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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Hon. Annette L. Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATT: Rulemaking and Adjudications Staff
BY: Electronic filing (file identifier: 885-0527), and First Class U.S. Mail

RE: Comments opposing the NRC's proposed "Changes to Adjudicatory Process" (RIN 3150-AG49), 66 FR 19609-19671 (April 16, 2001), on behalf of forty-six (46) local, regional, and national organizations, one (1) company, and one (1) township.

Dear Secretary Vietti-Cook:

Please convey to the Commission the following comments which are intended to place the Commission on notice that the above referenced rulemaking is fatally defective and should be immediately withdrawn due to violations, as described herein below, of the Administrative Procedure Act, the Atomic Energy Act, the National Environmental Policy Act, the Nuclear Waste Policy Act, and the First and Fifth Amendments to the United States Constitution. We submit these comments on behalf of the following organizations:

Alliance For A Clean Environment
P.O. Box 3063
Stowe, PA 19464

Arizona Safe Energy Coalition
5349 W. Bar X Street
Tucson, AZ 85713-6402

Aurum Foundation
8 Green Acres Road
Keene, NH 03431

BANDU (Ban Depleted Uranium)
5349 W. Bar X Street
Tucson, AZ 85713-6402

Blue Ridge Environmental Defense League
PO Box 88
Glendale Springs, NC 28629

Californians for Radioactive Safeguards
167 Almendral Avenue
Atherton, CA, 94027

Canton Township
655 Grove Avenue
Washington, PA 15301

Central Pennsylvania Citizens for Survival
467 Martin Terrace
State College, PA 16803

Citizens Action Coalition of Indiana, Inc.
5420 N. College Ave. #100
Indianapolis, IN 46220

Citizens Awareness Network
P.O. Box 83
Shelburne Falls, MA 01370-0083

Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Citizens' Resistance at Fermi Two
P.O. Box 463
Monroe, MI 48161

Coalition for a Nuclear Free Great Lakes
P.O. Box 331
Monroe, MI 48161

Communities United for Responsible Energy
P.O. Box 130
Frontenac, MN 55026

Don't Waste Michigan
6677 Summitview
Holland, MI 49423

Don't Waste Oregon
P.O. Box 40729
Portland, OR 97240

Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, PA 16803

Environmental Justice Action Group
P.O. Box 85513
Tucson, AZ 85754

Friends of the Coast Opposing Nuclear Pollution
P.O. Box 98
Edgecomb, ME 04556

Georgians for Clean Energy
3025 Bull Street, Suite 101
Savannah, GA 31405

GE Stockholders Alliance
P.O. Box 754
Fair Oaks, CA 95628-0745

Grand Rapids Chapter of Don't Waste Michigan
2213 Riverside Dr., NE
Grand Rapids MI 49505

Green Delaware
Box 69
Port Penn, DE 19731

Health & Energy Institute
P.O. Box 5357
Takoma Park, MD 20913

Lake Michigan Federation
220 S. State St., Suite 1900
Chicago, IL 60614

Massachusetts Citizens for Safe Energy
29 Temple Place
Boston, MA 02111

Nevada Nuclear Waste Task Force
4550 West Oakey Blvd., Suite 111
Las Vegas, NV 89102

New England Coalition on Nuclear Pollution
P.O. Box 545
Brattleboro, VT 05302-0545

New Hampshire Pure Water Coalition
8 Green Acres Road
Keene, NH 03431

North American Water Office
P O Box 174
Lake Elmo MN 55042-0174

Nuclear Energy Information Service
P.O. Box 1637
Evanston, IL 60204-1637

Nuclear Information and Resource Service
1424 16th Street NW, Suite 404
Washington, D.C. 20036

Nukewatch
P.O. Box 649
Luck, WI 54853-0649

Oregon Conservancy Foundation
18140 SE Bakers Ferry Road
Boring, OR 97009

Pennsylvania Environmental Network
P.O. Box 92
Fombell, PA 16123-0092

Physicians for Social Responsibility/Atlanta
421 Clifton Road NE
Atlanta, GA 30307

Prairie Island Coalition
4425 Abbott Avenue South
Minneapolis, MN 55410-1444

Return the Environment of Susquehanna Country to Unspoiled Ecology
RR 1, Box 25
Thompson, PA 18465

SF-Bay Area Chapter Physicians for Social Responsibility
2288 Fulton Street, Suite 307
Berkeley, CA 94704-1449

Shundahai Network
P.O. Box 6360
Pahrump NV 89041

Sierra Club/Global Warming & Energy Program,
408 'C' Street, N.E.
Washington, D.C. 20002

Sierra Club/Pennsylvania Chapter
600 North 2d Street, Suite 409
Harrisburg, PA 17101

SJG Design, Inc.
170 Villanove Drive
Paramus, NJ 07652

Three Mile Island Alert
315 Peffer Street
Harrisburg, PA 17102

Union of Concerned Scientists
Two Brattle Square
Cambridge MA 02238-9105

West Michigan Environmental Action Council
1514 Wealthy SE, Suite 280
Grand Rapids, MI 49506

Wisconsin Green Party
P.O. Box 1701
Madison, WI 53701-1701

Women's International League for Peace and Freedom/Tucson
2451 N. Santa Rita Ave.
Tucson, AZ 85719

We hereby incorporate by reference and herein republish thereby as our own, to the extent they are not inconsistent with our comments below, the comments filed on behalf of Nuclear Information and Resource Service by Paul Gunter and Michael Mariotte.

I. RESPONSES TO THE COMMISSION'S REQUESTS FOR COMMENTS

- A. The Commission states in the statement of consideration section of the proposed rule that it is, "interested in public comments on the relevant considerations that should inform the Commission's decision in adopting informal hearing procedures, and whether the Commission's strategy in moving towards informal hearings should be continued." 66 FR at 19618 (April 16, 2001).

Response A:

The Commission's process to date is fatally flawed, should not be continued, and this proposed rule should be immediately withdrawn. Holding only two days of meetings attended by an extremely small number of persons who may be adversely affected by the Commission's proposed rule is fundamentally unfair to the many members of the public not invited to the invitation-only meeting. The persons at the meeting were predominantly lawyers who have done legal work for various organizations, but who did not necessarily attend as representatives of those organizations. Thus, the Commission's "public process" hardly included the public at all; instead it was, once again mostly 'beltway' representatives and only a select few of the hundreds of thousands of interested persons whose hearing rights will be adversely affected by this rulemaking.

Given the Commission's and its General Counsel's recognition that there is an exceedingly long history of providing formal hearings in licensing proceedings, the Commission should withdraw the proposed rule and hold public hearings on it at sites throughout the country. In this way, if the Commission is really interested in building public confidence in the process, it will take the only step that can accomplish this end: actually going out to meet the public where they live, listening to their concerns--not merely those of their lawyers or national organizations to which they may belong--and then working with them to create a new set of rules for adjudicating

licensing proceedings to will encourage and support meaningful public involvement instead of stifling it.

Along the same lines, if the Commission were really concerned with building public confidence, it would have provided to the public, in the open file on the internet, and with proper references to ADAMS file locations, the complete rulemaking history of the proposed rule. Instead, the Commission chose to hide from ready public access the extensive comments of the Atomic Safety and Licensing Board in response to the initial rulemaking proposal. Likewise well hidden were the responses and redrafts of the General Counsel, and any comments provided to the Commission by the Office of Appellate Adjudication. Anyone asking for the “complete file” in the case would be told that it consisted solely of the transcripts of the two days of meeting at NRC headquarters. See Exhibit ‘A’ attached hereto (copies of e-mail communications with the NRC staff person in charge of this rulemaking and a librarian at the NRC’s Public Document Room showing that the background documents were not available to the public in the rulemaking file); see also Exhibit ‘B’ attached hereto (declaration of Jonathan M. Block concerning difficulties locating and obtaining NRC documents using the ADAMS system). The “regulatory History for Proposed Rule” was not made available to the public in the rulemaking file. This NRC failure to provide information crucial to an interested person forming an opinion based upon the data available to the Commission is fatal to the completion of this rulemaking. See generally, e.g., *Portland Cement Assn. v. Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973). This failure to provide documents is compounded by the lack of a bibliographic data retrieval system for NRC documents. See Exhibit ‘B’ attached hereto, *Declaration of Jonathan M. Block Concerning Difficulties Locating and Obtaining NRC Documents Using the ADAMS System*.

Because interested persons who wish to participate in this NRC rulemaking (or any other current NRC rulemaking, for that matter) no longer have ready access to any functional kind of bibliographic index to the NRC documents, there is no way for the public to effectively research those documents. Thus, there may be technical notice of the existence of a rulemaking via the Federal Register, but the public had neither ‘notice’ based upon research access to NRC

documents, nor a meaningful 'opportunity' to participate in the rulemaking (or hearing processes) absent ready access to information.

Locating and viewing a twenty or thirty page document using ADAMS without having the document identifying code in advance is entirely a hit or miss affair. Obtaining help from a librarian may result in a quick reply—or the reply may come a day or more later. Even when one has the document code and can locate a copy on ADAMS, scanned copies ("OCR") are extremely difficult and time-consuming to read on screen. Making a copy of even a mere fifteen page document may take nearly an hour. Because the NRC chose to eliminate the NUDOCs bibliographic system as a tool for locating documents by relevant and sensible parameters related to customary use of the documents, the public is effectively left without access to NRC documents unless one stumbles across them or happens to find a librarian who can locate them.

In addition, the NRC's switch to ADAMS at the same time as the complete elimination of public access to NRC documents in local public document rooms on microfiche, and in the central Public Document Room with bibliographic computer access to data in paper form, has had a disproportionate impact upon interested persons without computer and internet access. The NRC knows, or should be aware of existing government studies, or should have conducted its own studies which would have revealed that this change to ADAMS affected a massive denial of the minimum due process and First Amendment right of interested persons to access NRC information. *See, e.g.*, U.S. Dept. of Commerce, "Falling Through the Net: Toward Digital Inclusion" Figures II-4 and II-5 (October 2000). Moreover, government studies, of which the NRC should be aware in terms of implementing agency environmental justice policies and in the course of its own cases, show the disparate impacts upon persons whose households and local public libraries have no, or extremely limited, computer and internet access compared with the access available to other groups in the United States. The NRC could have used ADAMS as a pilot project. It could have chosen to continue to provide local document access and a PDR with a complete and easily usable bibliographic data retrieval system that permitted research of NRC documents. Instead, the agency chose a path that has disproportionately denied any meaningful access to its documents, hence, its notice and comment rulemakings and public hearings, to

African Americans, Hispanic Americans, and Native Americans who comprise a class of persons suffering the disparate impact of lack of access to the NRC's documents, hence ability to meaningfully participate in its public proceedings. This is a violation of the Equal Protection provisions of the Fifth Amendment to the United States Constitution and the First Amendment right to receive ideas and the right to seek a redress of grievances from the government. In this particular rulemaking, where the hearing rights of potentially affected interested persons who comprise the disproportionately affected class are at stake, the NRC's failure to provide access to its documents locally by means other than computers is invidious discrimination. Moreover, it deprives class members of fundamental rights to redress grievances, receive ideas, and obtain due process, which rights are protected by the First and Fifth Amendments to the United States Constitution. It also deprives them of statutory rights under the Administrative Procedure Act, 5 U.S.C. Chapter 5, and the Atomic Energy Act, 42 U.S.C. §2239. Because it also adversely affects the ability of persons who are members of the class from participating in NRC actions implicating the National Environmental Policy Act, which participation will be adversely affected by the rule changes at issue, its also violates the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.*

NRC's proposed rulemaking in this case (and probably all other current rulemakings) is not valid because the NRC did not provide (and does not now provide) the public with access to the complete set of documents/data the Commission relied upon in its decision-making process for the rulemaking. This is a violation of the Chapter 5 of the Administrative Procedure Act. As legal scholars have noted:

The purpose of the notice required by § 553(b) is to permit potentially affected members of the public to file meaningful comments under § 553(c) criticizing (or supporting) the agency's proposal. That purpose is clear from consideration of the sequence of procedures mandated by § 553 and from the legislative history of § 553(b). Yet, it is impossible to file meaningful comments critical of a proposed action that is premised on particular data unless that data is available in time for comments.

KENNETH C. DAVIS AND RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE §7.3 (3d edition, 1994, supplement, 2000). The same judgement applies to documents as to data. This failure to provide reasonable access to agency documents also violates the United States Constitution's First Amendment protections. One cannot comment on agency proceedings and attempt to obtain redress of any grievances concerning such proceedings absent ready access to the records of the agency's underlying decision-making process. This situation also violates the Fifth Amendment guarantee of due process, as it is a basic, abject denial of both notice and any meaningful opportunity to be heard. In addition, it is a violation of the Atomic Energy Act, 42 U.S.C. §2239, as the agency is not providing public participation in its rulemakings to interested persons when it denies them ready access to all of the documents upon which the rulemaking and agency decision-making is based.

- B. The Commission requests public comments, "identifying any aspect of the proposed rule's informal and formal hearing procedures which the commenter believes could be improved, together with specific proposals for improvement and an assessment of the proposal against relevant considerations, including due process, fundamental fairness, the need for timely decisionmaking, and accurate factfinding." *Id.*

Response B.:

See our specific comments above, on the proposed rule changes below in section III, and generally in section II.

- C. The Commission also seeks comments, "on whether the informal hearing processes embodied in subpart L and subpart N should be augmented or even supplanted by more informal, legislative-style hearing procedures." *Id.*

Response C.:

See our specific comments on the proposed rule changes below in section III and responses to D and E below. We contend that there should be only a single, formal hearing process and that parts L and N should be eliminated.

- D. The Commission requests public comment on "the feasibility and desirability of using legislative-style hearing procedures for matters that would otherwise be subject to subpart L and subpart N procedures." *Id.* at 19619.

Response D.:

See our specific comments on the proposed rule changes above, below in section III, and response to E below. We do not think legislative hearings are appropriate when individual interests are at stake. Legislative style hearings are conducive to some public policy decisions but not those implicated in nuclear licensing and related issues. The granting of NRC licenses to nuclear energy corporations properly requires formal hearing processes. These are privileges being granted to individuals (corporations) to make money in nuclear fuel chain businesses at the risk of the lives and property of persons living and working in the vicinity of such enterprises. Given the balancing of rights and interests involved, formal hearing are needed to protect such interests as the Constitution requires.

- E. **The Commission requests public comments on: “(i) The proposed rule’s approach of multiple, specialized tracks tailored to certain types of issues, (ii) whether additional specialized tracks should be considered, (iii) the desirability of adopting an alternative approach of a single formal and two informal hearing procedures, with the presiding officer given the discretion to tailor the procedures to suit the circumstances of each case.” *Id.***

Response E.:

See response to F below and to specific rule changes in section III. We do not think it desirable to place the discretion in the hearing officer or Commission. In licensing nuclear fuel chain activities, the most ultra hazardous activities in the world, there should be formal hearings on the license available on request to interested persons. For nearly 50 years, with narrow exceptions, the AEC, the NRC and Congress interpreted the Atomic Energy Act § 189a as requiring no less. Such hearings should utilize the Federal Rules of Civil Procedure and Rules of Evidence to the extent practical and reasonable, with an appropriate standard of proof adopted to match the level of risk to person and property involved in all phases of the nuclear fuel chain.

- F. **The Commission seeks public comment on “whether there are better alternatives to the proposed rule’s approach for defining what type of proceedings are appropriate for formal or informal hearing procedures. Is the proposed category of cases to which formal hearing procedures would apply too narrow?” *Id.***

Response F.:

All NRC proceedings should be formal. See comments on applicable rules below.

- G. The Commission requests public comments on the following alternative, as well as proposals for other criteria for determining formal versus informal hearing procedures. The Commission requests that, “commenters identify perceived advantages and disadvantages of alternative approaches compared with the proposed rule’s approach for determining the applicability of formal and informal hearing procedures.” One such alternative “would be for the rule to specify that all proceedings would be informal hearings unless one or more criteria are met for the use of formal, subpart G hearing procedures. Some possible criteria would be whether the proceeding presents complex issues, raises difficult disputed issues of material fact or of expert opinion which cannot be resolved with sufficient accuracy except in a formal hearing (i.e., similar to the standard for a formal hearing in design certification rulemaking, 10 CFR 52.51(b)), and--to ensure that significant cases are captured--matters for which preparation of an environmental impact statement is necessary. Determinations regarding the criteria would be initially screened by the presiding officer, and certified to the Commission for final determination.” *Id.*

Response G.:

All hearings should be formal. See comments above and in sections II and III below.

- H. The Commission requests comments on, “whether there should be criteria for determining whether a proceeding should be held before an administrative judge/licensing board or the Commission and, if so, what those criteria should be.” *Id.*

Response H.:

The Commission should always serve the role of an appellate body. All proceedings should be before administrative law judges of the Atomic Safety and Licensing Board. See comments below to applicable changes in the rules in this regard.

- I. The Commission requests comments on, “whether discovery should be eliminated or limited to requests from the presiding officer. Would a general disclosure obligation of the sort that would be required in the proposals that follow be sufficient discovery for all NRC adjudicatory proceedings?” *Id.* at 19619-19620.

Response I.:

See comments below on specific rule change proposals. We object to the elimination or restriction of discovery in any way. Discovery should be governed by the Federal Rules of Civil Procedure. When a party fails to comply with properly made discovery requests, there must be

process to compel the requested production of information. Merely general disclosure requirements will not be sufficient, just as they have proved insufficient in Federal civil cases. Discovery must be of the opposing party—it cannot be through a hearing officer or limited to what that officer thinks is reasonable and necessary to conduct litigation. Moreover, there should be full discovery available of the NRC staff. No proceeding should be noticed until the staff has completely reviewed all of the documents relevant to the license at issue, filed all of the necessary reports—EAs, FONSI, SERs, and obtained answers from the licensee of all requests for information (RAIs). This simple change in scheduling of proceeding would save an enormous amount of time that is wasted because the staff and the license applicant have not finished their business before the proceeding is noticed as a hearing opportunity. Additionally, having all the documents available for public inspection at least thirty (30) days before notice of hearing opportunity is published may help to either eliminate entirely or narrow the issues which prospective intervenors would want to raise at hearing. Instead, however, the NRC's proposed rule changes seem predicated on the factually unsupported notion that intervenors are responsible for all of the delays in NRC proceedings.

Study of the history of NRC hearings would likely reveal that NRC staff and licensees, not intervenors, are most often responsible for delays. The time-line of the Yankee Rowe LTP case is instructive in this regard. In that case, it took NRC staff ten (10) months to complete its review of the LTP. At the same time, it took the licensee five (5) months to completely respond to the NRC staff RAIs. NRC Staff wrongly opposed the standing of intervenors, joining with the licensee at every turn. This is also something the NRC should study—how many times has the NRC staff opposed intervenor standing, how many of those times has its position been identical to the licensee, and how many times has its position been overturned? Additionally, how often, after being overturned, has the staff gone on to continue to support the licensee, and, significantly, how often has the Staff's (and/or applicant's) pursuit of legally and factually incorrect positions delayed the proceedings? Note also the lack of control over the motion practice--no interim orders issued to respond to requests for leave to reply, flurries of such filings by the large law firm representing the licensee, support for all such filing from the NRC staff attorneys. In the end, the licensee withdrew its LTP--allegedly to revise it, rather than submit to

the discovery process, saying it would submit it again sometime in the next 20 years. Curiously, when the Commission and OGC review the “problems” with the “efficiency” of NRC process, the intervenors are blamed for all delays, and the solution is to eliminate formal process, including cross-examination. This is utterly ludicrous and outrageous. It is also arbitrary, capricious, an abuse of discretion, and a violation of the Atomic Energy Act, 42 U.S.C. §2239, the Administrative Procedure Act, 5 U.S.C. Chapter 5, and the First and Fifth Amendments to the U.S. Constitution.

- J. The Commission seeks public comment on the degree to which oral testimony and questioning of witnesses should be used in each of the proposed hearing tracks. *Id.* at 19620.

Response J.:

See comments below on specific rule change proposals. We object to the use of the hearing track process. All hearings should be formal with the right to call witnesses for direct examination and cross examination of opposing witnesses, fully utilizing the engine of cross examination in order to arrive at the truth. The NRC should conduct all hearings under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Removal of intervenor cross examination of witnesses in every kind of proceeding inhibits the fact-finding process and limits intervenor access to the hearing process. As intervenors often cannot afford expert testimony, absent open discovery and cross examination, intervenors are effectively stripped of an opportunity for a hearing. Ralph Nader and John Abbotts, *The Menace of Atomic Energy* at 328 (1977).

- K. The Commission requests public comment on: “(i) The relative value and drawbacks of cross-examination; (ii) whether the proposed approach that would limit cross-examination in favor of questioning by the presiding officer is appropriate; (iii), whether subpart L should retain traditional cross-examination as a fundamental element of any oral hearing; and (iv) assuming that cross-examination is necessary or more effective in certain circumstances to afford parties fundamental fairness, timely and effective identification of relevant and material information, or to provide public confidence in the hearing process, the appropriate criteria for identifying and distinguishing between proceedings where cross-examination should be used, versus those where cross-examination is not necessary. Assuming that cross-examination as of right is not afforded in certain circumstances (as is currently proposed for, inter alia, subparts L and N), the Commission requests public comment regarding whether parties should be

permitted to make oral statements of position, and, if so, whether time limits should be placed on such statements.” *Id.*

Response K:

See response to J and work cited there. See also comments on specific rule changes affecting the right to cross examination in III below and general discussion within II below.

L. The Commission requests comments on “whether firm schedules or milestones should be established in the NRC’s rules of practice in 10 CFR part 2.” *Id.*

Response L:

No. See also comments in II and III below.

M. The Commission requests comment on “the appropriate time frame for filing a petition/request for hearing and contentions.” *Id.*

Response M:

Persons requesting a hearing should have at least thirty (30) days from the time of notice by publication in the Federal Register to request a hearing and identify the aspects of the proceeding in which they desire to intervene and identify their standing in the matter. After an initial ruling on standing based upon this filing, petitioners should have at least forty-five (45) days to file contentions and the right to amend the contentions within fifteen (15) days of the pre-hearing conference. Additionally, petitioners should be free to amend contentions at any time to conform to evidence discovered and/or adduced at deposition and/or hearing.

N. The Commission requests comments on “whether parties to NRC adjudications should be required to engage in ADR.” *Id.*

Response N:

While ADR should not be required, there is good reason to encourage parties to attempt to settle differences without the necessity of hearings. Crucial to facilitating the use of such process, however, is the assurance that hearing opportunities will neither be lost nor curtailed nor schedules truncated when parties avail themselves of settlement discussions. Provisions in the rules should strongly suggest that proceedings be suspended during ADR or other settlement negotiations. All settlements should be on the record, except in cases where workers or other private individuals would be harmed by on the record settlements.

II. COMMENTS IN OPPOSITION TO THE PROPOSED RULES CHANGES.

A. The existing process was already unfair to intervenors.

Consumer advocate Ralph Nader and Public Citizen Staff Scientist John Abbotts noted, in the later 1970s, that citizen groups who decide to intervene in NRC licensing proceedings face severe obstacles. Ralph Nader and John Abbotts, *The Menace of Atomic Energy* at 328 (1977). Nader and Abbotts based this judgment upon a study by Stevin Ebbin and Ralph Kasper, *Citizen Groups and the Nuclear Power Controversy* at 40 (1974). Significantly, the situation Ebbin and Kasper documented, and Nader and Abbotts decried, has never improved. Moreover, the proposed rule will make the situation worse by limiting both discovery and the use of cross-examination.

Nader and Abbotts note that citizens come to the NRC proceedings “at the eleventh hour”--after the NRC and the license applicant have already made the essential decisions. Nader and Abbotts, *supra* at 328. When attempting to obtain a hearing, both the NRC staff and the utility oppose citizens. A large pool of attorneys who do nothing but nuclear regulatory law and proceedings represents the NRC staff. The license applicants generally utilize the high priced legal talent of senior counsel from mega law firms with ready access to cutting-edge information processing technology and an army of associates and support personnel.

Faced with such significantly impossible odds, intervenors must also demonstrate standing before they get a hearing. Due to increasingly stringent requirements, this is quite often not a simple matter. (If public confidence and access to NRC process were really the goal, the NRC could easily eliminate the difficulty by finding automatic standing to request a hearing for any person living within a 100-mile radius of an NRC applicant for a license or amendment to an existing license.) Often, intervenors are confronted with mounting an initial attempt to obtain a

hearing from an Atomic Safety and Licensing Board panel, only to find that they need to appeal an adverse standing decision to the Commission. See, e.g., *Yankee Atomic Electric Company* (License Termination Plan), LBP-98-12 (June 12, 1998) (denies intervenors' right to hearing based upon lack of standing).¹ Then, if the appeal is granted, they face an onslaught of opposing motion practice, briefs and replies from the NRC staff attorneys and the applicant's mega law firm—all before there is even an actual hearing on the merits.

This enormously increases the cost of intervention by increasing the legal fees and decreases the odds of any success. Without at least some legal assistance, most intervention efforts will not succeed. Were this situation not difficult enough, as Nader and Abbotts note:

Because they come so late to the process, and because technical and expert witnesses cost money, intervenors are often reduced to challenging the utility and the NRC staff via cross-examination. That is, because it is usually too difficult to mount direct testimony, in a short time period...the intervenors are forced to make their case in cross-examination. This, of course, results in large legal fees.

Nader and Abbotts, *supra* at 328. This obstacle is expanded by other procedural hurdles:

Intervenor challenges must also be limited to attacking the particular plant in the licensing hearing. Contentions on limited liability, proliferation, emergency core cooling, or other larger issues are not allowed. The intervenors cannot challenge the regulations of the NRC in a licensing hearing—they can only attempt to show that the plant will not meet the regulations. Changes in the commission's regulations can be considered only in generic rule-making proceedings.

Once further problem is that it is often difficult to obtain documents to challenge a utility's statements and conclusions. The safety data which are supposedly the

¹ The Commission should be well aware that the protracted periods of time in the hearing process should not and cannot be attributed to intervenors (who will, under the new rule, bear the brunt of truncated hearing procedures). Curiously, despite the fact that the issue was raised in the Commission's two day invitation only discussion on the proposed rule changes by professionals in the field of administrative law and public policy, the Commission did not bother to order a study of its cases. Had it done so it could have considered actual evidence in making the decision as to whether a change in the hearing process was necessary. Instead, the Commission chose to pursue this rule change to "relieve the regulatory burden" upon its applicants of allowing any meaningful public participation, without having any real evidence to reply upon in determining the scope and nature of the problem. Acting without evidence is the essence of arbitrary and capricious agency action.

basis for some utility and vendor statements are often classified as "proprietary data" and thus not disclosable to the intervenors.

Id. at 328-329. However, these are not the only barriers to public participation:

In addition to the procedural problems, the largest obstacle is cost. With fees for lawyers, expert witnesses, and travel expenses, an intervenor can spend \$100,000 or more--without a prayer of stopping the plant. Thus, citizen groups who initially decide to work "within the system" by stopping a nuclear plant in the most obvious forum--the NRC licensing process--find that the odds are hopelessly stacked against them. Interventions have resulted in the addition of safety systems or use of cooling towers, against the utility's original desires, but rarely will intervention stop a plant.

Still, there are many groups who claim that intervention has value. For one, the cross-examination can result in the release of information on nuclear safety problems which might otherwise remain hidden.

Id. The current proposed rule changes will not only make the use of formal hearing process discretionary, they will also curtail discovery and eliminate cross-examination of witnesses. This will effectively eliminate the few remaining reasons for intervening in the NRC hearing process.

Surely, if the NRC really desires to increase public confidence in its processes, this rule making is not the right way to do it. In this rulemaking, the Commission seems to have forgotten the findings of its own Special Inquiry Group report on the Three Mile Island accident, which states, in pertinent part, that

Intervenors have made an important impact on safety in some instances--sometimes as a catalyst in the prehearing stage of proceedings, sometimes by forcing more thorough review of an issue or improved review procedures of a reluctant agency. More important, the promotion of effective citizen participation is a necessary goal of the regulatory system appropriately demanded by the public.

Rogovin Report, Vol. 1 at 143-44 (emphasis in original). As an NRC Appeal Board also observed:

Public participation in licensing proceedings not only can provide valuable assistance to the adjudicatory process, but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental

issues which have received the scrutiny of licensing boards and appeals boards were raised in the first instance by an intervenor.

Gulf States Utility Co. (River Bend Units 1 and 2), ALAB-183, RAI-74-3, Slip. Op. at 10-12 (March 12, 1974). Yet, in this rulemaking, the NRC is bent upon getting the public out of meaningful hearings and making formal hearings entirely discretionary. This is a return to the 'bad old days' when the agency put the blame on intervenors for alleged delays in licensing. It was a serious mistake then--and still is now. Hearings assist the Commission in carrying out its mission to assure occupational and public health and safety in nuclear fuel chain enterprises. As former Commissioner Peter Bradford told a Senate subcommittee:

NRC hearings did not cause Three Mile Island. NRC hearings did not bring about the cancellation and default at the WPPSS units. NRC hearings had nothing to do with the quality assurances breakdowns at Diablo Canyon and Zimmer. NRC hearing are not causing the Midland containment to sink. NRC hearings are not even at the bottom of the cost overruns at Shoreham and Seabrook.

Peter Bradford, testimony, *Nuclear Licensing and Regulatory Reform*, Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works at 10 (July 14, 1983) (pagination from Bradford's original copy). Bradford also noted, "[C]ontrary to popularly held myth, the public hearing process has never delayed a single nuclear power plant's operation by a single week." *Id.* at 6. Moreover, the significant role intervenors play in the NRC formal hearing process has multiple, crucial effects that assist the NRC in carrying out its mission:

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

B. Paul Cotter, Jr., Chief Judge, Atomic Safety and Licensing Board Panel, memorandum to NRC Commissioner John Ahearn at 8 (May 1, 1981).

Were the NRC to implement the proposed rules changes to Part 2, all of the benefits of intervention would be lost, and the risk of another major nuclear accident will increase daily. Doing away with mandatory formal hearings, limiting discovery, eliminating cross examination--all of these changes will completely rend the fabric of the public hearing process as conceived under the Atomic Energy Act and as implemented by the AEC and NRC for over 40 years.

Now, on the basis of a single invitation-only meeting among agency personnel, industry lobbyists, a handful of intervenors' lawyers, a few representatives of NGOs, two academics, and only a few members of the public, the NRC believes it can justify sweeping away these historic hearing rights and replacing them with a simulacrum of that process. The Commission hopes to justify this massive sea change on the basis of the invitation-only hearing transcripts and the dicta in a string of court cases that even the NRC's General Counsel admits may not support the elimination of formal proceedings. It is as if the agency suddenly developed acute institutional amnesia concerning the lessons of nearly 50 years:

The current NRC adjudicatory hearing process was developed as part of a bargain from which the nuclear power industry gained a great deal in the late 1950's. In return for accepting extensive federal hearings, the industry was exempted from any state or local regulation of radiological health and safety and received the limitations on liability that are set forth in the Price-Anderson Act. Thus, citizens in any community in which a nuclear facility was to be located--a facility with a remote but not nonexistent chance of destroying the community--gave up both local regulation of the facility and the additional financial and safety assurance that normal insurance industry operations would have brought (assuming that coverage would have been available). In return they got a commitment to the full panoply of trial-type procedures as part of the federal licensing process. Now that memories have faded, the industry is seeking to revoke its share of the concessions

in that original bargain.² To point this out is not to say that the licensing process must forever remain unchanged in all respects. Still, it is an important history in the context of changes [that] would significantly reduce public participation in future nuclear power plant licensing proceedings.

Peter Bradford testimony, *supra* at 4. Such reduced public participation is exactly the opposite of the lessons-learned from the debacle at Three Mile Island:

The fundamental message of both [the Kemeny and NRC post-TMI investigations] documents was that the NRC should emphasize increased safety above expedited licensing and that licensing reform should include, as a high priority, assistance to responsible intervenors whose contentions were effectively stifled by inadequate resources.

Id. at 9. The NRC never did provide that assistance. Now it would cut off all future interventions at the knees. This is an illegal and unjustified course of action. It reflects totally arbitrary and capricious decision-making. It is a rash course of action, dominated by the nuclear industry lobby's wish-list, rather than the agency's mandate to assure that occupational and public health and safety are primary considerations at all every link in the nuclear fuel chain.

B. NRC's legislative and agency history supports formal public hearings.

Driven primarily by concerns over public health and safety taking a back seat to the promotion of nuclear power, Congress sought to separate the promotional and regulatory functions of the AEC into functions served by two separate agencies. The Energy Reorganization Act of 1974 §§ 1 et seq., 101-103, 202, 42 U.S.C. §§ 5801 et seq., 5811-5813, 5842, created the Nuclear Regulatory Commission out of the Atomic Energy Commission. S. REP.

² The formation of this "bargain" in relation to passage of the Price-Anderson Act is recounted in J. SAMUEL WALKER, *CONTAINING THE ATOM* at 198-213 (1992). For other perspectives on the history that the NRC is revising, see, e.g., DIANE CURRAN, *THE PUBLIC AS ENEMY: NRC ASSAULTS ON PUBLIC PARTICIPATION IN THE REGULATION OF OPERATING NUCLEAR POWER PLANTS* (1992); UNION OF CONCERNED SCIENTISTS, *SAFETY SECOND: A CRITICAL EVALUATION OF THE NRC'S FIRST DECADE* (1985); and DAVID LOCHBAUM, *FISSION STORIES: NUCLEAR POWER'S SECRETS* (2000).

NO. 93-980, ___ Cong. ___ Sess., reprinted in 1974 U.S.C.A.N. at 5470, 5471.³ Congress created the NRC in an effort to assure the existence of a unique agency of the federal government dedicated to protecting the health and assuring the safety of the public and workers in the nuclear energy field. Congress specifically chose to make this role distinct from that of the promotion of nuclear power. That role Congress vested in an agency ultimately called the Department of Energy. The history of the congressional process is instructive.

When the bill creating the NRC was reported out of the Senate, the committee amendments strengthened safety, safeguards, research, and informational access, including providing technical assistance to intervenors. *Id.* at 5476. The bill reported out of committee required the Nuclear Regulatory Commission to provide technical reports to any party to a licensing or related proceeding, including so-called citizen intervenor groups. *Id.* at 5478. The bill created civil and criminal penalties for the employees of nuclear firms or other persons who fail to notify the Commission where regulations are violated. *Id.* Additionally, with the public's right to be informed in mind, the bill required routine reporting of abnormal events at nuclear reactors. *Id.* at 5479. Finally, the greatest consideration given to the citizen-intervenors in rulemaking and licensing cases was "substantially increased access to safety and other technical information" under provisions of the bill which required the Commission to comply with "good faith" requests for relevant technical information and reports. *Id.* at 5485. An expedited process was also created to permit appeal of adverse Commission decisions on requests that particular studies be undertaken. *Id.* The final version of the bill had much of the same tone and incorporated

³ The history of AEC's failures, nuclear accidents, and problems in AEC health and safety assurance due to confusion of the promotional and health and safety functions is detailed in Daniel Ford's *Cult of the Atom* (1982); see also the revised, updated version, *Melt Down* (1986).

many of the Senate amendments in one form or another, except one notable provisions that would have provided compensation to intervenors for the cost of legal services. H. CONF. REP. NO. 93-1445, __ Cong. __ Sess, reprinted in 1974 U.S.C.A.N. 5538-5553.

The NRC, on examination of the legislative history, was “born” in a congressional climate that encouraged and supported the efforts of citizen-intervenors, a climate of concern that public participation be assured in decision-making regarding the matters of occupational and public health and safety in the processing, distributing, utilization, and storage of highly dangerous nuclear materials. A rational explanation for this aspect of the legislative record is that where the legislative decision-making was directed toward providing greater assurance of health and safety in this field through more effective and focused regulation, citizens who spurred on the regulatory process would be advancing the congressional purposes underlying the creation of the NRC. If that can be taken as a reasonable appraisal of the tenor of the Congress in passing the Energy Reorganization Act of 1974, it follows that a genuine examination of the legislative origins of the agency would provide the NRC with an incentive to try to create more, rather than fewer, meaningful public hearing opportunities for interested citizens.

This reading of the congressional intent is consistent with the subsequent legislative history of the so-called Sholly amendment following the accident at Three Mile Island. There, the issue was whether to permit the NRC to allow its licensee to engage in venting radioactive gas accumulated during the accident conditions before providing a public hearing opportunity on the public health and safety issues. S. REP. NO. 97-113, 97th Cong., 2d Sess. 14-16, *reprinted in* 1982 U.S.C.A.N. 3598-3600; *see generally Sholly v. NRC*, 651 F. 2d 780 (D.C. Cir. 1980). Although, ultimately, Congress amended § 189a of the Atomic Energy Act to permit the NRC to take such

actions, at the same time, Congress carefully limited the instances in which there could be no prior public hearing opportunity to those in which there were findings of extreme emergency. Atomic Energy Act, 42 U.S.C. § 2239; *see also* S.REP. NO. 97-113, 97th Cong., 2d Sess. 14-16, reprinted in 1982 U.S.C.A.N. 3598-3600. Again, when implementing these provisions, Congress clearly indicated its intent that citizens have meaningful opportunities to participate in the decision-making process whenever “the proposed license amendment involves significant health and safety issues.” H. Cong. Rep. No. 97-884, 97th Cong. 2d Sess. at 38, reprinted in 1982 U.S.C.A.N. 3608.

The above interpretations of congressional intent are consistent with the NRC’s own general counsel’s analysis as set forth in the rulemaking and underlying documents. Therein she states that the record of congressional intent concerning the provision of hearings indicates that Congress, in several crucial instances, believed the hearing opportunities would be “on the record” or formal, and that this situation, coupled with the length of time the Commission and its predecessor engaged in formal process mitigate against curtailing readily available “on the record” hearings to interested persons:

[T]he 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 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.

⁴ William H. Berman and Lee M. Hydemman, *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).

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).

....

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.

Karen Cyr, Esq., U.S. NRC General Counsel, "Re-Examination Of The NRC Hearing Process," SECY 99-006 at page 15 (January 18, 1999) (emphasis added). The mere length of time an agency engages in a particular practice is not dispositive of the practice being correct. Plainly, however, when the practice involves the provision of the rights to due process, redress of grievances, and to receive ideas, i.e., when the practice embraces rights under the Fifth and First Amendments to the Constitution, an agency must act with the greatest deference to the rights it has acknowledged under *stare decisis*. In such an instance, as is the rulemaking at issue, it is totally inappropriate for the NRC to conduct extremely limited public discussions— such as the ones contained in transcripts which comprise the entire "file" for this rulemaking— and claim, thereby, to have satisfied the need to provide adequate public opportunity to respond to a rule change that severely limits public access to substantive legal process and the exercise of substantive rights. The jurisprudence of the Administrative Procedure Act, Atomic Energy Act, and the First and Fifth Amendments to the Constitution require far more.

The NRC, notably, held many public meetings across the country recently to take comment on proposed changes to the Generic Environmental Impact Study on Decommissioning of Nuclear Power Reactors. The NRC issued that document in August of 1988. Yet, in this case, when attempting to change the entire body of rules governing the nature of substantive legal procedures and the exercise of substantive rights available to the public

pursuant to 42 U.S.C. §2239, the NRC held only a two day, “invitation only” meeting at headquarters in Rockville, Maryland. Moreover, many of the invited guests were attorneys. Some were nuclear industry attorneys and lobbyists. Some of the invited guest attorneys had not been involved in actual NRC hearings for many years. Only one of the intervenor attorneys has a practice devoted to NRC matters. More important, however, was the fact that the group assembled by NRC’s Office of General Counsel included only a few persons from the “general public.” Most were from beltway organizations, attorneys of such organization, and staff of such organizations. Surely, the NRC owes the public more than the tiny, invitation-only two-day gathering it held in this case before changing from meaningful hearings upon request to meaningful hearings solely at agency discretion.

Another troublesome aspect of the two-day meeting arises in consideration of statements made there by an academic expert on administrative procedure. He suggested that the NRC needed to do a quantitative study of its cases to understand the real basis of any problems in the schedules or time-lines of these cases. See Comment of Professor Jeffrey Lubbers, Professor of Administrative Law at Washington College of Law, American University, and former research director of the Administrative Conference of the United States, Transcript of NRC’s invitation-only meeting discussing proposed changes to 10 CFR Part 2 at 339 (Wednesday, October 27, 1999). This need is borne out by actual experience with NRC proceedings. Rather than intervenors holding back the progress of proceedings, the NRC staff and the licensees do that. (An example of this situation is provided herein above in § I, Response I; see also *Gulf States Utility Co. (River Bend Unites 1 and 2)*, ALAB-183, RAI-74-3, Sl. Op. at 10-12, (March 12, 1974), B. Paul Cotter, Jr., memorandum to Commissioner Ahearne on the NRC Hearing Process at 8 May

1, 1981), U.S. NRC Special Inquiry Group Report on Three Mile Island [Rogovin report], Volume 1 at 143-44, Licensing Speedup, Safety Delay: NRC Oversight, House Committee on Government Operations, H.R. No. 97-277 at 37-39, 42-43 (October 20, 1981), U.S. NRC, Commission meeting transcript, Discussion of Possible Steps to Avoid Licensing Delays, Remarks of Commissioner Asselstine at 5-6 (April 24, 1984)).

The NRC, therefore, has no rational basis to support a change in the rules governing the hearing process—let alone any justification adequate to curtail discovery and cross-examination, and abandonment of the Federal Rules of Civil Procedure and Federal Rules of Evidence as guides for the conduct of agency proceedings. Hence, the Commission's decision to go forward with the rulemaking is arbitrary, capricious, and an abuse of discretion.

Curiously, the NRC recently embraced a quantitative approach to inspections and enforcement, so-called risk-informed inspections and decision-making. Yet, while this methodology has been applied throughout the agency's most significant practices in attempting to assure the health and safety of workers and the public, when it comes to NRC adjudications, the agency conducts no quantitative analysis. In fact, despite the comments the NRC obtained during its pathetically inadequate invitation-only meetings upon which the proposed rule-changes are based, the NRC did not bother to analyze the available data to see if the changes were justified in reality.

The failure to apply its new quantitative approaches to analyzing the agency's adjudication history is no less inexplicable than the lack of any significant discussion in the proposed rule changes of the impact of these changes upon occupational and public health and safety—the NRC's *raison d'être* under the Atomic Energy Act. An agency, such as NRC, whose mission is to

assure that occupational and public health and safety are paramount considerations in its licensees' activities in the nuclear fuel chain, cannot change all of its legal procedures for adjudicating licenses to fabricate, possess, use, store, and dispose of nuclear materials without even considering the impacts of these changes upon occupational and public health and safety. Moreover, the NRC has given no consideration—quantitative or qualitative—to any of the historic contributions of intervenors in enhancing health and safety through interventions in licensing proceedings. Thus, the rulemaking at issue is arbitrary, capricious, irrational, and violates the Atomic Energy Act in failing to consider the health and safety consequences of changing the rules.

This is not the first time that the NRC has been involved in attempts to alter the rules for public hearings. NRC Commissioner Peter Bradford confronted congressional attempts to change NRC procedures in order to eliminate formal hearings and intervenors' cross examination of witnesses in 1978. In his testimony to the United States Senate Subcommittee on Nuclear Regulation of the Committee on Environmental and Public Works, Commissioner Bradford pointed out the extremely serious effects of making the hearing process informal, noting that the perceived greater efficiency of informal hearings comes at a price not worth paying when dealing with issues of occupational and public health and safety:

[A]djudicatory hearings, which the NRC currently uses for all contested power plant licensing issues, are a better way to get an accurate assessment of complex factual issues. If they are run effectively, they will not take significantly longer than informal hearings, but they will be a much more reliable decisionmaking tool. They are more reliable because they permit direct confrontation between the views of different parties under circumstances that allow each party a maximum of opportunity to probe the assumptions and the weaknesses of the other's position. Informal hearings, by contrast, allow the parties to make statements that contain untested allegations and assumptions and that need not face cross-examination. Within limits, this favors the witnesses who are most careless with the truth. In

any clash of statements the chances of the fallacious one prevailing, especially if they are sufficiently financed to be repeated by several witnesses, improve in direct proportion to the informality of the proceeding. As one of the officials who must pass judgment based on the records that will be built at these hearings I ask you in the strongest terms not to change the current adjudicatory format.

Testimony of Peter A. Bradford, Commissioner, U.S. Nuclear Regulatory Commission, Before the Subcommittee on Nuclear Regulation of the Committee on environmental and Public Works, United States Senate, at 3-4 (Wednesday, June 28, 1978) (pagination in original copy) (emphasis added). Note well Commissioner Bradford's concerns regarding cross-examination—one of the procedures the current rulemaking will make discretionary or vest in the hearing officers rather than parties. Commissioner Bradford carefully points out that cross-examination is the key tool in the hearing process for getting at the truth. He also points out that informal hearings favor “witnesses who are most careless with the truth” and, “[i]n any clash of statements the chances of the fallacious one prevailing, especially if they are sufficiently financed to be repeated by several witnesses, improve in direct proportion to the informality of the proceeding.” *Id.*

This is a very serious defect in the Commission's current rulemaking. First, the Commission proposes to make most hearings “informal.” In their requests for particular public comments, the Commission reveals its desire to make the process even less formal. At the same time, the proposed rules curtail intervenors' discovery process and eliminate the right to cross-examination of opposing witnesses. When combined with the issues raised by Nader and Abbotts concerning intervenors' needs to utilize cross-examination in lieu of having adequate funds for experts and other witnesses, it becomes clear that the proposed rule changes will not only further disadvantage intervenors by limiting discovery and eliminating cross-examination, but, informal hearings will favor the party with the money to bring in the most witnesses--i.e., the

applicant/licensees. Furthermore, it will promote this in situations that favor less candor and provide no means to reveal that lack of candor to the factfinders.

Thus, the rule changes proposed will effectively eliminate the right to a meaningful hearing to interested persons that the Atomic Energy Act §189a, 42 U.S.C. §2239, guarantees. This violation of the Atomic Energy Act will also deprive interested persons of the right to receive information and seek redress of their grievances which the First Amendment guarantees. Moreover, as the hearing at issue involves decisionmaking which affects the rights and interests of persons with standing to be heard, the failure to provide hearings with adequate due process, including cross-examination of witnesses, also violates interested persons rights under the Fifth Amendment. These are the fundamental, substantive rights of interested persons that the NRC's proposed rule changes will significantly burden or entirely eliminate.

Finally, the matter at issue in proceedings required under the Atomic Energy Act §189a involves decisions concerning licenses that have traditionally been accorded formal hearings under the APA. This "tradition" was based upon long-held legal views concerning the nature of the hearing to which licensees and others with an affected interest were entitled:

Under Section 189a of the 1954 act, the Commission must, "upon the request of any person whose interest may be affected by the proceeding," grant a hearing "in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." The term "dealing with the activities of licensees" relates to those rules and regulations which prescribe the terms and conditions imposed upon licensees, and also, it is believed, to those which set forth the grounds for suspending, revoking, or amending any license.

Although Section 189a does not specifically prescribe either a "formal" hearing or one "on the record" for rules affecting licensing, the section undoubtedly applies to such rule-making procedures where regulations involving licensing are concerned, particularly in view of Section 189b which provides for judicial review of "any final order entered in any proceeding" under Section 189a. In order for court review to be effected under Section 189b, there must be a record made under Section 189a. For the Commission to take any other position would be to

open the door to possible use of rule making by informal procedure without hearing to affect the substantive rights of existing licensees, where a formal licensing proceeding would otherwise be required by Section 189a.⁶

The reason why such a change in position would be problematic is that

Section 189a of the Atomic Energy Act is the provision governing the grant of hearings by the Atomic Energy Commission, in particular affecting licensing. It provides opportunity for hearings in both adjudicative cases (eg, the granting or revoking of licenses) and sublegislative matters (eg, the issuance of rules dealing with the activities of licensees). It is silent respecting an 'on the record' requirement for hearings. Nothing in the text or history of Section 189a indicates that Congress intended to depart from the dichotomy under the Administrative Procedure Act between adjudication and sublegislation. The AEC has therefore quite properly followed the accepted interpretation that an 'on the record' requirement is implied in adjudicative proceedings, but not in sublegislative proceedings involved in rule-making.⁷

It has long been held that "an established statutory right [to a license] requires adjudicatory disposition, and the procedure which is sufficient for the rule-making is not sufficient for that purpose[.]" *Zenith Radio Corporation v. Federal Communication Commission*, 211 F.2d 629, 633-634 (D.C. Cir. 1954). This could not be plainer:

The fact that Section 189a of the 1954 act does not contain the words "on the record" should be immaterial in the context of the provisions for adjudication and judicial review contained in therein and the broad interpretation place upon Section 5 of the Administrative Procedure Act, 5 U.S.C.A. § 1004, prescribing opportunity for a hearing in cases of adjudication "required by statute to be determined on the record" and upon Section 4(b), 5 U.S.C.A. §1003(b), requiring a formal hearing for rule making "required by statute to be made on the record after opportunity for an agency hearing." (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 48 (1950), *as modified*, 339 U.S. 908 (1950)).⁸

As provided under the Administrative Procedure Act and the procedure of the Commission, a "formal" rule-making procedure includes the use of a hearing

⁶ Courts Oulahan, "Federal Statutory and Administrative Limitations Upon Atomic Activities," in E. BLYTHE STATSON, SAMUEL D. ESTEEP, AND WILLIAM J. PIERCE, *ATOMS AND THE LAW* at 1227-1228 (1959).

⁷ Plaine, *Rules of Practice of Atomic Energy Commission*, 34 TEX. L. REV. 801, 811 (1956) (emphasis added).

⁸ Oulahan, *supra* note 6 at 1228, n.98.

officer or of the agency itself, the conduct of the hearing along lines of judicial procedure where practicable, and the rendering of a decision by such presiding officer, with appropriate review by the agency and by a court.

The inclusion of the requirement for “formal” rule making in areas in which that process closely resembles adjudication represents a salutary legislative policy. This policy does much to protect the interests of atomic energy licensees in administrative due process, as well as to advance the interests of the Commission in orderly procedures which inspire public confidence.⁹

Section 181 [of the Atomic Energy Act] provides that the “provisions of the Administrative Procedure Act shall apply to all agency action taken under this act.” Licensing under the Atomic Energy Act clearly constitutes adjudication under the Administrative Procedure Act.¹⁰

Thus, where the NRC proposes to do away with the protections of formal adjudication through this rulemaking, it is proposing to violate the Atomic Energy Act and the Administrative Procedure Act. Informal procedures may be fine for collecting information and establishing rules which do not affect substantive rights--such informality is not appropriate in the context of APA defined “license” proceedings as required upon request under the conditions enumerated in §189a of the Atomic Energy Act. *See generally CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995).

III. ANALYSIS AND CRITIQUE OF PROPOSED RULES.

A. General critical observations.

The following comments and suggestions for changes to the proposed rules are offered without waiving the general objections to the rulemaking and claims of statutory and constitutional violations contained herein above.

The following sections of the original rules were omitted from the table of changes to the rules at § II., B.-1 of the rulemaking: §2.720 Subpoenas, §2.733 Examination by Experts; §2.742 admissions; §2.743 Evidence; §2.754 Proposed Findings and Conclusions; §2.756

⁹ *Id.* at 1228-1229.

¹⁰ *Id.* at 1281.

Informal Procedure; §2.759 Settlement. These absences are confusing and inexplicable under the published proposed rule. There is no plain indication as to what has happened to these crucial portions of the original rules. This is a major defect in your notice to the public which, additionally, created an additional barrier to public comment on this rulemaking. Similar defects exist concerning the kind of hearings that would be provided in licensing a high-level waste storage facility, such as the Yucca Mountain Project. The Commission had rules under subpart J, but it is now not at all clear if those rules will apply to the Yucca Mountain Project licensing proceeding, or if just the old subpart G will apply. This confusion is patently unfair to persons living in the vicinity of the Yucca Mountain Project who now have no way of knowing exactly which sections of the NRC regulations will apply to the licensing of Yucca Mountain. Such persons are now extremely disadvantaged in terms of obtaining counsel for such proceedings, as no counsel would have a way of explaining to such interested persons what the potential costs and timing would be of the process, due to the lack of clarity in the proposed rule concerning subpart J versus subpart G. Additionally, this lack of clarity is compounded by the fact that the rule-making is not clear about how the proceedings under subpart G would be conducted in relation to the existing subpart J requirement under revised rules that the Commission now says require subpart G proceedings instead of subpart J. Due to these confusions, no interested persons in the vicinity of Yucca Mountain--or interested persons living along the rail and highway routes along which all of the high-level waste would be shipped to Yucca Mountain--have a way of knowing which rules will apply to the licensing hearings.

B. Comments on proposed rules.

- §§ 2.1, 2.2 General objection: We oppose change to the exiting rules unless they are changes that maintain formal requirement, make it easier for intervenors to have standing to intervene, provide ready access to NRC and licensee documents, provide actually useful and locally accessible sources of NRC and licensee documents to all interested persons, provide legal assistance to intervenors through an “ombudsperson” office with attorneys whose function and command structure is separate from the Office of General Counsel, guarantee local hearings, and provide necessary funding to have meaningful interventions using expert assistance and counsel. Additional general objection: there should have been a red-lined version of the rules published clearly showing the changes from the existing Part 2. Without that, it is very difficult to provide comments on these rule changes. Where rules are skipped, our general objections apply.
- §2.101(a)(3)(ii) Required filing information should include an e-mail address. Instead of ‘affidavit’, a declaration should be required. affidavits are more difficult to obtain than declarations and create unnecessary hurdles for participating in both formal and informal proceedings.
- §2.101(b) Same objection. Note a continuing objection whenever e-mail address is not requested when available and declarations requested instead of affidavits.
- §2.101(g)(2) Revised pages should be required to be clearly labeled as such with each page listing the revision number (e.g., 0, 1, 2, etc.).
- §2.102 Needs to be completely revised to reflect the Commission’s abdication of any meaningful anti-trust review. This section gives the public the false impression that the NRC engages in any meaningful anti-trust review under its current policies.
- §2.107(a) Section should make plain that it tracks the Federal Rules of Civil Procedure which allow for recovery of fees and costs to the non-moving party when the interests of justice so require. Additionally, changes under this section are unnecessarily confusing. The second sentence implies that there could be a presiding officer who ‘shall’ dismiss an application before there ever was a notice of hearing--how could that be possible?

- §2.108 This section in the original unchanged portion needs to be changed to clarify its meaning. The first sentence is entirely garbled. (Some doubt is cast on the integrity of this rule change process by the NRC staff and OGC's failure to notice such glaring errors in the original rule and take this opportunity to correct them, yet took such great care in excising interested persons' adjudicatory rights.) Additionally, this section is flawed as the NRC staff should be required to review an application and move for approval or dismissal, per section (c), to make for greater efficiency. Staff should also be required, at this stage, to obtain any and all documents and information required to conduct an evaluation of the application prior to conducting that evaluation. Further, in the event that an applicant fails to meet such requirements for information and documentation within 60 days, the application should be required to be rejected. This would avoid the staff wasting precious agency resources (and, perhaps, later the resources of the Atomic Safety and Licensing Board panel and intervenors) when the staff is unable to place an SER, EA (or EIS or FONSI) and all other required licensing documents in the docket for the application prior to approval of the application and notice of a hearing opportunity. The current approach to collecting this information results in an enormous waste of taxpayer monies that the agency would do well to eliminate instead of eliminating the ready availability of formal public hearings.
- §2.300 Objection to entire section; should be struck in favor of formal hearing rules under existing subpart G.
- §2.301 This does not properly track requirements of Chapter 5 of the APA.
- §2.302 Given lack of universal access to computers, this is problematic and should be revised to accommodate the least electronically equipped person participating in a proceeding. Also, filing should be identical with certification of service. This promote efficiency and ease of participation by unrepresented persons.
- §2.303 Similar objections apply as to 2.302. Dockets in paper form should be available at locations convenient to any interested persons who could have standing to participate in the proceeding. There should be a docket file at each NRC Regional office in which a facility seeking license amendment is located. In high-level waste licensing, there should be docket files at local public libraries convenient to every rail and highway route that may be used to transport the

waste, as well as all public libraries and NRC offices in the state where the waste may be stored. Use of an electronic docket in the high level waste licensing proceeding is extremely problematic for small groups of intervenors who cannot afford technological access to the NRC proceeding. The approach the NRC had taken to this under the existing rules (and the proposed rules) is a gross denial of such interested persons rights to due process of law under the Fifth Amendment, a violation of the hearing rights provided for by the Administrative Procedure Act, the Atomic Energy Act, and the Nuclear Waste Policy Act.

- §2.304(b) Bound? What does that mean? Stapled? If not, how bound? What constitutes “good unglossed paper” ? Why not specify paper weight and brightness using paper industry standards? Instead of “standard letterhead size” why not 8 1/2” x 11 1/2”?
- §2.304(c) Should read “capacity or authority” to clarify. Language used here should track Fed. Rules of Civil Procedure, Rule 11(b)(1).
- §2.304(d) Three documents? Why not just one paper copy or electronic copy?
- §2.304(f) Either the agency should use paper copies in all proceeding or provide computers and internet access to all intervenors. Demanding paper where there is electronic filing is a waste of paper. Demanding electronic filing where there is no access to the technology and lack of sufficient experience using it is a violation of due process. Additionally, permitting and/or requiring two sided copying would save paper and storage space. Also, why not say an electronic signature or an original and two paper copies of the signature pages only?
- §2.304(g) Should provide for notice of defect and reasonable time for an opportunity to cure it with automatic docketing unless struck. Language used should be “any document that substantially fails to conform...” to avoid elevating form over substance when the remedy is as dire as striking a pleading and then have the filer be out of time for refiling.
- §2.306 Time limit should be 12 noon to eliminate gamesmanship by e-mail or faxes at 4:45 PM which force the opponent to lose a day.
- §2.309 In a high-level waste proceeding, this vests discretion in the judge to shut out would-be intervenors who cannot meet the costs of

technical experts to get onto the electronic docket or did not participate earlier because the organization had not been in existence during the 30 day period when the docket opened. The rule need to specify a procedure for ruling on this issue to assure fairness and provide notice of what procedure will be used.

Also, by joining contention filing with requests for hearing, the Commission overburdens interested persons by requiring them to spend the time and money on drafting contentions with expert support and supervision before they know if the Commission will grant them a hearing opportunity based upon their standing. Moreover, there needs to be an appeal provision if one is shut out of the hearing on this basis.

§2.309(b)

It is significant, and we contend, reversible error on the part of the Commission that the Regulatory History of the Proposed Rule, including the comments of the Chief ASLB Judge, the Hon. Paul Bollwerk, concerning this issue, were not provided to the public in the rulemaking file. Not only did the Commission choose, without any explanation, to ignore many of the salient comments Judge Bollwerk filed, it also failed to disclose and provide these important criticisms to the public in a way that they could be easily found. The Commission's action, in this regard, is arbitrary, capricious, and an abuse of the Commission's discretion. Commission experience, and that of its Chief Judge, which the Commission has not explained away in this rulemaking, reveals that there is often not enough time to file contentions along with the request for hearing and declarations proving standing. Thus, this change to the rules denies interested persons under their right to notice and an opportunity to be heard on the data the Commission had before it in reaching the decision to change the rule. This implicates a denial of 1st and 5th amendment rights as set forth herein above.

On the matter of timing at (b)(2)--what proceedings would not have notice in the Federal Register?

§2.309(c)(1)(iii)

How can the NRC, whose jurisdiction is predicated upon assuring occupational and public health and safety omit consideration of these matters in weighing whether to permit a non-timely filing? To put such consideration vaguely under the term 'other' (if at all) appears to be a complete abdication of the agency's responsibilities under the Atomic Energy Act. The overt absence of these considerations in evaluating a late intervenor's claim to participate taints every other aspect on the criteria listed herein. Without

primary consideration of these factors, the Commission sends a strong signal that only persons of wealth and property (i.e., corporations) may be permitted to file late, i.e. the greater claim to property and financial interest, the less consideration will be given to tardiness in filing.

- §2.309(d)(1) Having a telephone should no more be a requirement to participate in the hearing process than having a computer.
- §2.309(d)(1)(ii) 'Act' should be defined to include NEPA and NWPA and any other federal statute upon which one may reasonably premise intervention. A better locution would be "under law."
- §2.309(d)(1)(iii) The same argument applies as above. This rule illustrates the patent bias of the NRC staff and the Commission in allowing this rule to be published. Plainly, the Commission and Staff have forgotten their charge under the AEA.
- §2.309(d)(3) What is intended by the phrase "among other things"? What things? One's race, ancestry, clothing? What criteria are to be used and how, without notice of them, can interested persons under § 189a be assured that improper and unconstitutional criteria are not being employed (let alone criteria that are arbitrary, capricious, and an abuse of discretion)?
- §2.309(e)(1)(ii) Again, property and financial condition are the compelling criteria. There is no clear standard provided to the trier to differentiate the application of this intervention from intervention as of right because the same standard is used to weigh the intervenor's claim.
- §2.309(f)(1)(iv) The use of 'materiality' is confusing here, and there is no plain statement of requisite findings. A clearer statement of the requirement would be to state that, "The issue must be arguably relevant to one that the NRC must decide in order to grant or deny the application at issue."
- §2.309(f)(1)(v) The requirement is not unreasonable if and only if adequate time is allowed to the intervenor in preparation of such materials. Moreover, the petition to intervene and have a hearing could be decided adversely on standing or other issues, and, without more, it is inherently unfair, inefficient, and wasteful of government and private resources to force an intervenor to prepare both steps of the hearing admission process at the same time. The ASLB Chief Judge expressed the same opinion concerning the rule to the

General Counsel and the Commission. Inexplicably, his comments did not find their way into the public rulemaking file.

§2.309(f)(1)(vi)

The same criticism applied here as above. Again, also, the use of “materiality” should have a plain-language phrasing—see suggestion above.

§2.309(f)(2)

There should be some provision for filing contentions based upon documents which will be provided later which are not SERs, EAs, EIS,—e.g., if a scientist has made preliminary findings and is in the process of experimentally verifying those findings at the time the contention must be filed, it is not unreasonable to permit filing of a contention supported solely by the preliminary finding. Here, the information was only available as an hypothesis. Until the final report is out, such material should be permitted to support a contention.

Another problem with this section is that by law, no new environmental document would be necessary unless there were a “significant” difference in data or conclusions—so this requirement appears redundant. Also, data or conclusions are not global enough terms. To comply with NEPA and interpretive judicial opinions of long standing, this must also include “proposed actions or components thereof.” and alternatives to such actions (if applicable), and omission of such actions (if applicable). Moreover, permission to amend contentions should be freely given when justice so requires. See Federal Rule of Civil Procedure 5(a). Predicating the decisions upon a showing of “material difference” is a much higher standard than that of “changed facts and circumstances.” It is arbitrary, capricious, and an abuse of discretion, and a denial of one’s right to due process for the NRC to allow a standard for amending in private actions covering ones financial and property interests to be so much less stringent than that used in proceedings affecting the health and safety of millions of people. Another defect in this section is that the materiality of a change in fact or circumstance may not be immediately apparent. Thus, the rule at (2)(ii) would never permit amendment, as one would always be waiting for the material difference to become immanent.

§2.309(h)(2):

Five days for a response to the filing of an opposition to an industry or NRC opposition to a citizen petition for leave to intervene or for a hearing. Ten days is the minimum necessary response time for such weighty and potentially dispositive pleadings. Cf. FRAP 27(a)(4), which provides for seven days for a

reply to a motion response, and FRAP 31(a)(1), which provides for a fourteen day response period to an appellant for the filing of reply briefs.

- §2.310: All references to the use of the informal procedures should be stricken and replaced with references to subpart G.
- §2.311: There should be an automatic stay provision that stops the proceedings while the intervention and/or hearing issues are decided. Fairness, efficiency: otherwise the proceeding may have to begin all over again if the decision below is reversed and the citizen group is allowed to intervene.
- §2.312(b): This section should include a further criterion on time and place of the hearing: “the ability of the affected public to participate.”
- §2.313(c): This section should permit the filing of exhibits as well as supporting affidavits/declarations. Should contain a legal standard applicable to the disqualification issue: “A presiding officer or board member should be disqualified if such officer or board member has a conflict of interest, an appearance of such a conflict is apparent, or if a reasonable person would conclude, based on the totality of the circumstances, that the officer or board member might not be impartial.”
- §2.313(e): This section should allow at least 10 days to file the motion. Five days is on its face an insufficient period of time for a potential movant to determine that a disqualification motion is appropriate.
- §2.314(a): This section should contain the more substantive criterion of “adherence to the truth” in addition to such things as “dignity and decorum.”
- §2.314(b): For-profit corporations should have to be represented by attorneys, as the common law provides. Individual persons and citizen groups, including non-profits, should be permitted to appear pro se in recognition that they may not be able to afford attorneys. Persons without telephone or fax numbers should be permitted to file appearances. The appearance should include “the name and address of the person *or entity* on whose behalf he or she appears...”
- §2.314(c)(1): Contemptuous conduct should be the only ground for the discipline referred to here. The other categories are vague and

overbroad, in violation of the First and Fifth Amendments. For example, a lawyer may have sound legal grounds for refusing to comply with the presiding officer's "directions." Zealous advocacy within the bounds of professional conduct may be viewed as "disorderly" or "disruptive" by some.

- §2.314(c)(2),(3): The stays provided for in this section should be automatic, not discretionary.
- §2.314(c)(4): Seventy-two hours is insufficient. