the burden on Staff would be reduced and the disclosures to the public would be improved. Part of the reason Staff perceives that it is burdened by document production is its failure to integrate public disclosure of all, non-confidential and non-privileged, documents into its routine work. The alternative, if disclosure obligations for

hearings are reduced and if Staff continues its crabbed interpretation of its disclosure obligations, is for public participants in the NRC process to file weekly requests under FOIA for all NRC Staff documents. That is not a desirable, but it may be a necessary, process. It would be far preferable for Staff and the public if Staff embraced its duty of operating in the open and facilitated public access to relevant documents related to specific issues of public concern.

(b) Is the broad disclosure obligation imposed on the NRC staff by current Section 2.336(b) warranted in light of (a) the other parties' more limited disclosure obligations and (b) the parties' ability to find these same documents in an ADAMS search?

Since the Staff does not fulfill the disclosure obligations under Section 2.336(b) as currently written, the premise of the question is not correct. In addition, anyone who uses ADAMS on a regular basis knows that ADAMS is neither a comprehensive nor a reliable source of NRC documents. The search capabilities, while improved over the last year, are still a far cry from search capabilities with WestLaw and LEXIS. Thus, finding documents is laborious and it is difficult to effectively narrow searches to the precise information being sought. This necessitates reviewing hundreds of irrelevant documents in order to find the documents being sought. In addition, the disclosure of documents on ADAMS is inconsistent. For example, documents dated months, or even years, earlier suddenly appear on ADAMS without explanation for the delay. That makes it impossible to rely on ADAMS as a source of all relevant documents on any subject. In addition, documents are sometimes on ADAMS but, for some reason, cannot be opened or downloaded.

To be candid, the entire electronic production of documents at NRC is a mess. The

Electronic Hearing Docket is often incomplete and there is no standardized protocol for when documents will be on the EHD or which documents will be posted. For example, some of the monthly disclosure of documents by NRC Staff with regard to a particular licensing proceeding are posted to the EHD and some are not. The time after a pleading is filed and before it appears on the EHD is not standardized. Documents posted to the Hearing File by Staff are incomplete. For example, a review of the Hearing File for Indian Point relicensing lists document disclosures by Staff but do not include any privilege logs. In addition the document disclosures are merely ML numbers with no document description, not even the description provided in the monthly disclosure itself. In short, the present ongoing electronic disclosure of documents by NRC is in disarray, is not comprehensive or reliable and thus cannot be a substitute for full disclosure of documents in individual licensing proceedings by Staff.

(c) Would a shorter, more relevant
privilege log aid parties to the
proceeding?

This question is confusing. If it is asking would it be preferable for Staff to claim fewer documents are privileged, then the answer is certainly less. If it is asking should Staff withhold the same number of documents but disclose only some of them on a privilege log, the answer is obviously no. If it is asking should Staff be given more discretion to decide what is relevant, the answer is no, at least until the Staff has demonstrated that it is actually committed to full disclosure of all relevant documents. An improved privileged log, with more description of the nature of the document being withheld would be helpful. In addition, privilege logs used by Staff in the *Indian Point* proceeding, with the exception of the initial disclosures, have not included the recipients of the documents for which a privilege is claimed, making it hard to determine if the

privilege is validly asserted. There are many improvements that could be made to the privilege claim process by Staff but the question does not really address those. Consulting with persons who are more readily engaged in discovery in routine court litigation might improve the quality of the privilege log process. There are numerous law professors in the Washington, D.C. area who could be consulted to assist NRC in developing a more efficient and effective process for disclosing documents. The Sedona Conference would also be a good source of expertise. The present process of disclosure and privilege claims does not appear to be benefitting from persons with substantial experience with such processes outside the NRC.

(d) Would potential parties prefer to maintain the status quo?

As the preceding discussion indicates, the status quo with regard to Part 2 in general and discovery of Staff in particular, is not working. It needs to be changed in major ways.

(e) Would limiting the mandatory disclosures of documents as described in Federal Rule of Civil Procedure 26(a)(1)(A)(ii) be the preferred option?

No. A better implementation and enforcement of those obligations would be a preferred option. If, as suggested above, the entire Part 2 process were changed to provide for public intervention at the outset of the NRC process when the first suggestion of an application for a license or amendment is received by NRC, much of the disclosure problem would go away as the public participant would be able to be actively involved in the process from the outset and documents relevant to the proposal would be routinely available to the public. Thus, when a hearing notice was finally issued the obligations of disclosure that track the federal rules would

have been largely already met.

CONCLUSION

The current system does not work. Major changes, not minor adjustments, are needed to make it work. Until that happens, the NRC hearing process will not “promote fairness, efficiency, and openness”.

Respectfully submitted,

Anthony Z. Roisman

REGULATING NUCLEAR POWER IN THE NEW MILLENNIUM (THE ROLE OF THE PUBLIC)

ANTHONY Z. ROISMAN,* ERIN HONAKER,** AND ETHAN SPANER***

I. INTRODUCTION

On October 9, 2008, the Energy Information Administration of the U.S. Department of Energy reported that twenty-five applications for new civilian commercial nuclear power reactors had been filed with the Nuclear Regulatory Commission (NRC) and are under review. In August 2008, the NRC disclosed in its 2008-2009 Information Digest Report that it "will increase staffing levels to accommodate up to twenty-three [combined construction and operating license] applications for a total of thirty-four new nuclear units over the next few years."¹ In the same Report, the NRC also disclosed that as "of February 2008, approximately half of the licensed reactor units have either received or are under review for license renewal" and "48 units (26 sites) have received renewed licenses."²

In short, we are in the midst of the "Second Coming" of nuclear power. Many changes have been made in the process for deciding whether to license or re-license a commercial nuclear power plant from the early days of the "First Coming." The single

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1. U.S. NUCLEAR REGULATORY COMM'N, 2008-2009 INFORMATION DIGEST 43 (2008), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/>.

2. *Id.* at 47.

most significant change has been in the public participation process by which the NRC decides whether to issue a new or renewed license. In its August 2008 Report, the NRC asserts the "new licensing process is a substantial improvement over the system used in the 1970s, 1980s, and 1990s."³ The keystone of those "improvements" has been to substantially reduce the opportunity for public participation in the licensing process. The reason for these changes has been to address a perceived problem – unwarranted delay in completing the licensing process because of the alleged dilatory and substantively irrelevant input from an uninformed and irrational public.

On October 8, at the U.S. Department of Commerce's "Nuclear Energy Summit," NRC Chairman Dale Klein delivered a short address, tellingly entitled "Promoting Public Confidence in Nuclear Safety through High Standards."⁴ In his talk, Chairman Klein emphasized that a fundamental role of the NRC and the public participation process is to "make extra efforts to explain" why certain actions are being taken by the NRC.⁵ This echoes a procedure begun at the time of the earliest nuclear power plant licensing proceedings. In those days, the Atomic Energy Commission (AEC) used the "limited appearance" statement process as an opportunity for the general public to express their views, usually concerns, and then to have someone from the regulatory staff or the applicant, explain in simple terms why the expressed concerns were unfounded.⁶ These "tutorials" became significant parts of the public relations program of the AEC. The process changed as the public became more sophisticated and the questions became less capable of simplistic answers so that today, while limited appearances are still allowed, there is no effort by the regulatory staff or the applicant to respond. Rather, like those contentions which, for some technical or legalistic reason, are deemed unacceptable for admission into a hearing, the

3. *Id.* at 43.

4. Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Remarks to the U.S. Department of Commerce Nuclear Energy Summit: Promoting Public Confidence in Nuclear Safety through High Standards (Oct. 8, 2008), <http://www.nrc.gov/reading-rm/doc-collections/commission/>.

5. *Id.* at 2.

6. 10 C.F.R § 2.705 (1984), now 10 C.F.R. § 2.315(a) (2008) (a person not a party to a hearing may "be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues").

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questions raised during the limited appearances, no matter how substantively relevant they may be, usually go unanswered.

Underlying all of these policies is a firm conviction, often masked but never fully hidden, at the highest levels of the NRC, that public participation is either a necessary evil foisted upon the agency by Congress in the original Atomic Energy Act or a public relations tool to be used as a way to convince the public that nuclear power plants are safe by allowing them to believe they are effectively participating in a process where they can see how well all legitimate concerns are addressed and resolved. As to the important business of safety, most of NRC's highest executives believe the real safety of nuclear power plants rests squarely and comfortably on the NRC's own vigorous examinations and oversight and the industry's solid commitment to safety and security. If the NRC were right, that public participation is irrelevant to safety and that nuclear power plant safety is assured by the NRC's regulatory actions and industry's commitments, then the steps it has taken over the last couple of decades to severely restrict and control public participation would at least have some rational basis. However, there is virtually no evidence to support the NRC's opinion regarding the lack of substantive benefits of public participation nor of its confidence that nuclear reactors are safe because of the NRC's efforts and the industry's commitment. In fact, there is considerable evidence that NRC's opinion is wrong on both counts. First, the evidence demonstrates that public participation can and has contributed substantially to the safety of nuclear power plants and second, the NRC and the industry have fallen down in their safety obligations in significant ways.⁷

In an important law review article, Richard Goldsmith, Professor of Law at Syracuse University, wrote almost two decades ago, "[r]eviving public 'confidence' in 'nuclear safety' thus requires the restoration of public confidence in 'nuclear regulation,' and the history of nuclear regulation in this country teaches that such confidence cannot be obtained if the public is excluded from the licensing process."⁸ Seventeen years later, the wisdom of that analysis is evident.

7. See *infra* Section IV.

8. Richard Goldstein, *Regulatory Reform and the Revival of Nuclear Power*, 20 HOFSTRA L. REV. 159, 160 (1991).

The NRC's present regulatory scheme, which severely limits public participation, is based on several premises, each of which is demonstrably in error. These assumptions are:

1. Over-active public participation was the cause of the demise of the nuclear industry because it delayed licensing which increased costs and made nuclear power unacceptable;
2. The new, more efficient, NRC has actually increased public confidence in nuclear power because the NRC has strengthened nuclear safety regulation;
3. The new regulations on public participation make for more efficient and predictable licensing outcomes.⁹

II. WHAT KILLED NUCLEAR POWER

Although some opponents of nuclear power may get pleasure in the idea that they were responsible for the death of nuclear power, the truth is, it was a suicide, not a murder. In the early days there were over-assurances about nuclear safety and the "too cheap to meter" mantra. These were followed by the unyielding insistence that all was well with nuclear power even as unforeseen problems arose, like fuel densification¹⁰ and the Brown's Ferry fire.¹¹ Then, there was mounting evidence that nuclear wastes were a growing problem in search of a diminishing solution.¹² The Advisory Committee on Reactor Safeguards (ACRS), an advisory committee established by Congress,¹³ regularly identifies unresolved safety problems that require regulatory attention.¹⁴ The list of unresolved safety problems actually grew over the years, even as some of the

9. See *infra* Section III.

10. See *Friends of the Earth v. U.S. Atomic Energy Comm'n*, 485 F.2d 1031 (D.C. Cir. 1973).

11. OFFICE OF INSPECTION & ENFORCEMENT, U.S. NUCLEAR REGULATORY COMM'N, BULLETIN NO. 75-04A, CABLE FIRE AT BROWN'S FERRY NUCLEAR PLANT (Apr. 3, 1975).

12. WARREN S. MELFORT, NUCLEAR WASTE DISPOSAL: CURRENT ISSUES & PROPOSALS vii-viii (2003).

13. 42 U.S.C. § 2039 (2006); 10 C.F.R. § 1.13 (2008).

14. See THE REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, COMMISSION FINDINGS: G. THE NUCLEAR REGULATORY COMMISSION, ¶ 7 (1979) [hereinafter TMI REPORT], available at <http://www.pddoc.com/tmi2/kemeny/> (last visited Feb. 5, 2009).

