January 8, 2013

MEMORANDUM TO: Chairman Macfarlane
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff

FROM: Margaret M. Doane **/RA/**
General Counsel

SUBJECT: BACKGROUND MATERIAL ON NRC ADJUDICATIONS FOR THE JANUARY 31, 2013 COMMISSION MEETING ON PUBLIC PARTICIPATION IN NRC REGULATORY DECISION-MAKING

In preparation for the January 31, 2013, Commission meeting on Public Participation, OGC has prepared the two enclosed papers to provide pertinent background information that may be helpful to the Commission and public.

The first enclosure is entitled: "THE HISTORY OF NUCLEAR REGULATORY COMMISSION STANDING AND CONTENTION ADMISSIBILITY STANDARDS PROMOTING EFFECTIVE AND EFFICIENT PUBLIC PARTICIPATION". This paper provides historical context by reviewing the circumstances and public discussions that took place in connection with the more significant changes to NRC's hearing processes in the last twenty-five years.

The second enclosure is entitled: "INTERLOCUTORY APPEALS IN U.S. NUCLEAR REGULATORY COMMISSION ADJUDICATORY PROCEEDINGS". This paper discusses both the current regulations governing interlocutory appeals and several options that might be considered for changing the interlocutory appeal process as it relates to hearing requests and admission of contentions.

OGC has no objection to their public release.

Enclosures: As stated

cc: EDO
SECY
OCAA
ASLBP

CONTACTS: Jeremy Wachutka, OGC
301-415-1571

Michelle Albert, OGC
301-415-5431

ENCLOSURE 1

THE HISTORY OF NUCLEAR REGULATORY COMMISSION STANDING AND CONTENTION ADMISSIBILITY STANDARDS PROMOTING EFFECTIVE AND EFFICIENT PUBLIC PARTICIPATION

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is granted its authority primarily by the Atomic Energy Act of 1954, as amended (AEA). This authority includes providing a program to "encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." AEA § 3e. The NRC performs licensing reviews to determine whether an application to utilize atomic energy is consistent with the common defense and security and with the health and safety of the public.

The licensing review process involves various opportunities for public participation. The NRC makes a submitted application available to the public. The public may provide the NRC input on the application through written comments, participation in NRC-hosted public meetings, participation as a party to an adjudicatory hearing, and written or oral statements made in a limited appearance at an adjudicatory hearing.

With respect to hearings, the AEA only mandates granting a hearing when a person "whose interest may be affected by the proceeding" makes an acceptable "request" for a hearing. AEA § 189; *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008) (Participation in the adjudicatory hearing process "is not automatic."). These two adjudicatory hearing requirements are known as the "standing" requirement and the "contention admissibility" requirement, respectively. The Courts have repeatedly ruled that the Commission has broad discretion in interpreting the provisions of the AEA, such as this provision regarding the requirements for granting a hearing request. *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 54 (D.C. Cir. 1990); *see also Public Service Co. of New Hampshire v. U.S. Nuclear Regulatory Comm'n*, 582 F.2d 77, 82 (1st Cir. 1978) ("The [AEA] is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends."); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C.

Cir 1968) (The AEA regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective."). Over the years, the Commission has spent considerable time exercising this broad discretion in order to achieve an appropriate level of inclusiveness in the adjudicatory hearing process. This involves balancing, on the one hand, the effectiveness of the licensing process at obtaining meaningful public participation, and, on the other hand, the efficiency of the licensing process at identifying and resolving legitimate issues in a timely manner. *See, e.g., Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 735 F.2d 1437, 1446 (D.C. Cir. 1984) (discussing the NRC balancing of public participation and efficiency).

Debate about the appropriate level of inclusiveness in the adjudicatory hearing process came to a head following the Three Mile Island accident. Before the accident, the NRC had very general standing and contention admissibility standards. However, as a result of increasingly lengthy hearings in the years immediately after the accident, the NRC re-examined its standards for satisfying the standing and contention admissibility requirements of AEA § 189a. This document recounts the deliberations surrounding that time to provide the Commission with an understanding of the basis for the current NRC standards of standing and contention admissibility. It describes both (1) how the Commission broadened the standing requirement for adjudicatory hearings from the minimum required by the AEA through the use of "discretionary intervention" and (2) how the Commission, in order to prevent intervention abuses, narrowed the contention admissibility requirement for adjudicatory hearings through a rule that contentions must include a concise statement of the alleged facts or expert opinions which support the contention and a showing that a genuine dispute exists with the applicant.

I. CRITICISM OF THE NRC ADJUDICATORY HEARING PROCESS IN THE YEARS IMMEDIATELY AFTER THE THREE MILE ISLAND ACCIDENT

The accident at Three Mile Island occurred on March 28, 1979. After this accident, there was a not surprising increase in specific issues raised in adjudicatory hearings related to the Three Mile Island accident. Partly because of these emerging issues, there was heightened concern over the "well known" lengthening of the licensing process. *See* James Quirk, Katsuaki Terasawa, *Nuclear Regulation: An Historical Perspective*, 21 Nat. Resources J. 833, 839 (1981). Originally, for all reactors entering the licensing process in 1965, the average time to go commercial was five years and nine months. *Id*. By 1968, a typical reactor entering the licensing process took seven years and one month to complete the process. *Id*. In 1981, the average time required to complete the licensing process for a 1970 applicant was predicted to be in excess of 12 years. *Id*. The adjudicatory hearing process was undoubtedly one reason for this delay according to both private observers and those within the NRC. *See e.g., Id*. at 843 ("intervenors have forced delays that have lengthened the licensing process and increased the cost to utilities. . . . on average the presence of intervenors tends to lengthen the licensing process."); James R. Tourtellotte, NRC Assistant Chief Hearing Counsel, *Nuclear Licensing Litigation: Come on in, the Quagmire is Fine*, 33 Admin. L. Rev. 367, 367 (1981) ("[A]lthough there are several reasons for delays in nuclear licensing, the basic structure of the hearing process is a significant causal factor."); B. Paul Cotter, Jr., Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, *Nuclear Licensing: Innovation through Evolution in Administrative Hearings*, 34 Admin. L. Rev. 497, 522 (1982) (describing "inefficiencies, delays, and expense" in the hearing process).

Members of Congress expressed concern that delays in the adjudicatory hearing process would result in the delayed start of fully constructed nuclear power plants and, as a consequence, significant economic damages to the industry and the ratepaying public. *See* Energy and Water Development Appropriations for 1982, Part 4, Nuclear Regulatory

Commission: Hearings Before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. 112 (1981); House Comm. on Government Operations, Licensing Speedup, Safety Delay: NRC Oversight, H.R. Rep. No. 97-277, 97th Cong., 1st Sess. 2 (1981). As a result, the House of Representatives Committee on Appropriations, in H.R. Rep. No 96-1093, directed the NRC to provide it with monthly reports on the status of the NRC efforts to carry out licensing and regulatory duties and to improve resource management. House Comm. on Appropriations, Energy and Water Development Appropriation Bill, 1981, H.R. Rep. No. 96-1093, 96th Cong., 2d Sess. 147 (1980). The committee further admonished the NRC stating that,

> the committee is not providing funds to the Commission so it can decide whether nuclear energy should or should not continue to be developed. The Congress has already decided that nuclear energy can and should be developed. In the last session, the Congress decisively rejected, legislative proposals to place a temporary moratorium on the further development of nuclear energy. Language has been included in the bill that requires the Commission to use its appropriated funds to license, regulate and control nuclear energy according to the laws of the United States. The committee directs the Commission to carry out, the Congressionally-approved policy that mandates the continued and expeditious development of nuclear energy.

