Harmon, Curran, Spielberg + Eisenberg LLP

1726 M Street NW, Suite 600
Washington DC 20036-4523

202.328.3500 I office
202.328.6918 I fax
HarmonCurran.com

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Allison Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: *Comments on NRC Public Participation Process*

Dear Commissioners:

Thank you for the opportunity to share my views on the NRC's public participation process. I am sorry that a bad case of the flu prevented me from addressing you in person during your January 31, 2013 meeting, and appreciate your decision to hold the record open for my comments.

I have reviewed the transcript of the meeting, the procedural histories submitted by the NRC's Office of General Counsel (OGC), and the statements that were presented. I would like to add some points of my own, based on my thirty-plus years of representing environmental organizations, individuals, and state and local governments in licensing hearings before the NRC. As requested, I will focus on the issues of standing, contention admissibility standards, and the process for appealing decisions on standing and contention admissibility.

Before proceeding, I wish to clarify that I am writing this letter in my personal capacity and not on behalf of any of my clients. In addition, I wish to inform you that because my comments are based in part on my current experience in NRC licensing cases and I wish to avoid any appearance by this letter of an *ex parte* contact, I plan to submit it to the Atomic Safety and Licensing Board (ASLB) and parties in all of the active licensing cases in which I have entered an appearance: Diablo Canyon (license renewal), Levy Units 1 and 2 (combined license), Mixed Oxide Fuel Fabrication Facility (operating license), and Watts Bar Unit 2 (operating license).

Historical Context

In preparation for your January 31 meeting, the Office of General Counsel submitted a lengthy paper recounting the history and development of the NRC's procedural regulations governing standing and contention admissibility in NRC adjudicatory hearings.[1] According to the cover

[1] The History of Nuclear Regulatory Commission Standing and Contention Admissibility Standards Promoting Effective and Efficient Public Participation at 3, 31 ("OGC Hearing Procedures Paper"), attached as Enclosure 1 to Memorandum from Margaret M. Doane, OGC, to NRC Commissioners re: Background Material on NRC Adjudications for the January 31, 2013 Commission Meeting on Public Participation in NRC Regulatory Decision-making (Jan. 8, 2013) ("Doane Memorandum").

memorandum, the paper "provides historical context by reviewing the circumstances and public discussions that took place in connection with the more significant changes to NRC's hearing processes in the last twenty-five years."[2]

The OGC Hearing Procedures Paper briefly describes the nature and origin of the right afforded to a hearing by the Atomic Energy Act (AEA). It also provides helpful detail regarding the NRC's steady constriction of public hearing rights over the past three decades, in response to perceived delays in reactor licensing caused by hearings. Unfortunately, the paper fails to provide any information about the statutory purpose of licensing hearings or the valuable role played by those hearings in strengthening the rigor of NRC's regulatory program, and it unquestioningly repeats the well-established myth that licensing hearings were the driving force behind reactor licensing delays in the 1980s without acknowledging that the myth has been refuted by the federal government itself. Therefore, before commenting on the particulars of the NRC's current public hearing procedures, I want to fill in more of the historical context.

NRC Hearing Process – Required by the AEA to Ensure NRC Accountability

While the OGC Hearing Procedures Paper acknowledges that the AEA guarantees interested members of the public a right to request a hearing on NRC licensing decisions, it neglects to acknowledge the central importance of those hearings in the statutory scheme of the AEA. The Hearing Procedures Paper describes adjudicatory hearings as "but one" of an array of ostensibly equivalent measures for "public input," such as petitions for rulemaking, written comments, NRC-hosted public meetings, and limited-appearance statements.[3] During the January 31 meeting, OGC member Brad Jones further characterized adjudicatory hearings as a "supplement" to the NRC's other tools for "public interaction."[4]

Adjudicatory licensing hearings are neither equivalent nor supplemental to other means of "public interaction" or "public input" – they constitute a *right* conferred by the Atomic Energy Act.[5] The establishment of a process for adversarial hearings and judicial review was the key feature of the grand bargain that Congress struck with state and local governments in 1954, when it passed the AEA. In legalizing domestic production of nuclear energy, Congress exempted the new industry from state and local regulation and vested it in a new federal agency, the Atomic Energy Commission (AEC) (now the NRC). Congress also limited the industry's liability for accidents and provided federally subsidized insurance through the Price-Anderson Act. In exchange, Congress gave state and local governments and the general public an important legal tool: the right to challenge every AEC licensing decision in an adjudicatory hearing.[6] Congress

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[2] Doane Memorandum at 1.
[3] *Id.* at 32.
[4] Tr. 7.
[5] Atomic Energy Act, Section 189a, 42 U.S.C. § 2239(a). While a hearing requester must meet the NRC's standards for obtaining a hearing, the granting of a hearing is mandatory once those standards are met. *Beyond Nuclear v. NRC,* 704 F.3d 12 (2013).
[6] *Nuclear Licensing and Regulatory Reform: Hearings Before Senate Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works,* 98th Cong., 1st Sess. 562 (1983) (Testimony of NRC Commissioner Peter Bradford).

also gave hearing participants the right to appeal adverse AEC decisions to the U.S. Court of Appeals.[7]

Adjudicatory licensing hearings are distinct from other mechanisms for interaction by NRC with the public in an important way: they offer a means of holding the NRC *accountable* for compliance with the requirements of the AEA and the National Environmental Policy Act (NEPA) for protection of public health and safety, public security, and the environment. Only in a licensing proceeding does the applicant or the NRC Staff bear the burden of proving the adequacy of a license application to satisfy those statutes.[8] Only in an NRC adjudicatory hearing is a license application subject to the rigors of the adversarial hearing process as a matter of right. And only in a NRC licensing proceeding can the ultimate decision be appealed to the U.S. Court of Appeals, where the NRC must demonstrate it has satisfied statutory requirements for protection of public health and safety, security and the environment.[9]

The Hearing Process Strengthens Safety Regulation

The ultimate purpose of an open and fair public participation process is to maintain NRC accountability for safety and environmental regulation. The effectiveness of the hearing process in fulfilling that goal has been repeatedly recognized over the decades of NRC's operation. As members of the NRC's former Appeal Board observed in 1974:

> Public participation in licensing proceedings not only can provide valuable assistance to the adjudicatory process, but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.[10]

In 1981, the then-ASLB chief Panel, B. Paul Cotter, Jr., also described the benefits of participation by public intervenors in NRC licensing decisions:

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[7] Atomic Energy Act, Section 189b, 42 U.S.C. § 2239(b); 28 U.S.C. § 2342. Notably, the hearing and appeal rights afforded by the AEA apply only to licensing decisions, which are extremely important but occur infrequently. The Act offers no legal mechanism for public enforcement of NRC regulations. Instead, the AEA contains a provision giving the Attorney General the exclusive authority to sue licensees for enforcement of the Act and NRC implementing regulations. 42 U.S.C. § 2271. Nor does the AEA contain "citizen suit" enforcement provisions allowing members of the public to sue licensees in federal district court for failure to comply with the terms of their permits or the agency's governing regulations. *See, e.g.,* Clean Water Act, 33 U.S.C. § 1365; Clean Air Act, 42 U.S.C. § 7604; Safe Drinking Water Act, 42 U.S.C. § 300j-8; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270. These statutes were passed about 15 years after the AEA, and the AEA was never amended to conform to them.

[8] 10 C.F.R. § 2.325 accords to the burden of proof to the applicant or proponent of an order. As the proponent of an EIS, the NRC Staff bears the burden of proof on NEPA issues. *Louisiana Energy Services, L.P.,* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998).

[9] *See* note 7, *supra.*

[10] *Gulf States Utility Corp.* (River Bend Units 1 and 2), ALAB-183, 7 AEC 22, 227-28 (1974) (citation omitted) (1974). *See also Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5, 374 n.13 (May 25, 1973); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991).

> (1) Staff and applicant reports subject to public examination are performed with greater care; (2) preparation for public examination of issues frequently creates a new perspective and causes the parties to reexamine or rethink some or all of the questions presented; (3) the quality of staff judgments is improved by a hearing process which requires experts to state their views in writing and then permits oral examination in detail . . . and (4) staff work benefits from two decades of hearings and [ASLB] decisions on the almost limitless number of technical judgments that must be made in any given licensing application.[11]

Similarly, in the construction authorization case for the proposed Mixed Oxide Fuel Fabrication Facility, the ASLB Chairman Michael C. Farrar acknowledged that hearing petitioners were "instrumental in focusing the Board's attention on . . . troubling matters," including the NRC Staff's incorrect disavowal of the relevance of a Safety Evaluation Report (SER) issued at the construction stage to the operating license stage.[12] Those issues would not have come to light or been corrected if it were not for the public hearing process. As further recognized by former deputy ASLB Chief Frederick Shon, public participation in NRC decision-making aids the cause of safety even when specific improvements to safety cannot be readily identified: "You cannot necessarily decide how many robberies a policeman on the beat has prevented by checking how many arrests he's made. Just his presence on the beat discourages a lot of robberies."[13]

Economic Factors, Not the Hearing Process, Have Driven Licensing Delays

According to the OGC Hearing Procedures Paper, "between 1965 and 1981 there was an appreciable lengthening of the NRC licensing process that was partially attributed to inefficiencies in the adjudicatory hearing process."[14] As testified to Congress by former NRC Commissioner Peter Bradford, however, licensing hearings have never been a serious source of reactor licensing delay.[15] For the first generation of nuclear reactors, licensing hearings – although often contentious – always went on while the reactors were being built and had concluded by the time the reactor was ready to operate. Furthermore, the hearings process has at all times been overseen by an NRC majority that is very supportive of the nuclear industry.[16] In the 1990s, when the last generation of reactors was completed, only two operating licenses were delayed by hearings: Shoreham and Seabrook. Both of these plants had such serious emergency evacuation problems that they were opposed by the governors of New York and Massachusetts. Indeed, Shoreham never operated.

