POLICY ISSUE
(Notation Vote)

January 8, 1999 SECY-99-006

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

SUBJECT: RE-EXAMINATION OF THE NRC HEARING PROCESS

PURPOSE:

To advise the Commission on the legal requirements bearing on whether formal, trial-type hearings must be employed in NRC administrative proceedings, and to discuss options for deformalizing various types of proceedings.

DISCUSSION:

I. Statutory Provisions and their Interpretation

The debate over how much formality is legally required in NRC proceedings -- specifically, whether the Commission's licensing proceedings must be "on-the-record" adjudications under §554 of the Administrative Procedure Act[1], resembling a court trial -- long antedates the NRC's

[1]Under the Administrative Procedure Act, an agency adjudication required by statute to be "on the record" must give all interested parties the opportunity for submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit. 5 U.S.C. § 554(c). If the parties are unable to resolve a controversy by consent, they are entitled to a hearing at which they may present their case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct cross examination, "as may be needed for a full and true disclosure of the facts." 5 U.S.C. § 556(d). Before a decision is made, the parties are also entitled to submit proposed findings and conclusions, exceptions to an initial decision of a subordinate employee and supporting reasons therefor. 5 U.S.C. § 557(c). The procedural requirements for adjudication, both formal and informal, under the APA and under Constitutional due process will be

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establishment. The fact that this question can be the subject of discussion and uncertainty even today, nearly 45 years after Congress enacted the Atomic Energy Act of 1954, is a reflection of the controversy that has accompanied nuclear power since its inception. Virtually from the start, different perceptions of what was desirable as a matter of policy seem to have affected judgments on the seemingly quite separate issue of what was necessary as a matter of law.

The key statutory provision, Section 189a of the Atomic Energy Act, declared only that "a hearing" (or an opportunity for a hearing) was required for certain types of agency actions. It did not state that such hearings were to be on-the-record proceedings. A detailed discussion of Section 189 and its legislative history can be found in the Commission's decision in *Kerr McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982), which we have appended as Attachment 1. [2]

As a legal matter, where Congress provides for "a hearing," and does not specify that the adjudicatory hearings are to be "on the record," or conducted as an adjudication pursuant to §§554, 556, and 557 of the APA, it is presumed that informal hearings are sufficient.[3] Nevertheless, the Atomic Energy Commission (AEC) of the 1950's asserted that formal hearings were what Congress had intended. At that time, the AEC saw benefits in a highly formal process, resembling a judicial trial, for deciding on applications to construct and operate nuclear power plants. It was thought that the panoply of features attending a trial -- parties, sworn testimony, and cross-examination -- would lead to a more complete resolution of the complex issues affected the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC. One study concluded that the use of formal hearings developed in order to address concerns that the pressures of promotion by the AEC could have an undue influence on the AEC's assessment of safety issues. By use of an expanded hearing process, the Commission could more fully defend the objectivity of its licensing actions.[4]

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[1](...continued)
in greater detail later in this paper.

[2] In addition, there is a long and scholarly discussion of the question of whether NRC proceedings are required to be "on-the-record" in *Advanced Medical Systems*, ALAB-929, 31 NRC 271, 279-288 (1990).

[3]*United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972), *citing Siegel v. AEC*, 400 F.2d 778, 785 (D.C.Cir. 1968); *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).

[4]William H. Berman and Lee M. Hydeman, *The Atomic Energy Commission and Regulating Nuclear Facilities* (1961), *reprinted in* Improving the AEC Regulatory Process, Joint Committee on Atomic Energy, 87th Cong., 1st Sess., Vol. II, at 488 (1961).

The AEC thus took the official position that on-the-record hearings were not merely permissible under the Atomic Energy Act but required.[5] At least two subsequent statutes contain *implications* -- though no more than that -- that the Congresses that enacted them believed that such formal adjudication was required. These instances, both of which involve clauses beginning with the word "notwithstanding," are worth examining in some detail, because they form much of the basis for arguments that the 1954 Act should be read to require on-the-record proceedings.

The first came in 1962, when Congress amended the Atomic Energy Act to add a new Section 191, authorizing the use of three-member licensing boards rather than hearing examiners, "notwithstanding" certain provisions of the Administrative Procedure Act (APA). Because those referenced APA provisions dealt with formal, on-the-record adjudication, the "notwithstanding" clause in the statute could be read (and by some, is read) to imply that by 1962, Congress viewed the Atomic Energy Act as requiring on-the-record adjudication. (The crux of the argument is that such a clause would have been unnecessary if on-the-record adjudication were not mandatory.) That very year, however, as will be discussed below, the Joint Committee on Atomic Energy restated its belief that formal adjudication was *not* required in AEC proceedings.

That raises an obvious question: If the Joint Committee, which on matters pertaining to the AEC was given great deference by Congress as a whole, viewed AEC proceedings as *not* required to be formal, and thus not subject to the Administrative Procedure Act's requirements for formal proceedings, why was Congress, virtually at the same time, writing legislation with a clause that was wholly superfluous if the Joint Committee's view of the law was correct?

In 1978, "notwithstanding" made its second appearance, but this time, it was the Atomic Energy Act, rather than the Administrative Procedure Act, that presented the problem. In that year, Congress enacted the Nuclear Non-Proliferation Act, which provided among other things for the NRC to establish procedures for "such public hearings [on nuclear export licenses] as the Commission deems appropriate." The statute said that this provision was the exclusive legal basis for any hearings on nuclear export licenses, adding: "[N]otwithstanding section 189a. of the 1954 Act, [this] shall not require the Commission to grant any person an on-the-record hearing in such a proceeding." The inference can therefore be drawn that by 1978, Congress thought that without express statutory authorization to use other hearing procedures, on-the-record formal hearings would be called for by Section 189 of the Atomic Energy Act.

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[5] AEC Regulatory Problems: Hearings before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong., 2nd Sess. 60 (1962) (Letter of AEC Commissioner Loren K. Olsen).

Before offering our views as to the significance of these two "notwithstanding" clauses, it may be helpful to review the applicable legal standards. As a legal matter, the amount of weight given to retrospective legislative history -- that is, one Congress's opinion of what an earlier Congress intended -- depends greatly on the circumstances. While the Supreme Court recently reiterated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction," *Loving v. United States*, 517 U.S. 748, 770 (1996), the cases cited in that decision make clear that subsequent legislative history that falls short of explicitly "declaring the intent of an earlier statute," and instead gives rise merely to certain inferences, is entitled to far less weight.

In *Loving*, the Court cited a 1979 case, *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117. There, the Court began its discussion of the issue of "subsequent legislative history" with "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" The more formal and explicit is Congress's statement of what it intended in its previous enactment, the more weight it will be accorded. Where Congress has passed legislation, which an agency has interpreted in a particular (and controversial) way, and Congress then enacts a second statute continuing that the agency's interpretation was consistent with what it had intended all along, then Congress can truly be said to have "declared the intent of an earlier statute," and that kind of "subsequent legislative history" will indeed be given great weight by a reviewing court. This was the case, for instance, with the FCC's "fairness doctrine," upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There, the Court said, Congress had not just kept its silence about the agency's interpretation but had "ratified it with positive legislation." 395 U.S. 367, 381-82.

Where subsequent legislative history is less formal and explicit, the Supreme Court has made clear that it becomes perilous to rely on it: "[A]s time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *GTE Sylvania*, 447 U.S. 102, 118 n.13.[6] In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 751, the Court brushed aside a conference committee report that, in dealing with amendments to a statute, offered its view of the proper interpretation of the original statute. The report, it said, was written 11 years after the original statute and thus was "in no sense part of the legislative

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[6] Other Supreme Court cases that highlight the problems in relying on subsequent legislative history include *United States v. Price*, 361 U.S. 304 (1960), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). To a petitioner arguing that a committee report on a statute indicated Congress's probable view of an earlier statute, the Court said, in *Price*, "Inferences from legislative history cannot rest on so slender a reed." 361 U.S. 304, 313. In the latter case, the Court said that its construction of a particular provision was not foreclosed by the fact that "after the passage of the amendment, some members of Congress, and for a time the Justice Department, voice the [contrary] view...." 374 U.S. 321, 348.

history....It is the intent of the Congress that enacted [the section] that controls." [Citations omitted.] Likewise, in *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977), the Court stated that "little if any weight" should be given to a conference committee report, written eight years after the original statute, that purported to interpret that earlier statute.

Applying the law to the facts before us, we see nothing in these two "notwithstanding" clauses that even approaches being a clear declaration of what Section 189a of the 1954 Act provided. The most that can be said for the later statutes is that they give rise to possible inferences as to what the later Congresses -- not the Congress that passed the 1954 Atomic Energy Act -- may have believed. But even those inferences are far from unequivocal.

OGC's view is that the most plausible explanation for the "notwithstanding" clauses is that they were intended not as a means to overcome what were viewed as fatal legal impediments, but rather, like many such legislative clauses, as a precaution, to anticipate potential legal objections and eliminate them. In view of the way that the law was then being applied by the AEC, it would have been only prudent of the drafters to eliminate ambiguity on this point when enacting additional provisions, *even if they had been convinced that the clauses were unnecessary*. At this point, there is no good way to know whether they regarded these clauses as necessary or not, but we doubt that a reviewing court would care greatly one way or the other. To focus too much on Congress's thought processes in 1962, when it enacted Section 191, and in 1978, when it passed the Nuclear Non-Proliferation Act, runs the risk of losing sight of what any reviewing court interested in legislative intent would regard as the central question, which is what Congress intended in 1954, when it enacted Section 189a.

To return to our chronology, for many years, the agency did not depart from the longstanding assumption that the Atomic Energy Act requires on-the-record hearings despite the fact that assumption had never been reduced to a definitive holding.[7] While some court decisions reflected this assumption, others did not.[8] In addition, in 1990, Congress provided that for the

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[7] Consistent with this approach, the NRC declared in 1978 that the hearing it would hold on an application to construct and operate a nuclear waste repository for high level waste would be formal. In final rules published in 1981, now codified at 10 CFR Part 2, Subpart J, the Commission provided for a mandatory formal hearing at the construction authorization stage and for an opportunity for a formal hearing prior to authorizing receipt and possession of high level waste at a geologic repository. Subsequently, Congress enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq*. That law includes no specific hearing requirements. Instead, it seems to contemplate, at Section 114, that the NRC will apply existing laws applicable to the construction and operation of nuclear facilities. In sum, there is no *statutory* requirement for a formal hearing on a high level waste repository, but without a rule change, the NRC's regulations *would* require a formal hearing.

[8] *Compare Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444 n. 12 (D.C. Cir.

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licensing of a uranium enrichment facility, the NRC "shall conduct a single adjudicatory hearing on the record."[9] This provision can be interpreted in one of two ways: either as one more reflection of Congress's understanding that formal adjudication was the norm in NRC facility licensing proceedings, or as the very opposite, *i.e.*, as showing that Congress understood that because of the presumption against formal hearings, explicit statutory language would be

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[8](...continued)
1984), *cert. denied*, 469 U.S. 1132 (1984)[*UCS I*]("there is much to suggest that the Administrative Procedure Act's (APA) 'on the record' procedures...apply [to section 189]") *with Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 n.3 (D.C. Cir. 1990)("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 procedures designated by the [APA] for formal adjudications"). The commentary in these and other cases is essentially *dicta* -- observations not essential to the court's decision. *See also Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968)(deciding only permissibility of informal rulemaking procedures under section 189); *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F. 2d 1363, 1368 (D.C. Cir. 1979)(deciding only NRC's discretion to initiate enforcement proceedings subject to section 189 hearing); *City of West Chicago v. NRC*, 701 F.2d 632, 642 (7th Cir. 1983)(deciding only permissibility of informal procedures in materials licensing adjudication).

Professor Kenneth Culp Davis, a leading scholar of administrative law (who also roundly criticized the AEC's view of the "mandatory" nature of hearings during the 1962 review of AEC's regulatory process), has criticized the D.C. Circuit's reading of the Administrative Procedure Act in the *Porter County Chapter* case. 2 K. Davis, Administrative Law Treatise, 450 (2d ed. 1979). Subsequently, in *Chemical Waste Management v. EPA*, 873 F.2d 1477, 1480 (D.C. Cir. 1989), the D.C. Circuit stated that while the presence of the words "on the record" are not absolutely essential in order to find that formal adjudicatory hearings are required, there must, in the absence of those words or similar language, be evidence of "exceptional circumstances" demonstrating that Congress intended to require the use of formal adjudicatory procedures. Although the court suggested, again in dicta, that section 189a of the Atomic Energy Act might be a case where "exceptional circumstances" dictate formal, on-the-record hearing requirements, that observation has its roots in a *dictum* in *UCS I* which suggests that in 1961 "the AEC specifically requested Congress to relieve it of its burden of 'on the record' adjudications under section 189(a)" and Congress did not do so. 735 F.2d at 1444 n.12. The opposite is more nearly correct: the AEC argued in favor of formal procedures and the Joint Committee on Atomic Energy advised that informal procedures were permissible. *See* H.R. Rep. No. 1966, 87th Cong., 2d Sess., at 6 (1962), *quoted in Kerr McGee Corp.*, CLI-82-2, 15 NRC 232, 251 (1982). More recently, in *Kelley v. Selin*, 42 F.3d 1501, 1511-12 (6th Cir.), *cert. denied*, 115 S.Ct. 2611 (1995), the court emphasized the NRC's latitude to determine the nature of the "hearing" mandated by the Atomic Energy Act.

[9] Atomic Energy Act § 193, 42 U.S.C. § 2243.

needed to make proceedings for this type of facility "on the record," as that term is used in the Administrative Procedure Act.

The view that formal adjudications were desirable and mandatory was not unanimously held, however. As early as 1962, a Senate subcommittee wrote, in words that might easily have been written today:

> By now, it has become apparent that the adversary type of proceeding, resembling as it does the processes of the courts, does not lend itself to the proper, efficient, or speedy determination of issues with which the administrative agencies frequently must deal.... Questions relating to ... licensing of atomic reactors ... might better be solved in some type of proceeding other than an administrative "lawsuit" among numerous parties.[10]

This report was cited with approval by the Joint Committee on Atomic Energy, which turned down a proposal, recommended by its consultants, to provide explicit statutory authorization for the AEC to use informal procedures. The Joint Committee reasoned that such legislation was unnecessary, given that the Commission already had "legal latitude ... to follow such procedures," that such procedures were desirable, and that the Committee had strongly encouraged the Commission to make use of them. Despite the Joint Committee's urgings, however, the AEC made no move in the direction of deformalization.

Over the decades since the Atomic Energy Act was passed, debate over the value of on-the-record adjudication for the resolution of nuclear licensing issues, and indeed for resolving scientific issues generally, has only increased. There are now many observers, not all of them aligned with industry or the NRC, who are skeptical that the use of formal adjudication in NRC licensing cases is the appropriate means to settle a regulatory issue; that whatever validity there may have been to the arguments for formal adjudication from the 1950's to the 1970's, they no longer have merit; and that less formalized proceedings could mean not only greater efficiency, but also better decisions, with more meaningful public participation and greater public acceptance of the result. *See, e.g., Improving Regulation of Safety at DOE Nuclear Facilities*, Final Report of the Advisory Committee on External Regulation of DOE Nuclear Safety, December 1995, at 39.

However, because of the early interpretation that formal hearings were required, as well as the NRC's long-standing practice of conducting formal hearings on reactor licensing actions, each time that the NRC has explored ways of deformalizing its proceedings, it has had to confront its own prior statements and actions on the subject. The approach to deformalization has therefore been cautious, taking place in slow, incremental steps.

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[10] H.R. Rep. No. 1966, 87th Cong., 2d Sess. 6 (1962), *quoted in Kerr McGee Corp.*, CLI-82-2, 15 NRC 232, 251 (1982)[Attachment 1].

One such step came in 1982, when the Commission, in the *West Chicago* case, granted an informal hearing (*i.e.*, with written submissions only) on an amendment to a materials license. In doing so, it observed that the Atomic Energy Act did not specifically require on-the-record hearings, and it called the legislative history "unilluminating" as to Congress's intent in materials licensing cases. The Commission noted that while it held formal hearings in all reactor licensing cases, it had not stated explicitly whether it did so as a matter of discretion or of statutory requirement; in any event, it did not view the Act as mandating an on-the-record hearing in *every* licensing case. This decision was upheld by a reviewing court.[11] Subsequently, the NRC issued a new Subpart L to Part 2, setting forth procedures for holding informal proceedings on all materials license applications and amendments.

The *West Chicago* court's finding that formal hearings were not required for materials licenses opened the door considerably wider for the argument that formal hearings are not necessarily required in reactor licensing cases either, as the provision of the Atomic Energy Act that establishes the basic statutory entitlement to a "hearing" does not distinguish between reactor licenses and materials licenses.

The first significant move toward deformalization of reactor licensing cases came in 1989, when the NRC completed what a reviewing court described as a "bold and creative" effort to foster standardization of nuclear power plant designs, as well as the early resolution of key safety issues.[12] This was the issuance of a new Part 52, which provided for issuance of design certifications and "combined licenses" for construction and operation of nuclear power plants. The rule provided that standard designs could be approved by rulemaking, with an opportunity for an informal hearing conducted by an Atomic Safety and Licensing Board. (This would be a "paper" hearing, unless the Licensing Board requested the authority to conduct a "live" -- that is, oral -- hearing, and the Commission agreed.) Subpart G formal hearings would be offered prior to the issuance of the combined construction permit/operating license. When the facility was essentially complete, and close to fuel loading and criticality, there would be an opportunity for members of the public to raise any concerns they might have about plant operation. These could fall into one of two categories: either a claim that the facility as built did not meet the "acceptance criteria" specified in the original combined construction permit/operating license, or a claim that the acceptance criteria themselves (that is, the licensing requirements) were deficient. For claims in the former category, the Commission would determine whether to hold a hearing. If the Commission decided to grant a hearing, it would be "formal" within the definition

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

[12] In the Nuclear Waste Policy Act of 1982, sec. 134, Congress specified a set of hybrid procedures for licensing expansions of spent fuel storage capacity at reactor sites. The process called for written submissions, oral argument and an adjudicatory hearing only after specific findings by the Commission. The Commission promulgated procedures --10 CFR Part 2, Subpart K -- to implement this legislation, but they have never been used in an agency proceeding.

of the Administrative Procedure Act, but would not be governed by the requirements of Subpart G of the Commission's rules, which impose more formal procedures than required by the Administrative Procedure Act. (Subpart G, for example, provides for discovery; the Administrative Procedure Act does not.) A request to modify the terms of a combined license would be handled as a request for action under 10 CFR § 2.206.

When Part 52 was promulgated, the Nuclear Information and Resource Service promptly filed suit. A panel of the U.S. Court of Appeals for the D.C. Circuit issued a decision that upheld some parts of the rule but set aside others, including the provisions governing the opportunities for a hearing after completion of construction and prior to operation.[13] However, the decision was later vacated by the entire D.C. Circuit, sitting *en banc*.[14] In its brief to the full court, the NRC argued unequivocally that the Atomic Energy Act's hearing requirement for nuclear power plant licensing did not necessarily mean a formal hearing.

The full court upheld Part 52 in its entirety, but on the question of whether hearings must be formal, it reserved judgment, on the grounds that the NRC's argument that informal hearings were permissible had not been made in the rulemaking or before the original panel.[15] Subsequently, Congress enacted legislation giving its blessing to Part 52, and specifying that at the pre-operation phase, any hearing on whether the appropriate inspections and tests have been made, and the prescribed acceptance criteria have been met, shall be either "informal or formal adjudicatory," as the Commission may in its discretion determine.[16]

Since that time, the Commission has taken two more steps to further stake out its position that the Atomic Energy Act does not require formal hearings. The first was a rulemaking

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[13] *Nuclear Information and Resource Service v. NRC*, 918 F.2d 189 (D.C. Cir. 1990), *vacated & rehearing en banc granted*, 928 F.2d 465 (D.C. Cir. 1991).

[14] *Nuclear Information and Resource Service v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992).

[15] *Id.* at 1180.