Id. The committee also directed the NRC to "complete the high priority work necessary to incorporate the lessons learned from the [Three Mile Island] accident into the Commission's licensing and regulatory process" so that pending applications could be considered because "with the growing energy supply problems facing the United States, the electric utilities deserve timely consideration of their proposals so they can plan and act in a rational and responsible manner." *Id*. Thus, the question facing the NRC in the wake of the Three Mile Island accident was how to effectively obtain meaningful public participation in the hearing process while simultaneously resolving licensing matters in a timely and efficient manner.

The first action taken by the Commission in response to the inefficiencies of the adjudicatory hearing process was to provide direction to the licensing boards "encourag[ing]

[them] to expedite the hearing process by using those management methods already contained in Part 2 of the Commission's Rules and Regulations" while "still ensuring that the hearings are fair and produce full records." *Statement of Policy on Conduct of Licensing Proceeding*, CLI-81-8, 13 NRC 452, 452-53 (1981). The Commission stated that "staff reviews and hearings . . . for applications for nuclear power plant operating licenses" are one of "a number of difficult problems [that] face the agency." *Id*. at 452. In particular, echoing Congressional criticism, the Commission expressed concern that "[n]ow, for the first time the hearings on a number of operating license applications may not be concluded before construction is completed" and "[i]f these proceedings are not concluded prior to the completion of construction, the cost of such delay could reach billions of dollars." *Id*.

To avoid this, the Commission provided, in part, the following guidance. First, to promote fairness, Boards should apply adjudicatory procedures equally to all hearing participants. Therefore, "[w]hile a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." *Id*. at 454. Second, the Commission expressed concern for discovery abuses. *Id*. at 455. It stated that, "[t]he purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant." *Id*. However, "the number of interrogatories served in some cases may place an undue burden on the parties, particularly the NRC staff, and may, as a consequence, delay the start of the hearing without reducing the scope or the length of the hearing." *Id*. Therefore, the Commission recommended that the licensing boards limit the number, and focus the content, of interrogatories.

Then Chairman Palladino opined that these "immediate actions to improve NRC effectiveness" were not sufficient. NRC Announcement No. 123, Regulatory Reform Task Force (Nov. 17, 1981). With the Commission's concurrence, he established a Regulatory Reform Task Force tasked with "address[ing] the question of long-range streamlining of the regulatory process." *Id*. The Regulatory Reform Task Force had seven members including one member from the NRC Office of the General Counsel (OGC) and one member from the Atomic Safety and Licensing Board Panel. One of the task force's objectives was to "create a more effective and efficient vehicle for raising and resolving legitimate public safety and environmental issues regarding applications under review." *Id*. James R. Tourtellotte, OGC Assistant Chief Hearing Counsel, was made chairman of the task force and was tasked with "explor[ing] ways to make a basic overhaul of the [regulatory] process" including "changes in hearing formats." *Id*. Consequently, the Regulatory Reform Task Force set out, in part, to revise the then-existing standing and contention admissibility standards in order to achieve a better balance between the effective collection of meaningful public input and the efficient execution of licensing reviews.

II THE HISTORICAL DEVELOPMENT OF THE CURRENT STANDING REQUIREMENT FOR ADJUDICATORY HEARINGS

Section 189a. of the AEA provides that, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." Thus, whether the Commission must grant an adjudicatory hearing is dependent, in part, on a finding that the petitioner has an interest which may be affected by the proceeding. This prerequisite for requiring an adjudicatory hearing is known as the "standing requirement." Originally, the Commission regulation implementing the standing requirement of AEA § 189a. was 10 C.F.R. § 2.714(a), which provided, in pertinent part, that

> [a]ny person **whose interest may be affected** by a proceeding and who desires to participate as a party shall file a written petition

> . . . [and] set forth **the interest of the petitioner in the proceeding, how that interest may be affected** by Commission action, and the contentions of the petitioner. . . .

See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) 4 AEC 75, 82 (1968) (emphasis added). Thus, the Commission regulations basically adopted the language of the AEA without providing any additional specificity; however, additional specificity was subsequently provided through Commission adjudicatory rulings.

A. Intervention as a Matter of Right

An important early discussion of the standing requirement occurred in the Pebble Springs proceeding in 1976. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). There, the Commission discussed the relationship between the AEA standing requirement and the judicial concept of standing. Citing the United States Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Commission stated that, in a court,

> [t]o have 'standing' . . . one must satisfy two tests. First, one must allege some injury that has occurred or will probably result from the action involved. Under this 'injury in fact test' a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing. One must, in addition, allege an interest 'arguably within the zone of interest' protected by the statute. For example, if a statute were exclusively concerned with safety, allegation of a purely aesthetic concern would not satisfy this 'zone of interests' test.

Id. at 613. Additionally, the pleading of these two allegations in court must be "sufficiently particularized" to afford a basis for judicial standing. *Id*. at 614. However, with respect to the AEA-mandated adjudicatory hearings before the Commission, the Commission recognized that these judicial concepts of standing are not required to be used – that is, that the Commission is not bound by so-called "Article III" standing requirements. Despite this, the Commission concluded that their use in Commission proceedings is permissible and is, in fact, desirable because, "[o]ur administrative process benefits from the concrete adverseness brought to a

proceeding by a party 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." *Id*. at 613. Therefore, the Commission directed that, in determining whether a petitioner has alleged an "interest [which] may be affected by the proceeding" according to AEA § 189a., "contemporaneous judicial concepts of standing should be used." *Id*. at 613-14. The Commission called the satisfaction of the standing requirement through the use of "contemporaneous judicial concepts of standing" an "intervention as a matter of right." Once a petitioner demonstrates that it has standing to intervene as a matter of right, that petitioner may then raise any admissible contention for which there is a nexus between the asserted injury and the relief. *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 340 (2009). Thus, for instance, "if denying a license amendment would alleviate a petitioner's potential injury . . . that petitioner [may] prosecute any admissible contention that could result in the denial of the license amendment, regardless of whether the contention was directly related to the petitioner's articulated injury." *Id*.

In its use of contemporaneous judicial concepts of standing to evaluate intervention as a matter of right, the Commission eventually developed a "50-mile proximity presumption" for standing in certain cases. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994). Applying its expertise, the Commission concluded that persons living or having frequent contacts within a 50-mile radius of a site that is the subject of a power reactor initial construction permit, operating license, combined operating license, or license renewal proceeding, or certain amendments thereto, face a realistic threat of harm if a release of radioactive material were to occur and thus satisfy contemporaneous judicial concepts of standing. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66

NRC 1, 14-15 (2007). Therefore, the Commission does not require such persons to separately demonstrate injury in fact. *Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16.

