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ADJUDICATORY ISSUE

December 5, 1990 (Information) SECY-90-396

FOR: The Commissioners

FROM: John F. Cordes, Jr.
Solicitor

SUBJECT: LITIGATION REPORT 1990-33

Union of Concerned Scientists v. NRC, No. 89-1617 (D.C. Cir., Nov. 30, 1990)

This lawsuit challenged the NRC's 1989 rule change heightening the threshold pleading standards in licensing proceedings. Petitioner did not challenge the heightened pleading requirement alone, but argued that the NRC ought not be permitted to impose tougher threshold pleading standards, while at the same time adhering to its traditional approach to "late-filed" contentions. That approach rests on a test balancing five factors: (1) good cause for lateness, (2) the availability of other means to protect the late petitioner, (3) the assistance to be expected from the late petitioner, (4) the extent the petitioner's interest is protected by existing parties, and (5) the extent that the new petitioner will broaden the issues or delay the proceeding. 10 C.F.R. 2.714(a). Petitioner argued that late intervention should be automatic, without applying any balancing test, when the NRC staff releases safety or environmental documents revealing new information. Otherwise, according to petitioner, the NRC would abrogate the hearing guaranty contained in section 189a of the Atomic Energy Act.

The court of appeals (Silberman, Henderson & Randolph, JJ) has just issued a decision rejecting the petitioner's position and affirming the NRC's new threshold contention rule and its traditional late-filed contention rule. The court started with the proposition that petitioner's "challenge to the NRC's procedural rules faces a steep uphill climb" because "the Act itself nowhere describes the content of a hearing or prescribes the manner in

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which this 'hearing' is to be run" (Slip op. at 6). The court brushed aside petitioner's argument that an earlier D.C. Circuit case, Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985), should be read "to require that a licensing proceeding embrace anything new revealed in the SER or the NEPA documents" or "that the NRC consequently may not employ the balancing test to preclude consideration of new 'information'" (Slip op. at 8). The Union of Concerned Scientists decision, ruled the court, does not guarantee a hearing on all new evidence, but holds merely that the NRC cannot refuse a hearing altogether on an issue that the NRC itself agrees is material to a licensing decision.

This is an important victory that reaffirms the NRC's authority to structure its licensing proceedings reasonably. The decision gives the agency considerable leeway in construing the section 189a hearing requirement. The decision may prove useful should the NRC seek further review in Nuclear Information Research Service v. NRC, No. 89-1381 (D.C. Cir., Nov. 2, 1990) (partially invalidating Part 52 on ground that it does not provide guaranteed post-construction hearing opportunity on new evidence).

Contact:
Carole Kagan
x21632

United States v. Comley, M.B.D. No. 89-422 (D. Mass., Nov. 19, 1990)

In the latest turn of events in the NRC's longstanding effort to obtain by subpoena tape recordings held by Stephen Comley, the district court has ruled that the NRC subpoena issued in March 1989 no longer is valid. The court reasoned that the Commission's own investigation (conducted by Administrative Judge Alan Rosenthal) ended in December 1989, that the Inspector General took over the investigation shortly thereafter, and that if the Inspector General's investigation requires production of the Comley tapes, he should exercise his own independent subpoena authority rather than rely on the outstanding NRC subpoena. The court issued its decision as a "draft" memorandum and order, and has not yet entered it formally. At our request the United States Attorney's office has

filed a motion asking the district court to stay the effect of its decision for sixty days to allow the NRC to consider an appeal and the Inspector General to consider whether to issue his own subpoena. The court has not yet issued its decision on our motion. The United States Attorney and Mr. Comley's attorney have reached agreement that Mr. Comley's monetary liability for his longstanding contempt of the court order enforcing the original NRC subpoena is approximately $135,000.

Contact:
Neil Jensen
x21634

Nuclear Management and Resources Council, Inc. v. Public Citizen, No. 90-360 (S. Ct., certiorari denied Nov. 26, 1990)

We previously have reported on this lawsuit challenging the NRC's policy statement on training. See Litigation Reports 1990-18, 1990-26, and 1990-31, SECY-90-142, SECY-90-251 & SECY-90-380. The court of appeals invalidated that policy statement and held that the NRC must promulgate binding rules in its place. On November 26 the Supreme Court denied NUMARC's petition for a writ of certiorari. We did not file our own petition, but in collaboration with the Solicitor General we did file a Supreme Court brief indicating that the government did not oppose NUMARC's petition. Justice Byron White indicated that he would have granted certiorari on a jurisdictional question raised in the case.

Contact:
Susan Fonner
x21632

Citizens for Fair Utility Regulation v. NRC, No. 90-119 (S. Ct., certiorari denied October 9, 1990)

As previously reported, this lawsuit challenged the full power license granted to the Comanche Peak nuclear power plant in Texas. See Litigation Reports 1990-09 and 1990-18, SECY-90-045 & SECY-90-142. The NRC rejected an effort of a citizens group to reopen the Comanche Peak licensing proceeding on the ground that it had been improperly settled. The Fifth Circuit and the Supreme Court

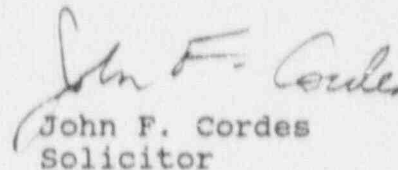
denied stays of the full power license, and the Fifth Circuit ultimately issued an opinion rejecting petitioner's arguments for late intervention. The citizens group then sought review in the Supreme Court, and we filed a brief in opposition. Earlier this fall the Supreme Court denied the petition for a writ of certiorari.

Contact:
Charles Mullins
x21606

Atlas Corp. v. United States, No. 89-1705 (S. Ct., certiorari denied, October 1, 1990)

As previously reported, this was a multi-million dollar damage suit brought against the government by uranium producers on the claim that the government had contracted for the uranium pr[illegible] n and should be held liable for the [illegible] radiation clean-up costs the prod[illegible] incurred. See Litigation Rep. 1990-10, SECY-90-052. The Federal Circuit issued a decision last winter agreeing with our arguments (developed in cooperation with the Department of Justice) that the government was not liable for the clean-up costs. The uranium producers sought Supreme Court review, and the government filed a brief in opposition. Earlier this fall the Supreme Court denied the petition for a writ of certiorari.

Contact:
Charles Mullins
x21606



John F. Cordes
Solicitor

Enclosures: As stated

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 5, 1990 Decided November 30, 1990

No. 89-1617

UNION OF CONCERNED SCIENTISTS,
PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA,
RESPONDENTS

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC. AND
EDISON ELECTRIC INSTITUTE,
INTERVENORS

Petition for Review of an Order of the
Nuclear Regulatory Commission

Diane Curran, with whom *Dean R. Tousley* was on the brief, for petitioner.

Carole F. Kagan, Senior Attorney, Nuclear Regulatory Commission, with whom *William C. Parlor*, General Coun-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

sel, *John F. Cordes, Jr.*, Solicitor, and *E. Leo Slaggie*, Deputy Solicitor, Nuclear Regulatory Commission, and *Robert L. Klarquist*, Attorney, Department of Justice, were on the brief, for respondents.

Jay E. Silberg, with whom *Thomas A. Baxter, Mindy A. Buren, Robert W. Bishop*, and *Peter R. Kelsey* were on the brief, for intervenors Nuclear Management and Resources Council, Inc. and Edison Electric Institute.

Before: SILBERMAN, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: The Union of Concerned Scientists (UCS) petitions for review of a Nuclear Regulatory Commission (NRC) rule heightening the specificity requirements for pleadings filed by parties seeking to intervene in licensing hearings, 54 Fed. Reg. 33,168 (Aug. 11, 1989). UCS contends that the rule on its face violates the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* We deny the petition.

I.

An understanding of UCS' objection to the NRC rule requires a brief summary of the NRC licensing process. Utilities seeking to construct or operate a nuclear power plant must file a license application and detailed health, safety, and environmental submissions with the NRC. 10 C.F.R. § 50.34 (1990). The NRC Staff then studies the applicant's submissions and compiles a Safety Evaluation Report (SER) and the environmental documents required by NEPA. Interested parties may request or move to intervene in a hearing within 30 days of the filing of the application. 10 C.F.R. § 2.714(a) (1990); § 2.102(d)(3) (1990). Shortly after making such a request or motion, and well before the NRC Staff completes the SER or NEPA documents and releases them publicly, a party

must file a pleading listing its "contentions," that is, what it seeks to litigate in the hearing. 10 C.F.R. § 2.714(b) (1990).

Any party that timely files at least one admissible contention may participate in the hearing. Previously, prospective intervenors had only to set forth the bases for contentions with "reasonable specificity." 10 C.F.R. § 2.714(b) (1989) J.A. 45. The new rule perceptibly heightens this pleading standard. It requires that contentions consist of "a specific statement of the issue of law or fact to be raised or controverted," that they detail the alleged facts or opinion on which the prospective intervenor will rely, and that they "show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2). As the NRC recognized that this showing would have to be made before the NEPA reports are released, the rule further provides that with respect to environmental issues "the petitioner shall file contentions based upon the applicant's environmental report [and] ... can amend those contentions or file new contentions if there are data or conclusions in the ... [NEPA reports] that differ significantly from the data or conclusions in the applicant's document." 10 C.F.R. § 2.714(b)(2)(iii). Intervenors who had raised issues in a timely fashion and who had been admitted to the hearing thus may incorporate as of right new evidence raised in the SER and the NEPA reports bearing on those issues.

In promulgating the new rule, the NRC also made clear that it had not changed its 17 year-old rule with respect to late-filed contentions. *See* 54 Fed. Reg. 33,172 (Aug. 11, 1989). Under that prior rule, parties advancing untimely contentions are not automatically granted access to the hearing even if their contentions otherwise pass muster under the NRC admissibility criteria; instead, they are admitted on the basis of a discretionary, five-factor balancing test. 10 C.F.R. § 2.714(a).[1] This test applies fully

[1]The five factors are:

even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline; the NRC has ruled that while the first factor—good cause for filing late—is by definition met in such circumstances, the other four factors, if implicated, permit the denial of intervention in a given case. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983) ("*Catawba*").

II.

The sole question presented by UCS' petition for review is whether the new contentions rule is on its face "not in accordance with law," 5 U.S.C. § 706(b). UCS does not, however, contend that the heightened pleading requirement, standing alone, would be illegal. Its position is rather that the new rule's operation in conjunction with the longstanding late-filing rule denies it the ability fully to litigate challenges to licenses, and that the combination of the rules therefore facially violates the Atomic Energy Act, the APA, and NEPA. It argues that the NRC may not apply the final four factors of the late-filing balancing test whenever there is good cause for the late filing due to the unavailability of information, but must instead admit as of right contentions filed late for this reason.

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a).

The NRC claims that this argument is actually an out of time challenge to the late-filing rule and the interpretation of it in *Catawba* and that we accordingly lack jurisdiction to hear UCS' petition. To be sure, the preponderance of UCS' brief is devoted to criticism of the late-filing rule. UCS, however, also argues that even if the late-filing rule itself is consistent with Section 189(a), the heightened specificity requirements of the new rule push the NRC over the statutory edge by foreclosing a previously available circumvention of the late-filing rule. Under the old, more lenient, pleading standard, parties could file timely contentions incorporating evidence and issues frequently appearing in SERs and NEPA documents but not disclosed in the license application; many of these "anticipatory" contentions, as the NRC concedes (NRC Br. at 27-28), would be eliminated by the new rule's specificity requirements. We consequently have jurisdiction to entertain UCS' claims and so we turn to the merits.[2]

In order to prevail on its claim that the NRC is bound to conduct its proceedings in the particular manner it advocates, UCS must point to a statute specifically mandating that procedure, for "absent constitutional constraints or extremely compelling circumstances" courts are *never* free to impose on the NRC (or any other agency) a procedural requirement not provided for by Congress. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978). UCS focuses on Section 189(a) of the Atomic Energy Act,

[2]Because we hold that even the combined effect of the new contentions rule and the late-filing rule does not violate the Atomic Energy Act, the APA, or NEPA, we need not specifically address UCS' arguments that the permissibility of the *Catawba* doctrine itself is properly before us because the NRC reopened the issue in the proceedings below and that that doctrine alone transgresses each of these statutes. UCS' claim concerning the combined effect of the rules necessarily incorporates its claim concerning the late-filing rule alone. We can conceive of no analytic basis on which petitioner's "combined" claim could fail but its attack on the *Catawba* doctrine alone could succeed. For that reason, we do not have to determine whether we have jurisdiction independently to entertain the latter challenge.

which provides that "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a).