[16] The law amended Sections 185 and 189 of the Atomic Energy Act. Public Law 102-486 (1992). This amendment, however, is of little value or weight in establishing the meaning of the basic requirement of a "hearing." While it could be argued that it shows that Congress did not intend all licensing actions to require formal adjudicatory procedures, the contrary argument could also be made: that when Congress wishes to allow informal procedures, it knows how to write the necessary statutory language. As noted earlier, the same kind of double-edged analysis can be applied to the provision in Section 193 that provided for on-the-record hearings in enrichment facility licensing proceedings: that it can be seen as signifying either that Congress recognized that proceedings on NRC-licensed facilities were ordinarily formal, or that, on the contrary, it recognized that such proceedings could be informal unless the statute specified otherwise.

implementing the Equal Access to Justice Act[17]. This statute authorizes the recovery of attorney's fees by certain "prevailing" parties in "adversary adjudications," which for purposes of that Act includes many types of on-the-record agency adjudications.[18] The NRC decided to authorize the payment of attorney's fees only for adjudications under the Program Fraud Civil Remedies Act,[19] which by law must be on the record, on the grounds that no other NRC adjudications (other than those for the licensing of uranium enrichment facilities under Section 193) must by law be on the record.[20] To date, no lawsuit has been filed challenging this determination. The second and more significant step was the recent promulgation of Subpart M to Part 2, to cover transfers of licenses, including those for power reactors. Here again, the rule does not provide for formal proceedings.

In concluding this discussion, however, we do not wish to leave the Commission with the impression that the question of formal vs. informal proceedings under Section 189 is free from doubt, or that if the Commission were to take the position that informal hearings were permitted, it could be sure of prevailing in court. As we have observed, early interpretations and long-standing practice argue for formality. How much weight a reviewing court would give to the competing arguments, if it came to a lawsuit, is not necessarily easy to predict. In making this observation, we do not mean to intimate doubts about our conclusion that Section 189 does not mandate use of formal adjudicatory proceedings, or to suggest that the Commission should base its actions on anything other than its view of what represents sound law and policy; rather, in the interest of informing the Commission fully, we wish to make clear that victory in court should not be taken for granted.

II. Other Agencies' Practice

The experience of other agencies is not particularly helpful in answering either of the two key questions: whether deformalization is legal, and whether it is desirable as a matter of policy. It may be helpful, however, in the Commission's formulation of hearing procedures for the future. In Attachment 2 to this paper, we offer a summary of the legal requirements applicable to a variety of agencies, and to the efforts made by agencies in recent years to streamline their processes, encourage settlement and use of mediation, and other forms of alternative dispute

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[17] 5 U.S.C. 504.

[18] The term "adversary adjudication" is defined in 5 U.S.C. 504 (b)(1)(C) to generally mean, for purposes of the EAJA, adjudications conducted under 5 U.S.C. 554, the section of the Administrative Procedure Act applicable to adjudications required by statute to be determined on the record after the opportunity for an agency hearing. "Adversary adjudications" do not include adjudications to consider the grant or renewal of a license.

[19] 31 U.S.C. 3801-12.

[20] 10 CFR Part 12, 59 Fed. Reg. 23121 (May 5, 1994).

resolution. Many agencies still use formal adjudicatory proceedings, but other agencies' formal hearing processes appear to be used primarily for enforcement-type proceedings, *i.e.*, in circumstances where they are imposing sanctions or restrictions on a licensee or permittee. This is not uniformly the case, however. Of particular interest to the Commission may be the Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act of 1992, which calls for EPA to determine the suitability of a particular New Mexico site for a demonstration project on the safe disposal of transuranic wastes. This statute explicitly *precludes* use of formal adjudication. Instead, it emphasizes ensuring public access to pertinent information, with notice-and-comment procedures to follow.

III. Trends in Administrative Law

Recent years have shown a distinct movement away from formal adjudication and toward a variety of alternatives to the formalized, winner-take-all courtroom approach for some types of regulatory actions. This may well be a reflection of Americans' general perception that all too often, litigation has become a first step, rather than a last resort, in the resolution of disputes.

Beginning in the early 1980's, the Administrative Conference of the United States, since abolished by Congress, made efforts to encourage flexible approaches for resolving disputes. This led to the Administrative Dispute Resolution (ADR) Act, first passed in 1990 and reauthorized six years later.[21] That Act encourages Federal agencies to use alternative means of dispute resolution and case management. Its enactment and renewal were a sign of the growing enthusiasm for alternatives to formal adjudication, as a means both of achieving fairer and more sensible decisions and of saving time and resources. Also in 1996, President Clinton signed Executive Order 12988, "Civil Justice Reform," encouraging agencies to use alternatives to litigation "wherever feasible, ... [through] informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding...." The Executive Order also called for training litigation attorneys in alternative dispute resolution techniques "to facilitate broader and effective use of informal and formal ADR methods." Subsequently, Congress enacted the Alternative Dispute Resolution Act of 1998 which requires each United States District Court to authorize and encourage the use of alternative dispute resolution processes in all civil actions.

In practice, ADR methods may be as informal as having a neutral party serve as a mediator to help the parties craft mutually acceptable solutions, or as formal as peer panels, management review boards, and binding arbitration. Typically, less formal processes are used first; if they fail, more formal means are employed. Philosophically, the approach of ADR differs from that of litigation in that courtroom procedures focus on whose claims are more meritorious, whereas ADR asks what the parties' interests are, and how they can be harmonized.

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[21] P.L. 104-320 [5 U.S.C. 571 note].

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[21] P.L. 104-320 [5 U.S.C. 571 note].

Since the passage of the initial ADR Act, many agencies have employed these techniques in connection with certain of their activities, most notably the Environmental Protection Agency, the U.S. Air Force, the Army Corps of Engineers, and the Federal Deposit Insurance Corporation. As noted in our discussion of other agencies' practices, many of them have adopted ADR mechanisms as a voluntary or even mandatory process which parties can or must use before availing themselves of formal or informal adjudication. In September, 1998, the Attorney General established a working group, comprised of representatives of many agencies, with a goal of creating ADR programs in every agency, and, within a year, at least one new conflict resolution program in each agency. NRC has been involved in this endeavor.

In short, for the NRC to move in the direction of developing less formal mechanisms to resolve issues in its proceedings would be consistent with the philosophic approach taken in recent years by the Congress, the Federal courts, and the Executive Branch. At the same time, it must be recognized that certain ADR practices such as arbitration or its equivalents may be more appropriate in the context of "conflict resolution" (*e.g.*, contract disputes, personnel grievances) than for nuclear licensing, where ultimate questions, such as whether a particular site is an appropriate place for a nuclear facility or whether a facility can be operated safely, may not lend themselves to compromise solutions.[22] There may also be a certain amount of skepticism about whether informal processes are an effective forum for addressing issues, such as nuclear power, where people are fundamentally adversarial.

IV. Role of the NRC Staff and Separation of Functions

Over many years, a consistent concern of Commissioners has been that when, in their quasi-judicial role as adjudicators, they are called upon to make decisions on technical issues, they are often barred from soliciting the advice of those staff members most knowledgeable on those issues, because these are the individuals who have helped develop the staff's position in the adjudication.[23]

The barrier to such consultation derives from the Administrative Procedure Act, 5 U.S.C. § 554(d), known as the "separation of functions" provision. It provides that in every "adjudication required by statute to be determined on the record after opportunity for an agency hearing," the agency decision maker may neither: "(1) consult a person or party on a fact in issue, unless on

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[22]Moreover, the NRC was created in order, among other things, to render expert technical judgments on issues within its area of expertise. There may be limits on the extent to which the NRC can allow other kinds of decision-making or outside decision-makers (*e.g.*, arbitrators) to substitute for the agency's exercise of its own best judgment.

[23]This has led to such practices as the assignment of "separated" staff experts as advisers to the Office of General Counsel and the Office of Commission Appellate Adjudication in individual cases, so that in writing opinions for the Commission, the lawyers can draw on staff expertise without contravening the rules.

notice and opportunity for all parties to participate; [n]or (2) [consult] ... an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." The statute makes clear that employees engaged in investigative or prosecuting functions for an agency in a case "may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ... except as witness or counsel in public proceedings." This does not apply, however, where the agency is "determining applications for initial licenses."[24]

It will be noted that these Administrative Procedure Act provisions apply only if the matter is one that is required to be decided "on the record." Accordingly, if we are correct in advising, as this paper does, that Section 189 of the Atomic Energy Act does not require an "on-the-record" decision, then this "separation of functions" barrier does not apply to ordinary NRC licensing proceedings, irrespective of whether they are conducted as formal or informal hearings. The NRC's rules, however, include strict prohibitions on *ex parte* communications (that is, direct or indirect communications to the decision makers from interested parties outside the agency) and separations of functions barriers (10 CFR §§ 2.780 and 2.781, respectively), presumably written in the belief that in fact, Section 189 *does* require formal, on-the-record proceedings. If the Commission were to conduct informal hearings in all of its proceedings conducted under Section 189, then among the NRC regulations that would need to be reviewed and possibly changed are those dealing with separation of functions. Changes in these rules could allow the Commission and individual Commissioners to meet with the technical staff to discuss technical issues, notwithstanding the pendency of a licensing hearing.

V. Discussion

We have described above how the Atomic Energy Commission and then the NRC have traditionally provided more formality than the law required in adjudicatory proceedings. We have suggested that at the time, there seemed to be policy reasons for doing so: the public, it was thought, would have greater confidence in decisions made in a courtroom setting. We have also identified the trend in statute law and in much administrative practice to move away from formalized adjudication, with its winner-take-all courtroom model, toward alternative procedures, aimed at finding solutions that both satisfy legal requirements and accommodate a variety of interests.

In the last several years, moreover, the Chairman and other Commissioners have created a number of opportunities outside the agency's Section 189 hearing processes to conduct informal

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[24] An "initial license" would include construction permits, operating licenses, and combined licenses. The initial licensing exception would not apply, however, to an amendment to such a license or to license renewal. *See Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1264 (1977). The NRC has chosen here to go beyond the statutory requirement: under 10 CFR 2.781, the separation of functions rules apply to all of the agency's Subpart G adjudications, including initial licensing proceedings and license amendments.

meetings with members of the public and other stakeholders, both in Washington, and in communities close to nuclear power plants that were experiencing performance problems. The feedback on such informal meetings has been, by most accounts, extremely positive. This experience has raised the question of whether some of the elements of the give and take in these settings could be productively introduced into the agency's Section 189 processes. The foregoing discussion as well as observations such as those of the Advisory Committee on External Regulation of DOE, that "trials are not always...useful in the regulatory context", and that they "consume a disproportionate amount of time in highly formal processes such as discovery and cross-examination which are expensive for all concerned" suggest that the formality of NRC hearings is not only unnecessary legally, but may even be counterproductive in terms of providing an appropriate vehicle for participation by affected individuals or an understanding of the issues by a broader public.

At the same time, however, a number of caveats are appropriate. First, the question of the formality or informality of proceedings needs to be kept in its proper perspective. This issue, and the actions of individual licensing boards or the Licensing Board Panel as a whole, should not be made the scapegoat for broader economic and political trends for which they bear no responsibility. The corollary of that statement is that no one should imagine that a shift from formal to informal proceedings is a panacea that will bring about rapid proceedings, increase public acceptance, or solve the various problems of the nuclear power industry. The principal reason that proceedings are lengthy is usually that the subject matter is technical and complex, issues are numerous, and the parties far apart in their view of the appropriate outcome. And we have seen, from our experience with materials licensing cases under Subpart L, that informal procedures are no guarantee of a speedy and uncomplicated proceeding.

Moreover, it may well be that the critical change to be made in agency adjudication is not to the framework within which it occurs, but rather to the manner of implementation -- to get back to the fundamentals, as recently spelled out by the Commission in its *Statement of Policy on Conduct of Adjudicatory Proceedings*. The technical staff must do a sufficient review of the safety issues that are to be decided to provide an adequate basis for decision-making on a schedule that supports prompt resolution of issues. Agency attorneys must represent those staff assessments before the decision-makers in a forthright and disciplined way, and the presiding officer must, in a firm but fair manner, enforce adherence to litigation procedural requirements, all actively overseen by the Commission in its supervisory capacity.

There are positive attributes of a formal proceeding that should not be dismissed lightly. If proper discipline is exercised by the presiding officer, a formal proceeding by definition is one that can be controlled, with "quality control" over proffered evidence and the resulting record from which a decision ultimately is to be drawn. An informal proceeding, by contrast, has the potential for the introduction of vast amounts of material, not necessarily germane to the proceeding, but nevertheless absorbing the time and attention of the participants and the presiding officer, and requiring substantial time and effort to sort out the valuable evidentiary

wheat from among the far less useful chaff.[25] Moreover, there may be intangible benefits of formality that are no less real for being difficult to measure: for example, the extent to which the prospect of cross-examination improves the quality of NRC staff evaluations, testimony, and submissions. Other intangible benefits, as seen by the public interest community, may be that the formal process empowers the intervenor; *e.g.*, the licensee must respond to the discovery requests, and the witness must answer the questions. Any considerations of informal processes should account for how these interests could be addressed, albeit in a different manner. The issue, as we see it, is one of shades of gray, in which there are trade-offs between benefits and detriments of different approaches.

One way to approach the issue is to differentiate between various types of proceedings -- *e.g.*, construction permits, power reactor operating licenses, license amendments, license renewals, license transfers, decommissioning, materials licenses, materials license amendments, enforcement proceedings, etc. -- and to consider each in terms of its function and complexity, and how the Commission's overall goals are met with respect to it. For example, there are some aspects of formality, such as the right to confront and cross-examine witnesses, that may be appropriate (because of due process considerations) in an enforcement proceeding, because of its essentially accusatory nature, but that would not be equally useful or desirable in other types of proceedings.

In Attachment 3 to this paper, we offer in matrix form an analytic model for understanding how the functional elements of a proceeding contribute to the performance goals of that proceeding. In our view, the major performance goals, which we draw from the NRC's Principles of Good Regulation, are five: inclusiveness (*i.e.*, access for the interested public); transparency (open decision-making); efficiency; fairness (including due process considerations); and substantive soundness. These principles can be represented on the vertical axis, while on the horizontal axis, we consider the functional elements that comprise the essence of the proceeding in its three major stages: prehearing, hearing, and decision. At the prehearing stage, the key questions are: (1) who participates? (2) what is the scope of the issues to be addressed? and (3) what access to information will be allowed? At the hearing stage, the critical issues are: (1) how will participants present information? (2) how will a sound record be developed? and (3) how will the quality and accuracy of the proffered information be tested? Finally, at the decision stage, we ask: (1) who makes the decision? (2) how do participants persuade the decision-maker? and (3) how does review of the decision occur? For a particular type of proceeding, some of these issues or questions may not be pertinent or even answerable, but even that can help to guide the agency in making judgments on the degree of formality that is warranted for that type of proceeding.

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[25] No one is suggesting that the Atomic Energy Act would allow the NRC to move to a Section 2.206 type of procedure in place of hearings offered under the Atomic Energy Act. Denials of enforcement action under that section, in contrast to Section 189a decisions, are normally not judicially reviewable. Any decision resulting from an informal proceeding of the type we discuss here, as with current Subpart L cases, would be judicially reviewable.

We are not suggesting that a matrix of this sort should be used as a formal decision-making tool either generically or on a case-by-case basis. Rather, it is one way of looking, in a reasonably orderly way, at the outcomes the agency is seeking to achieve in its proceedings, and developing an understanding of how different elements of a proceeding vary in their importance in contributing to those outcomes, depending on the type of proceeding. For example, in a reactor operator license denial case where the evidence consists of test results, cross-examination to test the quality of the evidence may be much less important in contributing to the soundness of the decision or to fairness than it might be in an enforcement case where the evidence consists of testimony on the intent of an employee in failing to take a required action.

VI. Options

As indicated above, consideration of the adoption of less formal procedures means facing a number of questions: What procedures should be adopted? Should the preference be for written submissions, oral presentations, or a combination of the two? Should formal procedures be an option in specific cases? Should proceedings be "hybrid," with such formal procedures as discovery or cross-examination on particular issues placed within the discretion of the presiding officer? Should all reactor licensing proceedings be informal or only certain classes of proceedings?[26] Should the high-level waste repository proceeding be informal?[27] Whatever procedures the Commission decides upon, one requirement will be the development of a record adequate to support an agency decision and judicial review. In Attachment 4 to this paper, we discuss some of the possible formats, and the Constitutional requirements that must be considered. In Attachment 5, we discuss options for resolving the question of who should preside. In Attachment 6, we discuss issues associated with "standing," to provide further insights on answering the questions "who participates?", "what is the scope of issues to be addressed?", and, to a lesser degree, "how can we ensure that a sound record will be developed by persons with a real interest and stake in the outcome?"[28]

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[26] One possible approach would be to limit formal adjudications to hearings for the grant of construction permits, operating licenses, combined licenses for power reactors and possibly some enforcement proceedings; informal procedures would apply in all other proceedings, such as those on license amendments.

[27] This proceeding is likely to be extremely complex and controversial. Potential parties to it, including the State of Nevada and certain Indian tribes, are expecting that it will be a formal adjudication, and some may well react negatively to any change in format. This expectation is a result of consistent public announcements by the Commission, since 1978, that the HLW repository licensing will involve formal hearings before the NRC.

[28] It can be argued that if the Commission were to ease its standing requirements, it would spend less of its resources on procedural disputes, and perhaps also find itself with a fuller, more useful record. Counter-arguments may be made, however. Standing issues are

(continued...)

We do not discuss these issues in the body of the paper, however, because most of these matters are secondary to, and supportive of, a decision on the central policy question -- whether and how to proceed to change the current hearing process. Essentially, there are five options. The first is to follow the Commission's current course, set out in its recent Policy Statement on Conduct of Adjudicatory Proceedings, of rigorous adherence to existing procedures, and also to modify those procedures to adopt generically some of the additional instructions in the Policy Statement, such as using case files and allowing electronic submittals. However, under this option, no *major* changes would be made to the hearing process. This option would include making limited changes, such as modifying Subpart L procedures in the light of lessons learned, to make them more effective.[29] The second is to pursue a strictly legislative solution, seeking statutory approval for deformalized Section 189 proceedings, and a change in Section 193, which currently mandates formal proceedings for the licensing of enrichment facilities. The third is for the Commission to proceed on its own, by rulemaking, to deformalize its proceedings to the extent permissible under existing law, while asking Congress to amend Section 193, since with regard to it, a change in law would be necessary. The fourth is to take a two-track approach, simultaneously moving forward with rulemaking and with a separate legislative proposal. The fifth is to use a formal hearing process for enforcement cases, while moving to informal proceedings for all licensing cases. Any of the options which include rulemaking could include some of the practices followed in recent rulemaking by the Commission, such as meetings with stakeholders to consider options and to better understand the issues associated with alternative ways of revising Commission procedures.

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[28](...continued)
usually addressed early in the process before staff documents are completed, and thus do not normally contribute to the length of a proceeding in and of themselves; moreover, if the Commission, in the interest of saving time in some proceedings, were to forego a formal determination of standing and allow all would-be participants to be heard, it would mean giving participants with potentially a less direct stake in the outcome the right to engage in an adjudication before the NRC and subsequently to take the NRC to court in the event of an adverse decision.

[29] Another minor change that the Commission could make, with negligible litigative risk, is to repeal those elements of Subpart G that go beyond the Administrative Procedure Act's requirements for "on-the-record" hearings. One immediate effect would be to eliminate formal discovery in NRC adjudications.

Each of these possibilities has its pros and cons, which we would summarize as follows:

1. Follow current course of action

Pro:
Commission has recently established a renewed vigor in implementation of its current procedures, via its Policy Statement; results could be assessed before significant change was undertaken. Existing system is a known quantity; altering it is to exchange known problems for unknown ones. Avoids possible perception that Commission intends to truncate rights of public participation. Avoids litigation risk of using changed procedures, with attendant uncertainty for parties. For cases where credibility of witnesses is an issue, such as in some enforcement proceedings, use of cross-examination and other formal procedures may be the best means of establishing the facts.

Con:
Widespread, although certainly not universal view, is that existing system is deficient; thus an opportune time to act to fix problems. Absence of applications for new nuclear power plants makes this a suitable time for procedural changes, as disruption would be less than if many major proceedings were ongoing. May be seen as indicating Commission indifference to perceived inadequacies in its processes. Formal adjudicatory procedures may not be well suited to resolving scientific, technical, and policy disputes.

2. Seek a legislative solution

Pro:
An explicit, definitive resolution of the problem; no cloud of legal uncertainty over Commission actions; no risk to licensees that licensing actions will be overturned for failure to use formal procedures. Since Congressional action would be needed in any case to deformalize Section 193, Commission would be justified in asking for legislative confirmation across the board.