This 50-mile proximity presumption for standing has been challenged by some applicants in recent years. *See id.* at 916; *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-22, 70 NRC 932, 933 (2009). These applicants have argued that the 50-mile proximity presumption is outdated when compared to current contemporaneous judicial concepts of standing, which teach that, to have standing, a petitioner must demonstrate that "(1) it has suffered an injury-in-fact, an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 181 (2009) (quoting *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560-61 (1992) (internal quotations and citations omitted)). In particular, the applicants argued that the 50-mile proximity presumption is invalid because persons residing or having frequent contacts within 50 miles of a nuclear reactor do not necessarily suffer an injury that is "actual or imminent," but only an injury that is merely conjectural or hypothetical based upon the low probability of there being an accidental release in the first place. *Id*.

The Commission recently rejected this argument on two separate occasions. *Calvert Cliffs*, CLI-09-20, 70 NRC at 917; *Fermi*, CLI-09-22, 70 NRC at 933. It held that the 50-mile proximity presumption is "simply a shortcut for determining standing in certain cases" and that "no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC's proximity presumption" exists. *Calvert Cliffs*, CLI-09-20, 70 NRC at 917. The basis for the presumption is that *if there were* an accidental release of fissionable materials at a nuclear reactor, then persons within a 50-mile radius of the nuclear reactor would "face a realistic threat of harm." *Id*. Contrary to the applicants' arguments, this rationale is not

dependent upon the probability of the accidental release actually happening. *Calvert Cliffs*, LBP-09-4, 69 NRC at 185.

The Calvert Cliffs Licensing Board provided two additional grounds for rejecting this argument. First, as a practical matter, a requirement that a petitioner demonstrate that some undefined quantitative accident probability threshold is met in order to demonstrate standing would "frustrate the public's opportunity to dispute and put to the test the applicant's claims" concerning safety because the only accident probability analysis available at the time of the filing of contentions would be the analysis provided in the application itself. *Id*. at 186. Second, even if the 50-mile proximity presumption did not conform to contemporaneous judicial concepts of standing, this would not necessarily mean that the 50-mile proximity presumption would have to be overturned. *Id*. As discussed above, the standing to participate in the NRC adjudicatory hearing process is ultimately determined by AEA § 189a. – the Commission is not bound to apply "contemporaneous judicial concepts of standing." *Id*. Since the 50-mile proximity presumption is reasonable and consistent with AEA § 189a., separately granting standing based upon this test is permissible. Furthermore, AEA § 189a. only pertains to when an adjudicatory hearing is *required*. AEA § 189a. does not preclude the Commission from granting an adjudicatory hearing in circumstances when an adjudicatory hearing would not otherwise be required by the AEA. This is the issue of "intervention as a matter of discretion," which is discussed next.

B. Intervention as a Matter of Discretion

In addition to "intervention as a matter of right," the Commission in *Pebble Springs* also held that, when a petitioner does not satisfy contemporaneous judicial concepts of standing, a licensing board may still, "as a matter of discretion," grant the petitioner standing if the petitioner may nevertheless make some contribution to the proceeding. *Pebble Springs*, CLI-76-27, 4 NRC at 612. This was permitted because "there is no legal impediment preventing

administrative agencies from allowing wider participation in their proceedings than is required by statute," and because of "the fundamental importance of meaningful public participation in [the] adjudicatory process . . . [which] is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to [the Commission]." *Id*. at 614-15. In exercising this discretionary authority, licensing boards should consider "all the facts and circumstances of the particular case" including the following, non-exhaustive list of six factors:

> (a) Weighing in favor of allowing intervention—
> (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
> (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
> (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
> (b) Weighing against allowing intervention—
> (4) The availability of other means whereby petitioner's interest will be protected.
> (5) The extent to which the petitioner's interest will be represented by existing parties.
> (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Id. at 616. Also, "[p]ermission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them." *Id*. at 617.

Recognizing that the availability of discretionary intervention in addition to the more stringent "intervention as a matter of right" standard may cause delay, the Commission noted that licensing boards "may demand specificity from prospective intervenors and, further, may limit the participation of intervenors in discretionary cases to the issues they have specified as of particular concern to them." *Id*.

According to Mr. Tourtellotte, by the time of the creation of the Regulatory Reform Task Force five years later in 1981, this potential for delay due to discretionary intervention that was acknowledged by the Commission in *Pebble Springs* had become a reality. Mr. Tourtellotte complained that the standards used by the licensing boards to determine whether a contribution to the record may be made sufficient to warrant discretionary intervention were "vague, if they exist at all," that the licensing boards "do not articulate their reasons for permitting discretionary intervention," and that the licensing boards permit excessive discretionary intervention. James R. Tourtellotte, NRC Assistant Chief Hearing Counsel, *Nuclear Licensing Litigation: Come on in, the Quagmire is Fine*, 33 Admin. L. Rev. 367, 373 (1981). Therefore, he advocated for the abolishment of discretionary intervention.

The 1982 draft report of the Regulatory Reform Task Force reflected Mr. Tourtellotte's position. SECY-82-447, Draft Report of the Regulatory Reform Taskforce (Nov. 3, 1982) (ADAMS Accession No. ML12241A688). The report recommended granting standing only to those petitioners that satisfied "intervention as a matter of right" without exception for discretionary intervention. It stated that, "[r]equiring a person to demonstrate [contemporaneous judicial concepts of] standing will help ensure that all participants in NRC proceedings have an interest in the proceeding sufficient to justify his or her participation in the proceeding and the necessary commitment of additional Commission resources." *Id*. at 5. This recommendation also appeared in the Commission's 1984 "Request for Public Comment on Regulatory Reform Proposal Concerning the Rules of Practice, Rules for Licensing of Production and Utilization Facilities." 49 Fed. Reg 14,698 (Apr. 12, 1984). However, the proposal to eliminate discretionary standing was not included in the 1986 proposed rule or the 1989 final rule amending Part 2, though the 1989 final rule did note that,

> Some of the proponents of the proposed amendments expressed the view that the amendments should be further revised. Several commenters expressed the view that the proposed amendments did not go far enough in that they failed to include more stringent requirements respecting standing.

Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,169 (Aug. 11, 1989) (final rule). Thus, the precedent set by *Pebble Springs* expanding public participation in adjudicatory hearings beyond what is required by the AEA went unchanged.