The only term in this section that UCS implicitly seeks to interpret is the word "hearing." As the Act itself nowhere describes the content of a hearing or prescribes the manner in which this "hearing" is to be run, UCS' challenge to the NRC's procedural rules faces a steep uphill climb.[5] We are, of course, obliged to defer to the operating procedures employed by an agency when the governing statute requires only that a "hearing" be held. *See, e.g., American Trucking Ass'ns v. United States*, 627 F.2d 1313, 1319 n.20, 1321 (D.C. Cir. 1980) (noting that such "operating procedures" fall "uniquely within the expertise of the agency"); *see also Richardson v. Wright*, 405 U.S. 208, 209 (1972); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940); *see generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). And we have in addition long noted the *increased* deference due NRC procedural rules because of the "unique degree 'to which broad responsibility is reposed in the [Commission], free of close prescription in its charter as to how it shall proceed in achieving the stat-

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[5]As we have previously noted, it is an open question whether Section 189(a)—which mandates only that a "hearing" be held and does not provide that that hearing be held "on the record"—nonetheless requires the NRC to employ in a licensing hearing the procedures designated by the Administrative Procedure Act for formal adjudications, 5 U.S.C. §§ 556, 557. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444-45 n.12 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985); *see generally United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 234-238 (1973) (APA formal rulemaking procedures are not required where the substantive statute provides for a "hearing" without specifying that the hearing be held "on the record"). Because the rules do not on their face contravene any of the formal procedures, we need not resolve this issue here.

utory objectives.'" *BPI v. Atomic Energy Comm'n*, 502 F.2d 424, 428 n.3 (D.C. Cir. 1974) (quoting *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968)); *see also Cities of Statesville v. Atomic Energy Comm'n*, 441 F.2d 962, 977 (D.C. Cir. 1969) (en banc) (quotation omitted) (the NRC "should be accorded br[illegible] discretion in establishing and applying rules ... public participation").

UCS nonetheless argues that the operation of the NRC procedural rules denies it a hearing within the "plain meaning" of Section 189(a). It claims that the NRC may not exclude a late-filed contention raising "information" first brought to light by the staff documents on grounds (contained in its five-factor balancing test) that the late-filing party's interest will be protected by other means, that the party's participation is not necessary to develop a sound record, that the party's interest is represented by other parties to the hearing, or that the party's participation will delay the proceeding. This argument is based on the following syllogism: (1) under Section 189(a), any party has a right to a hearing on any material issue; (2) much material information bearing upon a licensing decision will not be apparent before the SER and NEPA documents are completed and made public and so cannot be raised in a timely fashion with the specificity the NRC now demands; and therefore (3) by subjecting late-filed contentions incorporating this information to a balancing test for admission, the late-filing rule and *Catawba*'s interpretation of it illegally place at the NRC's discretion that to which parties have an absolute right under Section 189(a). It seems rather creative to draw all of this from the "plain meaning" of the word "hearing." UCS maintains, however, that all three logical steps are drawn from our interpretation of the section 189(a) "hearing" in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) ("*UCS I*"). We disagree—both with UCS' construction of that case and with UCS' logic.

In *UCS I*, we invalidated as in violation of Section 189(a) an NRC rule which eliminated from all licensing

hearings a specific issue—the adequacy of emergency preparedness plans—that the NRC conceded was material to a licensing decision. *See* 735 F.2d at 1443. We found "no basis in the statute or legislative history for NRC's position that Congress granted it discretion to eliminate from the hearing material issues in its licensing decision." *Id.* at 1447. *UCS I* thus stands for the proposition that Section 189(a) prohibits the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision. But it does not do anywhere near the service petitioner asks of it.