Instead of faulting the hearing process, licensing delays – and the drop-off in initiation and completion of reactor projects after the mid-1970's – can be attributed to economic factors. As

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[11] B. Paul Cotter, Memorandum to NRC Commissioner Ahearne at 8 (May 1, 1981).
[12] *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 500 (2008) (Farrar, J., concurring).
[13] Transcript of Advisory Committee on Reactor Safeguards (ACRS) meeting at 509-510 (August 10, 1984).
[14] *Id.* at 31; *see also id.* at 4 (hearings were "undoubtedly" a reason for licensing delays).
[15] *See* Testimony of Peter Bradford to the Senate Committee on Environment and Public Works in hearings on "Nuclear Licensing and Regulatory Reform," 98 Cong. 1 Sess., July 14, 1983.
[16] *Id.*

the U.S. Department of Energy's (DOE's) Energy Information Administration (EIA) reported in 1999:

> Orders for new units fell off sharply after 1974. Of the total of 259 units ordered to date, none was ordered after 1978. Although safety concerns, especially after the accident at Three Mile Island in 1979, reinforced a growing wariness of nuclear power, the chief reason for its declining momentum in the United States was economic. The promise of nuclear electric power had been that it would, in the now-famous phrase, make energy "too cheap to meter." In reality, nuclear power plants have always been costly to build and, for several reasons, became radically more costly between the mid-1960s and the mid-1970s. Utilities began building large plants before much experience had been gained with small ones. Expected economies of scale did not materialize. Many units were forced to undertake costly design changes and equipment retrofits, partially as a result of the Three Mile Island accident. Meanwhile, nuclear power plants have also had to compete with conventional coal or natural gas-fired plants with declining operating costs. These trends disillusioned many utilities and investors. Interest in further orders subsided and many ordered units were cancelled before they were built. By the end of 1999, 124 units had been cancelled, 48 percent of all ordered units . . .[17]

The same pattern of overwhelming economic forces can be seen hindering the so-called "nuclear renaissance." As demonstrated in the following table, combined license (COL) applicants have repeatedly pushed back their planned dates for starting operation of their new reactors, based on economic considerations or lags in approval of underlying designs – factors that have nothing to do with the NRC hearing process:

[17] EIA/Annual Energy Review 1999 at xxxii (emphasis added). *See also* Schlissel, et al, *Nuclear Loan Guarantees: Another Taxpayer Bailout Ahead?* at 7-9 (Union of Concerned Scientists 2009), which demonstrates that the actual costs of 75 of the first generation of U.S. nuclear power plants exceeded initial estimates by more than 200 percent. http://www.ucsusa.org/nuclear_power/nuclear_power_and_global_warming/nuclear-loan-guarantees.html

Proposed Site	Number of Reactors	Delay
Bellefonte	1	4-6 years (from 2016 to 2020, 2022)[18]
William States Lee	2	5 years (from 2016 to 2021)[19]
Levy County	2	8-10 years (from 2016, 2018 to 2024, 2026)[20]
Turkey Point	2	"Beyond 2018, 2020"[21]
Watts Bar	1	3 years (from 2012 to 2015)[22]
Vogtle	2	8 months (from April 1, 2016 to November 28, 2016 and from April 1, 2017 to November 28, 2017)[23]
Shearon Harris	2	"after 2020"[24]
North Anna	1	2 years[25]
Comanche Peak	2	2 years (2018, 2020 to 2021, 2022)[26]

The economic problems with new reactors also are causing NRC to cancel, suspend, or delay its licensing reviews. Among the 18 combined license applications (COLAs) that are listed on the NRC's "new reactors" website page, for instance, six NRC reviews have been cancelled, deferred, or suspended:

- Bellefonte Units 3 and 4 ("deferred indefinitely");
- Callaway Unit 2 ("suspended");
- Grand Gulf ("suspended" and "closing down");
- Nine Mile Point (review schedule "to be determined");
- River Bend Unit 3 (review schedule "suspended");
- Victoria (COLA and early site permit application (ESPA) withdrawn).

[18] http://www.timesfreepress.com/news/2009/aug/07/bellefonte-construction-pushed-back-again/ (delay attributed to economic recession).
[19] http://www.cleanenergyinsight.org/nuclear-news/duke-energy-may-delay-lee-nuclear-plant/ (delay attributed to problems with underlying design).
[20] http://blogs.newsobserver.com/business/progress-energys-nuclear-plans-on-hold-for-now#storylink=cpy (delay attributed to cost overruns, sluggish economy and low natural gas prices).
[21] http://www.power-eng.com/articles/2010/03/fpl-study-nuclear-delay.html (delay attributed to delay in final AP1000 design certification).
[22] http://timesdaily.com/detail.html?sub_id=189215 (delay attributed to cost overruns and poor planning)
[23] http://chronicle.augusta.com/latest-news/2012-02-29/vogtle-reactor-completion-might-be-later-planned?v=1330517508 (delay attributed to delay in final AP1000 design certification).
[24] http://www.pennenergy.com/articles/pennenergy/2011/02/progress-says-new.html (delay attributed to reactor cost).
[25] http://www.world-nuclear-news.org/RS-Dominion_Luminant_COLA_reviews_extended-0803114.html (delay attributed to delay in certification of underlying design).
[26] http://blogs.star-telegram.com/barnett_shale/2011/03/comanche-peak-nuclear-expansion-delayed.html (delay attributed to delay in certification of underlying design and "other commercial issues").