C. Codification of Discretionary Intervention

In the wake of *Pebble Springs* and the Commission's decision not to adopt the recommendation to eliminate discretionary intervention, licensing boards proceeded to enforce the standing requirement through a two-part analysis of (1) "standing as a matter of right" determined by contemporaneous judicial concepts of standing, including the 50-mile proximity presumption (where applicable), and (2) "standing as a matter of discretion" determined by the six *Pebble Springs* balancing factors. An example of such an analysis is contained in the 1992 proceeding of Envirocare of Utah, Inc. *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167 (1992). In *Envirocare*, the licensing board stated that, in order to establish standing, a petitioner must satisfy "contemporaneous judicial concepts of standing," which entails a demonstration of both "injury in fact" and that the injury falls within the NRC "zone of interests" of the AEA or the National Environmental Policy Act (NEPA). *Id*. at 172. The licensing board defined "injury in fact" as "a showing that the petitioner has suffered or will suffer a distinct and palpable harm, that the harm fairly can be traced to the challenged action and that the injury is likely to be redressed by a favorable decision." *Id*. at 173. If the purported harm or injury has not yet occurred, it must at least be shown to be "likely." *Id*. The injury in fact showings must be made with "particularity." *Id*. at 174. For instance, the "distinct and palpable harm" requirement is not met with particularity by a

> "generalized grievance" shared in substantially equal measure by all or a large class of citizens—such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic

> interest as a ratepayer—that will not result in the distinct and palpable harm sufficient to support standing.

Id. Regarding the "zone of interests" requirement, the required showing was that the injury falls within the zone of interests "at least arguably sought to be protected by the statute being enforced." *Id*. at 172.

Under these standards, the Licensing Board found that the petitioner lacked standing as a matter of right to participate in the proceeding. However, the Licensing Board then considered the petitioner's claim that the petitioner should be granted standing as a matter of discretion. The Licensing Board did this by balancing the factors provided in *Pebble Springs*. In so doing, the Licensing Board realized that the *Pebble Springs* factors did not completely account for the situation confronted in this proceeding where granting discretionary intervention would create an adjudication in a situation where there otherwise would have been none because no other intervention had been granted in the proceeding. The Licensing Board stated that this was "[o]ne further factor [that] needs to be considered" and that,

> Based on our inquiries to the parties as well as our own research, we are unaware of any proceeding where discretionary intervention was the only intervention granted. We also are unaware of any bar to doing so. Indeed, the Appeal Board long ago suggested that no such bar exists, commenting that "before a hearing is triggered at the instance of one who has not alleged any cognizable personal interest in the operation of this facility, there should be cause to believe that some **discernible public interest** will be served by the hearing." Watts Bar, ALAB–413, supra, 5 NRC at 1422. There do not appear to be any established standards for determining whether a **discernible public interest** would be served by a hearing.

Id. at 183 (emphasis added). The Licensing Board did not define "discernible public interest," but it did find that, in this case, there was no discernible public interest because the issues raised by the petitioner were being actively addressed by the NRC staff and the applicant outside of the hearing process. Therefore, the Licensing Board declined to grant discretionary intervention.

In 2001, the Commission proposed amending the "affected interest" definition of standing in 10 C.F.R. § 2.714(a) by codifying the holdings of *Pebble Springs* that intervention as of right should be determined by contemporaneous judicial concepts of standing and, where this requirement is not met, a petitioner may also request discretionary standing, which should be evaluated according to six balancing factors. *See* Changes to Adjudicatory Process, 66 Fed. Reg. 19,610 (Apr. 16, 2001) (proposed rule). The Commission recognized that this would expand the opportunity for public participation in adjudicatory hearings to circumstances where the petitioner does not have a direct interest and cannot demonstrate standing. *Id*. at 19,617. By granting this expansion to the adjudicatory hearing requirements of the AEA, the Commission hoped "to underscore the fundamental importance of meaningful public participation in [the Commission's] adjudicatory process." *Id*. at 19,622.

Echoing the argument of the Regulatory Reform Task Force in favor of abolishing discretionary intervention, some commenters opposed the codification of discretionary intervention because, among other reasons, "discretionary intervention is not consistent with the purpose of adjudicatory proceedings and would permit parties who cannot demonstrate a direct interest in the outcome of the proceeding to extend and broaden the scope of the proceeding." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,201 (Jan. 14, 2004) (final rule). The Commission did concede to these critics of discretionary intervention that the six balancing factors do "presume that discretionary intervention is an extraordinary procedure, and will not be allowed unless there are compelling factors in favor of such intervention." *Id*. However, the Commission concluded that discretionary intervention is indeed consistent with the purpose of adjudicatory proceedings because, when such intervention is found to "meaningfully contribute to the development of a sound record on contested matters," it helps to "resolve material issues with respect to an NRC regulatory action." *Id*.

In the final rule, the Commission modified its discretionary intervention definition from the proposed rule to address the *Envirocare* situation where the petitioner asking for discretionary

intervention would constitute the only admitted party. The final rule (in place today) provides that discretionary intervention "will not be allowed unless at least one other petitioner has established standing and at least one admissible contention." *Id*. at 2,189; s*ee* 10 C.F.R. § 2.309(e). Therefore, instead of having to determine whether a "discernible public interest" would be served by a hearing initiated by the discretionary admission of a petitioner where no other parties have been admitted, the licensing board may not consider discretionary intervention in these circumstances. *See e.g., Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC, et al.* (Palisades Nuclear Plant, et al.), CLI-08-19, 68 NRC 251 (2008) (denying petitioner's request for discretionary intervention because "[o]ur regulations provide that we 'may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held' . . . [and] we find today that no petitioner has demonstrated standing [therefore] these prerequisites are not present . . . .").

Thus, in 2004, the Commission codified its position that the standing requirement for an adjudicatory hearing may be satisfied by either demonstrating standing as a matter of right or, when at least one petitioner has established standing and at least one contention has been admitted, at the discretion of the licensing board after it balances the six factors identified in *Pebble Springs*. The 2004 Part 2 amendments were challenged as violating the APA, but were sustained by a Federal court of appeals. *See Citizens Awareness Network, Inc. v NRC*, 391 F.3d 338 (1st Cir. 2004).

D. The Provision of Both Intervention as a Matter of Right and Intervention as a Matter of Discretion Exemplifies the Commission's Balancing of Meaningful Public Input and Efficient Licensing

The history of standing and discretionary intervention exemplifies the Commission's efforts to balance effective public participation and efficient licensing. Following criticism of the adjudicatory hearing process after the Three Mile Island accident, there were calls for the

complete abolition of discretionary intervention. At this same time, however, there were also calls for granting licensing board judges more discretion to determine standing. In the end, the Commission struck a middle ground and granted licensing board judges circumscribed discretion. A licensing board may grant standing even when contemporaneous judicial concepts of standing are not satisfied, but they may do so only as an "extraordinary" measure, only after balancing six factors, and only when there was already at least one admitted intervenor and contention. In this way, the Commission ultimately implemented what it considered to be a balanced standing requirement.

III THE HISTORICAL DEVELOPMENT OF THE CURRENT CONTENTION ADMISSIBILITY REQUIREMENT FOR ADJUDICATORY HEARINGS

The contention admissibility requirement for adjudicatory hearings is derived from the language of the AEA. Section 189a. of the AEA states that,

> 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.