In the first place, *UCS I* does not establish, as UCS contends, that *any* party raising a material issue has a right to intervene. *UCS I* held only that the NRC may not preclude *all* parties from raising a specified material issue. Indeed, we have long recognized that Section 189(a) "does not confer the automatic right of intervention upon anyone," *BPI*, 502 F.2d at 428, and that the NRC may exclude a party from a hearing if, for example, another party has fully presented a material issue identical to the one the excluded party seeks to raise. *See Cities of Statesville*, 441 F.2d at 977. UCS' view of Section 189(a) would compel the NRC to reopen a hearing to anyone and everyone filing a contention based on a new issue brought to light by the SER or NEPA documents, regardless of how many parties sought to intervene on the same issue. We think that is an unreasonable interpretation of the statute, and that the NRC may employ each of the four factors in its late-filing test to limit the admission of late-filing parties raising the same issue.

Petitioner also is mistaken in reading *UCS I* to require that a licensing hearing embrace *anything* new revealed in the SER or the NEPA documents and in contending that the NRC consequently may not employ the balancing test to preclude consideration of new "information." *UCS I* dealt with a matter conceded by all parties to be a material *issue*, *see* 735 F.2d at 1445-46, whereas much of what those reports will bring to light will, it seems to us, not

be new *issues* but new *evidence* on issues that were apparent at the time of application. As we recently recognized, new information about nuclear power plant safety arising between the time of the initial application and the commencement of operations does not necessarily present a new *issue*: "[d]uring the lengthy construction process, new and safety-significant information about plant design, siting, or operation may arise. These intervening developments *may in turn raise new issues* about the conformity of the plant with the Act . . . ." *Nuclear Information and Resource Serv. v. NRC*, No. 89-1381, slip op. at 11-12 (D.C. Cir. November 2, 1990) (emphasis added). Information raised in the environmental reports does not amount to a new material "issue" simply because it adds marginal weight to the case of an opponent or a proponent of a license; the reports instead raise a new "issue" only when *the argument itself (as distinct from its chances of success)* was not apparent at the time of the application. Although the concepts of new issues and new evidence are analytically distinct, we recognize that in practice they can converge—the demarcation line may depend on how the "issue" is stated. Still, whether an actual new "issue" is raised is a matter for the NRC to determine in the first instance and is reviewed deferentially. *Cf. San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir.) (en banc), *cert. denied*, 479 U.S. 923 (1986); *Carstens v. NRC*, 742 F.2d 1546, 1555, 1559-60 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985).

Whatever the statutory restraints on the NRC's authority to exclude material *issues* from its hearings, the Commission can certainly adopt a pleading schedule designed to expedite its proceedings. *See BPI*, 502 F.2d at 428. In this instance, the Commission has adopted such a schedule, properly balancing two competing concerns: the risk that a private party's new evidence on a previously apparent issue will be excluded and the need adequately to delineate the scope of the licensing hearing. When a staff document reveals new material, the NRC undoubtedly must take that new material into account internally and

courts will certainly consider it in determining on review whether a licensing decision is supported by substantial evidence or is arbitrary and capricious because the NRC failed to take into account a relevant factor. But we think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.[4] We see nothing in the statute that guarantees all private parties the right to have the staff studies as a sort of pre-complaint discovery tool. The NRC, it seems to us, is permitted to employ considerations such as whether a party's participation "may reasonably be expected to assist in developing a sound record" or will "delay the proceeding"—the third and fifth factors in its late-filing test—in assessing whether to admit to a hearing a late-filing party seeking to raise only new evidence contained within the environmental reports.

The NRC rules of course *could be* applied so as to prevent *all* parties from raising a material issue. But "[e]ven assuming *arguendo* that we were to find that these instances . . . [would] constitute specific misapplications of the rule . . . they [would] suggest, at most, only that the rule might in the future be misapplied. Such arguments are of course inappropriate here, where the rule is being challenged on its face." *Union of Concerned Scientists v. NRC*, 880 F.2d 552, 558-59 (D.C. Cir. 1989). Any application of the rule to prevent all parties from raising material issues which could not be raised prior to release of the environmental reports will be subject to judicial review, and the validity of the rules as there applied can be addressed at that time.[5]

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[4]A party may, of course, petition the NRC to modify a license in light of such new evidence. *See* 10 C.F.R. § 2.206 (1990).