Others have been delayed because COLAs were submitted before the underlying standardized designs had been certified. *See, e.g.*:

- North Anna and Comanche Peak (review schedule "to be determined" (TBD) in light of design approval delays).
- Although a COLA was submitted for Turkey Point Units 6 and 7 in 2009, the NRC has yet to establish a schedule for a safety or environmental review. The reason for the delay is unexplained, but the chart above shows that the applicant itself has postponed completion of Turkey Point for reasons having nothing to do with the hearing process.[27]

With respect to reactor license renewal, adjudicatory hearings can have no delaying effect on the timing of renewed operation of reactors by operation of law: under the "timely renewal doctrine" of the Administrative Procedure Act and NRC implementing regulations, any applicant who makes a timely application for renewal of an NRC license may continue to operate under its current license until the NRC makes its decision on the renewal application.[28]

Thus, throughout the history of NRC reactor licensing, the hearing process itself has not been the driving force that causes delays in reactor operation. The NRC's many procedural "reforms" over the past decades have not prevented the cancellation or delay of numerous reactor projects. Economic forces are simply much more powerful. The NRC has no grounds for using adjudicatory hearings as a bogeyman to rationalize the severe restrictions on public participation that hamper the effectiveness of licensing hearings today.

Comments on Procedures for Licensing Hearings

The NRC's stated goal in conducting a hearing is:

> to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.[29]

At the outset of a licensing proceeding, the NRC interprets the AEA to permit it to limit the right to a licensing hearing to "those persons who have real interests at stake and who seek resolution of concrete issues."[30] The asserted purpose of the NRC's standards for establishing standing and admissibility of contentions is to satisfy that limitation.[31] As the Appeal Board has warned, however, the process for evaluating standing and contention admissibility should be fair and flexible enough to ensure that legitimate participants and issues are not excluded for mere pleading defects. [32]

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[27] *See* http://www.nrc.gov/reactors/new-reactors.html.
[28] *See* APA Section 9(b), 5 U.S.C. § 1008(b); NRC regulations 10 C.F.R. § 2.109(b).
[29] *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 19, (1998). *See also Final Policy Statement: Conduct of New Reactor Licensing Proceedings,* 75 Fed. Reg. 20,963, 20,969 (April 17, 2008).
[30] *Virginia Electric and Power Co,* ALAB-146, 6 AEC at 634.
[31] *Virginia Electric and Power Co,* ALAB-146, 6 AEC at 634.
[32] *Id.*

In order to fulfill its goals of ensuring that all hearing requests receive fair consideration and all legitimate participants and issues are heard, the NRC's procedural regulations should have the following basic characteristics:

- They should be clearly and logically presented so that they can be understood both by lawyers and *pro se* petitioners;
- They should provide adequate time for obtaining and reviewing the application and other relevant documents and for preparing hearing requests that can satisfy the NRC's pleading standards;
- They should include reasonable opportunities to respond to opposing arguments and cure pleading defects;
- They should be designed to make efficient use of all parties' time and resources; and
- They should be applied in a fair and flexible manner that takes into account the circumstances of the case.

Unfortunately, the NRC's procedural regulations for determining standing and admissibility of contentions fall far short of fulfilling these basic requirements for a fair hearing. Even worse, the procedures interact like a succession of booby traps designed to ensure that most petitioners and most of the concerns they raise are either barred from a hearing at the outset or fall by the wayside along the path to a hearing.

The NRC's procedural regulations have five characteristics that work together to prevent interested members of the public from gaining meaningful access to the NRC's hearing process. Those five characteristics are:

(1) the premature commencement of the hearing process,
(2) the short time frame allowed for preparing hearing requests that must satisfy a very high standard,
(3) the discouragement of amended pleadings after initial hearing requests have been submitted,
(4) the unclear standard for challenging generic environmental determinations, and
(5) the lack of information in NRC regulations regarding standing requirements.

All five of these characteristics should be re-examined, not just in isolation but also for their interaction. Together, they frustrate and exhaust petitioners and prevent them from introducing or maintaining their claims in an effective way. Resolution of any one of these problems could lessen the adverse effects of the others.

THE PROBLEMS:

(1) The hearing process is inefficient and wasteful of all parties' time and resources because it begins too early in a licensing proceeding.