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problems were being addressed, particularly as the nuclear industry rapidly increased the size of nuclear reactors from a few hundred megawatts to 1300 megawatts.¹⁵ All of these events were like radiation-induced embrittlement of the credibility of nuclear power and the Three Mile Island (TMI) accident, involving a nearly brand new 900-megawatt reactor, was the thermal shock that shattered that credibility.¹⁶ TMI was not a full nuclear reactor meltdown; it was a full nuclear reactor credibility meltdown.

Following the accident, no new nuclear reactors were ordered in the United States and many reactors planned or under construction were cancelled.¹⁷ The nuclear power industry was in shambles because of its own arrogant dismissal of safety concerns and not for any other reason. The public was now convinced that nuclear power could not be operated reliably and safely. Several investigations were conducted regarding the root causes of the TMI accident¹⁸ and, as a result of those investigations, expensive and time-consuming modifications were required to most existing plants as well as those under construction and planned.¹⁹ The economic costs were rising rapidly and eventually it became evident to everyone but the most die-hard nuclear advocate, that any attempt to build more nuclear power plants would face powerful public opposition, in part, because the plants were economically unacceptable.²⁰

III. WHO TO BLAME?

Because neither the industry nor its supporters were able to accept the fact that they were the cause of the demise of nuclear power, they chose to make the public the scapegoat and to start an aggressive campaign to modify the rules by which the public

15. *Id.* at ¶ 8.

16. See generally *id.*; see also U.S. NUCLEAR REGULATORY COMM'N, FACT SHEET: THREE MILE ISLAND ACCIDENT 1 [hereinafter TMI FACT SHEET], available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html> (last visited Feb. 5, 2009).

17. Marsha Freeman, *Who Killed U.S. Nuclear Power?*, 21ST CENTURY SCIENCE & TECHNOLOGY, Spring 2001, at 23.

18. See generally TMI REPORT, *supra* note 14.

19. See TMI FACT SHEET, *supra* note 16, at 3-4.

20. See Freeman, *supra* note 17, at 4-6.

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could participate in the decisions relating to the siting, construction, and operation of nuclear power plants. In the latest in a long line of attacks on public participation, Llewellyn King, a long time pro-nuclear journalist, wrote about the origins of public participation and how he perceived it was used in licensing:

The idea was that this openness would encourage the public to take a greater interest in nuclear science and the civilian uses of nuclear. No other licensing procedure was so open or, as it turned out, so subject to distortion and abuse.

The net effect of the licensing regime established for nuclear was that any member of the public, without technical background and without any identifiable stake-holding in the proposed plant, could have standing and start the process of delaying a technical decision with lay arguments.²¹

In his recent address at the Nuclear Energy Summit, NRC Chairman Klein quoted from an *Energy Daily* article by King in which King bemoaned the fact that there is more public input in nuclear power plant licensing than in drug, airplane, or bridge approval.²² While Chairman Klein acknowledged that "transparency and public involvement must be key elements of the NRC's licensing and oversight" as noted above, his central theme is that the role of public participation is to build public confidence in nuclear power, not to enhance nuclear safety.²³ However, if one is to believe the nuclear industry claim, that not a single life has been lost due to the civilian nuclear power program, then nuclear power is doing much better with its enhanced public participation, than prescription drugs, airplane designs, or bridges where there is essentially no public input. One must wonder what lesson should be learned from King's comparison.

It is true that many NRC licensing hearings have been prolonged and stretched out over many years. But it was not the number of hearing days that made the process so long, it was how long it was taking the applicants and the NRC Staff to complete

21. Llewellyn King, *Why Nuclear Power Has Languished*, NORTH STAR WRITERS GROUP, Sept. 30, 2008, available at <http://www.northstarwriters.com/lk066.htm>.

22. See Klein, *supra* note 4, at 2.

23. *Id.*

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their reviews and submit their full case. Often, several days of hearings would result in months of delay while the staff and the applicant went back to the drawing board to find the answers to questions raised by intervenors or the Board, or to make changes to plant designs or procedures to eliminate problems that were exposed by the hearing process.²⁴ Thus, the perception that an operating license hearing that endured for more than five years was delayed due to the number of hearing days is totally without basis. In fact, then, as now, the applications and the staff documents, as lengthy as they may have been, were woefully deficient in detail and noticeably lacking in the specifics on issues of greatest concern to the intervening public.²⁵ Thus, it is not surprising that even today the bulk of the contentions raised in licensing hearings are based on the absence of data to support a claim rather than the substantive error in the claim itself. Thus, for instance, in the ongoing hearings regarding the proposed issuance of new, extended term licenses, for Indian Point 2 and 3, of the thirty-two contentions offered by New York State, almost half of the contentions are based on the failure of the application to contain information required by the law and regulations; of the fifteen contentions admitted for consideration by the Board in the hearings, over half are based upon the failure of the application to include information required by law or regulation.²⁶

The NRC Staff is also aware that the applications as filed and accepted for docketing are seriously deficient. It devotes months of its efforts to submitting requests for additional information (RAIs) to the applicant to complete the required details of the application.²⁷ This iterative process is not, in and of

24. Paul Gaukler, Address at the American Nuclear Society International Topical Meeting on Operating Nuclear Facility Safety: New NRC Hearing Rules—Hard Lessons Learned from the Trenches 2 (Nov. 18, 2004).

25. See generally *id.* at 3.

26. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), New York State Notice of Intention to Participate and Petition to Intervene, Docket Nos. 50-247-LR, 50-286-LR (Nov. 30, 2007); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order, LBP-08-13, Docket Nos. 50-247-LR, 50-286-LR (July 31, 2008).

27. See e.g. Request for Additional Information from the NRC Division of License Renewal, Office of Nuclear Reactor Regulation to Mr. Michael A. Balduzzi, Sr. Vice President and COO Entergy Nuclear Operations, Inc. (Subject: Review of the Vermont Yankee Nuclear Power Station, License Renewal Application) (Aug. 29, 2007); Requests for Additional Information from

itself, inappropriate and apparently reflects a serious commitment by the NRC Staff to improve the quality of the information it must review to make safety determinations. However, docketing the application long before the application is complete, when it often contains substantial areas in which the applicant merely promises to address an issue at a later date or leaves out most of the significant details of its proposed actions, creates the false impression that the time between when the application is "docketed" and when a final decision is rendered is attributable to the hearing process and public participation. This "delay" is then used to justify even further restrictions on the public's right to participate.²⁸

The effect of these deficiencies in the applications is to prolong the time required for processing an application. More significantly, it also places the public at a distinct disadvantage in attempting to meet the ever more stringent and rigid requirements to submit admissible contentions for hearings.²⁹ As characterized by NRC Staff in its "canned" pleading in response to public petitions to participate in the NRC licensing process for Indian Point, a contention must clear all of a large group of

the NRC Division of License Renewal, Office of Nuclear Reactor Regulation to Mr. Michael A. Balduzzi, Sr. Vice President and COO Entergy Nuclear Operations, Inc. (Subject: Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application) (Nov. 9, 2007).

28. A recent experience regarding the proposal to extend the operating license of the Vermont Yankee nuclear power plant in Vernon, Vermont, well-illustrates this point. The applicant, Entergy, has been dragging its feet on submitting a complete and accurate calculation of the impact of extended operation on metal fatigue. This problem dates back to its original application filed more than three years ago. After several efforts to produce only a partial set of calculations, Entergy was finally ordered in a partial final decision of the Licensing Board, to either produce the full calculations or have its license denied. See *Entergy Nuclear Vermont Yankee, LCC and Entergy Nuclear Operations, Inc.* (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3, and 4), LEP-08-25, Docket No. 50-271-LR (Nov. 24, 2008) at 151-52. This has delayed a final decision on the application for at least 6 months while Entergy produces the required calculations and the parties are allowed to submit new contentions based on the new calculations. In its records of how long it takes to issue final decisions on license renewal applications, NRC makes no effort to identify who is the cause of the delay but critics of public participation use those statistics to urge even more restrictions on public participation.

29. See generally 10 C.F.R. § 2.309(f) (2008).

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hurdles before it can be accepted for consideration in the hearing.³⁰

There is a revealing irony in the design of these regulations. The NRC staff, which will have been in contact with the applicant for many months, if not years, before the application is filed and will have frequent private meetings at which candid exchanges occur and documents are provided, and where even so-called proprietary documents are allowed to be viewed, is excused from taking a position on the license application until it issues its final environmental report and final safety evaluation, often a year or more after the notice of opportunity for hearing is filed.³¹ In fact, the NRC Staff does not even have to determine whether it will participate in the hearing until after the Atomic Safety and Licensing Board (ASLB or Board) has decided whether to admit any contentions.³² Nonetheless, the public, which has no direct access to the applicant and cannot probe the applicant to explain its position on any matter and which only has access to the small subset of documents which an applicant has chosen to make public, is expected to meet all the many hurdles regarding contentions it wishes to file within sixty days after notice of filing of the application.³³ These hurdles include substantial substantive obligations regarding the technical basis for disagreement and the evidence upon which such disagreement is based.³⁴

How can it be fair or in aid of full public participation to impose on the public a high burden of production and proof as a prerequisite to participation in a licensing hearing when such a standard is not even applied to the NRC Staff with its vast array of legal and technical resources? No objective observer would see this for anything other than what it is – a deliberate and

30. See, e.g., *Entergy Nuclear Operations* (Indian Point Nuclear Generating Units 2 and 3), NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club-Atlantic Chapter, and Assemblyman Richard Brodsky, and (2) Friends United for Sustainable Energy, USA, Docket Nos. 50-247-LR and 50-286-LR (Jan. 22, 2008).

31. See 10 C.F.R. § 2.332(b), (d).

32. *Id.* § 2.1202(b)(1).

33. *Id.* § 2.309(b)(3).

34. *Id.* § 2.309(f).

calculated plan to deprive the public of participation rights in NRC proceedings by imposing unreasonable and often unachievable evidentiary burdens as prerequisites to participation. Although some of these requirements have been partially challenged in *Citizens Awareness Network v. United States*³⁵ and the requirements have been upheld, no court has yet been confronted with a fully briefed challenge to the contention requirements as applied to a particular case. Such a challenge is likely to produce a far different result if the putative public participant makes a record of the inherent impossibility of meeting the standards as insisted upon by the NRC Staff.³⁶

Persuasive evidence of the true motives of the NRC is well illustrated by the attitude of its Regulatory Staff to attempts by the public to participate in decisions relevant to the NRC. In two recent examples, the Staff demonstrated an overt contempt for public participation by states and Indian tribes, in proceedings that directly affect their interests, by raising hyper-technical

35. *Citizens Awareness Network v. United States*, 391 F.3d 338 (1st Cir. 2004).

36. An important ameliorating influence on the harsh application of these regulations has been the rule of reason that the ASLB has imposed when interpreting the regulations. See, e.g., *Entergy Nuclear Operations* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting Riverkeeper, Inc.'s Motion and Amending Briefing Schedule), Docket Nos. 50-247-LR, 50-286-LR (Apr. 9, 2008); *Entergy Nuclear Operations*, Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2) (Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions EC-4 and EC-5) (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1), Docket Nos. 50-247-LR, 50-286-LR (Dec. 18, 2008). However, as encouraging as this is for those participating in the process, so long as the Commissioners hold the ultimate power on these matters and use it to squelch contentions which are otherwise sound and reasonable with hyper-technical and disingenuous analyses, as it has done in several cases, see *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), CLI-07-13, Docket No. 50-271-LR (Mar. 15 2007), the rule of reason adopted by the ASLB will have little lasting effect and the Commission's more draconian view of its own regulations will have the desired effect of chilling public participation by warning those who try to participate that all their efforts, regardless of the correctness of their concerns, may go for naught because of some technical requirements that could not be reasonably met.

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objections to their attempts to be part of the process.³⁷ NRC Staff questioned the authority of the general counsel of the Prairie Island Indian Tribe to represent the tribe as a party in the proceeding, and demanded that counsel, contrary to the rules that apply to all other parties, provide an affidavit from a tribal officer confirming that he had authority to represent the tribe.³⁸ Not surprisingly, the Board had no problem easily disposing of this claim by NRC Staff.³⁹

In a recently filed appeal by the NRC Staff to a ruling of the ASLB in *Entergy Nuclear Vermont Yankee, LCC and Entergy Nuclear Operations, Inc.* (Yankee Nuclear Power Station),⁴⁰ several states sought to file an *amicus* brief in opposition to the appeal based upon the fact that the issue which the Staff sought to challenge was also an issue in licensing proceedings in which they were parties.⁴¹ NRC Staff opposed the filing on several highly technical grounds, including the fact that the states had not previously sought to intervene in the *Vermont Yankee* proceeding, that they did not sufficiently detail how their participation as an *amicus* would be beneficial to the Commission, and that their participation would set a precedent that would allow states to "jump from proceeding to proceeding in an effort to further their plant-specific interests," as though it were undesirable for a state to seek to protect its interest in a specific case by participating in the resolution of issues that were

37. *Nuclear Management Company, LLC* (Prairie Island Nuclear Generating Plant, Units 1 and 2), NRC Staff's Answer to the Prairie Island Community's Petition for Leave to Intervene, Docket Nos. 50-282-LR, 50-306-LR (Sept. 12, 2008).

38. *Id.* at 6; *Northern States Power Co.* (formerly Nuclear Management Company, LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2), Memorandum and Order (Ruling on Petition to Intervene, Request for Hearing, and Motion to Strike), LBP-08-26, Docket Nos. 50-282-LR, 50-306-LR, at 7-9 (Dec. 5, 2008).

39. *Northern States Power Co.*, LBP-08-26, at 7-9.

40. NRC Staff's Petition for Review of the Licensing Board's Partial Initial Decision, LBP-08-25, Docket No. 50-271-LR (Dec. 9, 2008).

41. *Entergy Nuclear Vermont Yankee LLC*, Motion for Leave by the States of New York and Connecticut, Hudson Riverkeeper, Inc., Hudson River Sloop Clearwater, Inc., and the Prairie Island Indian Community to Submit Brief *Amicus Curiae* in Opposition to Staff's Petition for Review and in Support of Intervenors State of Vermont and the New England Coalition, Docket No. 50-271-LR (Dec. 19, 2008).

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directly relevant to those interest in another case.⁴² But most disturbingly, the Staff, in its zeal to prevent public participation by these interested states, cited to the Atomic Energy Act provision that assures states the right to participate in licensing proceedings by selectively quoting an excerpt from that statute that distorted its plain meaning.⁴³

The provisions of 42 U.S.C. § 2021(l) guarantee every state the right to participate in NRC licensing decisions:

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.⁴⁴

The obligation to give notice to a state is limited to the state in which the activity will occur.⁴⁵ However, the "reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission" applies to "State representatives," appears in a phrase separated by a semicolon from the "notice" phrase and is not limited to a state in which the facility is located.⁴⁶ NRC Staff in quoting from this provision and arguing that it is limited to states in which the facility is located, provided the following truncated version of the statute:

The Commission shall give prompt notice to the State or States *in which the activity will be conducted* of the filing . . . [of an application] and shall afford reasonable opportunity . . . for the

42. *Entergy Nuclear Vermont Yankee LLC*, NRC Staff's Reply to Motion to Submit Brief *Amicus Curiae*, Docket No. 50-271-LR, at 3 (Dec. 23, 2008).

43. *Id.* at 3-4.

44. Atomic Energy Act § 274(l), 42 U.S.C. § 2021(l) (2006).

45. *See id.*

46. *Id.*

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State to . . . advise the Commission with regard to the application.⁴⁷

By truncating the citation and leaving out the semicolon, Staff gives the misleading impression that the state, which receives notice of Commission action, is the only state that has a right to advise the Commission.

These examples of the Staff's crabbed view of the rules and regulations that govern public participation are hardly in step with the Commission's oft-expressed, but rarely implemented, goal of encouraging public participation in NRC decisions.

IV. PUBLIC PARTICIPATION PROVIDES VALUABLE ADDITIONS TO PUBLIC HEALTH AND SAFETY

If public participation were substantively valueless, as people like Llewellyn King, the nuclear industry, and many at the NRC believe, then restricting that participation would be of much less consequence. But the available evidence strongly rejects that assumption.

As early as 1974, when faced with a broadside attack on the value of public participation in NRC licensing decisions, the Atomic Safety and Licensing Appeal Board (since abolished by the Commission), drawing on its substantial experience with individual licensing decisions and their evidentiary records, recognized the contribution of public participation to nuclear safety:

Our own experience – garnered in the course of the review of initial decisions and underlying records in an appreciable number of contested cases – teaches that the generalization [that public participation contributes nothing to safety] has no foundation in fact. 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

^{47.} *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), NRC Staff's Reply to Motion to Submit Brief *Amicus Curiae*, Docket No. 50-271-LR, at 3-4 (Dec. 23, 2008).

licensing boards and appeal boards were raised in the first instance by an intervenor.⁴⁸

As recently as this last summer, Michael Farrar, an NRC hearing officer who has been serving as an NRC Judge for over thirty years, reaffirmed the valuable contribution that is made to NRC safety and environmental reviews by public participation:

The Petitioners were instrumental in focusing the Board's attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages.⁴⁹

These views were acknowledged by Chairman Klein, who recently stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders."⁵⁰ He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."⁵¹ Nonetheless, while the NRC today gives lip service to the value of public participation, its every action reflects a deep disdain for the usefulness of the public input on matters of safety or environmental protection. Yet, as the ASLAB recognized in the

48. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974) (citing *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5 371, 374 n.13 (May 25, 1973)) (footnote omitted).

49. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098-MLA, at 49 (June 27, 2008) (Farrar, J., concurring).

50. Dale E Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), <http://www.nrc.gov/reading-rm/doc-collections/commission/>; see also The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), <http://www.nrc.gov/reading-rm/doc-collections/commission/>; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co-operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), <http://www.nrc.gov/reading-rm/doc-collections/commission/>.

51. Klein, *supra* note 50, at Slide 11.

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River Bend case, intervenors have raised important safety and environmental issues that, but for their involvement, would not have been addressed in the NRC safety and environmental review.⁵²

But has public confidence in nuclear power increased? Since, as Chairman Klein has declared, it is the goal of the new NRC tactics to increase public confidence in nuclear power, it is worth looking at that issue to see if there is in fact increasing public confidence in nuclear power. One measure of the public attitude regarding nuclear power is how politicians view the issue. In recent years, an increasing number of elected officials have been raising serious questions about nuclear reactor safety. One of the leading public officials challenging nuclear power is Andrew Cuomo, Attorney General of New York State, who has expressed his unalterable opposition to the further operation of Indian Point and whose staff has filed one of the largest and most comprehensive challenges to a proposed license renewal.⁵³ Attorneys General in many other states are adding their voices of concern, including Massachusetts, Connecticut, California, and Nevada, to mention only a few. Similarly, President Barack Obama has endorsed the use of nuclear power only if high level waste disposal and critical safety problems can be resolved.⁵⁴

Increasing numbers of citizen organizations are mounting challenges to nuclear plant proposals and to NRC decisions. In one recent decision, *Massachusetts v. United States*,⁵⁵ the First Circuit expressed some concern that the NRC would actually obey the procedural interpretations it placed on its own regulations in order to prevail in the case and gave this unusual warning to the NRC:

52. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974).

53. Press Release, New York State Executive Chamber, Governor Spitzer & Attorney General Cuomo Announce Effort to Halt Indian Point Relicensing (Dec. 3, 2007), <http://www.state.ny.us/governor/press/1203072.html>.

54. Stephen Power, *In Energy Policy, McCain, Obama Differ on Role of Government*, WALL ST. J., June 9, 2008, at A2. See also Environment & Energy Daily which reported on April 22, 2009 ("No new nuclear or coal plants may ever be needed in the United States, the chairman of the Federal Energy Regulatory Commission said today. 'We may not need any, ever,' Jon Wellinghoff told reporters at a U.S. Energy Association forum").

55. *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008).

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Further, if the agency were to act contrary to these representations in this matter, a reviewing court would most likely consider such actions to be arbitrary and capricious.⁵⁶

Those are not the words of a court that has a lot of confidence in the NRC or its credibility.

But Chairman Klein has indicated that the key to public confidence is high standards. He may be right, but the NRC record is anything but evidence of high standards or, more importantly, of vigorous enforcement of those standards. Peter Bradford, the former NRC Commissioner and internationally recognized energy expert, compiled the following list of some of the more notorious lapses by NRC in its oversight and regulatory responsibilities, just in the last seven years:

1. January 7, 2003 - A *New York Times* story reported that the NRC had ruled that terrorism was too speculative to be considered in NRC licensing proceedings, even as the Bush administration and Congress considered terrorism likely enough to suspend habeas corpus and commit torture. This position has since been rejected by the Ninth Circuit Court of Appeals, but the NRC continues to apply it elsewhere. – The original staff testimony taking this position in opposition to an intervenor contention was submitted on September 12, 2001, one day after the terrorist attacks on the World Trade Center and the Pentagon. The licensing board wanted to admit the contention despite the staff opposition but was overruled by the commission.
2. A 2002 survey of NRC employees says that 40% would be scared to raise significant safety questions. Then Chairman Richard Meserve said this was a big improvement from the 50% of five years earlier.
3. From a *New York Times* editorial of January 7, 2003 – "Unfortunately, the regulatory agency that was supposed to ride herd on unsafe plants was equally negligent. A report just released by the NRC's inspector general concludes that the regulatory staff was slow to order Davis-Besse to shut down for inspection, in large part because it did not want to impose unnecessary costs on the owner and did not want to give the industry a black

56. *Id.* at 130.

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eye. Although the NRC insists that safety remains its top priority, its timidity in this case cries out for a searching Congressional inquiry into whether the regulators can still be counted on to protect the public from cavalier reactor operators."

4. In 2003 the NRC submitted the name of Sam Collins, the official who had overseen the Davis Besse shutdown delay, to the Office of Personnel for the highest civilian financial award, a 35% bonus. During the time covered by the award, the NRC inspector general also concluded that Collins had knowing[ly] inserted a false statement into a letter sent by the NRC chair to David Lochbaum at the Union of Concerned Scientists. As Lochbaum observed at the time, "The NRC has a safety culture problem. The survey released last December showed that only 51% of the workers felt comfortable raising safety concerns. The Commission can only reinforce the fears by rewarding a person who has falsified documents, chided those who did their jobs, and taken repeated steps to undermine safe."
5. Immediately after the September 11th attacks, the NRC rushed out a claim that nuclear power plants were designed to withstand such crashes. This claim, which had no basis, was later withdrawn.
6. Two unprecedented speeches by Commissioner Edward McGaffigan attacking groups with a history of responsible participation in NRC proceedings.
7. The claim by Senator Pete Domenici that he had successfully persuaded the NRC to reverse its "adversarial attitude" toward the nuclear industry by threatening to cut its budget by one-third during a 1998 meeting with the chair (from PETE V. DOMENICI, *A BRIGHTER TOMORROW: FULFILLING THE PROMISE OF NUCLEAR ENERGY* 74-75 (Rowman and Littlefield 2004)).
8. Current NRC chair (Dale Klein) appeared in paid industry ads attesting to the safety of Yucca Mountain. When Commissioner Jaczko was appointed from the staff of Nevada Senator Harry Reid, he was required to take no part in Yucca Mountain matters for a year or two. No such requirement was placed on Klein.
9. The NRC has eviscerated the opportunities for public participation that existed 15-20 years ago. To give but one of many examples, lawyers can no longer cross

examine but must submit their questions to the licensing board chair, who decides whether or not to ask them.