[5]At oral argument, counsel for UCS suggested that we must anticipate that case now because UCS will otherwise be "chilled" from attempting to participate in NRC hearings and from challenging NRC decisions in court. Given the proliferation of litigation on NRC decisions and the expansiveness of the NRC hearing process, *see generally Vermont Yankee*, 435 U.S. at 557, we find this novel argument unpersuasive.

III.

UCS also argues that the rules violate the APA and NEPA by not allowing full notice and comment on the environmental reports. The short answer to the APA challenge is that UCS does not cite any express provision of the APA which the rules contravene—it refers only to 5 U.S.C. § 553, which applies solely to rulemaking and is hence inapplicable to NRC licensing hearings. In any event, UCS' reliance upon cases holding that the APA gives interested parties the right to full notice and comment on Staff positions in adjudications is misplaced; in those cases, the agency completely refused to disclose its Staff's position, *see, e.g., Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 923-24 (D.C. Cir. 1982); *U.S. Lines, Inc. v. FMC*, 584 F.2d 519, 533-34 (D.C. Cir. 1978), whereas under the challenged rules the NRC discloses the environmental reports before the hearing, and parties to that hearing then have a right to object to or use all information contained in those reports bearing on issues the parties had timely raised. To the extent that an *issue* could not be raised before the release of the reports, there might possibly then be an argument that the notice and comment requirement would mandate admittance of a late-filed contention raising that issue, but we again decline to anticipate that case.

UCS' NEPA arguments fare no better. While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues. *See, e.g., Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 305, 319 (1975). As a result, NEPA does not alter the procedures agencies may employ in conducting public hearings, *see Vermont Yankee*, 435 U.S. at 548; it instead merely prevents agencies from excluding *as immaterial* certain environmental issues from those hearings.[6] The NRC has not attempted to do this, and as

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[6]Contrary to UCS' claim, our decision in *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), does not establish that NEPA confers on parties an abso-

its procedural rules do not facially violate the Atomic Energy Act or the APA, they also are consistent with NEPA.

* * * *

The NRC rules to which UCS objects may be employed consistent with the Atomic Energy Act, the APA, and NEPA. Although hypothetical applications of these rules might transgress the statutory provisions upon which petitioner relies, we think it inappropriate to anticipate them in resolving petitioner's facial challenge to the rules. The rules accordingly are valid on their face, and the petition for review is

Denied.

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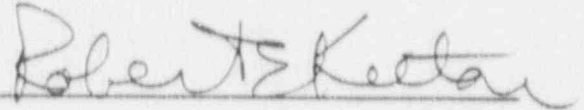
lute right to a hearing on the documents that Act requires agencies to compile. That case held only that an agency may not consistent with NEPA limit its consideration of environmental issues to those actually raised by parties, *see id.* at 1117-18, and does not speak to whether a party has a right to a hearing on all environmental issues irrespective of its failure to comply with an agency's perfectly legal procedural timetables.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Petitioner v. STEPHEN B. COMLEY, Respondent	)	M.B.D. NO. 89-422

Procedural Order
November 19, 1990

Attached is a tentative draft of a Memorandum and Order the court will enter after the hearing today, unless good cause is shown for modification or for entry of a different order.



United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Petitioner v. STEPHEN B. COMLEY, Respondent	)	M.B.D. NO. 89-422

Memorandum and Order
November 19, 1990

On June 23, 1989, this court entered an Order (Docket No. 15) enforcing a subpoena duces tecum of the Nuclear Regulatory Commission ("NRC") directing respondent Stephen Comley to produce tape recordings and transcripts for use in an NRC investigation of employee misconduct. At a hearing on October 15, 1990, the court requested both parties to submit memoranda addressing the subpoena's continuing enforceability. Having reviewed the memoranda and reply memoranda submitted by the parties, I conclude that the NRC subpoena duces tecum underlying my Order of June 23, 1989 ceased to be enforceable not later than December 31, 1989.

I. BACKGROUND

When the NRC directed the subpoena duces tecum to respondent on March 24, 1989 and amended it on April 17 and April 24, 1990, the NRC sought tape recordings and transcripts in the possession of respondent pursuant to an investigation of

employee misconduct. The investigation was then being conducted by a special investigator, Judge Alan Rosenthal, who was acting as an agent of the NRC. The NRC placed Judge Rosenthal in control of the investigation on February 28, 1989, when it relieved its Office of Inspector and Audit ("OIA") of responsibility for the investigation.

Legislation became effective in April of 1989 that abolished the NRC's OIA and replaced it with a statutory inspector general--the NRC Office of Inspector General ("OIG") (Inspector General Act, §102(d)(11), Pub. L. No. 100-504, 102 Stat. 2515 (October 18, 1988), amending Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, codified as amended at 5 U.S.C.App. 3 (Supp. 1990). At some time after the effective date of this amendment of the Inspector General Act (the exact time not being determinable on the submissions now before the court), the investigation by the NRC terminated and the newly created OIG undertook an investigation of at least some aspects of matters within the scope of the previous investigation under the direction of Judge Rosenthal. One may infer from submissions now before the court (a) that these developments occurred some time between this Court's Order in June, 1989 and January, 1990, and (b) that Judge Rosenthal continued to play some role in the investigation until December 31, 1989, when his contract with the NRC expired (Letter dated December 22, 1989 from NRC Chair Kenneth M. Carr to David C. Williams, NRC Inspector General, Exhibit 4 to Respondent's Memorandum on Continued Validity of NRC Subpoena, filed November

1, 1990). Since January 1, 1990, the only investigation still in progress has been under the exclusive control of the OIG.

The OIG has not directed any subpoena *duces tecum* to respondent. Instead, it has attempted to enforce the subpoena *duces tecum* issued by the NRC.

II. IS THE NRC SUBPOENA NOW ENFORCEABLE?

The subpoena *duces tecum* in question was issued by a vote of the NRC, pursuant to its authority under Section 161(c) of the Atomic Energy Act, codified at 42 U.S.C. §2201(c) (1973). As part of its "General Duties," the NRC is authorized by the statute to:

> (c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter.... For such purposes the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place.

Id., 42 U.S.C. §2201(c) (1973).

The OIG, like the NRC, has independent authority to issue subpoenas. However, the scope of the OIG's authority and the purposes for which it may be invoked differ from those specified for the NRC. The pertinent section of the 1988 amendment to the Inspector General Act of 1978 cited above (the "Amended Act") authorizes each Inspector General:

> (4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers and other data and documentary evidence <u>necessary in the performance of the functions assigned by this Act</u>....

5 U.S.C.App. 3, §6(a)(4) (Supp. 1990) (emphasis added). Setting out the "Purpose" of the Offices of Inspector General established by the Act, Section 2 provides:

> In order to create independent and objective units--
>
> > (1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2) [including the NRC in the list];
> >
> > (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and
> >
> > (3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;
>
> there is hereby established in each of such establishments an office of Inspector General.

5 U.S.C.App. 3, §2 (Supp. 1990).

In keeping with the statutorily specified policy of independence and objectivity, the Inspector General who heads the NRC's OIG is appointed not by the NRC but by the President of the United States, with the advice and consent of the Senate, and may be removed only by the President. See 5 U.S.C.App. 3, §3(a)-(b) (Supp. 1990).

Emphasizing the independence of an OIG from the associated governmental agency, the District of Columbia Circuit, in a case involving the Department of Energy, concluded that an agency is not authorized to delegate its subpoena powers to its

affiliated OIG. United States v. Iannone, 610 F.2d 943 (D.C. Cir. 1979) The court distinguished the Secretary's authority to delegate his subpoena power to one of his agents from the asserted authority to delegate to the Inspector General, noting that the Secretary's functions are distinct from those of the Inspector General:

> The Inspector General is not an agent of the Secretary, but is intended to be and is an independent officer. He is appointed by the President by and with the advice and consent of the Senate and may be removed only by the President who must communicate the reasons for any such removal to both houses of Congress. Although he reports to and is under the general supervision of the Secretary, there is no suggestion in the statute that he is subject to direction by the Secretary in carrying out his investigative functions. See 42 U.S.C. §7252.