As the OGC recognizes in its Hearing Procedures Paper, the NRC seeks to set a balance between efficiency and effectiveness of hearings.[33] One of the key measures used by the NRC to enhance efficiency is to start the hearing process at the very earliest date possible and to require all contentions (including environmental contentions) to focus on the application rather than NRC Staff review documents such as the SER and the environmental impact statement (EIS).

Therefore, under current NRC regulations, the hearing process begins shortly after a reactor license application is determined to be adequate for purposes of review and docketed. The hearing notice may be simultaneous with the docketing notice, or may follow the docketing notice by about a month. NRC generally allows 60 days after publication of the hearing notice for the submission of hearing requests as of right. After the initial deadline has passed, any new or amended contentions must satisfy a "good cause" test, showing that the contention is based on information that was not previously available and is materially different from previously available information, and that the filing "has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(c).[34]

Unfortunately, the early commencement of licensing hearings does not improve the efficiency of hearings. Instead, it wastes the time and resources of all parties on premature and unproductive litigation. This is because the docketing of a reactor license application or license renewal application does not in any way signify that it is complete; in virtually all cases, the applicant will add a great deal of new information and make multiple revisions to the application over a period of months if not years. With respect to environmental issues, the applicant is likely to amend its Environmental Report several times before the NRC Staff takes over and uses the Environmental Report to issue an EIS.

Thus, even after filing their initial hearing requests, petitioners are under a heavy and long-lasting obligation to review new information submitted by license applicants, compare it to previously submitted information, and submit new or amended contentions that demonstrate they could not have raised the issue before.

This exercise turns too many licensing hearings into an extended battle over the timeliness of new issues. It is also a gross waste of all parties' resources because a great deal of time and money is spent litigating issues that are later cured by the completion of a license application. While the NRC's recent revisions to the standards for new or amended contentions simplify matters somewhat, they do nothing to cure these fundamental problems.

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[33] *Id.* at 3, 17, 31.

[34] This standard is a revision to the previous standards in 10 C.F.R. §§ 2.309(c) and 2.309(f)(2). *See Final Rule: Amendments to Adjudicatory Process Rules and Related Requirements,* 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012).

(2) After publication of a hearing notice, the NRC's time periods for filing initial documents are far too short to allow a meaningful hearing opportunity.

As ASLB Judge Michael Farrar has observed, "the time periods that routinely govern potential intervenors' prehearing participation in the adjudicatory process" are "unnecessarily short and burdensome."[35] The NRC typically allows only 60 days after publication of a hearing notice to submit standing documents and contentions. Such a short time period is far from adequate to perform the multiple tasks involved. License applications that may run thousands of pages must be reviewed. Just the process of downloading them and putting them in a readable format can take days. Obviously, these documents take far longer to digest and analyze. Given the extremely high standard for submitting contentions, it is also advisable to retain lawyers and experts if at all possible.[36] That process takes time too.

During the January 31 meeting, Mr. Jones stated that the 60-day period is not unfair because hearing petitioners have access to license applications as soon as they are submitted.[37] But it is unfair to expect hearing petitioners to undertake the arduous process of downloading and reviewing an application (not to mention hiring expensive experts) before the application has been docketed and deemed complete enough for review by the Staff. If an application is not ready for docketing and Staff review, it is not ready for review by hearing petitioners either.

The NRC's procedural rules for hearing requests contain two other deadlines that are so short they virtually amount to a denial of the opportunity they purport to offer:

(a) The time for requesting sensitive unclassified security information (SUNSI) is far too short. Since 2001, when the NRC drastically reduced the amount of information that is available on its public website, reasonable access to SUNSI in licensing proceedings has become paramount to a meaningful hearing. But the NRC's regulations make it virtually impossible to obtain SUNSI as a matter of right at the outset of a hearing. At the very earliest stage after a hearing notice – within ten days – petitioners are required to identify the SUNSI documents they will need to prepare a hearing request.[38] In the great majority of cases, that is far too short a time period in which to perform all the tasks necessary to determine whether access to SUNSI is necessary and to make a request. As noted above, just the process of downloading the many pieces of a license application from the website can take days, let alone determining what the petitioners' concerns will be or whether SUNSI information is relevant to those concerns. Where experts need to be brought in to assist in the evaluation, the exercise becomes even more impossible to complete within ten days. Thus, the ten-day deadline is so abbreviated as to amount to a *de facto* denial of SUNSI documents.

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[35] *Shaw Areva Mox Services,* LBP-08-11, 67 NRC at 497.
[36] Indeed, NRC regulations all but require a petitioner to retain an expert. Any contention must contain "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." 10 C.F.R. § 2.309(f)(1)(v).
[37] *Id.* at
[38] Tr. 10.