(Emphasis added). Whether a contention is admissible is dependent upon whether the request describing that contention satisfies the Commission interpretation of the statutory term "request." *See Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92 (1973). Before the Three Mile Island accident, the Commission defined "request" in 10 C.F.R. § 2.714(b) as requiring a petitioner to set forth "the bases for each contention . . . with reasonable specificity" in order that they be admitted – essentially, the regulations at the time required only "notice pleading. This will be referred to as the old "reasonable specificity standard" for contention admissibility. It required that the presiding officer examine each contention to determine whether: (1) the contention was stated with requisite specificity; (2) the basis for the contention was adequately delineated; and (3) the issue sought to be raised was cognizable in an individual NRC licensing proceeding. SECY-82-

60, *Part 2 – Contentions*, att. 1, p. 3 (Feb. 12, 1982) (ADAMS Accession No. ML12241A725). The presiding officer was not permitted to inquire into the merits of the contention or whether a genuine dispute existed between the intervenor and the applicant or licensee on an issue of law or fact. Therefore, intervenors did not need to proffer any evidentiary foundation whatever for their contentions, so long as the contentions themselves were stated with basis and specificity. *See Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB–130, 6 AEC 423, 426 (1973); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB–590, 11 NRC 542 (1980). *Pro se* litigants' contentions were held to even lower standards of clarity and precision. *See, e.g.*, *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB–136, 6 AEC 487, 489 (1973).

A. Problems Associated with the Old "Reasonable Specificity" Standard for Contention Admissibility

The result of determining contention admissibility based on a "reasonable specificity" pleading standard that required no evidentiary foundation or demonstration of a genuine dispute was that licensing boards admitted and litigated numerous contentions that appeared to be frivolous or overly broad, and based on little more than speculation. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1996). Indeed, in practice, intervenors could satisfy the reasonable specificity standard merely "by copying contentions from another proceeding involving another reactor." *See* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986) (proposed rule). Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to develop a case through cross-examination. *See* B. Paul Cotter, Jr., Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, *Nuclear Licensing: Innovation through Evolution in Administrative Hearings*, 34 Admin. L. Rev. 497, 505, 508 (1982). The Commission called this

practice a "fishing expedition" and found that it was an inappropriate use of the tools of discovery and cross-examination. Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (final rule). The admission of these frivolous or overly broad contentions led to the evidentiary hearings being "delayed by months and even years of prehearing conferences, negotiations and rulings on motions for summary disposition." *See Yankee*, CLI-96-7, 43 NRC at 248 n.7. For instance, one proceeding subject to the reasonable specificity standard involved 500 proposed contentions, with 60 admitted for discovery, and only approximately 10 actually litigated after 2 years of negotiation. *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), LBP–85–5, 21 NRC 410, 413 (1985). Congress therefore called upon the Commission to make "fundamental changes" in its public hearing process to assure that "hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors." *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (citing H.R. Rep. No. 177, 97th Cong. 1st Sess. at 151 (1981)).

B. The Debate over Whether to Address Problems of Frivolous and Overly Broad Contentions by Heightening the "Reasonable Specificity" Standard, by Increasing Licensing Board Discretion, or by Changing the Timing of Request Filing

Three solutions were proposed to address the inefficiencies associated with the reasonable specificity standard. Mr. Tourtellotte, NRC Assistant Chief Hearing Counsel and Regulatory Reform Task Force chairman, and the NRC staff argued that the reasonable specificity contention admissibility standard should be heightened by requiring that adjudicatory hearing requests include (1) a concise statement of the alleged facts or expert opinions which support the contention and on which the intervenor intends to rely and (2) a showing that a genuine dispute exists with the applicant by specific references to the application. SECY-82-447, at att. 1, p. 16.

B. Paul Cotter, Jr., Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, countered that frivolous and overly broad hearing requests should be minimized not by heightening the contention admissibility standard, but by increasing the authority of licensing board judges. B. Paul Cotter, Jr., *Nuclear Licensing: Innovation through Evolution in Administrative Hearings*, 34 Admin. L. Rev. 497 (1982). For instance, he recommended that licensing board judges be granted the ability to dismiss meritless contentions as is done by Article III Federal court judges under the Federal Rule of Civil Procedure 12(b)(6), which allows dismissal "for failure of the pleading to state a claim upon which relief will be granted." *Id*. at 527. Similarly, Chairman Palladino advocated that licensing board judges should be permitted to "use their technical knowledge in ruling on the admissibility of contentions." SECY-82-60, at 1.

In addition to the manner by which contention admissibility is determined, Judge Cotter also believed that the timing of the filing of contentions was crucial. Contentions were (and are today) required to be filed at the time of the application's submission. Judge Cotter claimed that most arguments over contentions were a result of this timing, because contention admissibility had to be determined based on an incomplete record since the NRC staff evaluations of the application were not yet available. B. Paul Cotter, Jr., *Nuclear Licensing: Innovation through Evolution in Administrative Hearings*, 34 Admin. L. Rev. 497, 524 (1982). Therefore, he advocated that contentions should be required to be filed no earlier than sixty days before the date of issuance of the staff safety evaluation report. *Id*.

Thus, the primary recommendations to combat the admission of frivolous and overly broad contentions were (1) to amend the reasonable specificity definition of "request" to include the requirements that the request allege facts or expert opinions and show that a genuine dispute exists, (2) to maintain the reasonable specificity definition of "request" but increase licensing board discretion to deny hearing requests, or (3) to maintain the reasonable specificity definition of "request" but require that requests be submitted closer in time to the publication of

the staff evaluations of the application. As described below, after a decade of debate, the Commission ultimately decided to take the first approach and to heighten the contention admissibility standard.

C. The Development of the Heightened Contention Admissibility Standard

The Commission first solicited public comment on a proposal to raise the threshold for the admission of contentions in 1981. Modifications to the NRC Hearing Process, 46 Fed. Reg. 30,349 (June 8, 1981). Subsequently, the staff developed a draft final rule for a heightened contention admissibility standard and presented it to the Commission. *See* SECY-82-60. This draft final rule and its associated Commission paper demonstrate contemporary thought on the subject. They illustrate that Chairman Palladino had suggested allowing licensing boards to "use their technical knowledge in ruling on the admissibility of contentions" and that a majority of the Commission supported the heightening of contention admissibility standards whereas Judge Cotter and several other licensing board judges did not. The draft final rule was not published in the *Federal Register* at this time; however, much of its language is exactly repeated in the final rule ultimately published in 1989.

As discussed above, the Commission found in its 1981 *Statement of Policy on Conduct of Licensing Proceeding*, that "[t]he purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant." CLI-81-8, 13 NRC 452, 455 (1981). The draft final rule extrapolated from this finding that the purposes of contentions, which give rise to discovery, are (1) to "serve as the mechanism by which a would-be intervenor informs the parties to the proceeding and the hearing tribunal of the issues upon which the intervenor wishes to be heard" and (2) to govern the scope of discovery. SECY-82-60, at att. 1, p. 3. The draft final rule argued that the

contemporary practice of contention admission under the reasonable specificity standard did not fulfill these purposes because, in making its admission determination, the presiding officer "makes no inquiry into the merits of the contention" but just whether the "reasons (i.e. the basis) for the contention" are stated. *Id*. Therefore, "the intervenor is under no obligation to demonstrate that a genuine dispute exists between it and the applicant or licensee on an issue of law or fact" before admission. *Id*. Rather, this must be demonstrated later in the proceeding, either in opposition to a motion for summary disposition or at the evidentiary hearing, but in all cases after resource-intensive discovery had begun. Thus, the proposed heightened contention admissibility standards would, in line with the Commission's *Statement of Policy on Conduct of Licensing Proceeding*, improve the hearing process by "reducing the possibility that time and resources may be expended by the parties and the hearing tribunal in a proceeding on issues that do not involve material factual disputes." *Id*. at att. 1, p. 12. Though this would likely result in fewer parties being admitted, "it is quality and not quantity that is important, and the Commission believes that these new rules will improve the quality of public participation by focusing hearings on genuine issues." *Id*. at att. 1, p. 13. Finally, the draft final rule makes clear that these changes to the contention admissibility standard do not preclude an intervenor from presenting its case by cross-examination. However, they "will preclude a contention from being admitted where intervenor has no facts to support its position and where intervenor contemplates treating cross-examination as a fishing expedition which might produce relevant supporting facts." *Id*. at att. 1, p. 21.