Con:
May be time-consuming. Commission has history of seeking legislative relief and failing to get it. No guarantee, once Congress begins to write legislation, that the result will be what the Commission asked for. If the Commission comes to Congress for assistance without first acting under existing authority to solve the problem (to the extent it can), it could be seen as showing a lack of energy and commitment. Moreover, if Congress failed to grant the requested legislative relief, opponents of deformalization could be expected to argue that (1) the NRC, in seeking this relief, had effectively conceded that current law requires formal proceedings, and (2) the Congress, by denying the request, had signaled that it wished formal proceedings to continue.

3. Use rulemaking to effectuate the NRC's interpretation of Section 189

Pro:
Commission can act on its own, without waiting for Congress; if pursued energetically, could be accomplished relatively quickly. Demonstrates Commission's willingness to help itself rather than look to others to solve its problems. If the changes adopted were unacceptable to some, could ultimately provide an opportunity for definitive resolution in court.

Con:
Some statutory provisions, *e.g.*, Section 193 of the Atomic Energy Act, would require Congressional action in any case. Uncertain degree of litigative risk for Commission actions taken in reliance on the NRC's interpretation of Section 189. NRC licensees may not wish to place themselves at risk of having to go back and relitigate issues in a formal proceeding, if a reviewing court were to set aside an NRC decision made under informal procedures.

4. Two-track solution (rulemaking and request for legislative relief)

Pro:
Shows the Commission trying to put its own house in order, at the same time that it reflects recognition that a complete solution requires at least some Congressional action (to amend Section 193). May increase chances of a timely solution, as one or the other path may move more quickly. Could be seen as showing a Commission serious and resolute in attempting to come to grips with a long-standing problem. Consistent with successful NRC approach to Part 52 (simultaneous rulemaking and request for legislative fix).

Con:
May give rise to question why the NRC is seeking legislative relief if it thinks that much of the problem can be solved administratively. Could be seen as duplicative, because some efforts would be parallel. May be seen by some as showing a Commission overzealous in the effort to eliminate formal proceedings.

5. Retain formal adjudication for enforcement proceedings, informal adjudication for some or all licensing (initial and amendment) cases

Pro:
Recognizes that enforcement proceedings are by nature more accusatory, therefore more trial-like, arguably create greater need for procedural protections for participants. (See also discussion of earlier options for benefits and disadvantages of formal and informal proceedings.)

Con:
Arguably allows decisions on critical safety issues to be made without the maximum procedural tools for assuring the accuracy of testimony. A decision to use informal proceedings for the High Level Waste Repository licensing would probably be highly controversial.

Recommendation

OGC makes no formal recommendation of any of the options. We believe that this is an issue of sufficient complexity and significance that it should be the Commission's own, based on its evaluation of the nature of the problem, the likelihood of obtaining legislative relief, and the acceptability of different options to our various stakeholders. If the Commission does choose deformalization of some or all of its proceedings, we would reiterate our observation that, as is apparent from the agency's experience with Subpart L procedures in the *University of Missouri* case, informal proceedings offer no guarantee against complex and drawn-out proceedings. The Commission should expect, whichever option it chooses, that close monitoring of its proceedings as committed to in the *Policy Statement* will continue to be an important element of its agenda.

Coordination

An earlier draft of this paper was provided to the Chief Judge of the Atomic Safety and Licensing Board Panel for comment. His comments have been considered and addressed in this final paper. The paper has also been coordinated with the Executive Director for Operations.

Karen D. Cyr

Karen D. Cyr
General Counsel

Attachments:
1. Excerpt from *Kerr-McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982)
2 Adjudicatory Proceedings of Other Agencies
3. Assessing Procedural Options: An Analytic Model
4. Options for Formats for Adjudicatory Proceedings
5. Presiding Officers
6. Standing Requirement Options

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Tuesday, January 26, 1999.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT January 19, 1999, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATTACHMENT 1

Cite as 15 NRC 232 (1982) CLI-82-2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nunzio J. Palladino, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne
Thomas M. Roberts

In the Matter of **Docket No. 40-2061**

KERR-McGEE CORPORATION
(West Chicago Rare Earths Facility)

February 11, 1982

The Commission denies petitions requesting a formal adjudicatory hearing on a materials license amendment (granted September 28, 1981) permitting licensee to demolish certain buildings on its West Chicago site and receive for temporary onsite storage a small quantity of thorium ore mill tailings.

RULES OF PRACTICE: NOTICE OF PROPOSED ACTION OR OPPORTUNITY FOR HEARING

The Commission is required to issue a notice of proposed action, or notice of opportunity for hearing, only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." 10 CFR 2.105(a).

RULES OF PRACTICE: NOTICE OF HEARING

The Commission has no duty under its regulations to issue a notice of hearing under 10 CFR 2.104 unless (1) a hearing is mandated in even an uncontested case by either section 189a of the Atomic Energy Act, or 10 CFR Chapter I; (2) it has issued a notice of proposed action or notice of

THE ATOMIC ENERGY ACT OF 1954 DOES NOT REQUIRE A TRIAL-TYPE HEARING UNDER §554 OF THE APA

Under section 5 of the Administrative Procedure Act, 5 U.S.C. §554, the formal hearing procedures set forth in APA sections 7 and 8, 5 U.S.C. §§556, 557, are applicable only if the adjudication in question "is required by statute to be determined on the record after opportunity for an agency hearing . . . ." The City has argued that it is entitled to a formal hearing, pursuant to 5 U.S.C. §554, under section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239(a).[13] Section 189a states, in relevant part:

> In any proceeding under this Act, 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.

Although the statute explicitly requires a "hearing," the Commission does not read section 189a as requiring a section 554 hearing in every single licensing proceeding and, in this case, the Commission believes the statute may properly be read to deny such a hearing.

On its face, section 189a does not indicate what type of hearing must be granted to interested persons. The legislative history of the 1954 Atomic Energy Act is unilluminating on this question.[14] That history does show,

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licensing cases 20 years ago — particularly in materials license cases — are surely less novel on the whole. Given our changed regulations, and changed conditions at the agency and in the industry, there is reason for us to forego providing formal hearings in materials licensing cases like this one. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1264-65 (3d Cir. 1974).

[13] Under section 181 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2231, it is stated that "[t]he provisions of the Administrative Procedure Act . . . shall apply to all agency action taken under this Act . . . ." It is well recognized, however, that the applicability of the APA in a specific instance turns on that act's requirements, see *Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1978), which in this instance affords a formal hearing only when the agency's statute requires a hearing "on the record." Further, the inclusion of this provision appears to have reflected a congressional concern that, with regard to proceedings involving restricted or defense (and later safeguards) information to which the APA would otherwise apply, there be parallel procedures except to the extent necessary to protect against the wrongful dissemination of the sensitive data. *See* 100 Cong. Rec. 10171 (July 16, 1954).

[14] In the course of the congressional debates on the Atomic Energy Act, Senator Anderson, commenting on a proposed version of the 1954 Act that did not include section 189a, stated that if the AEC were "to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects . . . ." 100 Cong. Rec. 10000 (July 14, 1954). He argued that the bill only made the Administrative Procedure Act applicable to the AEC, but that the APA did not, by itself, require formal hearings. *Id.* The bill provision criticized by Senator Anderson provided that "upon application, the Commission shall grant a hearing to any party

(CONTINUED)

however, that Congress' overwhelming concern was with facilities licenses, as opposed to source, special nuclear, and byproduct materials licenses that were virtually ignored in congressional reports and legislative debate. In adopting rules to carry out the Act, the AEC did provide for formal hearings in all licensing cases upon request of intervenors or applicants, or upon its own motion. 10 CFR §§2.102, 2.708, 21 *Fed. Reg.* 804 (Feb. 4, 1956). The agency did not state whether it was providing such hearings in its discretion or as a matter of statutory mandate. When section 189a was amended in 1957 to require "mandatory" hearings on even uncontested construction permit or operating license applications for certain facilities prior to the grant of these applications, once again the type of hearing to be held was left open.[15] Nonetheless, the AEC continued to hold formal hearings in all licensing cases.

In December 1960, in response to a letter from the Joint Committee on Atomic Energy requesting an AEC reply to the charge that license hearing procedures were "unnecessarily formal and judicialized," the agency replied that it did "not exclude the possibility of future modification of the method of conducting the hearings in the direction of greater informality."[16] With particular reference to only power or test reactors, the AEC also noted an earlier Joint Committee staff study, which preceded the 1957 amendments to the Atomic Energy Act, in which the Joint Committee staff stated that under guidelines recommended by the Attorney General of the United States, "the licensing of reactors could be considered to be of far-reaching importance to many interests and therefore to warrant formal public hearings."[17] A few months later, the AEC presented a report to the Joint Committee in which it again summarized the charges of excessive formality in licensing cases, pointed to the lack of substantial experience in reactor licensing and the importance of the safety interests at stake, and concluded that "[i]t is possible that substantially less full presentation of testimony would be appropriate in some cases after there has been more experience in the operation of large power and test reactors."[18] As to this critical category of licensees — *i.e.*, reactor licensees — soon after receiving the AEC report the Joint Committee staff published its own conclusion that the AEC "has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of the procedures."[19] On the question of license amendments, the Joint Committee staff stated that "[o]nly occasionally will the matters at issue justify the time consuming, expensive business of preparing testimony and finding an opportunity to fit its presentation into a schedule of a busy hearing examiner . . . ."[20] As to materials licenses, the Joint Committee staff suggested that the AEC consider registration instead of licensing for many of the less hazardous sources, though it did recommend — as opposed to arguing that the Atomic Energy Act required — hearings before a hearing examiner in contested materials licensing cases.[21] In June 1961, the Joint Committee held hearings to explore legislative improvements in the AEC regulatory program. A major debate ensued between witnesses who argued that section 189a of the Atomic Energy Act required the AEC to use formal hearing procedures in its licensing cases[22] and those

materially interested in any 'agency action.'" S. 3690, 83d Cong., 2d Sess. §181 (1954). Significantly, section 189a as subsequently adopted provided no more than section 181 criticized by Senator Anderson. The legislative history is also otherwise silent on whether a formal hearing under section 554 of the APA would be required. It must also be emphasized that the threat of "monopoly" is what triggered Senator Anderson's remarks, a threat which surely does not exist here.

[15] Senator Anderson did repeat his 1954 remarks during the 1957 debate but, once again, little else was said. 103 Cong. Rec. 3616 (Mar. 21, 1957). Even if the 1957 amendments were premised on the need for formality, it must be emphasized that they dealt with only certain facilities licenses.

[16] Letter from Loren K. Olson, AEC Commissioner, to James T. Ramey, Exec. Dir., Joint Comm. on Atomic Energy (Dec. 22, 1960), *reprinted in* 1 Staff of Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the AEC Regulatory Process 588 (Comm. Print 1961) [hereinafter cited as Improving the AEC Regulatory Process].

[17] Letter from Loren K. Olson, AEC Commissioner, to James T. Ramey, Exec. Dir., Joint Comm. on Atomic Energy (Nov. 30, 1960), *reprinted in* Improving the AEC Regulatory Process, *supra* at 580.

[18] Report on the Regulatory Program of the Atomic Energy Commission (Feb. 1961), *reprinted in* Improving the AEC Regulatory Process, *supra* at 410.

[19] Improving the AEC Regulatory Process, *supra* at VIII.

[20] *Id.* at 54.

[21] *Id.* at 73.

[22] The requirement of a formal hearing was set forth by AEC Commissioner Olson, who appears to have based the AEC practice of providing for formal hearings upon congressional intent associated with the 1957 amendments. He stated:

> [W]e recite from the 1957 hearings with respect to the mandatory hearing requirement in which the [AEC] report quoted extensively from the Attorney General's report and then went on to make clear in our opinion, by my interpretation, that you wanted a formal hearing of record.
>
> I think that I would like to offer to submit for the record a memorandum opinion with respect to this since there seems to be considerable difference of opinion as to whether we were legally justified in placing upon the act the interpretation that we have up to date.

Radiation Safety & Regulations: Hearings before Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 382 (1961). The memorandum submitted by Commissioner Olson quotes tidbits from the 1954 and 1957 legislative history, all of which we believe can be said to be inconclusive on the issue of whether section 189a requires formal hearings. In any event, we emphasize that since the AEC justifiedrequiring formal hearings under section 189a by heavy reliance on the legislative history of the 1957 amendments and on the broad public safety concerns with the new area of reactor licenses, we believe that it can reasonably be concluded that the Commission can adopt different procedures in materials license cases, where the 1957 legislative history is irrelevant and concerns over the newness of the technology involved and over safety are of a very different magnitude.

who insisted to the contrary.[23] Significantly, the Joint Committee membership, which authored the 1954 Act and the 1957 amendments, expressed no opinion on this critical question.

The debate over the statutory necessity for formality in licensing cases, specifically reactor cases, continued into 1962. At Joint Committee hearings to consider amendments to the Atomic Energy Act which would, *inter alia*, substitute three-member licensing boards for hearing examiners, the Joint Committee heard from two of its consultants, Professor David Cavers and William Mitchell, Esq., the latter a former General Counsel of the AEC. Although the consultants recommended retaining formal hearing procedures for reactors to which there was strong opposition, they seemed to suggest that the section 189a hearing requirement could be met with informal procedures and they recommended that Congress pass legislation stating that "the requirement of a hearing in section 189a . . . shall not be deemed to require a determination on the record after opportunity for agency hearing, within the meaning of section [554] of the [APA]."[24] When the Joint Committee proposed amendments to the Atomic Energy Act in 1962, which would establish licensing boards[25] and dispense with the mandatory hearing requirement in uncontested operating license — but not construction permit — proceedings, it refused to add the provision recommended by its consultants; significantly, however, the Joint Committee report stated:

> The AEC has contended that the type of hearing procedures followed by the Commission is required to carry out the intent of the 1957 amendments to the Atomic Energy Act and their legislative history as well as the Administrative Procedure Act.
>
> To the extent that the legislative history of the 1957 amendments may not be clear, it is expressly stated here that the committee encourages the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act.
>
> In this connection, the committee refers to the recent report by the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee . . .:
>
> > By now, it has become apparent that the adversary type of proceeding, resembling as it does the processes of the courts, does not lend itself to the proper, efficient, or speedy determination of issues with which the administrative agencies frequently must deal . . . . Questions relating to . . . licensing of atomic reactors . . . might better be solved in some type of proceeding other than administrative "lawsuit" among numerous parties . . . .
>
> Having pointed out the desirability of informal procedures, *and the legal latitude afforded the Commission to follow such procedures*, the committee does not believe it necessary to incorporate specific language in the legislation requiring informal procedures.

H.R. Rep. No. 1966, 87th Cong., 2d Sess. 6 (1962) (emphasis added). The proposed legislation passed, but, it must be noted, the AEC continued to provide for formal hearings in all reactor cases in which an intervenor requested a hearing. In light of the relative newness of the technology and the broad safety concerns associated with reactors, it is not surprising that

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[23] Strong disagreement with the view expressed by Commissioner Olson came in the form of testimony from Professor Kenneth Culp Davis. He stated:

> I do not agree with Commissioner Olson that the statute requires a trial-type of hearing . . . .
>
> * * * * *
>
> I do not agree with Commissioner Olson about the interpretation of legislative history. In fact, I have gone over the legislative history very carefully and search for any words that indicate an intent that the hearing should be on the record. That is, that it should be a trial type of hearing. I find no such words . . . .

Radiation Safety and Regulation: Hearings Before Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 376, 386 (1961).

[24] *AEC Regulatory Problems Hearings before Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 87th Cong., 2d Sess. 57 (1962) [hereinafter cited as *AEC Regulatory Problems*]. It should be noted that part, but not all, of the consultants' conclusion is based upon the "initial licensing" exemption in sections 554, 556, and 557 of the APA which, by their very terms, requires less formal procedures in initial licensing cases. It appears, however, that the consultants were going beyond this exemption to argue that section 189a did not even require resort to those sections of the APA. See also *id.* at 33-35 (testimony of Herzel Plaine, American Bar Association).

[25] Section 191 of the Atomic Energy Act, 42 USC §2241, provides for the appointment of three-member licensing boards in lieu of the hearing examiner required by section 556 and 557 of the APA for formal adjudications. The opening words of section 191, "[n]otwithstanding the provisions of section 7(a) [*i.e.*, 556(a)] and 8(a) [*i.e.*, 557(a)] of the Administrative Procedure Act," do suggest that formal APA hearing procedures were applicable to AEC licensing cases. However, it is not clear that the Joint Committee, which used this language, believed that the use of the APA's formal procedures was required by the Atomic Energy Act; it may have been, for example, that the Joint Committee intended only to preempt any argument that having chosen to use section 554 procedures, the AEC was

(CONTINUED)

required to use them *ex toto*. In any event, the consultants who authored the report behind the Joint Committee bill stated that the AEC had construed section 189a as requiring a formal hearing on power and test reactor license applications pursuant to the 1957 amendment. *AEC Regulatory Problems*, *supra* at 56. That amendment mandated a hearing, even in uncontested cases, by imposing a separate hearing requirement apart from the reference to the word "hearing" in the first sentence in section 189a. Thus, APA sections 7(a) and 8(a) may have been applicable pursuant to the second, separate reference to a "hearing" in section 189a, so that the "[n]otwithstanding" clause was necessary. Since materials license cases come under only the first sentence of section 189a, and given the history of the 1957 amendment and the 1962 adoption of section 191, we do not think that the "[n]othwithstanding" clause demonstrates a congressional intent to require formal APA procedures in materials licensing cases.

the agency failed to follow the Joint Committee's guidance in encouraging informal procedures in some cases. Perhaps more surprisingly, but understandably in light of having established this one form of hearing, the AEC also referred material licenses to hearing boards.

Given this history, we are unable to conclude that Congress intended, when it adopted section 189a in 1954, to require section 554 hearings for every single licensing case. Even if the 1957 amendments mandating hearings in uncontested reactor cases can be said to support this result for reactors, a different result can obtain for material licenses. Moreover, although legislative developments show that another basis for formal hearings in reactor cases was the AEC recognition of novel technological questions with wide-ranging safety concerns, the same argument was never made with regard to materials licenses. Given the uncertainty on the issue even as to reactor licenses, and in view of the Joint Committee's express recognition of the AEC's legal latitude to use informal procedures, we believe that the agency has gone beyond legal requirements under the Atomic Energy Act in providing formal hearings in materials license cases in the past and that it is reasonable to change that approach.[26]

This interpretation is bolstered by the need for NRC flexibility in fashioning hearing procedures. Although the Commission can be said generally to deal with "nuclear" matters, its licensees range from individual radiographers to small medically related businesses to uranium mill operators to nuclear power plant owners. There are literally thousands of licensees, and new applications or amendments to existing licenses abound each year. We are unwilling to ascribe to Congress an intention that the Commission treat each of these applicants or their opponents in an identical procedural manner in the different categories of cases. Our analysis of the City's constitutional objections *infra* makes clear that the widely varying interests, the diverse risks involved, and strong governmental interests justify less than a section 554 trial-type hearing under the Due Process

[26] As one court has said:

> In approaching the problem of statutory interpretation before us, we show "great deference to the interpretation given the statute by the officers of agency charged with its administration. 'To sustain the Commission's interpretation of [a] statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"
>
> We think such deference to the agency's interpretation of its governing statute is reinforced where . . . the legislative history is silent, or at best unhelpful, with respect to the point in question . . . . In such a situation [where Congress could not anticipate new technological developments that would arise for decades to come], the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.

Philadelphia Television Broadcasting Co. v. *FCC*, 359 F.2d 282, 283-284 (D.C. Cir. 1966) (footnote omitted). See also note 12 *supra*.

Clause. We believe that the hearing requirement of section 189a similarl should not be interpreted to hamstring the Commission into providing section 554 hearing in every licensing case. *See Vermont Yankee Nuclea Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 51 (1978).

Our interpretation of section 189a is also supported by recent regulator developments in administrative law jurisprudence. For many years, ager cies and courts often overlooked the common sense use in adjudications less than the trial-type procedures set forth in section 554. K. Davi *Administrative Law Text* §4.07, at 106-07 (3d ed. 1972). In the 1970' however, there was broad recognition of the principle that an agency ca comply with a statutorily mandated hearing by something less than sectio 554 procedures as long as the adopted procedures are fair. In two semin cases, *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 74 (1972), and *United States* v. *Florida East Coast Railway Co.*, 410 U.S 224 (1973), the Supreme Court ruled that the requirement of a hearing an agency's organic statute did not mandate a formal hearing in th absence of the phrase "on the record" or some definite congression intention expressed in the statute's legislative history. Although both the cases involved rulemaking, as opposed to adjudication, courts have begu to realize that the rulemaking/adjudication dichotomy is not dispositive interpreting a statutory hearing requirement; rather, the touchstone fairness in light of the dispute presented.