(b) The seven-day period for replying to oppositions to hearing requests is far too short. The other absurd deadline is the seven-day period for responding to oppositions to standing and the admissibility of contentions. Armed with ample legal and technical resources, license applicants and the NRC Staff often submit hundreds of pages of legal arguments and factual claims in opposition to both standing and contention admissibility. Only an intervenor with huge monetary resources can mount an adequate defense in seven days. While the NRC has announced a policy that it will not cater to impoverished intervenors,[39] that policy is no justification for establishing procedures that effectively prevent most members of the public from being able to adequately defend contentions within seven days. And even if monetary resources are not factored in, seven days may still be inadequate if the relatively few experts who are not conflicted out by their work for the nuclear industry are unavailable. There simply is no justification for providing such a short period of time for a hearing requester to demonstrate the legitimacy of its claims. And the NRC poorly serves its own public image by appearing to allow a pile-on by the applicant and Staff on the hapless and helpless public.

(3) The NRC makes it too difficult to get extensions or amend initial pleadings.

(a) The standard for extensions is not only too high, but unclear. NRC regulations require that in order to get an extension of a pleading deadline, a requester must show "compelling circumstances."[40] In its 1998 Policy Statement on Conduct of Adjudicatory Proceedings, the Commission effectively amended the standard by stating that a request for an extension must demonstrate "unavoidable and extreme circumstances."[41] The Commission did not put any qualification or limitation on this standard – it applies to every single extension request, from the mundane to the significant.

Given that the deadlines established by the regulations are already so short that in many cases they are virtually impossible to comply with in a meaningful way, this standard is far too rigid and difficult to satisfy. And the Commission's extremely high standard for extensions is inconsistent with its grant of authority to licensing boards to manage hearings in a fair way. The standard for granting extensions should be one of reasonableness under the circumstances.

If the Commission continues to limit its definition of "compelling circumstances" to consist only of "unavoidable and extreme circumstances," it should put that information in the regulations. It is unreasonable to expect *pro se* intervenors to consult case law or policy statements in order to know the standard for such a basic and commonly needed pleading.

(b) The standard for amending contentions is too high for a process that starts so prematurely. As discussed above at page 9, after the initial deadline has passed, any new or amended contentions must satisfy a "good cause" test, showing that the contention is based on information that was not previously available and is materially different from previously available information, and that the filing "has been submitted in a timely fashion based on the

[39] *See* OGC Hearing Procedures Paper at 6.
[40] 10 C.F.R. § 2.307(a).
[41] CLI-98-12, 48 NRC at 19.

availability of the subsequent information."[42] By itself, this provision is not terribly onerous. But in combination with the premature commencement of the hearing process, it is disastrous.

As also discussed above at page 9, reactor license applications are amended so many times that hearing petitioners' resources are exhausted by the long process of reviewing application amendments and submitting amended contentions in order to avoid the mooting of their initial concerns. The presumption that a new or amended contention is not timely if it is submitted more than 30 days after the information becomes available also imposes undue hardship on members of the public who must scramble to hire experts and review documents during that relatively short time period.

The problem is further exacerbated by the fact that the NRC has no requirement that applicants must notify intervenors that an amendment to an application is relevant to an admitted contention. This imposes on intervenors an unacceptable burden of reviewing every license application amendment to determine whether it relates to an admitted contention. The penalty for not doing so may be fatal: dismissal of the contention for mootness and failure to amend in a timely way.

(4) The standard for challenging generic determinations is cumbersome and confusing and puts inappropriate burdens on hearing requesters.

In reactor license renewal proceedings and uranium mining cases, the NRC relies on generic EISs for a number of its analyses and conclusions about the significance of environmental impacts.[43] While NRC regulations require the agency to revise these EISs when new and significant information or changed circumstances arise, the NRC does not always fulfill that obligation. For instance, the License Renewal GEIS is seventeen years old, and the research on which it is based is even older. While the NRC published a draft revised License Renewal GEIS in 2009, it has yet to finalize it. Four years later, even the 2009 draft revised GEIS is becoming outdated. Thus, it would not be surprising for new and significant information to arise that should be considered in current license renewal proceedings.

Yet, the Commission's procedures make it extremely difficult to raise new and significant information or changed circumstances in licensing hearings. A petitioner who believes that the findings of a generic EIS have been superseded by new and significant information or changed circumstances that should be considered in a license renewal proceeding must not only submit a contention that justifies reconsideration of the environmental conclusions of the GEIS, but the petitioner also must prepare either a waiver petition or a generic rulemaking petition to suspend the regulation.[44] The choice of a waiver petition or a rulemaking petition is left to the petitioner. If the petitioner chooses to file a waiver petition, the submittal of an affidavit or declaration is required to support the petition.

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[42] 10 C.F.R. § 2.309(c).
[43] *See,* NUREG-1437, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (1996); NUREG-1910, *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (2009).
[44] 10 C.F.R. §§ 2.335; 2.802.

These regulations are not only cumbersome, confusing, and expensive for petitioners to comply with, but they also are inconsistent with NEPA in two key respects. First, placing the burden of choosing between a waiver petition and a petition for rulemaking shifts the NRC's burden onto hearing petitioners. As the Supreme Court recognized in *Baltimore Gas & Elec. Co.,* the decision of whether to address environmental issues generically or on a case-specific basis lies within the NRC's discretion.[45] By the same token, it should be NRC's responsibility in the first instance.