The draft final rule rejected Judge Cotter's argument that contentions should be filed no earlier than 60 days before the publication of the staff review instead of at the time of the publication of the application. This is because, with the exception of NEPA issues, "the sole focus of the hearing should be on whether *the application* satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance." *Id*. at att. 1, p. 20 (emphasis added). With regard to NEPA issues which do focus on NRC staff performance,

Federal courts have made it clear that NEPA does not itself require hearings. *See, e.g., Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 56 (D.C. Cir. 1990). As a result, "NEPA does not alter the procedures agencies may employ in conducting public hearings; it instead merely prevents agencies from excluding *as immaterial* certain environmental issues from those hearings." *Id*. (citations omitted). Therefore, the draft final rule, as a policy matter, decided against the timing advocated by Judge Cotter and was within its legal authority to do so under both the AEA and NEPA.

In addition to heightening the contention admissibility standard, the draft final rule sought to grant licensing board judges Federal Rule of Civil Procedure 12(b)(6)-like authority and the ability to determine admissibility based on the judge's technical knowledge. It allowed a presiding officer to deny admission of a contention if "it appears beyond doubt that petitioner can prove no set of facts in support of its contention, or if the contention, if proven, would not entitle the petitioner to relief that is within the authority of the Commission to grant" or if, in the presiding officer's technical opinion, "reasonable minds" would not inquire further as to the contention's validity. SECY-82-60, at att. 1, p. 24.

Following this first written explanation for a heightened contention admissibility standard, the draft report of the Regulatory Reform Task Force was submitted to the Commission. The report largely repeated the hearing process inefficiencies and solutions identified in the unpublished draft final rule. *See* SECY-82-447. For instance, the report found that "the quality of the existing hearing process can and should be improved" by raising the threshold for the admission of contentions by requiring "the tendering of evidence to demonstrate the existence of a genuine factual dispute." *Id*. at 7-8. The task force also carried forward the suggestion of Chairman Palladino that presiding officers should be able to dismiss contentions if there is no "technical basis for reaching a conclusion that a proposed contention raises a genuine issue of disputed fact." *Id*.

In 1984, the recommendations of the Regulatory Reform Task Force were published for public comment. Request for Public Comment on Regulatory Reform Proposal Concerning the Rules of Practice, Rules for Licensing of Production and Utilization Facilities, 49 Fed. Reg 14,698 (Apr. 12, 1984). This publication again criticized the "reasonable specificity" contention admissibility standard for not requiring an inquiry into the merits of the contention, and for not requiring a demonstration of some factual support for the contention before admission. *Id*. at 14,699. The report stated that this failure allowed for the easy admission of frivolous contentions. *Id*. It asserted that a heightened contention admissibility standard would "ensure that the resources of all parties are focused on real rather than imaginary issues." *Id*. at 14,701. As before, suggestions that contention filing be delayed until the publication of the staff's safety review were rejected. Filing contentions at the time of the publication of the application was preferred in order to identify "issues as early as possible in the proceeding." *Id*. It was argued that this would not prejudice intervenors or run afoul of the AEA or NEPA because intervenors would be allowed to file amended or additional contentions based on staff documents that differ significantly from the application. *Id*.

After consideration of the public comments on the Regulatory Reform Task Force report, the NRC staff developed a new draft of the proposal to heighten the contention admissibility standard. The Commission approved the publication of the proposal with modifications, including Chairman Palladino's direction that

> This proposal is intended to do more than just eliminate imaginary or frivolous issues; it is to sharpen the issues in dispute throughout the prehearing and hearing phases. See 46 F.R. 303; SECY-82-60. A discussion of the standard (2.714 (D) (2) (I)) and its legal basis should be added.

SECY-86-40A, Proposed Changes to 10 CFR Part 2 to Improve the Hearing Process: Selected Proposals Suggested by the RRTF and Commissioner Asselstine, 1 (Apr. 17, 1986) (ADAMS Accession No. ML12248A655). The proposed rule was then published in the *Federal Register*. Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing

Process, 51 Fed. Reg. 24,365 (July 3, 1986) (proposed rule). In the Statement of Considerations, the Commission stated that the purpose of the heightened contention admissibility standard was "to sharpen the issues in dispute throughout the prehearing and hearing phases and to ensure that the resources of all parties are focused on real rather than imaginary issues." *Id*. at 24,366. According to the Commission, the "reasonable specificity" standard did not accomplish this because, as stated before,

> the presiding officer makes no inquiry into the merits of a contention in ruling on its admissibility. An intervenor is under no obligation to demonstrate the existence of some factual support for the contention as a precondition to its acceptance. In addition, an intervenor need not show that a genuine dispute of fact exists with the applicant or the NRC staff. These obligations do not arise until later in the proceeding, either in opposition to a motion for summary disposition or at the evidentiary hearing

Id. Because of this, "[i]n practice, [the reasonable specificity standard] may be met by copying contentions from another proceeding involving another reactor. Thus, an intervenor may not fully understand a contention and frivolous contentions may be admitted. In addition, the contentions may not adequately identify the issues that the intervenor seeks to litigate." *Id*.

In 1989, the NRC published the final rule that heightened the contention admissibility standard. Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989) (final rule). The Statement of Considerations addressed the more than 150 comments that were received on the proposed rule. The comments were split between supportive comments stating that the old reasonable specificity standard had "permitted too many insignificant, meritless, hypothetical and time-consuming contentions to be admitted" whereas the new standard would "streamline the hearing process and make it more efficient"; and dissenting comments stating that the new standard would "curtail the public's role in the licensing process and meaningful public participation" so that "it would be virtually impossible for persons seeking to participate in an NRC adjudicatory proceeding to succeed in having their contentions admitted." *Id*. at 33,168-

69. The dissenting comments also claimed that the heightened standard would permit a licensing board to "prejudge the petitioner's evidence before the petitioner was granted standing to participate in the proceeding." *Id*. The Commission disagreed with these dissenting comments. The Commission stated that the heightened standard "does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, *be it one fact or opinion or many,* of which it is aware at that point in time which provide the basis for its contention." *Id*. at 33,170 (emphasis added). The heightened standard also requires "the intervenor to read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view." *Id*. Finally, the heightened standard supports the finding that the appropriate use of discovery and cross-examination is not as part of a fishing expedition to flesh out vague, unparticularized contentions. *Id*. at 33,170-71. Therefore, echoing the language of the original, unpublished draft final rule and the Regulatory Reform Task Force report, the Commission concluded that the requirements of the heightened contention admissibility standard were reasonable and not overly burdensome.

Thus, in 1989, following ten years of debate with all potential stakeholders, the Commission decided to heighten the contention admissibility standard and to grant the licensing boards Federal Rule of Civil Procedure 12(b)(6)-like contention dismissal authority. The Commission rejected proposals to link the filing of contentions with the publication of the NRC staff evaluations of the applications instead of with the publication of the applications. The Commissioned also rejected proposals to grant licensing boards the authority to rule on the admissibility of contentions based upon their technical knowledge.

Even after this 1989 amendment, concerns for the balancing of effectiveness and efficiency in the hearing process lingered. As a result, in 1998, the Commission expanded upon its 1981 *Statement of Policy on Conduct of Licensing Proceedings* with an updated policy statement. *See* Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872 (Aug. 5, 1998). This new policy statement reaffirmed the 1981 policy statement while

directing the licensing boards to employ certain additional measures to ensure that adjudicatory hearings focus on both "genuine issues and real disputes regarding agency actions subject to adjudication" and the "prompt resolution of disputes." *Id*. at 41,873. These additional measures included such direction as shortening filing and response times; requiring simultaneous, rather than sequential, filing; using electronic filing; allowing filing extensions only for unavoidable and extreme circumstances; and requiring that all filings be supported by appropriate and accurate references to legal authority and factual basis on pain of their being stricken or their proponent being dismissed. *Id*. at 41,873-74. The Commission also directed that evidentiary proceedings and discovery against the staff should generally not commence before the completion of the NRC staff's evaluation of the application, with the exception of the staff establishment of a case file for the application. *Id*. at 41,874, 41,875. Regarding contention admissibility, the Commission "re-emphasize[d]" that "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the [contention admissibility standard]." *Id*. at 41,874. The Commission stated that a licensing board cannot re-formulate a contention as a way to consider a matter on the licensing board's own initiative. *Id*. Rather, a proper exercise of licensing board sua sponte authority requires an explicit finding that a serious safety, environmental, or common defense and security matter exists, a forwarding of this finding to the Commission and the General Counsel, and prior approval of the Commission before proceeding. *Id*.

Following this 1998 policy statement, the Commission engaged in rulemaking and, in 2004, again amended Part 2. *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (Jan. 14, 2004). This 2004 amendment did not weaken the 1989 contention admissibility standard; rather, its Statement of Considerations emphasized the importance of the 1989 contention admissibility standard and the standard's use was expanded to informal proceedings as well as formal proceedings. *Id*. at 2,188. The Commission identified the requirement "for well-supported specific contentions in all cases" as crucial to "improv[ing] NRC hearings, limit[ing]

unproductive litigation, and at the same time eas[ing] the burdens in hearing preparation and participation for all parties." *Id*. Furthermore, the Commission stated that the use of the heightened contention admissibility standard was "necessary to ensure that . . . the proceedings are effective and focused on real, concrete issues." *Id*. at 2,189-90. Finally, the Commission stated that it did not expect the use of the heightened contention admissibility standard in informal proceedings to adversely affect public participation because the standard had been in effect in formal proceedings for more than ten years and "[p]etitioners generally have been able to meet [its] requirements." *Id*. at 2,190.

Part 2 of the Commission's regulations was amended once more in 2012, but that amendment did not change the contention admissibility standard. *See* Amendments to Adjudicatory Process Rules and Related Requirements, 77 FR 46562 (Aug. 3, 2012). Therefore, today's contention admissibility standard located at 10 C.F.R. § 2.309(f) is a product of the 1989 amendment as modified by the 2004 amendment. The contention admissibility standard reads as follows with the language generally retained from the 1989 amendment in bold:

> (f) Contentions.
>
> (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a **specific statement of the issue of law or fact to be raised or controverted** . . .;
>
> (ii) Provide a **brief explanation of the basis for the contention**;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide **a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at**

> **hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue**;
>
> (vi) … **provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact**. **This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief**; and
>
> (vii) …
>
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. **On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report**.
>
> Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

10 C.F.R. § 2.309(f) (emphasis added).

In a later discussion of its 1989 rulemaking, the Commission repeated that the basic intention behind the heightening of the old reasonable specificity contention admissibility standard was to "focus[] the hearing process on real disputes susceptible of resolution in an adjudication . . . put[] other parties in the proceeding on notice of the petitioners' specific grievances and thus give[] them a good idea of the claims they will be either supporting or opposing [and] . . . help[] . . . assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49

NRC 328, 334-35 (1999). The combination of this heightened contention admissibility standard and the Commission's late-filing standard was found by the Court of Appeals for the District of Columbia Circuit to not violate the Administrative Procedure Act, the AEA, or NEPA. *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C. Cir. 1990). Furthermore, a recent decision by the Court of Appeals for the First Circuit expressed support for the heightened contention admissibility standard in denying a petitioner's "backdoor challenge to the decision made by the NRC in 1989, at the prompting of Congress, to toughen the standards for getting a hearing on contentions." *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n*, No. 12-1561, 2013 WL 49829, at *7 (1st Cir. 2013).

CONCLUSION

As described above, between 1965 and 1981 there was an appreciable lengthening of the NRC licensing process that was partly attributed to inefficiencies in the adjudicatory hearing process. Thereafter, in response to Congressional and stakeholder criticism, the contention admissibility regulations were amended, in large part to achieve a better balance between the effectiveness and the efficiency of the adjudicatory hearing process so that adjudicatory hearings would remain open to meaningful public input but also be free from frivolous, delaying, or overly broad public input. The importance of considering truly "meaningful" public input was emphasized in the first adjudicatory decision issued by the newly created Nuclear Regulatory Commission in 1975:

> . . . we wish to underscore the fundamental importance of meaningful public participation in our adjudicatory process. Such participation, performed in the public interest, is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us.

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI–75–1, 1 NRC 1, 2 (1975). The goal of the screening tools of standing and contention admissibility is to

ensure that public participation in the adjudicatory hearing process is indeed truly meaningful. However, these screening tools are not foolproof. The current Commission approach to the dilemma of meaningful public input being potentially excluded from adjudicatory hearings is not to eliminate the standing and contention admissibility requirements. Rather, the Commission provides alternative means for the submission of this meaningful public input that may not otherwise satisfy the adjudicatory hearing requirements. Adjudicatory hearings are but one means of public input reaching the NRC; public input can also reach the NRC through petitions for rulemaking, written comments, NRC-hosted public meetings, limited appearance statements, etc.