> The emphasis, today, in the absence of a specific statuto directive as to the requisite form of hearing, is on the requiremen of a particular case, not on formalistic interpretations of statuto words, and not on the equally formalistic and often circul distinction between adjudication and rulemaking.

RCA Global Communications, Inc. v. *FCC*, 559 F.2d 881, 886 (2d Ci 1977). The rulemaking/adjudication dichotomy was recognized in *Siegel AEC*, 400 F.2d 778 (D.C. Cir. 1968), but we think that that case suppor our conclusions here. In *Siegel* the court upheld the AEC's interpretati of the word "hearing" as applied to rulemaking proceedings. Althou section 189a uses the word "hearing" only once in referring to an inte ested party's right to a "hearing" both in licensing proceedings and rulemakings, the court agreed that the AEC could interpret that san word differently for the two different types of agency action. Recognizi that the AEC provided at that time section 554 hearings in react licensing cases, the court nonetheless concluded that only a "notice a comment" proceeding under section 553 of the APA satisfied the secti 189a "hearing" requirement for rulemakings. In our view, there is analogous logical basis — and we add, no statutory prohibition has be

found — for further delineating among different types of licensing actions in deciding what type of "hearing" is appropriate in any particular licensing matter.

Thus, we believe that the word "hearing" in section 189a can be interpreted as allowing an informal hearing in at least some licensing cases. Other agencies that are required by statutes to adjudicate matters in "hearings" have been permitted to utilize informal adjudicatory procedures. For example, in *Marine Space Enclosures, Inc.* v. *FMC*, 420 F.2d 577, 589-90 (D.C. Cir. 1969), the court, focusing on section 15 of the Shipping Act of 1916, stated that:

> The requirement of a hearing [in section 15] in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama. In some cases briefs and oral argument may suffice for disposition . . . In some cases, however, the public hearing may usefully approach the legislative rather than adjudicatory model.

The court noted that section 15 required a hearing prior to agency modification, disapproval, or cancellation of an agreement. *Id.* at 540. The *Marine Space Enclosures* opinion was recently cited with approval in *Sea-Land Service, Inc.* v. *FMC*, 653 F.2d 544, 551, n.20 (D.C. Cir. 1981), in which the court stated:

> The hearing contemplated by this section is not the full administrative hearing on the record that is required by the Administrative Procedure Act . . . . Rather, the "notice and hearing" requirement in section 15 contemplates "meaningful public participation . . . ."

Id. at 551 (footnotes omitted). A similar result was reached in *United States* v. *Independent Bulk Transport, Inc.*, 480 F.Supp. 474 (S.D.N.Y. 1979). The organic statute was the Federal Water Pollution Control Act Amendments of 1972, which required an "opportunity for a hearing" before assessment of a penalty. A survey of the appropriate legislative history did not conclusively indicate whether Congress intended the requirements of section 554 of the APA to apply to proceedings under 33 U.S.C. §1321(b)(6). The court stated:

> The courts have never gone so far as to rule that all statutory hearings must be conducted in accordance with the APA despite the lack of a provision that they be "on the record . . . ." The mere fact that the penalty assessed by the Coast Guard was an adjudication required by statute to be made after a hearing did not mandate application of the APA.

Id. at 478-479. And in *Nofelco Realty Corp.* v. *United States*, 521 F.Supp. 458 (S.D.N.Y. 1981), the court ruled that another statutory

mandate in the Federal Water Pollution Control Act Amendments of 1972 for the issuance of dredge or fill permits "after notice and opportunity for public hearings," 33 U.S.C. §1344, did not require the Army Corps of Engineers to grant a section 554 hearing before denying an application to construct a bulkhead on a shoreline.[27]

The application of these precedents is particularly appropriate here since the City has not shown there is a basis for concluding there were disputed adjudicative facts that had to be determined before the license amendment was issued. As is discussed more fully *infra*, a number of the City's issues present legal or policy disputes. Nonetheless, even if a statute normally does require a section 554 adjudication, a hearing need not be commenced simply to resolve such legal or policy issues. *See, e.g., Independent Bankers Association* v. *Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975). *A fortiori*, nothing more should be required under section 189a than allowing the City to argue its case in written submissions, and to respond to the licensee's arguments, a procedure which we have already followed. As to the adjudicative facts which the City has contested, our discussion of the City's claim makes clear that the City has provided no basis to support its conclusions that citizens and the environment will be exposed to airborne and waterborne radiological material in excess of NRC regulatory limitations.[28] In response to the City's bald assertions, the licensee provided monitoring and other data that show the use of fine water mist sprays and/or standard "fire-fighting" type foam has contained potential offsite

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[27] To be sure, there are numerous cases interpreting a statutory requirement of a "hearing" or a "public hearing" to mean that a section 554 hearing must be held. In some of these cases, the legislative history of the relevant agency statute provided some reasonable support for that proposition. *See, e.g., Independent Bankers Ass'n* v. *Bd. of Governors*, 516 F.2d 1206, 1217-19 (D.C. Cir. 1975). However, as we have stated here, not only did Congress fail to focus on the need for formality in section 189a hearings, but its almost exclusive concern when it adopted the hearing requirement was for facilities licenses as opposed to materials licenses. In other of the cases requiring a section 554 hearing the courts made a presumption that we are unwilling to accept — *i.e.*, licensing adjudications by their very nature require trail-type procedures as contrasted with rulemakings, in which "notice and comment" is adequate. *See, e.g., Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978); *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977). However, this view fails to recognize the modern trend towards fairness and away from classifying agency action as either rulemaking or adjudication. We agree with the observation of the United States Court of Appeals for the District of Columbia Circuit, expressed in connection with section 15 of the Shipping Act, that APA trial-type procedures "do not apply unless Congress has *clearly* indicated that the 'hearing' required by statute must be a trial-type hearing on the record." *United States Lines, Inc.* v. *FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978) (emphasis added).

[28] As is explained more fully *infra*, the City did not even make any factual assertions, let alone provide any basis for believing, that by permitting Kerr-McGee to receive onsite for temporary storage very low-level radioactive material from 75 "hot spots" in West Chicago, the NRC has created any risk to public health and safety, or to the environment.

releases of radioactive material into the air or water. The City replied to the licensee's facts not by contesting them, but rather by arguing that the licensee had no legal authority to dismantle the buildings in this manner. Once again, even if section 189a requires a trial-type hearing, the City must make some threshold showing that a hearing would be necessary to resolve opposing and supported factual assertions. Having failed to do so, the City is not entitled to a formal hearing.[29]

CONSTITUTIONAL DUE PROCESS DOES NOT REQUIRE A FORMAL, TRIAL-TYPE HEARING

Although section 189a's provision for a "hearing" does not require that a formal adjudicatory hearing under section 554 be convened, there nonetheless remains the question of what, if any, process is due the City under the Constitution. It is well established that due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961)). Rather, due process "'is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). In analyzing whether a given administrative procedure conforms to the requirements of due process, the Supreme Court has recognized that three distinct factors must be analyzed and balanced:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Turning initially to a consideration of the private intest involved and how it will be affected in this instance, it has been recognized that the determination of whether an interest exists will depend not on the unilateral expectation of the one claiming the private interest, but rather on whether there is "a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). A property interest, cognizable for due process purposes can be created by a congressional enactment, *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970); *Pence* v. *Kleppe*, 529 F.2d 135, 140-42 (9th Cir. 1976), or agency regulations, *see, e.g., Joy* v. *Daniels*, 479 F.2d 1236, 1240-41 (4th Cir. 1973). It should be noted, however, that the generalized health, safety, and environmental concerns the City indicates it seeks to protect in any hearing may not be liberty or property interests subject to due process protection. *See Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981); *Gasper* v. *Louisiana Stadium & Exposition District*, 418 F. Supp. 716, 720-21 (D.La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). The only conceivable property or liberty interest here may be the City's statutory right under section 189a to some sort of hearing. *See Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 801 (D.C. Cir. 1975); *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069, 1081 (D.C. Cir. 1974). Although we doubt that this right to a hearing qualifies, we continue with our analysis.

Assuming the existence of a protectable interest does not end the inquiry, however, because the effect of the official action in question upon the private interest must be assessed. As to any statutory interest in a hearing, the City is not being deprived of a hearing; its argument is with the type of hearing.[30] Yet, even if we assume the existence of some other property or liberty interest in the health, safety, or environment of the

[29] As we have said, the City's factual assertions were not only unsupported, but they were affirmatively rebutted by factual submissions from Kerr-McGee with which the City took legal, rather than factual, dispute. Courts have ruled that even where a statutory hearing requirement must be satisfied by a section 554 hearing, the party requesting a hearing "does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists . . . . [An agency] is not to be burdened with a hearing requirement where a protestant has not given reason to believe a hearing would be worthwhile." *Connecticut Bankers Ass'n* v. *Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980). See also *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980).

The City claims that its submissions meet the standard for admissible contentions under 10 CFR §2.714(b). However, that rule is applicable only *after* the Commission has triggered the hearing process by publishing a notice of the sort referenced in 10 CFR §2.700. Such notice was not published here. In any event, we do not believe that the City's contentions satisfy section 2.714(b).

[30] Our due process analysis, insofar as we can assume that the section 189a hearing right is a protected interest, is in some sense not necessary. The question is whether the City is being deprived of that interest—*i.e.*, its interest in having a hearing—without due process. However, if we were to find that the Constitution required certain hearing procedures, we would likely interpret section 189a as requiring those same procedures. *See, e.g., Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (absent explicit statutory language to the contrary, congressional solicitude for fair procedure will be assumed). Thus, we would conclude not that the City's due process rights were implicated, but rather that its Atomic Energy Act rights required a hearing. For this reason, the remainder of our due process analysis, which speaks of balancing risks and interests, can be considered relevant to two distinct, but related, matters: (1) assuming the existence of some property or liberty interest other than the right to a section 189a hearing (e.g., health, safety or environmental interests rising to the level of property or liberty interests), does due process require a section 554 hearing; and (2) balancing the various interests at stake, are there constitutionally-based reasons to interpret section 189a as requiring a section 554 hearing?

community, the Supreme Court has recognized that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 789 (1980); *see Martinez* v. *California*, 444 U.S. 277, 281 (1980). The effects of the governmental action of granting a license amendment to Kerr-McGee are indirect as to the City, thereby lending little weight to any assertion that due process requires that a formal proceeding be convened to protect the City's interests. Moreover, even if these indirect effects are considered, they do not appear to be compelling in this case. The importance of the City's supposed health, safety, and environmental concerns that are to be raised at any formal hearing is diminished by the City's failure to object to, and indeed its approval of, an almost identical demolition effort under Amendment No. 1.[31] Further, as to the City's concerns about the effect of Amendment No. 3 as a precedent for additional Kerr-McGee activities prior to any final decommissioning plan, it is apparent that the demolition is required in any event and that it does not in any way alter or preclude any of the options now open for such a plan or prejudice any City concerns with regard to the ultimate disposition of the wastes at the Rare Earth facility. As to the offsite thorium, even if a later determination was made that it should not be placed at the Kerr-McGee site, it could be collected and removed to a different site, thereby mitigating any prejudice the City might perceive in the receipt of such wastes at the Rare Earth facility. Thus, the licensing action here has only indirect and insubstantial effects upon the City's concerns and interests in this instance, meriting less concern about formal trial-type procedures to protect those interests.

Considering next the risk of erroneous deprivation that might result from the procedures used, it is first worth reiterating the opportunity afforded both Kerr-McGee and the City to present their views and any information relevant to Amendment No. 3. Subsequent to its receipt of the City's petitions, the Commission wrote both to the City and Kerr-McGee requesting that the former provide any information or arguments it had relating to the health, safety or environmental effects of Amendment No. 3 and affording the latter an opportunity to respond. In response, the City sent a list of contentions, four of which presented only legal, nonfactual

[31] *See* Exhibit C to Verified Response of Defendant Kerr-McGee Chemical Corp. to Temporary Restraining Order, No. 81 C 5743 (N.D. Ill. filed Oct. 15, 1981) (transcript of May 20, 1981 television news report in which Mayor of West Chicago indicated support of building demolition begun under Amendment No. 1). While it is correct that the demolition authorized under Amendment No. 1 was for a fewer number of buildings which, unlike those involved in Amendment No. 3, were in danger of collapse, nonetheless any purported inadequacy of the Kerr-McGee procedures existed under that first amendment as well.

questions and two of which were arguably factual.[32] Kerr-McGee responded to the contentions by denying the validity of any of them. The Commission then addressed another letter to both Kerr-McGee and the City that asked the former to respond to the City's factual allegations concerning the dust abatement program and the lack of a lagoon and offered the City an opportunity to respond. As a result, Kerr-McGee submitted a detailed rebuttal of the City's contentions with supporting documentary information. The City responded by reiterating its earlier assertions, but provided no factual information, documentary or otherwise.

In requesting a formal hearing, the City has indicated its belief that additional procedures beyond the opportunity to provide written comments and documentation afforded here are necessary to fully adjudicate the validity of its concerns. In assessing the risk of erroneous deprivation of the City's interests, "the issue-specific and flexible analysis employed by the [Supreme] Court confirms that every due process case should be carefully examined in light of the factual determination to be made, the evidentiary factors that must be reviewed, the characteristics of the parties, and the role played by the decisionmaker." *Keller* v. *Joy*, 641 F.2d 1044, 1053 (2d Cir.) (Tenney, J., concurring), *cert. denied*, 102 S. Ct. 390 (1981).

Looking to those factors in this instance, we note that while the factual determination to be made is one involving public health and safety and environmental considerations, nonetheless the evidentiary review is one that is based in large part on technical submissions containing objective data and scientific judgments. The determination of factual issues whose resolution lies in technical or scientific submissions usually does not require an oral, trial-type presentation. *See Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344-45 (information crucial to decision on entitlement of Social Security disability benefits usually derived from medical reports, such as clinical or laboratory tests and x-rays, which are more amendable to written rather than oral presentation); *Basciano* v. *Herkimer*, 605 F.2d 605, 611 (2d Cir. 1978) (in making decision on eligibility for accident disability retirement benefits, evidence relevant to medical determination can be presented as effectively in writing as orally), *cert. denied*, 442 U.S. 929 (1979); *Graham* v. *National Transportation Safety Board*, 530 F.2d 317, 320 (8th Cir. 1976) (determination of fitness for exemption from regulation precluding granting of airman's certificate for history of alcoholism based on medical reports; no further right to be heard need be given); *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F. Supp. 330, 343 (D. Del. 1978) (decision

[32] Of the six contentions listed at p. 242 *supra*, only those regarding the inadequate use of water for a fogging system and the failure of Kerr-McGee to construct a lagoon can be considered as presenting factual issues. A detailed discussion of our resolution of the legal and factual issues presented by the City follows beginning at page 262 *infra*.

on potential effect upon urban minorities of relocation of hospital and the appropriate remedy for such effect likely to be based largely on technical information that does not necessitate on oral evidentiary hearing); *Owens* v. *Hills*, 450 F. Supp. 218, 223 (N.D. Ill. 1978) (objective factual determination of whether structural defect exists in dwelling requires only written submission of materials relative to structural defect without oral hearing). Further, while the City contested whether the Kerr-McGee dust control and water runoff measures were adequate, when Kerr-McGee responded with data to show why its dust abatement procedures were proper and why no lagoon was needed, the City did not contest the accuracy of Kerr-McGee's submissions. When questions of credibility or veracity are not raised, a decision based on written submissions rather than on oral, trial-type presentation does not offend due process. *See Califano* v. *Yamaski*, 442 U.S. 682, 696 (1979) (review of written submissions sufficient for initial decision to recoup Social Security overpayments when issues of credibility or fault not likely to be involved); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343-44 (initial decision to discontinued Social Security disability benefits likely to turn on written medical reports rather than issues of credibility so that no oral presentation required); *Digital Equipment Corp.* v. *Parker*, 487 F. Supp. 1104, 1112 (D. Mass. 1980) (no need for oral hearing if demeanor evidence not essential), *vacated on other grounds*, 653 F.2d 701 (1st Cir. 1981). Further written submissions are appropriate when, as here, the parties' private interest is fully represented by counsel. *See CNA Financial Corp.* v. *Donovan*, Civ. No. 77-0808, slip op. at 9 (D.D.C. Oct. 29, 1981). In addition, to the extent that no controverted issue of material fact is presented or that the questions presented are purely legal, the parties need only be afforded an opportunity to make written submissions. *See Monumental Health Plan, Inc.* v. *HHS*, 510 F. Supp. 244, 249 (D. Md. 1981). A careful reading of the submissions of Kerr-McGee and the City make it evident that, as is indicated in more detail *infra*, there are no controverted factual issues involved here, but rather a disagreement over the legal significance of certain facts or over whether certain agency actions are legally mandated. Finally, as a general proposition the risks associated with materials licenses are frequently of lesser magnitude than those associated with reactor licenses. This is surely the case as to the Kerr-McGee amendment.

Taking into account the technical, scientific nature of the factual issues involved, the absence of any credibility questions with regard to the parties' submissions, the fact that the City's interests were represented before the agency by experienced counsel, and the lack of any material issues of fact with regard to the City's contentions that raised factual issues, the procedures for written submissions and comment used were

sufficient to fully apprise the agency of the grounds for the City's concern and to provide an adequate record for determining the validity of its assertions. Moreover, Kerr-McGee's proposed amendment has received extensive staff analysis and scrutiny, with the conclusion being that adverse health, safety, and environmental impacts were so *de minimis* or nonexistent so as to preclude even the necessity for a negative environmental declaration. Thus, not only do we believe that the risk of an erroneous decision based upon the written procedures used was minimal and acceptable, but the real impact of any such error on public health, safety, or environmental concerns similarly appears to have little practical meaning.[33]

The final factor to be considered is the government's interest in being allowed to evaluate requested materials licensing actions in an informal hearing on the basis of written submissions and comments by interested persons. Of concern in this regard are the administrative burden and other societal costs associated with requiring, as a matter of constitutional right, an oral evidentiary hearing upon demand in all materials licensing cases. *See Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347. In each instance that a formal hearing is convened, the expense for the agency, and indeed for all the parties involved, is multiplied several-fold. A three-member licensing board or administrative law judge must be appointed, and with that come all the accouterments that make the proceeding more costly in terms of the time and materials expended: *e.g.*, participation in a prehearing conference, preparation of transcripts, discovery, submission of prefiled testimony, a trial-type hearing at which witnesses are presented and cross-examined, and the preparation of findings of fact and conclusions of law. The extra cost and delay involved in each formal, trial-type adjudication can become a special problem in the materials licensing area because, in any given year, the NRC receives literally thousands of applications for materials licenses or license amendments.[34] If, in even a small percentage of these licensing actions, a hearing was requested and a formal hearing was convened, agency resources would soon be stretched to the limit.[35] Not only would this affect the ability of interested persons to obtain a prompt

[33] In *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976), the Supreme Court noted that "due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." Although a variety of nuclear materials and [illegible]'s usage activities and facilities are subject to NRC's jurisdiction, the requests for licensing action embodied in Amendment No. 3 are not necessarily atypical, when compared to other materials licensing actions, in terms of the nature of the factual or legal issues involved and the risks of health, safety, or environmental harm.

[34] The 1980 NRC Annual Report indicates that currently the agency administers some 8,700 material licenses and took approximately 4,614 licensing actions concerning these permits in fiscal 1980. United States Nuclear Regulatory Commission, *1980 Annual Report* 110 (March 1981).

[35] *See* note 12 *supra*.

resolution of their materials license hearing requests, but it could ultimately jeopardize the NRC's ability to safeguard the public health and safety if extensive resources had to be directed to the legal hearing process at the expense of health and safety review of power reactors and other facilities which generally raise broader concerns. Accordingly, the possibility of greatly increased costs and, indeed, the potential for interference with the agency's responsibilities for protection of the public health and safety and the environment, indicate clearly an important governmental interest in being able to conduct informal hearings on the basis of written submissions in materials licensing cases.

Under the Supreme Court's suggested due process analysis, we think the procedures used in this instance afforded all the participants the due process that was necessary.[36] Although the City's asserted interest in the safety and health of its citizens and in the environment of the West Chicago area is an important one, the opportunity for it to present its objections and any information in support of its objections and to comment on Kerr-McGee's submissions was adequate under the circumstances. The factual issues involved are of a technical nature whose resolution does not require any oral, trial-type inquiry focusing on credibility and, accordingly, additional procedures are unlikely to add to the fact-finding process or result in a better record for agency review. The need for additional procedures being highly questionable, the magnitude of the increased government burden that would be involved by requiring additional procedures becomes of "pivotal importance." *Gerritson* v. *Vance*, 488 F. Supp. 267, 270 (D. Mass. 1980). As was indicated, that increased burden could be considerable in the materials licensing area. Accordingly, the procedure here comported with the requirements of due process, as well as those of the Atomic Energy Act and agency regulations.