Second, the regulations do not ensure that NRC will comply with NEPA's requirement that all legitimate environmental issues must be resolved before the NRC makes a licensing decision.[46] Instead, the regulations impose a burden on hearing requesters of requesting a suspension of a licensing proceeding while a rulemaking petition is under consideration.[47]

As discussed below, the NRC should amend its regulations to give hearing requesters a simpler process and a more appropriate legal burden in seeking to challenge generic environmental determinations.

(5) NRC's standing requirements are unclear and applied in an overly rigid manner.

As noted by Mr. Jones during the January 31 meeting, standing is not often rejected in reactor licensing cases.[48] Nevertheless, it does happen.[49] And standing is quite often disputed in cases that do not involve reactor licensing, such as license transfer and decommissioning cases. Too often, standing is denied based on pleading defects rather than a demonstrable lack of standing. This likely stems from a lack of information in NRC regulations regarding standing requirements, combined with the NRC's failure to provide adequate opportunities to amend standing documents.

Clarity of procedural regulations is always important, but its greatest importance may be at the outset of a proceeding, when parties are attempting to establish their right to be heard, including their standing. Unfortunately, important elements of the NRC's standard for establishing standing are hidden in NRC case law. Although the typical petitioner in an NRC licensing case is a civic or environmental organization – and may very well be represented by an attorney unversed in NRC practice or acting *pro se* – the regulations contain nary a hint of the NRC's strict requirement that in order to demonstrate an organizational petitioner's standing, the petitioner must submit member affidavits or declarations containing very particular statements. Those requirements are found only in the NRC's case law.

As a result, the citizen group that seeks to initiate a hearing by following the instructions in the NRC's regulations is very likely to miss those requirements. Prior to 2004, this was not an

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[45] 462 U.S. at 101.
[46] *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97 (1983).
[47] 10 C.F.R. § 2.802(d).
[48] Tr. 8.
[49] *See, e.g., Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261 (2008); *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-411 (2007), reconsideration denied, CLI-07-22, 65 NRC 527-28 (2007).

insurmountable problem because the regulations provided a generous amount of time to amend standing documents as of right, after the applicant and NRC Staff had responded to them and flagged the problems.[50] Therefore hearing petitioners had a reasonable opportunity to cure pleading defects in their standing documents.

Under the current regulations, in contrast, the only document that a hearing petitioner has the right to submit after its hearing request is a reply to the oppositions to the request. No time is provided to cure pleading defects in standing documents, other than to clarify standing declarations; new information may not be provided.[51] And the petitioner has only seven days to prepare and submit clarifications of its standing documents, in addition to preparing and submitting a reply to legal and technical arguments on standing and the admissibility of contentions.[52] These limitations turn the process for pleading standing into a high-stakes and high-pressure guessing game.

PROPOSED SOLUTIONS:

(1) Delay the publication of hearing notices.

The most efficient and effective time to start a licensing hearing is when the NRC Staff publishes the SER and EIS. At that point, it is reasonably certain that the application is complete and the Staff has ironed out all of its questions and concerns about the application. Although the OGC suggests that this approach would not work because it would change the subject of the hearing request from the application to the NRC's documents,[53] this is not necessarily the case. The subject of contentions on safety issues would be the application, not the SER – but hearing requesters would have the benefit of the SER in determining whether to raise concerns in a hearing. With respect to environmental issues, the subject of contentions would be the EIS. This focus on the EIS is appropriate under NEPA, because the government is responsible for an independent environmental analysis of the application.[54]

This is the single most important change the NRC could make to its regulations to ensure that the opportunity for a hearing on nuclear facility licensing issues is meaningful and fair to the public. And it would serve the NRC's goal of efficiency by ensuring that contentions focus on actual

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[50] Under the NRC's pre-2004 regulations, hearing requests were submitted in two parts. Standing was addressed in an initial hearing request that was later supplemented by a statement of contentions. *See* former 10 C.F.R. §§ 2.714(a) and (b). The deadline for submitting the initial hearing request was set by the Federal Register notice announcing the opportunity for a hearing. *See former* 10 C.F.R. § 2.714(a)(1). The deadline for contentions was 15 days before the first prehearing conference. *See former* 10 C.F.R. §§ 2.714(a)(1) and (b)(1). Under former § 2.714(a)(1), a petitioner could amend a hearing request any time up until the deadline for filing contentions. Thus, petitioners had a reasonable opportunity to cure any defects in standing declarations before the ASLB ruled on their adequacy.

[51] *South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 94 and n.18 (2009)

[52] 10 C.F.R. § 2.309(h)(2).

[53] OGC Hearing Procedures Paper at 23.

[54] *Louisiana Energy Services,* 47 NRC at 84, 89.

"concrete issues"[55] rather than on premature issues that are likely to be eliminated as applications are revised.

(2) At the very least, extend the time for filing hearing requests as of right.