In conclusion, meaningful public participation in NRC adjudicatory hearings is achieved, in part, through balancing the effectiveness and the efficiency of the adjudicatory hearing request process. Before specific standing requirements were codified and before contentions were required to demonstrate a factual basis and the existence of a genuine dispute, there existed uncertainty for licensing boards, applicants, and the public, and the Commission found itself at times considering non-meaningful public input in adjudicatory hearings. As a result, there was licensing delay and Congressional and stakeholder pressure to reform. The changes to the standing and contention admissibility requirements discussed above represent a compromise between the extremes of (1) screening out all non-meaningful public input in adjudicatory hearings through rigorous threshold requirements and (2) capturing all meaningful public input in adjudicatory hearings through minimal threshold requirements. The history of the development of this compromise and the availability of other means besides adjudicatory hearings for the admission of meaningful public input should inform any future changes to the adjudicatory hearing requirements.

ENCLOSURE 2

INTERLOCUTORY APPEALS IN U.S. NUCLEAR REGULATORY COMMISSION ADJUDICATORY PROCEEDINGS

Interlocutory Appeals in U.S. Nuclear Regulatory Commission Adjudicatory Proceedings

An interlocutory appeal is an appeal of a trial court's ruling that is allowed before the trial has concluded. At the U.S. Nuclear Regulatory Commission (NRC), an interlocutory appeal refers to an appeal to the Commission of a presiding officer's ruling (such as an Atomic Safety and Licensing Board decision) that is allowed prior to the end of the adjudicatory proceeding before the presiding officer. This paper describes the current rule in the NRC's regulations for interlocutory appeals as well as alternate approaches that could be used.

Current Rule

The NRC's regulations allow a participant who has filed a petition to intervene or request for hearing at the NRC to file an interlocutory appeal of a presiding officer's decision ruling on the participant's petition/request only if the presiding officer wholly denied the participant's petition/request (that is, denied it in its entirety). *See* 10 C.F.R. § 2.311(c). Consequently, if a presiding officer grants a petition to intervene but denies admission of at least one of the petitioner's contentions (in other words, the presiding officer does not allow a hearing on at least one of the contentions included in the petitioner's petition to intervene), then the petitioner is not allowed to file an interlocutory appeal of the presiding officer's decision. Instead, the petitioner would be allowed to appeal the presiding officer's denial of the contentions only after the presiding officer issues a final decision at the end of the adjudicatory proceeding. In summary, under current NRC regulations, a petitioner/requestor has the right to file an interlocutory appeal at the NRC only if the presiding officer denies admission of all the contentions filed in its petition/request or finds that the petitioner/requestor does not have standing (thereby wholly denying the petition/request).

In contrast, any party except for the petitioner/requestor (such as the applicant) is allowed under the current rule to file an interlocutory appeal of a presiding officer's decision, so long as the party argues that the presiding officer should have wholly denied the petition to intervene or request for hearing, even if the presiding officer denies admission of some of the petitioner/requestor's contentions. *See* 10 C.F.R. § 2.311(d)(1). To argue that a petition to intervene or request for hearing should have been wholly denied, a party would need to show either that the petitioner/requestor does not have standing or that all of the petitioner/requestor's proposed contentions are not admissible. Therefore, under the current rule, every party, except for the petitioner/requestor, may file an interlocutory appeal of a decision in which a presiding officer denies only part of a petition/request (and thereby does not wholly deny the petition/request).

Other Options: First Approach

The NRC has identified two approaches as other options for the NRC's rule for interlocutory appeals.[1] The first approach would allow all parties, including the petitioner/requestor, to file an interlocutory appeal of an order in which a presiding officer grants or denies, in whole or in part, a petition to intervene or request for hearing. As a result, under this approach, any party would be allowed to immediately appeal a decision ruling on the admissibility of any contention, including new or amended contentions filed after the initial filing deadline. As part of this

[1] Amendments to Adjudicatory Process Rules and Related Requirement, 76 Fed. Reg. 10,781, 10,790–10,791 (Feb. 28, 2011).

approach, parties would not have the opportunity to appeal presiding officers' contention-admissibility decisions at the end of proceedings, only immediately after the decision is issued.

There are a few advantages to this approach. This approach would ensure that all parties enjoy the same interlocutory-appeal rights—unlike the current rule, this approach would permit all parties to file an interlocutory appeal of a decision in which a presiding officer denies part of a petition to intervene or request for hearing. In addition, this approach would allow earlier resolution of contention-admissibility issues. In particular, this approach would eliminate the possibility that, after a presiding officer has issued the final decision in the proceeding, the Commission on appeal could remand the proceeding to the presiding officer to consider a contention that the Commission has determined should have been admitted by the presiding officer. A remand after the presiding officer has issued a final decision would prolong the proceeding and delay the agency's final decision in the adjudication.

One disadvantage of this approach would be that attention would be given to matters that may prove unnecessary to address at all during the proceeding. For instance, a party could choose not to pursue the matter at the conclusion of the proceeding, or other developments in the proceeding, such as settlement or issuance of the NRC Staff's safety or environmental review documents, could make it unnecessary to address the matter. Another disadvantage would be that this approach could have significant resource implications for the NRC—in order to address the increased appeal opportunities at an early stage in NRC adjudicatory proceedings.

Other Options: Second Approach

The second approach would remove the right of parties other than the petitioner/requestor to file an interlocutory appeal of rulings granting a petition to intervene or request for hearing. Under this approach, petitioners/requestors would retain the right to immediately appeal rulings in which a presiding officer wholly denies their petition/request (as is permitted by the current rule). However, unlike the current rule, under this approach, no party would be allowed to file a non-discretionary interlocutory appeal of a ruling that denies part of a petition to intervene or request for hearing. Parties would still be permitted to immediately file an appeal under the NRC's regulation that allows the Commission, in its discretion, to grant interlocutory review of a presiding officer's ruling in limited circumstances. *See* 10 C.F.R. § 2.341(f).

One advantage of this approach would be that it would remove any incentive for parties other than the petitioner/requestor to oppose all proposed contentions in order to preserve their right to file an interlocutory appeal. To a certain extent, the current rule provides an incentive for parties other than the petitioner/requestor to oppose admission of all proposed contentions because to be permitted to file an interlocutory appeal of a contention-admissibility decision under the current rule, a party must argue that the petition/request should have been wholly denied (which must be done by arguing that the presiding officer should have denied admission of all the contentions proposed in the petition/request or that the presiding officer should have found the petitioner/requestor lacked standing). Some believe that removing this incentive might result in less interlocutory appeals being filed. Another advantage would be that this approach addresses what-some-have-considered-to-be an inequity in the current system, which allows every party other than the petitioner/requestor to file an interlocutory appeal of a partial denial of a petition to intervene or request for hearing but does not provide the same opportunity to the petitioner/requestor.

The main disadvantage of this approach would be that it would remove the means by which an early determination can be made by the Commission regarding contention admissibility. In

particular, no party would be able to appeal a presiding officer's decision granting a petition/request, or denying only part of a petition/request, until the end of the adjudicatory proceeding (except under the Commission's discretionary interlocutory-review rule). This approach would also leave open the possibility that at the end of an adjudicatory proceeding, the Commission on appeal could remand the proceeding to the presiding officer to consider a contention that the Commission has determined should have been admitted. As previously mentioned, such remands delay the NRC's final decision in adjudications.