10. The top U.S. nuclear regulator vouched for the safety of a new Westinghouse nuclear reactor – yet to be built anywhere in the world – in a sales pitch to supply China's growing power industry. U.S. Nuclear Regulatory Commission Chairman Nils Diaz said that the \$1.5 billion AP1000 reactor made by Westinghouse Electric Co. is "likely to receive regulatory approval in the next few months."⁵⁷

The NRC's own Inspector General discovered that NRC Staff was copying into its reports on plant license renewal applications verbatim sections of the application itself, without attribution, and then, when the Inspector General went to test the Staff assertion that its review was thorough, even if its report writing was deficient, it was discovered the Staff had destroyed all the documents that allegedly demonstrated the thoroughness of its "independent" review.⁵⁸

In 2008 Judge Farrar raised concerns about whether the NRC Staff was primarily committed to a safety culture or whether its primary motivation was "do it faster" using two startling examples from the *Shaw Areva Mox Services* case before the ASLB, where safety was clearly not a paramount concern.⁵⁹ Judge Farrar noted that 1) the Staff initially supported allowing a decision on an operating license to proceed to final decision even though the construction of the facility had not yet begun, much less been completed, as required by NRC regulations and 2) was

57. Email from Peter Bradford, former member of the U.S. Nuclear Regulatory Comm'n, to Anthony Roisman (Jan. 15, 2009) (containing the text of a letter from Congressman Peter Welch to Congressman Henry Waxman outlining Bradford's concerns) (on file with author).

58. OFFICE OF THE INSPECTOR GEN., U.S. NUCLEAR REGULATORY COMM'N, AUDIT OF NRC'S LICENSE RENEWAL PROGRAM (OIG-07-A-15) 8-11, 15-16 (2007), available at <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/> (last visited Feb. 5, 2009); see also Memorandum from Hubert T. Bell, Inspector Gen., U.S. Nuclear Regulatory Comm'n, to Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, NRC Staff Review of License Renewal Applications (May 2, 2008).

59. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA (June 27, 2008) (Farrar, J., concurring).

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willing to ignore the requirements written into its own Safety Evaluation Report as part of the construction permit process and allow the facility to proceed without compliance with those requirements.⁶⁰

These events caused Judge Farrar to reach this conclusion:

The approaches the Staff took to two matters during this proceeding appear to raise concerns about the robustness of the agency's internal safety culture. Perhaps those two matters were aberrational, and can be explained away as of little broader consequence. But, on the other hand, they may be symptomatic of safety culture deficiencies, and thus raise a serious question about a foundation of nuclear safety – the culture of the government organization responsible for promoting it.⁶¹

To date, there is no evidence that the NRC Staff or the Commission has taken any steps to find the root cause of these serious lapses in NRC Staff commitment to safety nor taken steps toward identifying the root causes of NRC Staff decisions that seek to so seriously undermine its own obligation to safety.

Finally, the nuclear industry itself has changed in the last decade. With the advent of electric power deregulation and consolidation of nuclear power plant ownership into a handful of companies, there are new and ample opportunities for profits to trump safety and, regrettably, ample examples of laxness among the nuclear power plant owners. Before deregulation and the rise of "absentee" ownership of nuclear power plants, a local utility, with roots in the community and under a regulatory regime based on a guaranteed rate of return on capital and operating costs, an owner had no reason not to spend the money necessary to provide the best quality safety equipment and operating procedures. Now, as "merchant" owners, nuclear plant operators are: 1) selling power in competition with other forms of energy; 2) entering into fixed priced, long term power sale agreements to satisfy local public utility commissions focused primarily on protecting the pocketbook of electricity customers; and, 3) seeing the size of their profit margin directly affected by how much money they spend on safety, how much money they spend on

60. *Id.* at 45-48.

61. *Id.* at 46.

license applications, how large their plant staff is and how quickly they can complete work that requires the plants to be off line. While all these are laudable goals, they must not be allowed to over-shadow the principle goal of nuclear safety. Is that what is happening?

Without a vigorous and committed NRC Regulatory Staff fulfilling its duties as a safety watchdog, there is no comforting answer to that question. What is known is that over the last twenty years, the capacity factor for nuclear power plants has risen from the low sixties to the low nineties and there is no way to attribute that 50% improvement solely to a more efficient, and still safe, refueling process or other management initiatives implemented by the utilities.⁶² Certainly, one significant factor is that during that time period the NRC severely restricted the use of backfitting, i.e. the imposition, after construction or operation has begun, of safety improvements based upon new research resolving previously unresolved safety issues or addressing the occurrence of unanticipated safety problems such as fuel densification, the Browns Ferry fire or Three Mile Island.⁶³ The backfit procedure was used to compensate for the fact that all nuclear plants were licensed with substantial unresolved safety issues and that the fair price for that expediency was to backfit the nuclear plants with new safety equipment and procedures when resolution of the safety issue showed that such an upgrade was warranted.

The backfit standard used to be that if resolution of a previously unresolved safety problem demonstrated that a safety improvement was warranted, it was required. Now that safety improvement is only required if the Commission finds that there is:

A substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.⁶⁴

62. NUCLEAR ENERGY INSTITUTE, U.S. NUCLEAR GENERATING STATISTICS 1971-2007, <http://www.nei.org>.

63. See 10 C.F.R. § 50.109 (2008).

64. Id. § 50.109(a)(3).

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How does the NRC justify shifting the burden from the utility, to demonstrate that a safety backfit is not required, to the NRC, to justify that a backfit will provide a "substantial increase in the overall protection of the public health and safety" and how does the NRC justify allowing the cost of a safety improvement to be a factor in deciding whether to require it? At a minimum, such a drastic change in, and reduction of, safety requirements should have been proceeded by a thorough and publicly discussed analysis in the context of an adjudicatory hearing that demonstrated: that nuclear power had advanced sufficiently to be able to decisively conclude that the plants that had already been licensed were "safe" for their full term; that no important unresolved safety problems existed; and, that the industry had reached sufficient maturity to justify such a change. No such public hearings have been held and no such findings have been made. There is evidence that the nuclear industry is anything but "mature": sleeping guards, corroding pressure vessels and a shocking lack of candor by nuclear plant-owners⁶⁵ all suggest that, at best, the nuclear industry has morphed from an unsophisticated and nuclear naive child to a rebellious teenager, more in need of controls today than ever before.

In short, the public has much less confidence in nuclear power today than it did several decades ago and there is ample reason for such skepticism with a profit aggressive nuclear industry and a reluctant NRC regulator.

V. THE NEW HEARING REGULATIONS ARE NOT MORE EFFICIENT

Even though the NRC has wrongly blamed public participation as a major source of the nuclear industry's problems and ignored the evidence that public participation "not only 'can provide valuable assistance to the adjudicatory process', but on

65. E.g., Sharon Dunwoody et al *After Environmental Accidents, Public Deserves Candor*, THE SCIENTIST, Apr. 15, 1991, at 11; JOAN B. ARON, LICENSED TO KILL? THE NUCLEAR REGULATORY COMMISSION AND THE SHOREHAM POWER PLANT 8 (1998); U.S. GEN. ACCOUNTING OFFICE, NUCLEAR REGULATION: NRC NEEDS TO MORE AGGRESSIVELY AND COMPREHENSIVELY RESOLVE ISSUES RELATED TO DAVIS-BESSE NUCLEAR POWER PLANT'S SHUTDOWN (GAO-04-415) (May 2004); Steven Mufson, *Video of Sleeping Guards Shakes Nuclear Industry*, WASHINGTON POST, Jan. 4, 2008, at A01.

frequent occasions demonstrably has⁶⁶ done so, and even though the NRC has totally failed to increase public confidence in the safety and benefit of nuclear power due to its own lapses in regulatory oversight and the nuclear industries own shortcomings, has the NRC achieved its stated goal of making the nuclear licensing process more efficient? Again, the evidence is compelling that the nuclear licensing process has become less efficient, more convoluted, and ultimately vastly more vulnerable to attack in court as a result of misguided and, in many instances, just plain irrational changes to the NRC licensing process.

The core of the changes implemented by the NRC were to impose a series of barriers to any member of the public able to participate in the hearing process and inflict severe limitations on the issues that could be raised in the licensing hearing, including both substantive and procedural barriers. One of the more complete explanations of this draconian procedure is provided in the essentially canned analysis provided by NRC Staff in its opposition to the bulk, if not all, of the contentions proposed in license renewal proceedings. The following is taken from the NRC Staff's January 22, 2008 filing in the Indian Point relicensing hearings:

A. Legal Requirements for Contentions

1. General Requirements.

The legal requirements governing the admissibility of contentions are well established, and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)). Specifically, in order to be admitted, a contention must satisfy the following requirements:

(0) Contentions.

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
 - (ii) Provide a brief explanation of the basis for the contention;
 - (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

66. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974).

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- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
 - (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
 - (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.
- (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report . . .

10 C.F.R. § 2.309(f)(1)-(2).

The Licensing Board in this proceeding has previously addressed these standards at length, in its Orders denying certain petitions to intervene for failure to state an admissible contention. The Licensing Board summarized the standards in 10 C.F.R. § 2.309(f)(1), as follows:

An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to

specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

Memorandum and Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene) (Dec. 5, 2007), slip op. at 3; footnote omitted. As the Licensing Board further observed, sound legal and policy considerations underlie the Commission's contention requirements:

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." The Commission has emphasized that the rules on contention admissibility are "strict by design." Failure to comply with any of these requirements is grounds for the dismissal of a contention.

Id. at 4 (footnotes omitted).

The requirements governing the admissibility of contentions have been strictly applied in NRC adjudicatory proceedings, including license renewal proceedings. For example, in a recent decision involving license renewal, the Commission stated:

To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design," and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the

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contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." "Mere 'notice pleading' does not suffice." Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.

Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006); footnotes omitted; emphasis added.

Finally, it is well established that the purpose for the basis requirements is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom, supra*, 8 AEC at 20-21.⁶⁷

The use of terms such as "strict," "sufficient," "demonstrate," and similar admonitions underscores the rigidity with which NRC Staff and the Commission interpret these requirements. What is most notable is that in imposing the requirements for safety or even procedural requirements on the applicant, no similar rigidity is displayed. For example, pursuant to 10 C.F.R. § 54.13, all applications for license renewal must be "complete and accurate in all material respects."⁶⁸ Anyone who has participated in a license renewal proceeding knows how this requirement is ignored and how applicants are allowed to make major, substantive additions to their applications long after the application has been accepted and docketed by the NRC Staff. Perhaps the most notable of these afterthought amendments is the one that Entergy routinely files when it is challenged for its failure to demonstrate, as required by the regulations, that it has

67. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 1 and 2), NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club – Atlantic Chapter, and Assemblyman Richard Brodsky, and (2) Friends for United Sustainable Energy, USA), Docket Nos. 50-247LR and 50-286-LR, at 23-27 (Jan. 22, 2008) (footnotes omitted).

68. 10 C.F.R. § 54.13 (2008).

an aging management plan to address metal fatigue during extended license operation.⁶⁹ A similar laxity is evident in the manner in which NRC Staff, almost every month, grants an exemption under 10 C.F.R. § 50.12 from the safety standards imposed by 10 C.F.R. Part 50 because an applicant finds it too difficult or expensive to meet the requirements and offers a technically facile analysis to justify its entitlement to an exemption. If, as the NRC Staff and Commission delight in reminding intervenors, the requirements for public participation are "strict by design," fairness and good policy would dictate that safety regulations and filing requirements for applicants should also be "strict by design."