If the NRC were to change the timing of hearing notices to coincide with the publication of the SER and EIS, current time frames provided for the formulation of hearing requests would be reasonable, because the public would have the benefit of the Staff review documents in evaluating the application and deciding whether to raise concerns.

If the NRC makes no changes to the timing of hearing notices, however, it should -- at the very least -- significantly extend the period allowed for preparing hearing requests. The regulations should allow at least 180 days for preparation of hearing requests that are filed in early days after the docketing of applications. This period should include time for filing standing documents and responses and for amending standing documents as of right. *See* item (3) below. It should also include a reasonable period of at least 60 days for requesting SUNSI.

(3) Provide a reasonable period for amendment of standing documents as of right.

In 1973, the Appeal Board observed that while the NRC insists on "strict observance" of its procedural requirements to eliminate would-be participants who do not have a genuine interest in a proceeding, it is "not necessary to the attainment of that goal that interested persons be rebuffed by the inflexible application of procedural requirements with the result that they are not given a reasonable opportunity to cure the defects in their petition."[56] The meaningful application of that principle was lost in 2004, when the NRC eliminated the opportunity to cure standing documents as of right. It should be restored to ensure that no petitioner with an interest in the safety or environmental impacts of a proposed nuclear operation is refused a hearing only because of defective standing pleadings. And the Commission should amend its regulations to clearly state its basic requirements for affidavits and declarations that are required to demonstrate organizational standing.

(4) Change the process for challenging generic findings based on new and significant information or changed circumstances to shift NRC's statutory burden from petitioners to the NRC.

Section 2.309 of the Commission's regulations should include instructions on how to raise an admissible issue in challenging generic environmental determinations in a hearing request. The regulations should *not* require the petitioners to address the question of whether the concern raised by a contention is generic or case-specific. Instead, the regulation should refer petitioners to the standard in 10 C.F.R. §51.92 for consideration of new and significant information or changed circumstances and instruct the petitioners to address the application of that standard to the individual facility at issue.

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[55] *See Virginia Electric and Power Co,* ALAB-146, 6 AEC at 634.
[56] *Id.,* 6 AEC at 634.

The regulations should further provide that the presiding officer will (a) make a determination of whether the petitioner has made a *prima facie* case of the existence of new and significant information or changed circumstances and (b) refer any positive decision to the Commission. The Commission should then determine whether the ASLB's determination should be upheld; and if so, whether the issue should be remanded to the ASLB for case-specific resolution or referred to the Staff for consideration as a rulemaking petition.

The regulations also should state clearly that if the Commission determines that the petitioner has raised an admissible challenge to a generic environmental determination that will be considered as a rulemaking petition, the rulemaking petition will be resolved before the licensing decision is made for the individual facility.

(5) Eliminate NRC Staff's party status.

The NRC Staff generally participates as a party in NRC licensing proceedings. The Staff generally sides with the applicant on questions of contention admissibility, thus creating the impression that the Staff is a mere "spear carrier" for the applicant rather than a regulator charged with protecting public health and safety and the environment. [57]

Eliminating the Staff as a party to reactor licensing cases would go a long way toward restoring public confidence in the NRC as an independent agency. And there is no need for the Staff to take time and resources to oppose standing or contentions that challenge license applications; the applicant is well-equipped to handle that work.

In addition, if the Commission delays the commencement of the hearing process until the time the SER and EIS are issued, the Staff's time will freed for focusing on completing the safety and environmental reviews rather than opposing hearing requests and contentions.

Finally, to eliminate the Staff's party status would also make the procedural regulations consistent with the NRC's policy of focusing hearings on applications rather than Staff's review documents. If the Staff is to participate at all as a party, it should only be with respect to defending the EIS. Otherwise, the Staff should be called as a witness by the ASLB.

Comment on Proposed Changes to Regulations for Review of ASLB Decisions on Hearing Requests

There is no doubt that the current regulations for review of decisions on the admissibility of contentions are cumbersome and confusing. It is sometimes difficult to tell whether one has the right to appeal a decision or should file a petition for review. The regulations also create needless burdens for all parties, because a license applicant who wants to appeal the admission of one contention must appeal all of them in order to seek review as of right – whether or not the

[57] Transcript of oral argument on admissibility of contentions, Yucca Mountain repository licensing proceeding at 355 (April 1, 2009) (Statement by ASLB Judge Alan S. Rosenthal).

applicant believes all of the contentions are inadmissible. I think the fairest approach would be to adopt first option in the Staff paper on the subject – to allow an appeal by either the applicant or the petitioner of the ASLB's decision regarding standing and hearing requests.[58] By taking that approach, the Commission would eliminate pointless appeals of entire ASLB decisions and focus on issues that are truly in dispute.

I hope these comments are helpful. Please do not hesitate to contact me if you have any questions about them.

Sincerely,

/s/
Diane Curran

[58] Interlocutory Appeals in U.S. Nuclear Regulatory Commission Adjudicatory Proceedings, attached as Enclosure 2 to Doane Memorandum.