Id., 610 F.2d at 946.

Conceding that the Inspector General in Iannone had no independent authority to issue subpoenas, respondent nevertheless argues that the analysis applied in Iannone should control in the instant case as well. The NRC Inspector General, like the Department of Energy's Inspector General in Iannone, is not subject to direction by the NRC Commissioners in carrying out his investigative functions. Though Congress clearly authorized the NRC Inspector General to issue enforceable subpoenas, it also declared that the OIG subpoena power is to be used independently for the purposes of the OIG and only after an independent evaluation by the OIG of the need for invoking that power.

Respondent's argument is supported by the analysis of the

district court in United States v. Montgomery County Crisis Center, 676 F. Supp. 98, 99 (D. Md. 1987). In that case, the court declined to enforce a subpoena issued by the Inspector General of the Department of Defense. The court reasoned, in part, that the subpoena was not based upon an independent determination by the Inspector General to issue it. Similarly, respondent contends, the OIG, having made no independent determination of need, should not be permitted to enforce a subpoena issued by the NRC.

Petitioner contends that the court should nevertheless enforce the NRC subpoena because, as a practical matter, the end result will be the same except that the investigation will be further delayed. There are two fundamental flaws in this response.

First, courts may not disregard a statutory mandate regarding formalities for issuance of an effective subpoena. Formalities serve the purpose of assuring that a considered determination of need for the subpoena has been made by an authorized decisionmaker. They are in essence "solemn act" requirements that a court is not authorized to abrogate.

Second, it is debatable whether the Amended Act authorizes the OIG to investigate particular instances of alleged employee misconduct, and if not, whether another proper basis for a subpoena would be found to exist. This court should not be deciding disputable issues of statutory interpretation and factual support for a subpoena when the agency whose authority is at issue has not yet addressed them. If the agency, upon addressing them, declines to issue a subpoena, no case or controversy will exist for

resolution in court.

Petitioner makes an alternative argument in its memorandum that this court should enforce the NRC subpoena because, unlike the subpoena power of a grand jury, the NRC's subpoena power has not expired. Also, petitioner argues, respondent continues to be able to comply with the NRC's subpoena and thereby purge his contempt. This line of reasoning does not compel a different conclusion in this case.

The fact that the NRC has ongoing subpoena power does not obviate the OIG's obligation to make an independent determination in issuing its own subpoena. A trial court, unlike a grand jury, has ongoing subpoena power. Yet, when a potential witness is held in civil contempt and ordered into custody for refusal to obey a court order to testify in a trial of criminal charges against another person under a grant of immunity, that witness must be released as soon as the criminal trial is completed. Similarly, Comley's obligation to comply with the NRC subpoena <u>duces tecum</u> in the instant case terminated when the NRC terminated its own investigation and requested the OIG to pursue further investigation under the OIG's independent authority. It is not enough to say that Mr. Comley may purge his contempt by complying with the NRC subpoena <u>duces tecum</u> because that subpoena is no longer in effect.

ORDER

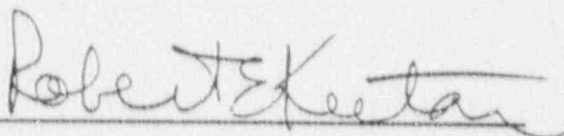
For the reasons stated above, it is ORDERED:

(1) This court's Order (Docket No. 15, dated June 23, 1989) enforcing the NRC subpoena <u>duces tecum</u> expired not later than

December 31, 1989. The respondent ceased to be in continuing contempt for failure to comply with that order when that order expired.

(2) The parties are directed to confer to determine whether it is undisputed (given the court's legal rulings in this Memorandum) that the date of expiration of the court's Order of June 23, 1989, was December 31, 1989, and, if not, whether a stipulation can be reached as to the expiration date.

(3) The parties also are directed to confer to see if they can agree upon the form of a final judgment in this case. If they are unable to submit a stipulated form of judgment on or before December 15, 1990, they shall, on or before December 29, 1990, submit their respective proposals to the court.



United States District Judge