Of course, there have been hearings where issues were raised that lacked substantive merit and questions were asked that were pointless, but there are ample ways to prevent or substantially reduce such occurrences without excluding legitimate concerns about nuclear plant safety because of hyper-technical regulations and hyper-strict implementation of those regulations. The effects of these highly restrictive entry requirements have become evident to NRC's independent judges who see these requirements in action every day and who also have the best vantage point to judge the value of public participation.⁷⁰ One of the most pernicious aspects of the hearing regulations is the use of time limits as a one-way restriction to disadvantage the public.⁷¹ In essence, any prospective intervenor who does not raise every conceivable contention within the sixty day time period allotted for filing intervention petitions must face the additional hurdle of justifying a "late filed" contention even if the late filed contention is necessitated by the late filed application amendment or information from the applicant.⁷² There are no restrictions on when the applicant can file its license

69. *Entergy Nuclear Vermont Yankee, LCC and Entergy Nuclear Operations, Inc.* (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3, and 4), LBP-08-25, Docket No. 50-271-LR (Nov. 24, 2008).

70. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA, at 45, 49-58 (June 27, 2008) (Farrar, J., concurring).

71. *Id.* at 55-58.

72. 10 C.F.R. §§ 2.309(c), (f)(2)(iii).

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amendment or when the Staff must complete its safety or environmental reviews. However, there are strict deadlines on how soon after the amendment is filed when an intervenor must file a contention based on that amendment. This situation provides numerous opportunities for applicants and the NRC Staff to "game" the system to the detriment of public participation.⁷³

For example, when Entergy filed its application for license renewal at Vermont Yankee, it left out of the application the crucial information on how it would address the issue of metal fatigue during the extended license period.⁷⁴ It listed three options, any one of which it might choose to implement in the future.⁷⁵ A contention based on the deficiency in any one of those approaches would be attacked as premature and speculative, since Entergy had not yet decided which approach to take. Thus, the only arguably "admissible" contention was one that criticized the application for not having a program.⁷⁶ Of course, once that

73. A recent filing in the *Indian Point* relicensing proceeding illustrates the point. The staff sent its draft Supplemental Environmental Impact Statement (DSEIS) to the applicant on December 22, 2008. See Notice of Availability to Entergy Nuclear Operations Inc. from the NRC Division of License Renewal, Office of Nuclear Reactor Regulation (Subject: The Draft Plant-Specific Supplement 38 to the Generic Environmental Impact Statement For License Renewal of Nuclear Plants (GEIS) Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3) (Dec. 22, 2008). The applicant argued that a January 9, 2009 request for an extension of time to file contentions based on that filing was untimely because it should have been filed on January 2, 2009 in accordance with the ten-day time limit to file a motion based on an event. See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Entergy's Answer to NYS and Riverkeeper's Motions for Extension of Time to File Contentions Related to Draft SEIS, Docket Nos. 50-247-LR and 50-268-LR (Jan. 12, 2009); 10 C.F.R. § 2.323(a). The Commission provides no allowance for intervening holidays or weekends so Christmas, Christmas weekend and New Years are ignored. This left the party seeking to file a motion for an extension of time to file new contentions based on the DSEIS less than five working days. It is unlikely that the filing of the DSEIS on December 22 was a mere accident, particularly since the filing was more than a month after the date the Staff indicated the document would be filed, having granted itself an extension of time without the need to ask permission from anyone.

74. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3, and 4), LBP-08-25, Docket No. 50-271-LR, at 13 (Nov. 24, 2008).

75. *Id.*

76. *Id.* at 14.

contention was admitted, the applicant then chose one of the methodologies - it would recalculate the metal fatigue numbers to show they were not excessive but the actual recalculation was not provided.⁷⁷ Entergy filed its "final" recalculation, which the intervenor's expert promptly eviscerated.⁷⁸ Entergy then had to redo the recalculation (called a confirmatory analysis) and a new contention, which was opposed, had to be filed, and was allowed.⁷⁹ The NRC Staff joined in Entergy's opposition. Eventually, the Board found that additional calculations for other components had to be completed and were subject to challenge in the hearing, not deferred until the hearing was concluded as Entergy urged.⁸⁰ This illustrates how wasteful and inefficient a process is, which allows an incomplete application to trigger a contention filing obligation and then subjects the public to even greater barriers when it seeks to raise issues when they are ripe and which could not have been raised earlier. Not surprisingly, but still disappointingly, when NRC amended its rules, the only efficiencies with which it was concerned were those of applicants, not the public.

Another example of the absurdity of the "strict by design" procedural rules for intervenors and the need to seek leave to file a "late filed contention" every time new information is released, is the rule applied to challenges to the NRC Staff's environmental impact statement. Pursuant to the National Environmental Policy Act (NEPA), every major federal action, which includes decisions to license or relicense a nuclear power plant, must be preceded by an environmental impact statement.⁸¹ The final is always preceded by a draft on which public comments are submitted. Common sense would say that a concerned member of the public should participate in the impact statement process by filing comments on the draft but waiting to file any contentions challenging the impact statement only after the agency has had a chance to consider the comments and to issue its final impact statement, modified as it sees fit by considering the public

77. *Id.*

78. *Id.* at 14-15

79. *Id.*

80. *Id.*

81. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

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comments. However, the NRC position, relying on 10 C.F.R. § 2.323(a), is that all contentions challenging the impact statement are untimely if they are not filed shortly after the draft impact statement is issued or unless the final impact statement contains positions not previously identifiable from the draft. If, in the final impact statement, the NRC modifies the draft impact statement such that the initial contention is no longer accurate, the intervenor must file a new contention and meet all the special rules for filing such a new contention.

These problems are complicated by another bizarre requirement. Pursuant to 10 C.F.R. § 2.309(f)(2), environmental contentions arising under NEPA must be based on the environmental report filed by the applicant, even though the obligations imposed on the applicant are those contained in the NRC Regulations, 10 C.F.R part 51 and not those contained in NEPA.⁸² When the NRC Staff issues a draft impact statement under NEPA, contentions can be based on the draft only if it can be shown that they are based on information or conclusions that differ significantly from the information contained in the applicant's environmental report. However, a contention that challenges the applicant's environmental report because it does not comply with NEPA is rejected because an applicant cannot be required to comply with NEPA. So, how does a NEPA challenge become a contention if the Staff merely parrots what the applicant has said in the environmental report?

These multiple hurdles that intervenors face are not merely annoying, they are resource intensive and sap the limited resources of intervenors on procedural issues making it less likely they will have resources to address the substantive issues. Because they are procedural hurdles, they also challenge the pro se intervenor, without legal assistance, to meet every technical requirement, each of which is "strict by design," thus creating multiple opportunities for the applicant and NRC Staff to find a "flaw" in the intervenor's pleading. This allows an applicant or NRC Staff to expose a procedural misstep, while avoiding a hearing on the substantive concerns that have motivated the public participation by the intervenor.

82. "On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." 10 C.F.R. § 2.309(f)(2) (2008).

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In a recent concurring opinion, Judge Farrar explored, at length, the inequities and inefficiencies in the NRC hearing procedures.⁸³ He focused primarily on barriers to the public to entry into the hearing process and inappropriate deadlines on the public once the hearing process begins. He reached the following conclusion:

In my view, a set of conditions that fosters these approaches and disparities should not have been allowed to continue to develop within the bounds of the Commission's adjudicatory system.

* * *

The adjudicatory system ought to operate in the way it would if it were "really trying" (1) to encourage the participation of those who are protected by the Atomic Energy Act's grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.⁸⁴

Judge Farrar's comments were echoed by another long time NRC hearing judge, Alan Rosenthal, at the outset of an oral argument in nuclear waste repository (Yucca Mountain) hearings:

As the parties to the proceeding are likely aware, I became a member of this Board very recently. Upon joining it, I discovered to my amazement that the Department of Energy was taking the position that not a single one of the 100 -- of the 229 separate contentions filed by the State of Nevada was admissible. In addition, to my further amazement, I learned that the Nuclear Regulatory Commission staff had told the Boards that, in its view, only a very small number of those 229 contentions met the standards for admission contained in the Commission's rules of practice, more particularly, Section 2.309(f)(1). That amazement stemmed from the fact that, on the face of it, it seemed most unlikely that experienced Nevada counsel, which included a

83. See *Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility)* Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA, at 45, 49-58 (June 27, 2008) (Farrar, J., concurring).

84. *Id.* at 58, 59.

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former deputy general counsel of this agency were unable to come up with even one acceptable contention relating to this extraordinarily and unique proposed facility. Put another way, I found it difficult offhand to believe that Nevada counsel were so unfamiliar with the requirements of section 2.309(f)(1) that they simple were unable to fashion a single contention that met those requirements.

Now, it might turn out that despite this initial reaction, at day's end it will be determined by the members of the three boards, myself included, that, in fact, none of Nevada's contentions is admissible. In that connection, DOE and the NRC staff can be assured that each of their objections to the admissibility of contentions will have received full consideration by the time of our decision. Should, however, upon that full consideration, we conclude that a significant number of the Nevada contentions are clearly admissible, with the consequence that the objection to their admission was wholly insubstantial, for me at least, both DOE and the NRC staff will have lost credibility.

Obviously DOE has an interest in fending off at the threshold as much of the opposition to its Yucca Mountain proposal as responsibly can be done. It is not responsible conduct, however, to interpose objections that are devoid of substance on an apparent invocation of the old adage, nothing ventured, nothing gained. Insofar as concerns the NRC staff, unlike DOE, it is the regulator, not the promoter of the proposal. That being the case, it would be even more unseemly for it to interpose to the admission of contentions objections that are plainly without substance. Indeed, in such circumstances, the staff would, to its detriment, create the impression that it is not a disinterested participant in the licensing process but rather a spear carrier for DOE. Once such impression has been garnered, there would remain little reason to credit anything that the staff might have to offer.

In the Matter of U.S. Department Of Energy (High-Level Waste Repository) Docket No. 63-001-HLW, Transcript of Proceedings (Interim Draft) April 1, 2009 at 238-241.

VI. TRUNCATED AND CONVOLUTED HEARING PROCEDURES

Even if a member of the public overcomes all the hurdles and actually manages to meet the requirements for a hearing, the path to full and fair exploration of the few issues that survived the procedural gauntlet is littered with potholes and roadside bombs designed to further impede a full exploration of the issues pressed by a public participant. Until fairly recently, adjudicatory hearings before the NRC provided full use of trial type procedures, including discovery tools like interrogatories, document production requests, depositions and requests for admissions and the availability of cross-examination, during the hearing. In 2004 the NRC drastically changed its hearing regulations to substantially curtail the availability of all these procedures. Its stated reason for the change was "to make the NRC's hearing process more effective and efficient."⁸⁵ What it created instead was a labyrinth of confusing and arguably inconsistent procedural regulations which create an enormous amount of litigation potential over the meaning and application of these regulations. In addition, because the "system" created by NRC has no counterpart in other agencies or in federal or state courts, each time an issue arises under the regulations it is a case of first impression. While this "lawyers' full employment act" type of regulation may be comforting to the lawyers for license applicants who are well-paid for their time, it is an enormous drain on the resources of the public to struggle through the regulations to assert their right to full and fair hearings. After four years of the new regime, what is evident is that the process is neither effective nor efficient. The following discussion illustrates the difficulty a party will face in attempting to assert the right to use the full panoply of discovery and hearing procedures in those cases where their use is warranted.