THE CONTENTIONS OF THE CITY OF WEST CHICAGO ARE WITHOUT MERIT

Having established that the solicitation of written comments was sufficient here to satisfy any requirement for a "hearing" under the Atomic Energy Act and the Due Process Clause, and that our regulations provide no greater right, we turn finally to consider the merits of the six contentions put forth by the City in the context of this "informal" hearing.

[36] Although instances might arise in which the Commission, in the exercise of its discretion, could afford an interested person a formal hearing after a materials licensing action is taken, it seems apparent from West Chicago's filings in this instance that it has no interest in such a post-amendment proceeding.

ATTACHMENT 2

ADJUDICATORY PROCEEDINGS OF OTHER GOVERNMENT AGENCIES

INTRODUCTION

The practices of other Federal agencies are relevant to the Commission's reevaluation of its hearing process. Accordingly, we surveyed a number of Government agencies regarding the procedures used in their adjudicatory proceedings. Where it was considered necessary, regulations prescribing rules of practice of the contacted agencies were also reviewed.[1] Primary focus was put on the following agencies, which represent a cross section of approaches:

Environmental Protection Agency
Federal Communications Commission
Federal Energy Regulatory Commission
Federal Trade Commission
Federal Aviation Administration
Department of Labor
Food and Drug Administration
National Labor Relations Board
Occupational Safety and Health Review Commission
Securities and Exchange Commission

Each of the listed agencies holds adjudicatory proceedings to resolve challenges by outside parties to actions taken by the agency or as part of an enforcement action[2] against an outside party.[3] Where such proceedings use practices that are generally associated with civil court proceedings,[4] including those practices covered by sections 554, 556, and 557 of the

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[1]Some Executive Branch Departments have under their aegis sub-agencies that are autonomous for most purposes (e.g., FERC, which is under the Secretary of Energy), and these sub-agencies may be covered by rules of procedure that differ from those used by other parts of the Department. The differences in function and procedure of some of these sub-agencies are sufficient to make it desirable to treat the subagency as a separate agency.

[2]As used here, the term "enforcement action" refers to an administrative proceeding of a Government agency brought for the purpose of penalizing a person (e.g, by imposing a fine or revoking a license) because of a violation of a law administered by the agency, or for the purpose of imposing a sanction on a person (e.g., surrender of profits made by a stock broker in the course of conducting transactions that violate a law administered by the agency).

[3]As can be seen from the discussion that follows, the threshold for convincing an agency that a challenge to an agency action requires a hearing can vary from agency to agency. In addition, some agencies' governing statutes do not require a hearing to be held on a challenge to agency action where the challenge is not addressed to an enforcement-type action.

[4]E.g., assignment of a designated trial officer (judge) to preside over the proceeding, representation of parties by counsel, discovery, submission of written and oral motions to presiding officer, oral presentation of testimony by witnesses, and cross-examination by the

Administrative Procedure Act (APA), 5 U.S.C. 554, 556, and 557, they are referred to in this discussion as "formal."[5] Discussions with staff of the listed agencies has indicated that though there are exceptions, in most such cases their agencies hold adjudicatory proceedings that are formal in nature, i.e., the presiding officer is an Administrative Law Judge (ALJ) and the ALJ follows both procedures required by and procedures authorized by the APA, as well as additional procedures that are associated with civil court trials. Sometimes the formality is dictated by statute, but not infrequently it is the result of agency policy and the practices that ALJs believe to be most consistent with their function.

DISCUSSION

A. Legislative style proceedings

Staff of each agency was asked whether the agency uses legislative style procedures in its adjudicatory proceedings. The term "legislative style procedures" was defined as encompassing the type of procedures used in Congressional hearings. In other words, the presiding officer determines who the witnesses will be, witnesses may be questioned only by the presiding officer, attorneys of parties may not as of right make oral presentations on behalf of parties, formal motions are not entertained by the presiding officer, and there is no constraint on the presiding officer with respect to the source from which needed information is obtained. As so defined, none of the agencies uses "legislative style" procedures in its adjudicatory proceedings. However, as will be seen below, some agencies have adopted one or another aspect of these procedures in order to expedite certain of their proceedings.

B. Efforts at revision of regulations regarding adjudicatory proceedings

A few Federal agencies are, or have in recent years been, engaged in efforts to streamline their agency adjudicatory proceedings. The following are examples of these efforts:

1. Environmental Protection Agency (EPA)

EPA administers a number of substantive statutes that require or authorize specific procedures to be used in adjudicatory proceedings held pursuant to the statute,

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parties.

[5]In proceedings that are subject to 5 U.S.C. 554 (which incorporates by reference the requirements of 5 U.S.C. 556 and 557), the agency must give all interested parties opportunity for (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit, and (2) hearing and decision after notice. Generally, the presiding officer, who must function in an impartial manner, is required to make the recommended or initial decision. An agency may give presiding officers a wide range of powers, such as authority to issue subpoenas, take depositions or have depositions taken, and regulate the course of hearings held. Of course, where property or liberty interests are involved, Constitutional due process requirements must also be considered. For a discussion of Constitutional requirements, see the attachment entitled "Options for Formats for Adjudicatory Proceedings."

and these have been reflected in a variety of regulatory provisions.[6] In general, EPA's adjudicatory proceedings are formal in nature, regardless whether the underlying substantive statutes require on-the-record proceedings.[7]

An effort is under way to revise EPA Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22.[8] The proposed rule, which was published in February 1998,[9] would provide a core set of procedures for many of the adjudications held in enforcement-type proceedings pursuant to various EPA-administered statutes. It covers not only the assessment of monetary penalties (low penalties do not require a hearing on the record), but also suspension or revocation of a permit or authorization to operate and issuance of corrective action orders under various provisions of the Solid Waste Disposal Act.

Although there are some references to procedures to expedite adjudicatory proceedings (e.g., use of ADR; limitation of discovery period), the body of the proposed rule is very similar to the current rule.[10] It is formal in orientation, and time limits for

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[6] Relevant statutes include the Clean Water Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Clean Water Act.

[7] EPA's use of formal proceedings is not limited to those statutes that require on-the-record proceedings or that otherwise indicate that Congress intended the agency to use formal proceedings. For example, the Federal Insecticide, Fungicide, and Rodenticide Act does not require formal hearings, but EPA, as a matter of policy, uses formal proceedings under the Act. In the case of other statutes, such as the Clean Water Act and the Safe Drinking Water Act, there appears to be an understanding within EPA that formal proceedings are not required, but nevertheless, a number of EPA Regions use formal proceedings under these statutes, except that the presiding officer is not an ALJ. Instead of an ALJ, the Regions use "Judicial or Presiding Officers," which appear to be the equivalent of NRC's Administrative Judges. The Judicial or Presiding Officers are typically senior agency attorneys.

[8] Most of the proposed rule is written for formal proceedings governed by section 554 of the Administrative Procedure Act, but provisions have been included for administrative proceedings not governed by section 554. With limited exceptions, the portion of the proposed rule dealing with administrative proceedings not governed by section 554 tends to apply the same rules to those proceedings as are applicable to section 554 proceedings.

[9] 63 Fed. Reg. 9464

[10] In certain circumstances, an expedited hearing is already available for cancellation or change in classification proceedings under the Federal Insecticide, Fungicide, and Rodenticide Act. (The hearing may address only whether an imminent hazard exists.) This is achieved, in large part, by the imposition of, and strict adherence to, short time limits for actions by parties. The presiding officer for such a hearing is not required to be an ALJ, and does not have the authority to make an initial decision on the merits.

In addition, there are "non-adversary panel procedures" for issuance of initial NPDES

certain action of parties (e.g., filing an answer) have actually been extended relative to the current rules. However, the proposal would provide for use of presiding officers who are not ALJs, more limited discovery,[11] and no interlocutory appeals. Cross-examination would still be permitted, but could be limited by the presiding officer. EPA has received negative comments on its proposal from the regulated community, which is concerned that the proposed rule would erode their procedural rights.

2 Federal Energy Regulatory Commission (FERC)

FERC is an independent regulatory agency within the Department of Energy. Its major functions are regulation of the transmission and sale (for resale purposes) of natural gas in interstate commerce; regulation of the transmission of oil by pipeline in interstate commerce; regulation of the transmission and wholesale sales of electricity in interstate commerce; and licensing and inspection of private, municipal and state hydroelectric projects.[12] Although there are a few special procedural provisions, the

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permits, and for some other situations. Under these procedures, as an adjunct to the Presiding Officer selected for a hearing, a panel (consisting of three or more EPA employee experts) is appointed to take part in the hearing. The Presiding Officer, after consultation with the panel, may request any person having knowledge concerning the issues raised in the hearing to testify. Cross-examination by persons other than panel members is not permitted, unless the Presiding Officer determines that allowing cross-examination would expedite the proceedings. Any party can submit written questions, but it is within the Presiding Officer's discretion to decide whether to ask them. A party to a panel hearing may submit a request to cross-examine on any issue of material fact in a supplementary hearing, but it is within the discretion of the Presiding Officer to determine whether motions for cross-examination will be granted, and the number of parties who may cross-examine may be limited. After the hearing is closed, parties may submit additional written testimony or information.

[11]Provision would be made for prehearing exchange of information, including exchange of names of witnesses, brief narrative summaries of expected testimony, and all documents and exhibits intended to be introduced into evidence. Documents or exhibits that have not been included and testimony that has not been summarized in prehearing information exchange will not be admitted into evidence, unless there is a showing of good cause for failure to exchange the information.

[12]FERC's legal authority comes primarily from the Interstate Commerce Act, the Federal Power Act, the Natural Gas Act, the Natural Gas Policy Act of 1978, and the Public Utility Regulatory Policies Act of 1978. These statutes contain a variety of provisions that require hearings relating to issuance of licenses, permits, approvals, or orders, and some (but not all) explicitly require the use of formal proceedings. For example, the Federal Power Act expressly provides, "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority" of the Act. 16 U.S.C. 825g(b). By way of contrast, the Public Utility Regulatory Policies Act of 1978 defines the term "evidentiary hearing" to mean, in the case of a Federal agency, "a proceeding conducted as provided in sections 554, 556, and 557 of title 5" of the United States Code. 16 U.S.C. 2602(6)(B) 5 U.S.C. 554, 556, and 557 govern on-the-record proceedings held by Federal agencies.

regulations in 18 C.F.R. Part 385 currently govern practice and procedure in most FERC adjudicatory proceedings. In general, the regulations are detailed and describe formal procedures.[13] In practice, FERC uses three different types of procedures in adjudicatory proceedings: paper hearings, very formal on the record hearings (with discovery, cross-examination, oral arguments, etc.), and mediation before a settlement judge. Many complaints that FERC receives don't get to the hearing stage, because they are decided on the pleadings or they are resolved by FERC staff working with the parties in informal conferences. Further, as indicated below, much of the present system may change within the next year. FERC is in the process of reviewing their processes with a view to possibly streamlining them, to the extent that the law allows. (Statutory changes are not contemplated.)

Earlier this year, it was reported in the trade press that the electricity industry had filed with FERC a plan that would revise how the Commission handles electricity complaints. Under the industry plan, a new office would be created to screen complaints and send them in one of six directions. In addition, complainants would have to submit their problems to a mediation process before filing a formal complaint. For complaints that are not resolved at this early mediation stage, the plan calls for the establishment of a new division of dispute resolution and strict time limits for acting on complaints. The new division would refer the most complicated cases to the full commission. The least complicated cases would go to an office director who would have the authority to resolve the dispute through a letter order. Complaints falling in the middle would be sent to alternative dispute resolution (ADR) or would be assigned an ALJ for either summary disposition, expedited hearing or full hearing. Each of these tracks would have relatively short deadlines for action.

The electric industry proposal is one of a number that are being considered by FERC.[14] FERC itself has come up with a proposed revision that contains elements of

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[13]Some noteworthy provisions in 18 C.F.R. Part 385 are: "presiding officer" is defined as one or more members of the Commission or an ALJ; summary disposition may be used where there is no genuine issue of fact; if a hearing is waived by the parties, the Commission may dispose of the matter upon the pleadings, other submissions, and recommendations of the staff; unless the presiding officer orders otherwise, direct and rebuttal testimony may be in written form, but the witness must be available for cross-examination; provision is made for appointment and use of settlement judges; a rather detailed provision addresses use of ADR, and when it may not be used; a special provision addresses authorization of arbitration; any participant in an adjudicatory proceeding may file a motion requesting the Commission to issue a final decision without any initial decision.

[14]A FERC notice of proposed rulemaking published in the August 6, 1998 Federal Register (63 Fed. Reg. 41982) summarized several proposals submitted to the agency. Comments have been received in response to the notice, and it now appears that in response to the comments and in recognition of the development of more competitive markets, some changes that were not reflected in the August 1998 notice may be recommended to the Commission. In particular, a recommendation may be made for instituting a process that would allow quicker movement on time-sensitive complaints, perhaps allowing for interim-type relief. The recommendation will likely include continued use of ALJ's, even in an accelerated process.

the electric industry plan. The FERC revision would strongly encourage potential complainants to use informal procedures, particularly voluntary ADR techniques, to resolve disputes. A decision has not been reached as to whether this would be mandatory prior to filing a formal complaint.

FERC would also like complaints to meet certain informational requirements, which would be strictly enforced. Some of these requirements are not unusual (e.g., clear identification of the action or inaction alleged to be unlawful or contrary to the terms of a certificate or license condition); others are more novel (e.g., inclusion in the complaint of all documents that support the facts in the complaint). Among the other changes proposed are: service of complaints on those the complainant knows will be affected must be simultaneous with filing at FERC; public notice of the complaint is to be issued within 2 days after the complaint is filed; FERC will not evaluate the sufficiency of the complaint until an answer is filed; answers to complaints and interventions will have to be filed no later than 10 days after the complaint is filed; answers to complaints will also have to include all documents that support the facts in the answer. In addition, FERC proposes use of several alternative procedures to resolve proceedings after an answer is filed:

- decision on the pleadings, with the Commission "endeavoring" to issue an order on the complaint within 60-90 days after the answer is filed.

- an expedited hearing before an ALJ, with the goal of having an initial decision rendered within 60 days after assignment to an ALJ, and an order on an appeal from an initial decision within 90 days after briefs are filed.

- convening of a conference, on which there is no elaboration in the notice, but presumably this is a reference to a conference of the proceeding participants for the purpose of arriving at agreement on the conduct or disposition of the proceeding, as provided in 18 C.F.R. 385.601.

- assignment of the complaint to an ADR procedure, where time consumed would largely be in the control of the parties.

The intention is to issue an order selecting one of these paths within approximately 30 days after the answer is filed. In a limited number of cases, a Letter Order or delegation of some complaint responsibilities to staff or an ALJ might be used, but this has not received much elaboration. FERC also suggested in its NPR (see foonote 10) that it might be able to develop a sort of "small claims court" procedure for use by small customers who allege harm or where there is a small amount of money in controversy.

3. Federal Trade Commission (FTC)

The FTC enforces a variety of Federal antitrust and consumer protection laws.[15]

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[15]The list of statutes with respect to which the FTC has some enforcement authority is lengthy. The oldest are probably the Federal Trade Commission Act (15 U.S.C. 41-58) and the

It does not hold adjudicatory proceedings regarding licensing, but the agency does hold adjudicatory proceedings related to law enforcement actions.[16] These proceedings generally follow APA procedures for on-the-record proceedings. Discovery, right to legal representation, and cross-examination are available. The outcome is subject to appeal to the full Commission, which takes written briefs, but does not use trial-type procedures.

In 1996, the FTC amended its Rules of Practice for adjudicatory proceedings, for the purpose of reducing the cost, complexity, and length of the proceedings. This revision was the result of a non-public report on adjudicatory proceedings issued by an FTC task force headed by the FTC General Counsel. The amendments were issued as immediately effective interim rules with request for comments. but they have for the most part been in effect without any further change since January 1, 1997.[17] This is, at least in part, because it is felt that insufficient time has passed to evaluate the changes that have been made. Among other things, the amendments provided for a new Fast Track Procedure to be applied to cases in which a preliminary injunction was sought in judicial proceedings. The proceedings are fast in the sense that actions by the parties

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Clayton Act (15 U.S.C. 12-27), both of which date back to the early part of the 20th century, but the list includes many other statutes intended to protect consumers or to ensure that the nation's markets function competitively. The Federal Trade Commission Act, which provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful, is considered to be the basic consumer protection statute enforced by the FTC. The agency also enforces a variety of specific consumer protection statutes (such as the Equal Credit Opportunity Act, 15 U.S.C. 1691-1691f; the Truth-in-Lending Act, 15 U.S.C. 1601-1667f; the Fair Credit Reporting Act, 15 U.S.C. 1681-1681(u); and the Cigarette Labeling Act, 15 U.S.C. 1331-1340) that prohibit specifically-defined trade practices and provide that violations are to be treated as unfair or deceptive acts or practices under the Federal Trade Commission Act.

The Commission enforces the substantive requirements of consumer protection law through both administrative and judicial processes. In the administrative process, the Commission makes the initial determination that a practice violates the law in either an adjudicative or rulemaking proceeding. The Federal Trade Commission Act authorizes the FTC to serve a complaint stating the agency's charges and containing a notice of a hearing upon the subject of the complaint. The subject of the complaint has the right to appear and show cause why an order should not be entered against the subject. The testimony presented in the hearing must be reduced to writing and intervenors are permitted, but the Act does not address other details of such hearings. It does provide that service of complaints, orders, and other processes may be personal, or by leaving a copy at the residence or principal place of business, or by registered or certified mail. 15 U.S.C. 45

[16]The basis of the FTC regulations on procedures in adjudicatory proceedings is found in statutory provisions contained in the Federal Trade Commission Act, particularly those codified at 15 U.S.C. 45. (Proceedings related to rulemaking are prescribed at 15 U.S.C. 57a.)

[17]See 61 Fed. Reg. 50639-50651.

and the ALJ must be completed within a relatively short time.[18]

The Supplementary Information for the 1996 amendments is interesting not only in its description of the changes that were made by the new rule (e.g., time changes by which parties are required to act), but also by the reference to other actions that the Commission uses to keep adjudicative decisionmaking on schedule. For example, the Commission meets at least quarterly to review the progress of each pending adjudicative matter on appeal before the Commission. In addition, internal deadlines have been set for the preparation and issuance of final orders and opinions in appeals from an initial decision. The FTC issues a quarterly report on the status of adjudicative proceedings pending before ALJs, indicating the dates by which various milestones (e.g., filing an answer, close of discovery, commencement of evidentiary hearing) are scheduled to take place, and places the report on the internet.

In the Supplementary Information for the interim rules, the Commission also encouraged its ALJs to consider implementing other techniques, besides the rule amendments, to expedite action, such as affirmative case management.[19] Among other things, the Commission suggested that parties could be encouraged to submit their direct examination of expert witnesses in writing, with live testimony being heard only on cross-examination. It was also suggested that it might expedite proceedings if ALJs required, in appropriate circumstances, that proposed findings of fact and conclusions of law be submitted by the parties before, rather than after, trial, and that an ALJ could require the parties to submit proposed stipulations and contentions before the hearing in order to further narrow the legal and factual issues to be addressed in the evidentiary hearing. The goals appear to be to encourage ALJs to handle adjudicatory proceedings in a more expeditious manner, and to change the ALJs' practice of allowing use of the full panoply of procedures available to parties in civil court litigation (even when that goes beyond the APA requirements for on-the-record adjudicatory proceedings).

C. OSHRC' s E-Z trial procedures

The Occupational Safety and Health Review Commission (OSHRC) has the function of resolving disputes that result from inspections carried out under the Occupational Safety and Health Act of 1970.[20] OSHRC has adopted a procedure called "E-Z trial." E-Z trial is a method

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[18]The only changes made in the Rules of Practice subsequent to 1996 involved the Fast Track Procedure, which was expanded somewhat, so that in appropriate cases where judicial proceedings were held, the Fast Track Procedure could be applied even though a preliminary injunction was not issued by the court. See 63 Fed. Reg. 7525-7528, Feb. 13, 1998.

[19]The "suggestive" nature of the statements directed to ALJs' conduct of proceedings was apparently due to sensitivities about giving ALJs direct orders.

[20]The mission of the Occupational Safety and Health Administration (OSHA) is to ensure safe and healthful working conditions for workers covered by the Act. Under the Act, after inspection or investigation, the Secretary of Labor (who acts through OSHA) is authorized to issue citations for violation of the Act, notifying the employer by certified mail of the citation and the penalty (if any) proposed to be assessed and that the employer has 15 working days within

for hearing less complex enforcement-type cases before OSHRC's judges. The proceedings are streamlined, but they still constitute a trial-type adjudication before an ALJ with sworn testimony and witness cross examination. E-Z trial may only be used in cases involving one or more of the following: relatively simple issues of law or fact, total proposed penalty of not more than $20,000, no allegations of willfulness or of repeated violations, no fatalities, a hearing that is expected to be completed in less than two days, or a small employer. While a party can request use of E-Z trial, the decision to hear a case under E-Z trial is made by OSHRC's Chief ALJ or the ALJ assigned to the case. Under E-Z trial procedures--

- To obviate the need for discovery and to expedite the proceeding, the Secretary of Labor, and sometimes the employer, are required to make certain disclosures of information relevant to the case early in the process.

- Soon thereafter, there will be a pre-hearing conference among the parties and the ALJ to either reach a settlement or to narrow and define the factual and legal issues. The parties are required to attempt to reach agreement on as many facts and issues as possible.

- Motions are discouraged unless the parties try first to resolve the matter among themselves.

- Discovery is discouraged, and permitted only when ordered by the ALJ.

- Interlocutory appeals are not permitted.

- Hearings are held as soon as possible after the pre-hearing conference.

- A court reporter is present at the hearing, and each party has the right to question all witnesses and to introduce relevant evidence. Federal Rules of Evidence do not apply in the hearings.

- Instead of submitting briefs, the parties are expected to argue their case orally at the conclusion of the hearing, though a party may ask for permission to file a brief.

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which to notify the Secretary that the employer wishes to contest the citation or proposed assessment of penalty. Within the 15 day period, the employer may file a notification that he or she intends to contest the citation or penalty, or any employee or representative of employees may file a notice alleging that the period of time fixed in the citation for abatement of the violation is unreasonable. If that occurs, the Commission must afford an opportunity for a hearing held in accordance with 5 U.S.C. 554, without regard to section 554(a)(3), which excludes from the application of section 554 proceedings in which decisions rest solely on inspections, tests, or elections. After the hearing, the Commission must issue an order, based on findings of fact, affirming, modifying, or vacating the citation or proposed penalty, or directing other appropriate relief. (The reference to 5 U.S.C. 554 actually encompasses sections 556 and 557 of title 5, since section 554(c) provides that if the parties are unable to resolve a controversy by consent, the agency must give interested parties an opportunity for a hearing and decision in accordance with sections 556 and 557.)

- The ALJ's decision is often rendered from the bench at the end of the hearing. If the judge does not rule from the bench, the judge must issue a written decision that is expected to be issued within 45 days after the close of the hearing.

- In some situations, time periods allowed for certain procedures are expedited.

Certain relatively minor changes to OSHRC's E-Z trial procedural rules were issued in the form of a final rule in July 1997.[21] It is interesting to note that reduction of time limits for actions by parties (and the Secretary) beyond those then already in the rules (e.g., lowering the time for responding to a party's claim of privilege from 15 to 10 days) was resisted by parties who commented on the proposed changes when published earlier in the year, and in some cases these proposed changes have been dropped

D. Approaches of other agencies

In most cases, the focus of the other Government agencies surveyed was more traditional than that of the agencies discussed above (i.e., the other agencies tended to continue using the formal-type proceedings over which ALJs preside, without significant innovation). The following do, however, provide for procedures that deviate from the very formal adjudicatory proceeding model, at least in some cases:

1. Department of Labor (Labor)

Labor has a wide variety of adjudicatory proceedings held by separate divisions of the Department or based on individual statutory provisions.[22] Some of these specialized situations (such as proceedings of the Occupational Safety and Health Administration) have their own procedures for adjudicatory proceedings, and they vary in degree of formality. Thus, the Wage and Hour Administrator's decisions on wage rate reconsiderations, which are more akin to licensing than enforcement proceedings, are based largely on a paper record, without any formal hearing process. Where adjudicatory proceedings do not fall within these categories, they are formal, on the record type of proceedings, which include discovery, cross-examination, and legal representation. As with some of the other agencies, Labor has processes for off the record settlement proceedings before settlement judges and for expedited hearings. The latter are very expedited in time,[23] but otherwise use many of the same practices as

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[21] 62 Fed Reg 35961

[22] E.g., proceedings relating to allegations of employer discrimination against whistleblowers in the nuclear industry, which are more akin to enforcement proceedings than licensing proceedings. These proceedings are covered by section 211(b) of the Energy Reorganization Act. Hearings in such proceedings are conducted by ALJs, and use formal, trial-type procedures.

[23] Labor's expedited proceedings are described in 29 C.F.R. 18.42. Under section 18.42, any party may move to advance the scheduling of a proceeding. The movant must describe the circumstances justifying advancement, describe the irreparable harm that would result if the

traditional, formal proceedings.

2. Federal Communications Commission (FCC)

The FCC was established as an independent regulatory agency by the Communications Act of 1934[24], after which the Atomic Energy Act was patterned. The Communications Act has been amended over the years, so that the FCC currently is responsible for regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC holds adjudicatory proceedings, and has four permanent ALJ's for this purpose. These proceedings involve licensing (and revocation) actions, as well as enforcement actions (such as, cease & desist orders) and similar work. They are formal, on the record, proceedings and legal representation is permitted. Discovery is allowed and there is a right to cross-examination.

The Communications Act of 1934 allows any party in interest to file with the Commission a "petition to deny" an application for a license, which serves much the same function as the NRC "intervenor" process. 47 U.S.C. 309(d) This procedure works as follows: Upon receipt of an application for a regular commercial broadcast license, or any substantial amendment to such a license, the Commission must issue a public notice of acceptance for filing. A hearing is required if an appropriate petition to deny the application is filed, so long as the petitioner is a party in interest and the petition contains specific allegations that demonstrate a substantial and material question of fact.[25] If these conditions are met, a formal hearing is held. Historically, formal hearings have also been held whenever two separate persons have requested a broadcast station license for a particular frequency in the same community. However, the Commission very recently decided that an auction would be a better approach in the

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motion is not granted, and incorporate in the motion affidavits supporting his or her representation of facts. Unless the ALJ directs otherwise, the parties have 10 days to file an opposition to such a motion. Under the procedure, the ALJ may advance pleading schedules, prehearing conferences, and the hearing, though a hearing on the merits cannot be scheduled with less than 5 working days notice, unless all parties consent. When expedited hearings are required by statute or regulation, the hearing must be scheduled within 60 days from the receipt of the request for a hearing. The ALJ's decision must be issued within 20 days after receipt of the transcript of any oral hearing, or within 20 days after the filing of all documentary evidence if no oral hearing is conducted.

[24]The Commission's General Rules of Practice and Procedure are found at 47 C.F.R. Chapter I, Part 1, Subpart B.

[25]A recent case describes the standards used by the Commission to determine whether the Commission will grant a hearing when it receives a petition for a hearing. Although the Commission's decision was reversed in that case, the case serves to emphasize the point that the FCC's focus is on whether granting the license application would be inconsistent with the public interest, convenience and necessity, and there is a considerable First Amendment interest (free speech and free press) that informs the Commission's decisions. Serafyn v. FCC, 149 F. 3d 1213 (D.C. Cir. August 11, 1998).

latter type of situation. It is thought that this is likely to be challenged in court.[26]

Though the statutory basis for holding formal hearings with respect to petitions to deny and multiple applications for licenses for the same frequency (in the same community) is not entirely clear, the historical Commission interpretation of 47 U.S.C. 309(e), which is applicable to such situations, is that formal hearings are required. The Commission does use paper hearings with respect to some services, such as low power television.

The FCC does not hold legislative-style adjudicatory proceedings. The Commission has held en banc hearings during which the Commissioners asked questions, but these proceedings did not purport to constitute "on the record" evidentiary hearings under the APA.[27]

3. National Labor Relations Board (NLRB)

The NLRB entertains administrative litigation in two types of controversies: those regarding representation of employees by a particular union (the regulations for representation cases are not entirely uniform because they are specific to various types of representation cases), and unfair labor practice cases, which are reminiscent of enforcement-type proceedings. Generally, staff in the regional offices of the NLRB hold hearings in representation cases (in some situations, the regional hearing is limited to fact-finding, and the final decision is made by the Board), and in controversies regarding compliance proceedings in unfair labor practice cases. These are on the record proceedings, with legal representation and cross examination permitted. A decision by the regional director is final, unless the Board grants a party's request for review of the regional director's decision. Though the regulations provide that "so far as practicable" proceedings shall be conducted in accordance with the rules of evidence applicable in U.S. Districts Courts, it appears that in practice the rules of evidence are not applied strictly in these NLRB proceedings.

In all other instances, hearings are held before ALJ's, and the proceedings are on the record and formal, with legal representation. The ALJ issues a decision, which is subject to review by the Board. There is usually no hearing before the Board when it is reviewing an ALJ's decision, though on rare occasions the Board may agree to hear oral arguments. There is no discovery of documents in NLRB adjudicatory proceedings (depositions may be taken upon an order in unfair labor practice cases, but good cause for taking the deposition must be shown); however, subpoenas ad testificandum or duces tecum are provided to parties upon their request, but these apply only to production of documents or a person at the hearing itself.

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[26]The new approach will have the advantage of producing money for the Treasury, while avoiding long and complex adjudicatory proceedings, the outcome of which was often appealed to the courts.

[27]There was an instance about 30 years ago, in which the Commission held an en banc legislative-style hearing and heard arguments of the parties, however, the facts in that case were not in dispute.

The Board also has the authority to order that any unfair labor practice complaint and any proceeding that has been instituted be transferred to the Board or any member of the Board. In that event, the same rules of procedure, insofar as applicable, apply as in proceedings held before an ALJ. In addition, in unfair labor practice cases and some representation cases, the General Counsel has a role in the decisional process on certain aspects of the proceedings.

Interestingly, in certain unfair labor practice cases, if the parties have agreed upon methods for voluntary adjustment of the dispute, the regional director must withdraw notice of the hearing or defer action until it becomes known whether use of those methods has been successful. The regulations also provide expeditious processing for certain types of unfair labor practice cases. This consists of giving such cases priority and involves expeditious hearings, but just what this entails is not defined in the regulations.

4. Securities and Exchange Commission (SEC)

The Securities and Exchange Act of 1934 created the SEC, which is an independent regulatory agency with responsibility for administering the Federal securities laws.[28] SEC adjudicatory proceedings are governed by a number of statutes, and most are enforcement-type proceedings.[29] All fact-finding proceedings are on the record and the parties are entitled to discovery, cross-examination, and representation by legal counsel.[30] Adjudications involving fact-finding are rarely, if ever, held by the

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[28]In addition to the Securities and Exchange Act of 1934, which prohibits brokerage firms from engaging in fraudulent and unfair behavior (such as sales practice abuses), the SEC enforces the Securities Act of 1933; the Public Utility Holding Company Act of 1935; the Trust Indenture Act of 1939; the Investment Company Act of 1940; and the Investment Adviser Act of 1940.

[29]Note that the SEC itself does not consider all of its proceedings that fall under the definition of "enforcement action" in footnote 2 to be enforcement proceedings. This is true, for example, for its disbarment proceedings against accountants who make egregious mistakes in preparing information needed by a client for SEC regulatory purposes. In addition, the SEC has held formal adjudicatory proceedings before ALJs in three types of other non-enforcement situations. These are: request for hearings on the denial by SEC staff of an exemption under the Public Utility Holding Company Act; stop order proceedings under the Securities Act of 1933, which prevent sales of securities to the public because disclosure in the registration document is inadequate; and, a proceeding under the Commodity Exchange Act regarding sale of futures contracts on a stock index, where the Commission must make a finding that the Act is satisfied before allowing the sale to go forward.

[30]Most discipline of brokers and brokerage companies by the SEC falls under the Securities and Exchange Act of 1934 (15 U.S.C. chapter 2B), which has been amended a number of times over the years. The Act contains numerous references to notice and hearing. These provisions are not, however, consistent. For example, 15 U.S.C. 78o(b)(4) provides that the Commission shall suspend or revoke the registration of a broker or dealer if it makes certain findings "on the record after notice and opportunity for hearing." On the other hand, the section

SEC Commissioners. Rather, they are conducted by ALJ's. However, as with other regulatory agencies, appeals can be heard by the Commissioners. SEC Commissioners may also hear oral arguments as part of their consideration of an appeal.

In addition, in some instances, the SEC has appellate jurisdiction with regard to decisions of stock exchanges and the National Association of Security Dealers to discipline their individual members. These are de novo reviews that go directly to the Commission, and in practice they are primarily paper proceedings with findings of fact based on the paper record. Presentation of oral arguments can be requested in these proceedings, but such a request is rarely approved. Administrative proceedings against registered entities may be instituted by the SEC, and these are heard by ALJ's and are formal, on the record proceedings.

5. Food and Drug Administration (FDA)

An important function of the FDA is to approve applications for introduction of new drugs into interstate commerce. For an application to be approved, the drug must be shown to be both safe and effective. If a drug is approved by the FDA, but is later shown to be unsafe or ineffective, the agency will withdraw the approval. In both disapproval and withdrawal of approval of marketing of a drug, the agency follows procedural steps that may include an adjudicatory proceeding.

The FDA process for review of new drug applications received by the agency involves the following steps: establishment of target dates for completion of steps in the process by the division to which the application is first assigned; review and analysis by various FDA employees of the information submitted by the applicant (there is considerable interaction between the reviewing FDA employees and the applicant both before the formal submission of the application and during the application review process); appointment of an advisory group to provide a recommendation on the application to the cognizant division director; decision (approval or disapproval) by the cognizant division director; notification to the applicant by letter of the approval or disapproval of the application (in case of disapproval, the letter contains notice of further options available to the applicant, i.e., amendment of the application, withdrawal of the application, or appeal). Most applicants who receive a rejection do not go beyond this point. However, if the division director disapproves the application, an applicant may request publication of a Federal Register notice explaining the deficiencies. This notice also offers the applicant an opportunity to request a hearing.[31]

At this point, an effort is made to negotiate an informal resolution of the matter. If this effort fails to resolve the matter and the applicant wishes to proceed further, the applicant may at this juncture make a formal request for a hearing. The standard for obtaining a hearing is, however, high. To be granted a hearing, the applicant must

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providing authority to the SEC to issue cease-and-desist orders (15 U.S.C. 78u-3(a)) requires it to find "after notice and opportunity for hearing" that a violation of chapter 2B is or has been taking place or is about to take place.

[31]This request must be made within 30 days of publication of the notice.

demonstrate that there is a substantial issue of material fact, and this requires submission of considerable data and analyses in justification of the applicant's position. (Perhaps because of this high threshold for receiving a hearing, there are relatively few requests for hearings.) In other words, the FDA will not provide a formal hearing where the applicant cannot demonstrate that there is a sound basis for challenging the FDA staff's conclusion. If it conclusively appears that there is no genuine and substantial issue of fact that precludes the disapproval or withdrawal, the FDA Commissioner will enter summary judgment against the person requesting the hearing.[32] If summary judgment is not granted, a hearing will be held that includes cross-examination and other concomitants of formal adjudicatory proceedings. An ALJ's decision can be appealed to the FDA Commissioner. If there is no appeal, the ALJ's decision becomes the agency's final ruling on the matter. Review lies in the U.S. court of appeals (this is also true for summary judgment).

Many of the steps described above are based on statute, as amplified by the FDA's regulations. See, 21 U.S.C. 355, and 21 C.F.R. Part 314, Subparts D and E. In recent years, the FDA has been able to cut total time consumed by procedures relating to new drug applications from an average of two years to an average of one year. (There are, however, wide swings in time between individual applications.) Discussion with FDA staff indicates that the reduction of average time spent in review has been largely due to adoption of new internal policies that make the review process more efficient. Internal procedures involving time lines, milestone dates, and the like, have been institutionalized. Thus, when received, the application is assigned target dates for completion of steps in the process in accordance with an overall plan developed by the agency for that purpose. There is also regular monitoring to determine whether the target dates are being met. In addition, where multiple FDA staff reviews of data relating to an application are needed (which is most often the case), to the extent possible such reviews are now held simultaneously, rather than serially.

E. Certification without adjudication – Federal Aviation Administration (FAA)

The mission of the FAA, a component of the Department of Transportation, is directed primarily to aviation safety and the establishment and enforcement of safety standards that apply to virtually every aspect of civil air transportation. Among other things, the FAA certifies commercial and cargo aircraft operators, aircraft and avionics manufacturers, and monitors compliance with its standards and certifications throughout the industry.

The statutory provisions that describe the FAA's responsibilities relating to safety regulation are contained in 49 U.S.C. chapter 447.[33] A major component of these responsibilities is the issuance of certificates that will assure that production of aircraft and production of significant components of aircraft are in accordance with standards issued by the FAA. Three serial certifications are involved: (1) design certification, (2) production

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[32]The summary judgment procedure was upheld in Weinberger v. Hynson, 412 U.S. 609 (1973). The fact that the FDA process involves rigorous review of scientific data seemed important to the Court's view that the procedure was not objectionable on due process grounds.

[33]The major relevant regulatory provisions are contained in 14 C.F.R. Part 21.

certification,[34] and (3) airworthiness certification. Upon receiving an application for certification of a design, the appropriate FAA field office reviews the design and determines whether it should be approved. Upon application for a production (manufacturing) certificate, a decision must be made whether the manufacturing system in question can competently produce the aircraft pursuant to the previously approved design. At this stage, an FAA inspector visits the facility, and based on the inspection and written material submitted by the applicant, a finding of compliance or non-compliance is made by the cognizant field office. The third step assures that the flight will be safe, and this certificate may be issued by the production certificate holder, but is subject to FAA surveillance.[35] The entire process can take months, or years, depending on the complexity of the design. There is no adjudicatory stage associated with this process, but in some instances a notice of the basis of a certification is published in the Federal Register before the certificate is issued, and the public is invited to submit written comments.

Formal adjudicatory proceedings are, however, associated with two types of FAA actions: (1) 49 U.S.C. 44709 requires that before amending, modifying, suspending, or revoking a certificate, the FAA Administrator shall provide the holder an opportunity to answer the charges and to be heard. A person adversely affected by an order of the Adminstrator may also appeal the order to the National Transportation Safety Board, which is independent of the Department of Transportation. After notice and an opportunity for a hearing, the Board may amend, modify, or reverse the Administrator's order. These proceedings are formal in nature and they are held before ALJs . (2) In addition, many actions imposing a civil penalty (which initially involves only informal conferences between the person proposed to be penalized and FAA staff and their lawyer) may be appealed and heard before Department of Transportation ALJs. 49 U.S.C. 46301

F. Fast track in Federal courts

Though not part of the Executive branch of Government, the "fast track" procedure in the U.S. District Court for the Eastern District of Virginia gives some insight as to efforts to expedite proceedings at the Federal court level. An article in the November 10, 1997 Washington Post (referred to in a December 15, 1997 memorandum from Commissioners Diaz and McGaffigan to Chairman Jackson and Commissioner Dicus) and other articles regarding the fast track procedure indicate that the success achieved by this court depends significantly on limiting the duration of time during which actions of the court and litigants may take place. This approach has come in for some criticism, because it tends to favor some litigants over others. A broader approach is to use processing tracks, alternative dispute resolution, and judicial case management, in addition to some paring of time limits. All these methods are covered in the Model Civil Justice Expense and Delay Reduction Plan, which was issued in 1992 under the auspices of the Judicial Conference of the United States.

The District Court for the Northern District of Illinois has also been successful in reducing costs and delays in judicial proceedings. According to the Senior Court Project Specialist at the Judicial Conference, that court relies on early and active judicial case

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[34]Actually, different certificates are issued for different parts of the aircraft.

[35]Large production facilities have resident inspectors assigned. Their job is to monitor the activities at the plant and to report to FAA any problems they encounter.

management and has managed to bring down the average time consumed by its cases considerably below those of the District Court for the Eastern District of Virginia.

ATTACHMENT 3

ASSESSING PROCEDURAL OPTIONS: AN ANALYTIC MODEL

In the body of this paper, we suggested that a matrix format might be one way of weighing the various attributes of different types of proceedings, in order to assess their contribution to meeting what could be called the "performance goals" of the adjudicatory process. The chart on the following page is a visual representation of this.

The tradeoff between different goals in the adjudicatory process is a familiar enough concept from the civil and criminal court system, where the gravity of the matter, and the danger of an erroneous result, are balanced against other considerations. Thus in a small claims court, where primary goals are access for the public and efficiency, lawyers are excluded, cross-examination is non-existent, and evidentiary standards are extremely loose. In a felony criminal case, on the other hand, where the overriding goals are a sound result and the assurance of due process, the balance is struck quite differently: free legal representation for the indigent is a constitutional right, evidentiary standards are high, and the right to confront witnesses through cross-examination is critical.

In considering how NRC's proceedings fit into this analysis, we would offer a few examples. Enforcement proceedings to suspend or revoke a license or bar an individual from nuclear activities, in our view, most closely resemble criminal trials, both in their accusatory nature and the sanction imposed, which may lead to the loss of one's livelihood. Here, accessibility to the public is generally not an issue. In such a case, we think that the most significant goals are, as in a criminal trial, a sound result and fairness to the accused.

The most difficult type of proceeding to analyze in this way, because it is so much a matter of individual judgment, is probably the reactor licensing proceeding. On point after point, conflicting arguments can be brought to bear. For example, it can be argued that informal proceedings, with low barriers to public participation, are a way to involve the public more broadly, without the expense and effort of a full-blown trial-type adjudication. But the contrary argument can also be made: that formal proceedings, which require more of the participants, have a winnowing effect, and ensure that those who participate are more likely to make a meaningful contribution. Transparency argues for the maximum disclosure of relevant information, and arguably therefore for discovery and cross-examination. Efficiency, on the other hand, may argue to the contrary. Fairness is very much in the eye of the beholder. For the opponent of a nuclear plant, fairness probably means the opportunity to test all the evidence bearing on the safety of the facility by cross-examination and all the other attributes of a trial. To the applicant, on the other hand, fairness probably means the ability to get its application approved without being subjected to dilatory actions by an opponent playing for time.

We do not presume to have all the answers as to how different types of procedures should be rated on the scale provided. We offer it only to assist the Commission in thinking through how procedures may vary or which may seem most appropriate for particular types of proceedings.

FUNCTIONAL ELEMENTS

PERFORMANCE GOALS	Prehearing Stage			Hearing Stage			Decision Stage		
	Who participates	Scope of Issues	Access to Information	How information presented	How record developed	How information tested	Who makes Decisior	How Participants Persuade Decisionmaker	How Decision reviewed
Inclusiveness (Access for Interested Public)									
Transparency (Open Decision-Making)									
Efficiency									
Fairness (Including Due Process)									
Substantive Soundness									

ATTACHMENT 4

OPTIONS FOR FORMATS FOR ADJUDICATORY PROCEEDINGS

This discussion addresses the procedural conventions Federal agencies employ in adjudicatory proceedings.

1. Introduction

Generally, the procedures that govern an agency's administrative proceedings are prescribed by statute or regulation, though the details of everyday implementation are left to more informal guidance and practice. Of course, if a statute sets forth express procedural requirements for certain types of proceedings, the regulations that govern those proceedings cannot alter those requirements. For example, the Administrative Procedure Act (APA) sets forth certain requirements[1] for hearings that are required by statute to be "on the record."[2] Unless there is a statutory exemption from the APA requirements for agency proceedings that are required to be "on the record," the APA requirements apply. In addition, an agency may, as a matter of discretion, choose to adopt the requirements applicable to "on the record" hearings for the conduct of cases for which there is no statutory mandate. In fact, in the past, the Commission has elected to treat certain types of NRC adjudicatory proceedings with such procedural formality, even though there was no statutory mandate to that effect. Indeed, the NRC has gone beyond the APA provisions for "on the record" hearings by allowing extensive opportunities for discovery in NRC's formal adjudications.

2. Constitutional requirements

Whatever their source, the procedures used in administrative proceedings must meet the due process requirements of the United States Constitution. The Supreme Court has never catalogued the specific procedures required to meet the Constitutional standard in such proceedings.[3] Nevertheless, in various cases, it has been suggested that providing notice to persons of an action proposed to be taken (or that has been taken) that will affect them, furnishing them with information about the action, and affording an opportunity for them to present their views to the agency either before or after the action has been taken is the minimum required.[4] There is little guidance regarding the formality with which these steps must

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[1]See 5 U.S.C. §§ 554-557.

[2]The only statutory requirement under the Atomic Energy Act (AEA) for such hearings is contained in section 193(b) of the AEA, which mandates that the Commission conduct an "on the record" hearing with regard to the licensing of the construction and operation of a uranium enrichment facility.

[3]In Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633 (1990), the Supreme Court stated that the minimum statutory requirements for an informal adjudication are set forth in section 555 of the APA. However, the Court noted that the Due Process Clause itself was not argued in the case (perhaps because LTV had, in fact, had ample notice and opportunity to present its views in relation to the central issues of the case).

[4]When property or liberty interests that are concrete and identifiable are at stake due process hearing rights attach. Stein, Mitchell, Mezines, Administrative Law §31.02 (vol. 4, release of May 1998). This implies that where such interests exist, notice is also required. The

be taken by an agency.[5] In fact, due process in adjudicatory proceedings has been said to be flexible and to call for such procedural protections as the particular situation demands.[6]

The case most often quoted with respect to whether, when, and how much due process requirements apply is Matthews v. Eldridge, a 1976 Supreme Court decision[7] that laid down a balancing test that is often referenced in cases involving Constitutional challenges to administrative proceedings. In Matthews, the Court began with the premise that something less than an evidentiary hearing is often sufficient prior to termination of Social Security disability payments, saying that three factors require consideration in determining what must be done: (1) the nature of the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the likelihood that more procedures would reduce that risk, and (3) the Government's interest in avoiding additional procedures, including the time and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In general, the court has seemed to say that a balancing test must be used to determine what is due process in a particular situation.

Supreme Court has said that due process requires that "a person in jeopardy of serious loss" must be given notice of the case against him or her and an opportunity to meet it. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-172 (1951). Thus, a cognizable liberty or property interest must be identified for the protection of due process to apply, and the loss to the individual must be significant. Unfortunately, the courts have not been uniform in deciding whether such an interest exists in particular types of fact situations.

[5]Just what sort of opportunity must be given to a person affected to meet the case against them has not been defined. The person probably must be given an opportunity to provide relevant information and sometimes even to present an argument, but whether this must be in the context of an oral or written hearing seems to depend on the type of case involved. Wolff v. McDonnell, 418 U.S. 539 (1974); Armstrong v. Manzo, 380 U.S. 545 (1965); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951). In Matthews v. Eldridge, which is discussed in note 7, the Court seemed to be saying that a process that provides significant administrative and judicial reviews of the action taken by the agency, or a hearing of some sort subsequent to the action being taken, can be sufficient to meet due process requirements.

[6]Morrisey v. Brewer, 408 U.S. 471 (1972).

[7]424 U.S. 319. This case involved a challenge to the Constitutional validity of the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability for purposes of receiving disability benefits under the Social Security Act. A fairly elaborate procedure, with several reviews, was used before benefits were terminated, but there was no evidentiary hearing before the termination took place. The beneficiary could thereafter receive a hearing before an administrative law judge. The hearing was nonadversary in nature and the Social Security Administration was not represented by counsel at the hearing, though the claimant could be represented by counsel or other spokesmen. The issue raised was whether due process requires an evidentiary hearing prior to termination of benefits. The Supreme Court decided that it does not.

The first factor is often expressed in terms of the amount of money involved, i.e., the greater or more significant the interest – often expressed in terms of the economic consequences to the affected person -- the more procedures the private person should be able to invoke. The second is described in terms of whether the establishment of facts that are being contested would be aided by trial-like procedures. (The Supreme Court has indicated that trial-like procedures may often be unnecessary where scientific or medical information is at issue.) As to the third factor, one commentator has suggested that the cost to the Government is generally a function of the number of cases of a particular type that the Government processes,[8] as well as the complexity of each case.[9] This commentator also suggested that the need for speed in adjudication is sometimes a relevant Government consideration (e.g., where public health or safety might be endangered).[10] Along similar lines, using the Matthews factors has led one court to suggest that trial-type procedures are better "reserved for the more factually complex and higher liability actions," as well as for those actions that have greater impacts on the public.[11]

3. Formal Proceedings

(a) APA requirements

As indicated previously, hearings that are required by statute to be on-the-record must be conducted in accordance with APA requirements. In such proceedings, the agency must give all interested parties opportunity for (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit, and (2) hearing and decision after notice.

Generally, the employee who presides at the reception of evidence is required to make the recommended decision or initial decision. The presiding officer's functions must be conducted in an impartial manner. To help ensure that this will be the case, the Act provides that the presiding officer may not be subject to the supervision or direction of an employee engaged in the performance of investigative or prosecuting functions for the agency,[12] and ex parte communications to or on the part of any member of the body

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[8]In other words, where an agency must deal with one thousand similar cases each year, giving each case all possible procedural protections may be much more costly to the agency than providing such protections to a type of case that arises just a few times each year.

[9]William Funk, Close Enough for Government Work?–Using Informal Procedures for Imposing Administrative Penalties, 24 Seton Hall L.Rev. 1 (1993).

[10]Id. at 9.

[11]United States v. Independent Bulk Transportation, Inc., 480 F.Supp. 474 (S.D.N.Y. 1979). See also Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C.Cir. 1989).

[12]Obversely, an employee who is engaged in investigative or prosecutorial functions for an agency in a case generally may not participate or advise in the decision, recommended decision, or agency review, except as witness or counsel in public proceedings.

comprising the agency, ALJs, or any other employee who is or may be involved in the decisional process in a proceeding are prohibited. Generally, an agency may give employees presiding at hearings a wide range of powers, such as authority to issue subpoenas, take depositions or have depositions taken, regulate the course of the hearing, and hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative dispute resolution.

A party is entitled to present his case or defense by oral or documentary evidence, but the agency may adopt procedures for the submission of all or part of the evidence in written form, if that will not be prejudicial to a party.[13] A party is also entitled to submit rebuttal evidence, and to conduct cross-examination. Before a recommended, initial, or tentative decision, or a decision on agency review, the parties are entitled to a reasonable opportunity to submit for consideration proposed findings and conclusions, exceptions to recommended, initial, or tentative agency decisions, and the reasons therefor.

When application is made for a license required by law, the agency is required to set and complete proceedings required to be conducted in accordance with most of the rules stated above, unless other proceedings are required by law. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if the licensee has been given written notice by the agency of the facts or conduct that are of concern, and opportunity to demonstrate or achieve compliance with all lawful requirements.[14]

In practice, on-the-record adjudicatory proceedings that are covered by the APA tend to be very "formal" in nature, using the types of procedures that emulate a civil judicial trial, even when there is no explicit requirement in the APA for the procedure, as is the case with discovery. This includes (1) filing of a complaint,[15] (2) notice to the defendant, (3) opportunity for the defendant to file an answer, (4) possible intervention by outside persons, (5) designation of a judge,[16] (6) opportunity for the parties to present motions, (7) opportunity for the parties to engage in discovery, (8) conferences held by

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[13]In such a proceeding, the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision, and must be made available to the parties upon payment of costs. All decisions, including initial and recommended decisions, and the rulings thereon are a part of the record. 5 U.S.C. §556(e).

[14]5 U.S.C. §558.

[15]In NRC formal adjudicatory proceedings, "contentions" serve much the same function.

[16]Ex parte rules (prohibition on a judge consulting with a party to the proceeding, except on notice and opportunity for all parties to participate) apply to parties' (or their attorneys') contacts with the judge.

the parties with the judge, (9) holding a trial or hearing,[17] (10) issuance of a decision, and (11) opportunity for an appeal from the decision by any aggrieved party.

(b) NRC procedures

There are little in the way of statutory requirements for the NRC to hold on-the-record proceedings.[18] Nevertheless, with the exception of informal procedures for adjudications in materials and operator licensing proceedings,[19] the agency has for many years treated its adjudicatory proceedings with the same formality as proceedings required by statute to be on-the-record. See, in particular, 10 C.F.R. Part 2, Subpart G, which provides rules of general applicability for licensing proceedings. Subpart G includes the whole panoply of procedures associated with formal judicial proceedings, albeit some of the terminology is modified to accommodate the special characteristics of NRC licensing procedures.[20] In fact, in proceedings subject to Subpart G, the NRC has even gone beyond the APA requirements. For example, Subpart G contains extensive provisions for discovery by the parties.[21] Although the APA authorizes use of discovery,[22] the APA does not require its use in agency adjudicatory proceedings.

4. Informal proceedings

(a) In general

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[17]At the trial, a whole set of additional rules and procedures become important, particularly the rules relating to admissibility of evidence, testimony of witnesses and objections to their testimony, introduction of exhibits, who must prove what (burden of proof), etc. At the end of the trial, presentations are usually made by the parties or their attorneys, orally or in writing, arguing their view of the case.

[18]See footnote 2.

[19]10 C.F.R. Part 2, Subpart L.

[20]Rather than being initiated by a complaint, an NRC adjudicatory proceeding subject to Subpart G may, for example, be instituted by the issuance of an order relating to the modification, suspension, or revocation of a license, or by an appropriate request for a hearing filed after notice of opportunity for a hearing on a license application.

[21]10 C.F.R. §§2.740-2.744.

[22]"Discovery" takes place before trial. In discovery, the parties exchange information relevant to the proceeding. This can take the form of sending written questions (often extensive) to the opposing party or someone who is a witness, having an oral interrogation that is transcribed, requesting existing documents, or requesting the opposing party to make specified admissions of fact. While the purpose of discovery is, in large part, to narrow the issues that will actually be litigated, thus shortening the trial stage of the proceeding, this saving of time is often more than outweighed by the length of time consumed by the discovery stage of the proceeding.

The procedures used in informal adjudicatory proceedings are more difficult to delineate than those used in formal proceedings, because there are many possibilities and the practice has not yet coalesced around the most acceptable. Further, the procedural requirements are defined by general statute only in the most minimal way,[23] and they are affected by Constitutional requirements, which appear to be dependent on the circumstances surrounding the particular case.[24] In light of all the relevant legal considerations, two procedural requisites stand out:

(1) notice must be provided to the affected person(s) of the action proposed to be taken or that has been taken,[25] and

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[23]The requirements have received relatively little attention by the courts. As indicated in footnote 3, in Pension Benefit Guaranty Corporation v. LTV Corp., the Supreme Court stated, in rather cursory fashion, that the minimum statutory requirements for an informal adjudication are set forth in section 555 of the APA. (496 U.S. 633, 656) That section does not provide much detail regarding procedure. Most significantly, it provides that a person compelled to appear in person before an agency is entitled to be represented by counsel; that a party may appear in person or by counsel in an agency proceeding; that so far as the orderly conduct of public business permits, an interested person may appear before an agency for the presentation or determination of an issue in a proceeding or in connection with an agency function; that prompt notice must be given of the denial of a written application, petition, or other request of an interested person made in connection with an agency proceeding, and that generally the notice must be accompanied by a brief statement of the grounds of denial.

[24]As proceedings become less formal, there is more flexibility regarding what constitutes the agency record. C. Koch, Administrative Law and Practice §5.63 (2nd ed. 1997). While there are no general guidelines regarding what must be in an informal record, a court in reviewing a challenge to the agency action will consider the "whole record" -- in other words, all information upon which the agency action was based, including everything that was before the agency pertaining to the merits of the decision. Valley Citizens for A Safe Environment v. Aldridge, 969 F.2d 1315 (1st Cir. 1992). The Supreme Court has indicated that in reviewing agency decisions rendered in informal proceedings, courts must determine whether on the basis of the information contained in the administrative record developed by the agency the agency action can be sustained under the appropriate standard of judicial review (generally, whether the agency action is arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence). Camp v. Pitts, 411 U.S. 138 (1973).

[25]Adequate notice has been said to be a fundamental due process element, without which an adjudicative process will rarely be acceptable. C. Koch, Administrative Law and Practice §5.3 (1997 Pocket Part). With respect to what form of notice due process requires, the notice must be reasonably calculated to apprise interested parties of action affecting their interests, and this depends on the circumstances of the particular adjudicative process. For example, where a person already has actual knowledge of the matter in question, notice requirements may not be strictly enforced by the courts. When the issue arises, a court will look at the entire notice "package" including reliability of the delivery technique, the timeliness of the notice, and the content and form of the notice. C. Koch, Id.

(2) an opportunity must be provided for persons who are directly affected to present their position.[26] There appears to be no requirement that the opportunity to present views to an agency must be in an oral evidentiary hearing. In fact, there are many indications that an agency can hold paper hearings for this purpose, i.e., it can require all submissions of the parties to be in writing.

The Matthews factors, discussed earlier, raise the question whether this is enough. In other words, in determining the extent of the procedures that must be offered to persons who are directly affected by an agency action, it is necessary to look at the complexity of the facts and law to be considered in the proceeding, the amount of money or degree of personal jeopardy at stake, the likelihood that facts will be at issue that are not simply dependent on the findings of medical or scientific experts, and the extent to which the situation is unique.[27]

(b) Shaping informal adjudications

Clearly, most procedures in adjudicatory proceedings, and to a large extent even those required by statute to be on-the-record, can be carried out orally or in writing. Deadlines for milestone actions, such as filing an answer or request to intervene, can be lengthened or shortened, and some of the procedures that characterize formal litigation, such as discovery and cross-examination of witnesses by parties, can be limited or even

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[26]Since in a strictly "legislative-style" hearing, the persons holding the hearing have complete discretion to determine who may participate in the hearing and what evidence will be entertained, such a hearing might not meet this test.

[27]Section 189a. of the Atomic Energy Act has been construed to require that once a hearing on a licensing proceeding has commenced, it must encompass all material factors bearing on the licensing decision raised by the requester. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C.Cir. 1984). A leading treatise on administrative law states that a fair adjudicatory decisionmaking process should encompass (1) notice of the proposed action and the grounds asserted for it, (2) an opportunity to present reasons why the action should not be taken, (3) an unbiased decisionmaking tribunal, and (4) a statement of reasons for the agency decision. 2 K. Davis & R. Pierce, Administrative Law Treatise §9.5 (3rd ed. 1994). While this has not been clearly stated by the courts, it seems to accord with basic notions of fairness. It should be noted that all this can be accomplished in written form.

Regardless of the format of the proceeding or the level of formality with which it is conducted, the decisionmaker should assure that sufficient information is available in the record upon which to base a reasoned decision. If new information arises after the close of the record or if additional information is needed by the decisionmaker to render a reasoned decision, fundamental fairness would seem to require that the parties to the proceeding, whether it is formal or informal, be provided with the information and given an opportunity to contest both the supplementation of the agency record and the evidence itself. C. Koch, Administrative Law and Practice §5.63 (2nd ed. 1997).

eliminated. There is also considerable flexibility with respect to the designation of presiding officer.[28]

In addition, a "Fast Track Option" can be adopted for cases that the Commission, a presiding officer, or the parties (by agreement) believe do not warrant a full-scale, formal hearing. Such an option could--

(1) require an early conference between the parties and the presiding officer for the purposes of encouraging settlement or use of Alternative Dispute Resolution,[29] and narrowing and defining unresolved issues;

(2) eliminate or limit motions;

(3) eliminate discovery, and require submission of documentary evidence and proposed testimony (in writing) at the beginning of the proceeding;

(4) require direct testimony to be in writing, with additional information (including cross-examination) being elicited only by the presiding officer;

(5) provide for only one oral or written argument by each party;

(6) eliminate petitions for review, making review a sua sponte decision of the Commission.

These types of changes would lead to quicker resolution of adjudicatory proceedings if the time frames for completion of milestone steps were short and strictly enforced.

(c) Hybrid proceedings

It is possible to streamline agency adjudicatory proceedings that are not statutorily required to be on-the-record by using a combination of the traditional formal procedures and newer, more innovative practices. In other words, the agency can select among the various procedures that are relevant to such proceedings, and, subject only to the limited Constitutional requirements applicable to adjudicatory proceedings,

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[28]Even under NRC regulations that is the case. Thus, 10 C.F.R. §2.704 provides: "The Commission may provide in the notice of hearing that one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, shall preside."

[29]Some agencies require the parties to advise the presiding officer at the outset of a proceeding that they have made bona fide efforts to settle the case, and to explain why they are NOT using ADR procedures to address the controversy.

determine what mix of procedures it believes will best serve the NRC.[30] The choices are many, but some of the salient ones are as follows:

- Notice of the Commission action proposed or undertaken and an offer of some form of hearing for persons directly affected by the action are Constitutionally required. However, the hearing can be largely based on paper submissions, or it can be both written and oral.

- Parties can be required to make a bona fide attempt at settlement or to make use of Alternative Dispute Resolution before their views will be addressed in an adjudicatory proceeding.

- More extensive use could be made of prehearing conferences, with presiding officers playing an active role in case management, and narrowing of issues.

- A party to an adjudicatory proceeding could be limited to questioning "standing" of a would-be intervener, or to opposing contentions, only when requested to do so by the presiding officer in the proceeding or the Commission.

- Individual administrative judges can be encouraged to develop expertise in procedures that frequently are used in adjudicatory proceedings, and that could be heard by someone other than the presiding officer at the hearing. For example, having a judge who specializes in holding pre-hearing conferences intended to narrow issues of fact and law might expedite the entire adjudicatory proceeding process.

- Presiding officers can be ALJ's or administrative judges (currently NRC does not have any ALJ's on the Atomic Safety and Licensing Board Panel), one or more members of the Commission, or another officer of the agency.[31]

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[30]This was, in fact, done in 10 C.F.R. Part 2, Subpart K, Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors. Subpart K provides for notice of proposed action (in the Federal Register), discovery, oral argument, and fact-specific designation of disputed issues for adjudicatory hearing by the presiding officer, and limits appeals on certain orders until the end of the proceeding. Subpart K also relies on fairly strict time limits for actions (e.g., discovery) by parties at the beginning of the proceeding.

[31]Some modification of NRC regulations might be required to allow use of other employees of the agency as presiding officers.

- Procedures common in civil court litigation, such as discovery[32] and making of motions by the parties, can be eliminated in whole or in part. In lieu thereof, parties can be encouraged to engage in voluntary exchanges of information at the outset of proceedings, and they can be required to submit all documents and non-documentary information (which can also be required to be submitted in writing) that they believe to be relevant to the presiding officer early in the proceeding.

- Questioning of witnesses – particularly, cross examination -- can be oral or in writing, and can be limited to the presiding officer (who could be allowed to receive written suggestions for questions from the parties).[33]

- The Commission could commit itself to early interlocutory review of legal or policy issues that the presiding officer believes to be pivotal to the adjudicatory proceeding, especially if early resolution of an issue would expedite the proceedings.

- The Commission could take a more active role in monitoring the progress of adjudicatory proceedings. For example, it could require a monthly report detailing the progress of each pending adjudicatory proceeding and any unexpected delays that have occurred.

- Commission review of presiding officers' initial decisions could be limited to sua sponte review, eliminating the step of appeals by the parties. This would simply mean that the Office of Commission of Appellate Adjudication would continue its present practice of monitoring pleadings and decisions, and recommending to the Commission when it should exercise its supervisory review powers. A quick briefing schedule for the parties could be set by the Commission, if it decided to take sua sponte review.

In addition to selecting among these choices, the Commission could also use strategies such as establishing short time frames for completion of milestone procedures in adjudicatory proceedings (e.g., filing of contentions, issuance of decisions by presiding officers) and limit extensions of the established times to exceptional circumstances. In the same vein, the Commission could require expedited forms of service, such as use of electronic mail. Of course, shortened time frames must still provide sufficient time for affected parties to react, and requiring expedited forms of service (e.g., electronic service) must take into consideration whether it is reasonable to conclude that all potential parties to NRC proceedings have access to such a service.

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[32]Note that efforts by agencies to eliminate discovery from their adjudicatory proceedings have often met with resistance by the industry that practices before them.

[33]It may be possible to eliminate cross-examination altogether, but consideration would have to be given to whether this would be advisable from a policy perspective.

ATTACHMENT 5

Presiding Officers

In developing a revised hearing process, the Commission will need to consider who should be the presiding officer. Under current Commission regulation,10 C.F.R. 2.704, the agency's formal adjudications can be presided over by the Commission, one or more members of the Commission, an Atomic Safety and Licensing Board, an Administrative Law Judge, or other agency official designated by the Commission. For the agency's informal adjudications under subpart L, 10 C.F.R. 2.1207 provides that, unless the Commission otherwise orders, a single member of the Atomic Licensing Board Panel should preside over the hearing. (The section then provides that a three person Atomic and Safety Licensing Board should preside over hearings on applications to receive and store unirradiated fuel at the site of a production or utilization facility.) This attachment further elaborates on these options.[1]

1. Administrative Law Judges (ALJs)

Section 3105 of Title 5 of the United States Code provides federal agencies with the authority to appoint as many administrative law judges as are necessary to conduct formal adjudicatory proceedings under sections 556 and 557 of the Administrative Procedure Act. Administrative law judges are barred from performing duties "inconsistent" with their duties and responsibilities as ALJs.

The Office of Personnel Management (OPM) maintains a roster of eligible individuals from which an agency may select an ALJ for a permanent assignment to the agency. These individuals are attorneys with at least seven years experience (as an attorney) preparing for, participating in, or reviewing formal hearings or trials in federal, state or local administrative law or litigation. OPM ranks the individuals on its roster based on the scores they receive on open competitions that involve an evaluation of an applicant's qualifications and writing sample, an interview and a personal reference inquiry. Based on these scores, OPM provides an agency with the names of at least three qualified individuals to consider for an opening. This is the only means for an agency to select an ALJ for permanent assignment.

If an agency needs an ALJ for a temporary assignment or to hear a single case, an agency contacts OPM and it will work out a detail or loan of an ALJ from another federal agency. Because the primary function of ALJs is to preside over formal adjudicatory hearings, OPM will not authorize an agency to select a permanent ALJ from its roster if the preponderance of the assignments to be given the individual would not involve presiding over formal adjudications.

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[1] OGC presumes that under each of the three options the Commission would provide that the presiding official will issue the initial decision. Other options would include directing the presiding officer to issue a recommended decision or certify the record to the Commission for decision. (An initial decision becomes final agency action if not appealed administratively or altered sua sponte by the agency decisionmaker. A recommended decision has to be adopted explicitly by the agency before it could become final agency action.) In the recently promulgated Subpart M to Part 2 governing license transfer proceedings (modeled after the Commission's export license hearing regulations found at 10 C.F.R. Part 110), the Commission provided that if it did not preside over the license transfer proceeding, the presiding officer that it designated would develop the record and certify it to the Commission for decision, without any recommendation.

Similarly, the agency could not expect the OPM to grant a loan for an ALJ to preside over an informal proceeding. However, if the vast preponderance of agency proceedings that the individual will preside over are formal adjudications, the agency could assign the ALJ to preside over a limited number of informal adjudications.

In the past, over most of its history, the Atomic Safety and Licensing Board Panel has employed one or two ALJs. These individuals have primarily served as Chairmen of three-person Atomic and Safety Licensing Boards established to preside over formal adjudications. They also have presided alone over enforcement and other proceedings, where the Chief Administrative Law Judge, Atomic Safety and Licensing Board Panel, has determined that a single presiding officer will suffice. In addition, the Program Fraud Civil Remedies Act, which provides a means for an agency to impose civil sanctions against those who engage in fraud or submit false claims or statements to the agency (e.g., pertaining to work vouchers, travel expenses, or time and attendance) requires that any proceeding conducted under that Act must be presided over by an ALJ. An NRC ALJ presided over the one proceeding we have conducted under that Act. Currently, the NRC does not employ any ALJs and would have to obtain one through the OPM assignment or loan process should we have a Program Fraud Civil Remedy Act proceeding. Finally, on occasion, NRC's ALJ's have presided over informal proceedings conducted pursuant to 10 C.F.R. Part 2, Subpart L.

In sum, if the Commission were to determine that it wished most, or virtually all of its proceedings to be informal adjudications, it likely could not obtain ALJs to preside over its informal proceedings.

2. Atomic and Safety Licensing Boards

Section 191 of the Atomic Energy Act authorizes the Commission to establish one or more atomic safety and licensing boards to preside over its proceedings instead of ALJs. Each board is to consist of three members, one of which must be qualified in the conduct of administrative proceedings (an attorney). The other two members shall have technical or other qualifications as the Commission deems appropriate to address the issues to be decided. The use of three-member boards provides a breadth of expertise that a single presiding administrative law judge cannot provide. Appointments to the Atomic Safety and Licensing Board Panel are initiated by the NRC Chairman and approved by the Commission.

Traditionally, these boards, comprised of full-time or part-time administrative judges employed by the Atomic Safety and Licensing Board Panel, have been established to preside over virtually all agency proceedings. Typically, a board is comprised of an attorney chairman and two administrative judges with technical qualifications. In some cases, such as antitrust proceedings, more than one attorney has been assigned to a board.

A significant advantage of using Board members to preside over agency proceedings is that, unlike ALJs, members of the ASLBP routinely may preside over informal proceedings as well as formal adjudications. Moreover, they may be assigned to preside as part of a three-member board, or in the case of informal adjudications, as a single judge. Another advantage of continuing to use members of the ASLBP to preside over proceedings, be they formal or informal adjudications, is that members of this body have the necessary expertise and

experience to preside over a fair proceeding and develop a record that will suffice for purposes of judicial review. (This issue is discussed in attachment 5 to this paper).

3. Commission, Commissioner, Senior NRC Technical or Legal Staff

There is no doubt that the Commission as a body or a Commissioner designated by the Commission can preside over an informal adjudication, nor is there any bar on the Commission designating a Commissioner, or a senior member of the NRC technical or legal staff, to preside over an informal adjudication. On the other hand, while the designated individual may have the necessary substantive expertise to conduct an informal proceeding, he or she may have little or no expertise in presiding, developing an administrative record and drafting an adjudicatory decision that will suffice for purposes of judicial review. This lack of expertise and experience may be overcome, in part, by assigning the necessary legal and technical advisers to the presiding officer.

ATTACHMENT 6

STANDING REQUIREMENT OPTIONS

The efficiency and effectiveness of the hearing process depends in part on how much discretion the Commission has to grant or deny hearings to persons who request them. Section 189a of the Atomic Energy Act, 42 U.S.C. 2239, creates a statutory right to the opportunity to request a hearing in most NRC licensing proceedings for persons "whose interest may be affected by the proceeding." The relevant statutory language is as follows:

> In any proceeding...for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control...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 party to such proceeding.

This language is mandatory. The Commission "shall grant" a hearing to a person "whose interest may be affected." In the judicial terminology the Commission has chosen to use, a person who can establish such an interest has "standing" and may intervene in a proceeding as of right (provided that other appropriate procedural requirements of the Commission are met).

The meaning of "interest" is a key question in determining whether a person has standing in a Section 189a licensing proceeding. More than twenty years ago, in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610(1976), the Commission determined that "contemporaneous judicial concepts of standing should be used" in deciding whether a petitioner for intervention has alleged an "interest [which] may be affected by the proceeding" within the meaning of Section 189a. Id. At 613-614. Recently the Commission summarized the judicial requirements for standing in Quivira Mining Co. (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 1998. "[A] petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." Quivira, Id. at 6. In addition, the courts have applied a "prudential" standing requirement that the petitioner's interest must fall "arguably, within the 'zone of interests' protected or regulated by the governing statute(s)...." For NRC proceedings the relevant statutes are the Atomic Energy Act and the National Environmental Policy Act. Id. In Quivira the Commission upheld a Licensing Board decision that economic damage to a petitioner's competitive position met the "actual injury" test but failed the "zone of interest" test. Standing was denied.

The Commission's adoption of "judicial concepts of standing" for Section 189a licensing proceedings, particularly the "zone of interests" test, was a matter not entirely free from controversy. The 1976 Portland General Electric decision responded to questions about intervention rights that the Atomic Safety and Licensing Appeal Board had certified to the Commission. The Appeal Board at that time was split over the issue of what standing tests should be applied and was uncertain about its power to allow discretionary intervention when a petitioner could not establish standing but appeared capable of making a worthwhile contribution to the licensing proceeding.

These issues came to a head In Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976), where the Appeal Board considered whether the Sun Shipbuilding and Drydock Company ("Sun Ship") had standing to intervene in the North Anna reactor licensing proceeding. Sun Ship questioned the integrity of certain reactor support structures and asserted as its basis for standing that Sun Ship's business reputation would be damaged if these structures should fail in a design basis accident. Chairman Rosenthal, writing for the Appeal Board majority, found that damage to Sun Ship's

business reputation met the standing requirement for "injury in fact" but was "not even arguably within the 'zone of interests' to be protected or regulated by the Atomic Energy Act." 4 NRC at 104. Chairman Rosenthal concluded that Sun Ship lacked "judicial standing." This left Sun Ship's status indeterminate, because the question whether "judicial standing" controlled intervention in Commission proceedings still awaited the Commission's answer to the questions certified in the Portland General Electric (Pebble Springs) case.

In a separate concurrence Mr. Farrar took the position that Sun Ship had demonstrated judicial standing simply by showing a redressable "injury in fact." He contended that the "zone of interests" test--a test originally developed by the courts to determine when a petitioner may obtain judicial review under the Administrative Procedure Act of final agency action--should not apply to intervenors in NRC administrative proceedings. "[T]he principles which control access to the courts proceed from and hinge upon the limited role which our constitutional system assigns to the judicial branch of the Federal Government. * * * There is...little if anything in judicial standing principles which bears on how the Commission should decide whom it will elect to hear in order best to accomplish its unique mission." 4 NRC at 114-115. But even if the test "arguably within the zone of interests" is applied to Sun Ship, Farrar said, the test is not a strict one and Sun Ship's business reputation injury meets it.

In Portland General Electric the Commission dismissed Mr. Farrar's analysis in a conclusory footnote ("We do not find persuasive Mr. Farrar's argument....") and established the present two-part test for standing: for Section 189a purposes an interested person is one "who may suffer injury in fact by Commission licensing action, and whose interest is arguably within the 'zone of interests' protected by the statutes administered by the Commission." 4 NRC at 613. Such persons may intervene as of right. The Commission further observed in Portland General Electric that "there is no legal impediment preventing administrative agencies from allowing wider participation in their proceedings than is required by statute." 4 NRC at 614. Stressing that public participation "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence,,,," the Commission concluded that intervention should be allowed "as a matter of discretion to some petitioners who do not meet judicial standing tests." Id. at 615-616.

The Commission thus adopted in Portland General Electric a strict legal test for standing, arguably the most restrictive test that the statutory language and "judicial concepts" would support, but moderated the effect by allowing discretionary intervention for petitioners "who would have a valuable contribution to make to our decision-making process." Id. at 617. (The Commission advised the adjudicatory boards that the participation of discretionary intervenors could be limited "to the issues they have specified as of particular concern to them," whereas intervenors as a matter of right "are now entitled to participate in all issues in contention." Id.) Over the years since Portland General Electric there have been several legal controversies over who met or failed to meet the Commission's "judicial concepts" of standing or qualified for discretionary intervention, but there appear to have been no direct challenges to the tests the Commission applies.[1]

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[1]Envirocare of Utah, the petitioner who was denied standing in Quivira for failing to meet the "zone of interests" test, filed a petition for review in the Court of Appeals for the D.C. Circuit on September 15, 1998. Envirocare argued before the Commission that its competitive injury

A good case can be made for leaving well enough alone. The Commission's current approach uses concepts which are well understood and accepted as standards for decision, which tends to ensure that only those with a bona fide interest that may be directly affected by Commission action are admitted to litigation. Nevertheless, the Commission does have options for modifying its treatment of standing if that might improve efficiency or effectiveness. The Commission is not obliged to follow all "judicial concepts" of standing that bind federal courts created under Article III of the Constitution, and there is even a legal question whether these concepts should be applied in their entirety to regulatory agency proceedings, as Mr. Farrar pointed out in Virginia Electric and Power Company. "Standing" has a different significance for agencies than it has for the courts. Federal courts have no power to adjudicate a case brought by a party that fails to meet minimum requirements for constitutional standing, but the courts do have power to set additional, prudential standing requirements. The Commission, in contrast, cannot deny standing to a person who meets the basic Section 189a "interest" requirement, but unlike the courts the Commission remains free to adopt more relaxed, easier-to-apply standing criteria if it chooses.

The option of modifying standing requirements may be worth looking at, even if it would open the hearing process to more potential intervenors and additional hearings, if one concluded that arguments over standing in NRC proceedings take up more time and effort than the benefit they provide in identifying participants with demonstrated interests affected by the outcome. Simplification might achieve a net reduction in resources spent on hearings, although this would require careful consideration and balancing. One apparently successful simplification that the Commission's adjudicatory boards adopted long ago in reactor licensing cases is that a petitioner's simple geographical proximity to the reactor establishes the required "interest" for intervention in the licensing proceeding related to constructions and operation.[2] It is sufficient (though not necessary) for standing that the petitioner resides "within the geographical zone that might be affected by an accidental release of fission products." Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n. 6 (1973). The "rule of thumb" is that residence within fifty miles of the reactor confers standing to contest a construction permit or operating license without further showing of "injury in fact." See e.g. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178 (1981). The question whether the petitioner's concerns about risk from the reactor are justified "must be left for consideration when the merits of the controversy are reached." Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). If the petitioner cannot present admissible contentions, there will of course be no need for an evidentiary hearing.

At present there is no comparable rule of thumb for standing in reactor license amendment or decommissioning, ISFSI, or materials licensing proceedings. Some lengthy

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met the zone of interests test but did not challenge the test itself. Presumably Envirocare cannot bring such a challenge on judicial review without having raised the issue before the Commission.

[2]Proximity-based standing is not automatic in reactor license amendment proceedings where there is not "a clear potential for offsite consequences." Florida Power and Light Company (St. Lucie), CLI-89-21, 30 NRC 325, 329 (1989).

battles over whether petitioners had sufficient potential contact with the facility in question to show standing have occurred. Cf. Private Fuel Storage, L.L.C., LBP-98-7, 47 NRC 142 (1998), affirmed by the Commission, 48 NRC 26 (1998). We believe that factual arguments about a petitioner's potential exposure to harm can be the most difficult and time-consuming aspect of standing determinations. It may be desirable to adopt some simplifying presumptions, if this can be done without seriously compromising the useful screening function that standing requirements serve. This possibility could merit further study if and when further troublesome factual disputes arise over standing.

The "zone of interests" test has also given rise to occasional time-consuming controversies, most recently in the Quivira Mining Company case. It might seem straightforward to identify the zones of interests of the Atomic Energy Act and NEPA simply as health, safety, and impact on the physical environment, so that a petitioner could not rely on economic injury as a basis for standing. It turned out, though, that in Quivira the Commission had to undertake a lengthy analysis before concluding that injury to petitioner Envirocare's competitive position caused by the grant of a license amendment to Quivira[3] failed the zone of interests test. The problem is that judicial decisions interpreting "arguably within the zone of interests to be protected by the statute" as applied to competitive injury have been notably complex.

Recently the Supreme Court thickened the fog surrounding this issue in a 5-4 decision, National Credit Union Administration v. First National Bank & Trust, 118 S. Ct. 927 (1998). Justice Thomas's opinion for the Court held that the First National Bank's "interest in limiting the markets that federal credit unions can serve" was arguably within the zone of interests of Section 109 of the Federal Credit Union Act, because Section 109 limits federal credit union membership to certain groups. The Court seems to treat the zone of interests test as satisfied as long as the petitioner for judicial review has an interest that is affected by actions taken under the statute, whether or not this interest is one that Congress intended to protect when it enacted the statute. In effect, the "zone of interests" of a governing statute has become the "zone of actions." This approach might seem to have the consequence that if a petitioner has been injured in fact by agency action under a statute, the injury will automatically fall within the "zone of interests" of the statute. The four dissenters argued that the majority's analysis "all but eviscerates the zone of interests requirement." Id. at 940. The current state of the zone of interests test is almost certain to be an issue in the Quivira litigation now before the D.C. Circuit. If the outcome of Quivira v NRC should cast doubt on the validity or worth of a zone of interests requirement in NRC licensing proceedings, the Commission will of course have the option, if not the obligation, to modify its standing criteria accordingly.

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[3]Envirocare complained that the license amendment in question permitted Quivira to become a general disposal facility for section 11e.(2) material in competition with Envirocare but that the NRC had not required Quivira to meet the same regulatory standards that had been imposed on Envirocare . The Commission agreed with the licensing board that alleged improper licensing of Quivira's facility "has the 'clear and immediate' potential to compete with Envirocare's own services" and met the standing requirement for "injury in fact." The question, which the Commission resolved against Envirocare, was whether this economic injury fell within the "zone of interests" of the Atomic Energy Act.