Three statutory provisions address the choice of hearing procedures: 42 U.S.C. §§ 2021(l), 2231 and 5 U.S.C. § 556. Four NRC regulations also address the choice of hearing procedures: 10 C.F.R. §§ 2.309(g), 2.310(d), 2.336(f) and, to the extent Subpart L is chosen, § 2.1204(b)(3). The underlying rationale behind all of these provisions is that procedures to be used in an NRC

85. 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

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licensing hearing governed by the provisions of 42 U.S.C. § 2239(a), which require a hearing in "any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . upon the request of any person whose interest may be affected by the proceeding . . ." shall be those procedures that have been shown to be necessary for "resolution of material issues of fact which may be best determined through the use of the identified procedures."⁸⁶ Although this concept is relatively simple, based on a practical showing of the need for particular procedures, NRC has encrusted the concept with a series of complicated hurdles that a party must overcome before they can get to argue for the use of any of these procedures. In this way, the NRC regulations are neither effective nor efficient and their principal effect is to make it virtually impossible for any but the most well-financed members of the public to obtain meaningful hearing procedures. The following discussion explores the current NRC regulations governing the hearing procedures available to a party to the proceeding and the difficulty involved in attempting to use these procedures. Instead of allowing a procedure to be used if it's shown that it is the best procedure for the purpose, a series of alternative tests have been developed that are not only virtually impossible to meet but also depart substantially from the practical test, endorsed by the Administrative Procedure Act (APA) and ostensibly adopted by the NRC.

NRC and applicants claim that in the 2004 regulatory amendments, the NRC announced two basic principles. First, by requiring all parties to a hearing to disclose all documents relevant to the issues raised in the proceeding, the need for any additional discovery would be negligible.⁸⁷ Second, the only way to gain the right to ask for additional discovery procedures

86. 10 C.F.R. § 2.309(g); *see also* 10 C.F.R. § 2.1204(b)(3) (cross-examination allowed under Subpart L where it is shown that it is "necessary to ensure the development of an adequate record for decision").

87. *See* 69 Fed. Reg. at 2194. However, unlike the federal rules which, in addition to the mandatory disclosures in FED. R. CIV. P. 26(a)(1), also allow interrogatories, document production requests, depositions, and requests for admissions, NRC essentially forecloses any other discovery. If the federal courts, with their extensive experience, do not believe the mandatory disclosures alone are sufficient, it is difficult to see what basis the NRC has for its assertion that such disclosures are enough. NRC offered none when it adopted the new rules.

(absent gross misconduct by a party in fulfilling its mandatory disclosure obligations)⁸⁸ is for the hearing board to decide at an early stage in the hearing that certain draconian tests have been met to justify placing the hearing in a special category where the opportunity to use other discovery procedures is available. In order to carry out its grand plan in 2004, the NRC created several hearing tracks, called Subparts. The Subparts most relevant to issuance of new extended operating licenses are Subparts G and L. To understand how complicated this procedure is, it is necessary to explore it in some detail because, as noted, it too is "strict by design."

According to the provisions of 10 C.F.R. § 2.336(f), the mandatory disclosure requirements of § 2.336 are "the sole discovery permitted for NRC proceedings [under 10 C.F.R. Part 2] unless there is further provision for discovery under the specific subpart under which the hearing will be conducted." NRC Staff and applicants maintain that the choice of hearing procedure is solely governed by 10 C.F.R. § 2.310, entitled "Selection of hearing procedures."⁸⁹ The provisions of 10 C.F.R. § 2.310(a) provide that a relicensing proceeding "may be conducted under the procedures of subpart L" (emphasis added) but do not mandate such use and in § 2.310(c), set forth one way in which a Subpart G proceeding (where provisions allowing for the full use of discovery and cross-examination exist) might be justified. Additional discovery and cross examination by the party are allowed in Subpart G but prohibited in Subpart L, except cross-examination may be available if a special showing is made under Subpart L.⁹⁰ Thus, the choice of the hearing Subpart itself is a significant hurdle that must be overcome and the factors that apply to determine which hearing Subpart will be used are, at best, confusing. The most sensible interpretation of these confusing regulations, as discussed below, is that any particular discovery procedure in Subpart G is available in any case where the use of the procedures can be shown to be necessary for

88. 10 C.F.R. § 2.336(e).

89. As discussed, *infra*, there is an alternative interpretation of the regulations in which the choice of individual discovery procedures is not governed solely by whether the entire proceeding is under Subpart L or Subpart G, but is done on an issue by issue basis, as authorized by 10 C.F.R. §2.309(g), which is also entitled "Selection of hearing procedures".

90. 10 C.F.R. §§ 2.336(f), 2.1204(b)(3).

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"resolution of material issues of fact which may be best determined through the use of the identified procedures."⁹¹

A determination of whether to use Subpart G or Subpart L is done on a contention by contention basis, creating the possibility that in a single hearing both Subparts might be applicable. This could prove confusing if, as is often the case, issues with regard to one contention have some bearing on a different contention. Separating the procedures so that they stay within the confines of the contention to which they are applicable is the kind of line drawing exercise that invites constant challenges from the party opposing the use of the procedure and wastes legal resources squabbling over discovery which, in many instances, will be less time-consuming and expensive than the actual battle over whether the appropriate procedure is being used for the appropriate issue.

There is a more rational interpretation of the regulations than the one advanced by NRC Staff and applicants that is both consistent with the regulatory language and more efficient. Although Subpart G includes a number of adjudicatory procedures and allegedly provides the sole basis for use of such procedures,⁹² application of Subpart G discovery procedures to a contention may be justified on the basis of the likely need for only one of those procedures. Under § 2.309(g), use of Subpart G is required whenever it can be shown that, as to any of the Subpart G procedures, "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." That does not mean that all

91. 10 C.F.R. § 2.309(g).

92. In its brief to the First Circuit in *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004), the NRC emphasized the availability of subpart G procedures as a "sanction" for failure to comply with the requirements of 10 C.F.R. § 2.336. Brief for the Federal Respondents at 49; see also 10 C.F.R. § 2.336(e)(1) (among the sanctions available against a party for its "continuing unexcused failure to make the disclosures required" is "use of the discovery provisions in subpart G"). However, there are many instances in which full compliance with the requirements of § 2.336 may still leave substantial gaps in the available information with regard to material facts needed to develop an adequate record or where it will not be possible to demonstrate that the § 2.336 disclosures are incomplete. This is the kind of phantom discovery right that pervades the NRC regulations but that is almost impossible to exercise in practice. Either that was deliberate or the authors of the regulations were unfamiliar with the practicalities of litigation.

Subpart G procedures are available with regard to the contention. The regulations provide wide discretion to the ASLB to determine whether, and to what extent, a party may use discovery tools identified in Subpart G.⁹³

Thus, arguably, the regulations create a two-step process. Step one, set forth in § 2.309(g), is to demonstrate that it is reasonable to anticipate that the use of one or more Subpart G procedures will be required for certain contentions. Once the Board accepts that analysis, it will still be necessary for the party seeking to use a particular Subpart G procedure to justify its use with regard to a particular contention. In this way, the Board would control the use of each procedure and assure that its use (1) would not unduly delay the hearing, (2) would involve the use of a procedure that was best to obtain the necessary information and (3) would serve the goal of developing an adequate record. As discussed, *infra*, one of the principle goals of discovery, if conducted properly, is to reduce hearing time and make the entire process more efficient. Thus, the standard for deciding whether any particular Subpart G discovery procedure should be used in a particular proceeding is set forth in § 2.309(g) and unequivocally identifies a functional test, drawn from the Administrative Procedure Act (see discussion *infra* of 5 U.S.C. § 556). The touchstone for deciding on the use of Subpart G procedures is whether "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."⁹⁴ Under § 2.309(g), a petitioner "must demonstrate by reference to the contention and the bases provided and the specific procedures" that this test is met in order to proceed under Subpart G.

While this appears to be the most rational interpretation of the NRC regulations, NRC Staff and applicants see the matter quite differently. In their view, the choice between Subpart G and Subpart L is an all or nothing proposition in which intervenors lose the right to any additional discovery unless they can demonstrate that they can prove the hearings must be conducted under Subpart G. The test they assert that must be met is set forth in 10 C.F.R. § 2.310(d), a test which is totally

93. See 10 C.F.R. §§ 2.319(f), (g), (k), (q), (r); 2.705(a), (b)(2).

94. 10 C.F.R. § 2.309(g).

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unrelated to any of the discovery procedures and is, at best, a test for determining whether to allow a party to conduct cross-examination.⁹⁵

There is no doubt that the NRC regulations are confusing because both the provisions of 10 C.F.R. §§ 2.309(g) and 2.310(d) appear to address the test for which hearing procedure to use. The test set forth in § 2.310(d) applies a different, and perhaps more lenient, test than § 2.309(g), and includes additional alternative tests which are uniquely relevant only to the use of cross-examination but of no relevance to whether requests for admissions, interrogatories, depositions or document production requests should be allowed. It should be possible to ignore the test in § 2.310(d) where a party can meet the test in § 2.309(g). However, in *Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station)⁹⁶ the licensing board ruled, 1) the only test for Subpart G use is contained in § 2.310(d) and 2) § 2.310(d) requires a showing that the credibility of a witness or the witnesses intent or motive must be at issue before any Subpart G procedures are available.⁹⁷

95. 10 C.F.R. § 2.310(d):

In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence 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, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

96. LBP-04-31, Docket No. 50-271-OLA, 60 N.R.C. 686, 694-95 (Dec. 16, 2004).

97. The Board concluded that § 2.309(g) "simply specifies how to submit a request for a particular hearing procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d)." *Id.* at 695 n.7. With due respect to that Board, no fair reading of the language of § 2.309(g) supports the proposition that it is simply a procedural regulation describing "how" to submit a request for Subpart G proceedings. A more logical interpretation is that because the focus on much of the controversy about the proposed new regulations was on the use of cross-examination, the Commission was focused on cross-examination when it wrote the test in § 2.310(d) and did not consider the instances in which other Subpart G procedures might be needed even though the credibility of a witness or the intent of a party were not at issue. See 69 Fed. Reg. 2182, 2205, 2222 (Jan. 14, 2004) (where the Commission's discussion of the issue is focused on cross-examination and not discovery procedures). This view

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The decision offers no analysis of the bearing those concepts have on the need for additional discovery procedures.

As noted *supra*, § 2.310(a) does not mandate the use of Subpart L in licensing proceedings but merely says that a hearing board *may* use that Subpart unless it finds the standard in § 2.310(d) has been met. Another Vermont Yankee ASLB, addressing the issue of hearing procedure choice in a license renewal proceeding, emphasized the discretion afforded the hearing board in deciding whether to use the procedures of Subpart L.⁹⁸ The Board found:

If a specific hearing procedure is not mandated, the plain language of 10 C.F.R. § 2.310(a) uses the term 'may' in describing our options in selecting the appropriate hearing procedures. The use of the permissive 'may' instead of the mandatory 'shall' indicates that even if a petitioner fails to demonstrate that Subpart G procedures are required, the Board 'may' still find that the use of Subpart G procedures is more appropriate than the use of Subpart L procedures for a given contention.⁹⁹

Thus, if a party meets the provisions of § 2.309(g) for use of Subpart G procedures for a contention, then, even if it is a Subpart L proceeding, Subpart G procedures should be available. This is essentially the ruling adopted by the ASLB in the *Indian Point* license renewal proceeding where it concluded that it would defer ruling on whether to use Subpart G or Subpart L hearing procedures until the case could be made for the need for the use of a particular procedure. *Id.* Memorandum And Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G), December 18, 2008 at 13.

is supported by the fact that the Commission does allow cross-examination in a Subpart L proceeding if a showing can be made that cross-examination is "necessary to ensue the development of an adequate record for decision" (10 C.F.R. § 2.1204(b)(3)) when the § 2.310(d) test is not met. 10 C.F.R. § 2.309(g) is the counterpart for discovery procedures to be used in a Subpart L proceeding on a contention by contention basis when the § 2.310(d) test is not met.

98. *Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, Docket No. 50-271-LR, at 86 (Sep. 22, 2006).

99. *Id.*

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But, there is another issue created by insisting that the sole test for choosing the Subpart to use is contained in § 2.310(d). It is arguable that § 2.310(d), if read "strictly" would allow for an even broader use of Subpart G procedures than applying § 2.309(g). Under § 2.310(d) the test is whether the ASLB finds that:

In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that [1] resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, [2] where the credibility of an eyewitness may reasonably be expected to be at issue, and/or [3] issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter *will be conducted under subpart G* of this part.¹⁰⁰

The plain reading of this regulation is that Subpart G must be used if any one of the three enumerated standards is met.

As written, by using commas to separate each of the three phrases as well as the conjunctive "and/or" phrase between the second and third phrase, § 2.310(d) establishes three separate standards that can be read either disjunctively or conjunctively.¹⁰¹ As a general rule of statutory construction, the use of a conjunctive (such as "or") before the last term in a series indicates that each term in the series is intended to be read in the disjunctive and given separate meaning.¹⁰² In addition, the use of the commas, along with the "and/or," signals that each phrase is to be read separately.¹⁰³ Basic grammar principles do not allow

100. 10 C.F.R. § 2.310(d) (emphasis added) (brackets added).

101. *Id.*

102. See *United States v. Urban*, 140 F.3d 229, 232 (3d Cir.1998).

103. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 2 (3rd ed. 1979) ("In a series of three or more terms with a single conjunction, use a comma after each term except the last . . . This comma is often referred to as the 'serial' comma."); THE CHICAGO MANUAL OF STYLE ONLINE § 6.19 (The Univ. of Chicago ed., 15th ed., 2007), <http://www.chicagomanualofstyle.org> ("Items in a series are normally separated by commas. . . When a conjunction joins the last two elements in a series, a comma—known as the serial or series comma or the Oxford comma—should appear before the conjunction. Chicago strongly recommends this widely practiced usage, blessed by Fowler and other

for any other reading of the text.¹⁰⁴ Thus, on its face, the plain meaning of § 2.310(d) establishes three separate tests and either all three tests have to be met or any one of them can be met.¹⁰⁵

In bypassing the plain text of the regulation, the Vermont Yankee Board's September 22, 2006 decision also eschewed a second rule of construction: when a statute's language is plain, "the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms."¹⁰⁶

The Statement of Consideration accompanying the amendments to NRC's adjudicatory process in 69 Fed. Reg. 2182 contains statements that support the view that § 2.309(g) provides the standard to be used for selecting Subpart G procedures and that § 2.310(d) has a more limited role. The ASLB panel in *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station) referred to this regulatory history when it addressed the choice of procedures issue.¹⁰⁷ In its decision, the ASLB panel recognized that the standard set forth in § 2.310(d) was primarily intended by the Commission to be tied to a claim for the right to cross-examine.¹⁰⁸ The ASLB quoted from the Statement of Consideration, where, in adopting the current test in § 2.310(d), the Commission offered the following extended discussion of its reasoning in adopting the language in

authorities . . . , since it prevents ambiguity."); *see generally* LYNNE TRUSS, EATS, SHOOTS & LEAVES 68-103 (2004).

104. I am grateful to John Sipos, Assistant Attorney General, Office of the Attorney General for the State of New York, for the grammatical insights and references related to this point.

105. As written, § 2.310(d) is not a model of clarity as to the criteria for tests 2 and 3, particularly test 3, which appears to have dropped a verb between "eyewitness" and "material." This merely underscores the conclusion that if the standard for Subpart G hearing procedures set forth in § 2.309(g) has been met there should be no reason to enter the § 2.310(d) maze. Since both sections are titled "Selection of hearing procedures" an either/or approach makes the most sense and gives meaning to both provisions.

106. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4 (2000) (internal citations omitted); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) ("in any case of statutory construction, a court's analysis begins with the language of the statute . . . [and] where the statutory language provides a clear answer, *it ends there as well*" (emphasis added)).

107. Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures), RAS 11713, Docket No. 50-0219 LR, at 2-3 (June 5, 2006).

108. *Id.* at 3.

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that section, showing clearly, that it was focused on the portion of Subpart G that relates to cross-examination when it developed the standards in § 2.310(d), not on discovery:

Rather, the Commission agrees with the thrust of the commenters opposing this criterion that, inasmuch as neither the AEA nor the APA require the use of the procedures provided in Subpart G, they should be utilized only where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters. *In the Commission's view, the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination which challenges their recollection or perception of factual occurrences.* This also appears to be the position of several citizen group commenters, judging by the reasons given for their opposition to greater use of Subpart L procedures. *Hence, the Commission focused on criteria to identify those contested matters for which an oral hearing with right of cross-examination would appear to be necessary for a fair and expeditious resolution of the contested matters.* Common sense, as well as case law, lead the Commission to conclude that oral hearings with right of cross-examination are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event."¹⁰⁹

Another reason why the test under § 2.310(d) should not be applied to a request for Subpart G discovery procedures is that the test, as interpreted by the Vermont Yankee and Oyster Creek ASLBs, is focused on witness credibility and intent, thus creating substantial opportunity for delay in the proceeding. For example, at an early stage in the proceeding where the provisions of § 2.310(d) are intended to be applied, it is not possible to even know the names of the witnesses, much less their proposed testimony. Thus, it would be impossible for the Board or the parties to intelligently address whether "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 [are involved]," until after the mandatory disclosures required by § 2.336 and the final witness lists were

109. 69 Fed. Reg. 2182, 2205 (quoting Union Pac. Fuels v. FERC, 129 F.3d 157, 164 (DC Cir. 1997)) (emphasis added) (footnote omitted).

submitted. The ASLB in Vermont Yankee recognized this dilemma and chose to postpone a final decision on whether to use the Subpart G procedures until after the final witness list was submitted.¹¹⁰

But there are problems with the Vermont Yankee approach, which was necessitated by the ASLB's earlier decision interpreting § 2.310(d) to require a showing on credibility and/or intent as a prerequisite to a Subpart G hearing. First, if the required showing were made at the time of the filing of the final witness list, the full panoply of discovery procedures would be available for the first time and their use at that time would almost certainly cause delay in the hearing procedure, thus defeating the most significant justification offered by the Commission for adopting the 2004 rule changes as they relate to discovery.¹¹¹ Second, without the benefit of depositions and other discovery procedures it will be extremely difficult to mount a challenge to a witness's truthfulness. Finally, in the unlikely event a case can be made that a witness's truthfulness is at issue, there is nothing to prevent the party from substituting someone else for the offending witness. Once again, the apparent availability of trial type procedures is more illusory than real.

The § 2.310(d) test focuses exclusively on the truthfulness of an eyewitness or the intent of that witness. Neither of those considerations has any relevance to whether to allow a deposition, interrogatory, document production request or request for admission where the principal goal is to "discover" what are the bases for a party's position and/or to eliminate from controversy in the hearing issues and facts on which there is no disagreement. It makes no sense to limit access to those important and useful discovery tools by tests that have nothing to do with the need for their use. The practical standard set forth in § 2.309(g) ("resolution of the contention necessitates resolution of material issues of fact which may be best determined through the

110. See *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Initial Scheduling Order, RAS 9241, Docket No. 50-271 LR, at 3 (Feb. 1, 2005).

111. See 69 Fed. Reg. at 2194 ("The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery.").

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use of the identified procedures") is easy to implement and serves the real goal of the hearing – establish the facts relevant to a fully informed decision on the issues in contention.

Thus, reading the literal language of the relevant regulatory sections and applying the policy considerations that underlay the Commission's adoption of the 2004 amendments to Part 2, a more rational reading of the NRC regulations is that, in a rare case where witness credibility appears to be central to the issues and this can be shown at an early date, a party can seek to have the entire hearing on that contention conducted under Subpart G. However, in the more normal case, after the mandatory disclosure requirements of 10 C.F.R. § 2.336 are met, a party can seek to use the provisions of § 2.309(g) to justify the use of discrete discovery procedures applied to discrete issues to fully develop their case. To obtain the use of any Subpart G procedure, the party seeking its use must demonstrate that the particular instance "necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."¹¹²

As the preceding discussion illustrates, even if the NRC were to accept this common sense interpretation of its regulations, there is a complicated series of tests and analyses that must be performed to reach that conclusion. That does not encourage efficiency nor meaningful public participation. In addition, by pressing the relevance of § 2.310(d) instead of the more common sense approach suggested above, NRC Staff is pushing a test that is so narrow it is virtually impossible to meet. This position by NRC Staff supports the earlier conclusion, that NRC Staff and the NRC believe the public has nothing useful to contribute to the relevant issues and that all hearings are a waste of time and resources that could be better spent by the Staff and applicant on other more fruitful endeavors. It would be refreshing if this hidden motivation were openly acknowledged so that there could be an open and vigorous debate on the topic. If the Staff and applicants were correct, they could convince Congress to abolish public participation in the licensing process, much as advocates like Llewellyn King assert is the case for other federal regulatory agencies. However, if they cannot defend their undisclosed

112. 10 C.F.R. § 2.309(g) (2008).

premise, which many knowledgeable members of the NRC hearing boards and others believe they cannot, then NRC would have to abandon this multi-year and multi-pronged effort to cripple public participation and could direct its efforts to really making public participation more effective and more efficient. Some modest steps in that direction are suggested at the end of this article.

VII. SUBPART G DISCOVERY TOOLS PROMOTE JUDICIAL ECONOMY

Each of the discovery procedures in Subpart G must be justified by the party seeking its use and the Board, using its broad discretion, may limit the use of a particular discovery tool by, for example, placing a limit on the number of interrogatories, requests for admissions, or document production requests or by placing time limits on depositions. This will allow discovery to be used as intended in the Federal Rules of Civil Procedure (FRCP), which is to shorten the hearing by discovering and clarifying facts and pinning down the position of parties.

When the Commission adopted the 2004 amendments to 10 C.F.R. Part 2, it specifically noted that it was drawing upon the Federal Rules of Civil Procedure.¹¹³ Significantly, when Congress implemented the 1993 Amendments to the FRCP it did not abolish the right to other discovery procedures such as interrogatories, depositions, requests for document production, and admissions. Rather, it strengthened the power of courts to control the use of those procedures while continuing other procedures, which, when they were adopted, were intended to improve the efficiency of the process. For example:

Rule 36 [requests for admissions] serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.¹¹⁴

113. 69 Fed. Reg. 2128, 2194 ("The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, have been tailored to reflect the nature and requirements of NRC proceedings.").

114. FED. R. CIV. P. 36, 1970 (Advisory Committee's Note).

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Depositions can make the entire process more efficient by assuring that persons possessing the knowledge offer the information provided by the opposing party rather than persons who the opposing party merely wants to have offer the information:

The testimony of a Rule 30(b)(6) witness is binding on the entity and goes beyond the individual's personal knowledge. A corporation has an affirmative duty to produce a representative who can answer questions that are within the scope of the matters described in the notice. *In Bracco Diagnostics Inc. v. Amersham Health Inc.*, C.A. No. 03-6025(SRC), 2005 U.S. Dist. LEXIS 26854, at *3 (D.N.J. 2005) (citations omitted), the Court succinctly summarized the benefits of a Rule 30(b)(6) deposition:

A 30(b)(6) deposition more efficiently produces the most appropriate party for questioning, curbs the elusive behavior of corporate agents who, one after another, know nothing about facts clearly available within the organization and suggest someone else has the requested knowledge, and reduces the number of depositions for which an organization's counsel must prepare agents and employees.¹¹⁵

As one district court noted, in chiding the parties for failing to cooperate to allow depositions to proceed "any eventual trial of this case will undoubtedly be more efficient if the depositions at issue go forward."¹¹⁶

In addition, courts have recognized that mandatory disclosures, similar to those provided under 10 C.F.R. § 2.336, are often insufficient to meet the legitimate goals of the opposing parties and that additional discovery will be required:

Plaintiff has requested more specific information in response to the request that each person listed in the Supplement to Attachment "A" to Defendants' Initial Disclosures (Motion to Compel, Exhibit D) be identified and a summary of the discoverable information possessed by each provided. The defendants have provided the identification information for the

115. *Harris v. New Jersey*, No. 03-2002 (RBK), 2007 WL 2416429, at 2* (D.N.J. 2007) (footnote omitted).

116. *Landeen v. Phonebillit, Inc.*, No. 1:04-cv-01815-LJM-WTL, 2007 WL 2902212, at 2* (S.D. Ind. 2007).

persons listed, but the summary of the information possessed by that person is often couched in generalizations such as, . . . "has information concerning certain matters alleged in the pleadings, including Tinley's business practices." The court finds this level of response to be inadequate. The plaintiff is entitled to a more complete factual summary of the individual's alleged knowledge about the issues relevant to this case and the basis for such knowledge. The plaintiff is entitled to enough basic information to allow him to determine, for instance, why the individual is placed on the defendants' list of initial disclosure in the first instance. If the defendants more fully describe the information possessed by the person listed, the plaintiff can more readily cull his list of necessary potential interviews or depositions and therefore save time and expense in trial preparation. Given that the defendants chose to include the person in their initial disclosures, the defendants are already knowledgeable about, at least, the general nature of the prospective witness's potential testimonial knowledge.¹¹⁷

A request for a further specification of information following § 2.336 disclosures is not clearly contemplated by Subpart L or § 2.336 but it would be readily available under Subpart G procedures.

The judicial recognition of the valuable assistance and improved efficiency associated with the proper use of pretrial discovery is also endorsed by administrative law judges. In discussing formal hearings under the APA, the Manual for Administrative Law Judges notes that "if [the] exchange of evidence is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced."¹¹⁸

Much time is wasted at evidentiary hearings while the Board attempts to determine precisely what each witness is claiming, or what commitments have been made by the applicant or are being imposed by the Staff. Allowing carefully controlled discovery with limits on the time for discovery will not only not delay the

117. *Tinley v. Poly-Triplex Technologies, Inc.*, No. 07-cv-01136-WYD-KMY, 2008 WL 732590, at 2* (D.Colo. 2008).

118. *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 56 (Morell E. Mullins ed., William H. Bowen School of Law 2001) (1993), <http://ualr.edu/malj/malj.pdf>.

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start of the evidentiary hearing, but will undoubtedly allow the hearings to be more focused and proceed more efficiently.

VIII. NRC REGULATIONS AND THE ADMINISTRATIVE PROCEDURE ACT

Pursuant to the Atomic Energy Act, the NRC is required to follow the mandates of the Administrative Procedure Act.¹¹⁹ The APA, 5 U.S.C. §§ 551 (2006), provides the minimum obligations that an agency must meet when it provides an opportunity for a hearing, as the NRC does, pursuant to 42 U.S.C. § 2239(a). In *Citizens Awareness Network, Inc. v. United States*,¹²⁰ the court upheld the NRC procedures for licensing hearings insofar as the provisions related to discovery rights and cross-examination.

The ruling in *Citizens Awareness Network* regarding the interplay between the APA and the AEA, plus the Commission's representation to the court about the meaning of its own regulations, provides conclusive support for the proposition that the only proper interpretation of the Commission regulations is that § 2.309(g) sets an acceptable standard for when Subpart G procedures may be used. Even if § 2.310(d) is an alternative test for application of Subpart G rights, *Citizens Awareness Network* provides support for the view that under this regulation, a Subpart G proceeding is authorized "where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity."¹²¹ In *Citizens Awareness Network* the Commission argued that its procedure for allowing the use of cross-examination was wholly consistent with the mandate of the APA. It referred to the following language in § 2.1204(b)(3) to support that proposition:

The presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by

119. 42 U.S.C. § 2231 (2006).

120. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004).

121. *Id.* at 345 n.3.

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the parties is necessary to ensure the development of an adequate record for decision.¹²²

The *Citizens Awareness Network* court agreed that the cited language meets the APA standard. In reaching that conclusion the court made the following ruling:

The APA does require that cross-examination be available when "required for a full and true disclosure of the facts." If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges.¹²³

Thus, the *Citizens Awareness Network* decision supports the proposition that cross-examination rights, regardless of the Subpart that is being applied, "must be allowed in appropriate instances," and those appropriate instances are where it is "required for a full and true disclosure of the facts."¹²⁴

However, if § 2.310(d) is interpreted to require either that "the credibility of an eyewitness may reasonably be expected to be at issue" or that "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" must also be shown to get a Subpart G proceeding, then the barrier to the right of cross-examination under Subpart G would be higher than the *Citizens Awareness Network* decision established or than the Commission represented to the court when it provided its own interpretation of the regulations.

In sum, the only reading of 10 C.F.R. Part 2 that is consistent with the regulations as written, consistent with the NRC's representations made to the First Circuit, and consistent with the ruling in *Citizens Awareness Network* is that a party is entitled to use Subpart G procedures on any contention for which it can demonstrate, pursuant to § 2.309(g), that it is likely "that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of

122. *Id.* at 351.

123. *Id.* at 354 (citing 5 U.S.C. § 556(d) (2006)).

124. *Id.*

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the identified procedures.¹²⁵ This practical test for cross-examination is equally applicable to providing parties with the right to seek to use discovery procedures whenever they are able to show that such procedures are needed to best determine the issue.

The ability to use discovery procedures in appropriate circumstances is also important to enable a party to demonstrate the need for direct cross-examination by the party. For example, depositions during which the witness must answer questions from the opposing party often disclose weaknesses in the witness's testimony that can not be easily explained in a written cross-examination plan. However, the NRC regulations require that cross-examination proposals be submitted to the hearing board for its consideration and only the board, not any party, decides which questions to ask and how to pursue lines of inquiry based on the answers given. While the licensing boards have been diligent in probing witnesses on lines of inquiry that they believe are worthy of review, if the board is not convinced that the line of inquiry proposed is fruitful or warranted, it does not pursue it. However, it is often the case that the best information concerning why an area should be explored comes from the live answers to preliminary questions regarding that area, answers which cannot easily be anticipated. In addition, the instincts that make a lawyer a good cross-examiner are not easily translated into words or disclosed in a cross-examination plan. Allowing depositions provides an opportunity to demonstrate the value of cross-examination in certain areas using techniques that can either convince the Board to allow the party to conduct the cross-examination or to provide the Board with evidence of why it should conduct cross-examination on a certain topic in a certain way or why no further examination of the witness is required.

The recent movie, *Frost/Nixon*,¹²⁶ about the David Frost interview of Richard Nixon, focuses on one of those moments in questioning that could not have been adequately explained in advance. Frost pressed Nixon on the illegality of the cover up of the Watergate break-in and the President's role in that cover-up. When pressed relentlessly by Frost, Nixon finally admitted that

125. See generally *id.*

126. FROST/NIXON (Imagine Entertainment 2008).

his view of the Presidency was that a President can never break the law because, by definition, if the President does it, it is legal. How could Frost have justified that area of questioning or anticipated where his inquiries would lead him in a cross-examination plan?

IX. FAIR AND EFFICIENT REGULATORY PROPOSALS

There is no reason why the NRC hearing process cannot be efficient and fair. The problem appears to be that the current regulations were not written with any effort to make them fair and the only concept of efficiency that was promoted was one that would prevent the public from participating in the decision making process or, if it managed to overcome all the adversity built into the regulation, to severely restrict the scope of that participation.

There are several steps the NRC can take to make the process more efficient and fair:

- (1) NRC Staff refuses to accept applications as filed unless they fully meet the requirement of being complete in all material respects. This will not prevent post-docketing amendments to applications or prevent the Staff from raising questions during the review process, but it will reduce those to a reasonable minimum;
- (2) Require the applicant to make available, in readily accessible form, within ten days of Staff acceptance of the application, all the information now required under 10 C.F.R. § 2.336 as to all matters contained in the application (i.e. treat the application as though it were a complaint filed in a lawsuit and require the applicant to provide access to all information in its possession or control that is relevant to the allegations contained in the application, much as is now required by Rule 26(a)(1) of the Federal Rules of Civil Procedure)¹²⁷;

¹²⁷ A salutary benefit of this procedure would be that applicants would have to develop an efficient system for storing information relevant to its application, thus improving its own ability to retrieve information for operational and regulatory purposes and making it easier for Staff inspectors to locate quickly the information they need to do their work. Complaints from applicants that organizing this

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- (3) Allow the public at least 120 days from when the applicant makes the required disclosures to file contentions and demand a high degree of specificity in the contention pleading based on the material in the application and the disclosures;
- (4) Allow oppositions to the petition to intervene to only reference facts or opinions that are included in the original application and the disclosures;
- (5) Require all parties, including Staff and interested states, who are on the same side of an issue to file a single pleading within the page limits set by the Board for each side of the issue;
- (6) If the applicant files a license amendment or a response to an RAI, require it to include all the disclosures it would have had to make if the material had been filed with the original application;
- (7) If any amendment or RAI is substantially based on material that could have been included with the original application and its disclosures, allow the public and any admitted party 120 days to file any petition to intervene based on the new information or any new contention. Otherwise, amended contentions must be filed within thirty days and the same for new petitions;
- (8) Require applicants to file amendments to applications within the same time period as any other party is required to file amendments or additions to its pleadings and to make the same showing of timeliness as to such amendment as any other party must make.
- (9) The procedures for hearings will be the full panoply of discovery allowed in federal court except, that after the initial disclosures under § 2.336, any party seeking additional discovery or cross examination would have to demonstrate that the discovery or cross examination was needed to fully develop the record and that it was the best or most efficient way to obtain the information sought;
- (10) Technical assistance grants would be available to public parties, other than governmental entities, of up to a total of \$150,000 for each hearing to be used solely to pay for the assistance of experts. A party would announce at the time of filing a petition to intervene its intention to seek such assistance and identify the experts it is retaining for

material and providing access to will be burdensome is either a phony argument or reveals how chaotically applicants maintain their important information.

which reimbursement would be sought. The determination of entitlement to the funds would be made by the licensing board upon application at the end of the hearings, no party could file a response to such an application unless it could support an allegation that the application was untruthful and the Board's decision would be final and not subject to appeal to the Commission.

X. CONCLUSION

There is irrefutable evidence of the value of public participation in the NRC licensing process. NRC procedures as now written and implemented are antagonistic to such participation. While no one believes that either the NRC or the nuclear industry wants to have unsafe nuclear plants, it is clear that considerations other than safety are dominating many of the decisions being made regarding the wisdom of licensing nuclear plants and the conditions applicable to such licenses. One party, the public, has demonstrated a commitment to safety and a fierce determination to see that safety standards are set and implemented. The nuclear power program in the United States cannot tolerate another TMI. If there is a role for nuclear power in the energy future it will only fulfill that role if the public has confidence in the safety of the technology. That confidence is lacking and will not be restored until the public is enabled to play a full and meaningful role in the licensing process. It is lapses by NRC Staff and the nuclear industry which have created the need to increase public participation and add their skeptical analyses to the licensing process. As Judge Farrar stated, the goal of the NRC hearing process should be: (1) to encourage the participation of those who are protected by the Atomic Energy Act's grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.¹²⁸ Not until that happens will, or should, nuclear power have an increased role in meeting our energy demand.

128. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098-MLA, at 59 (June 27, 2008) (Farrar, J., concurring).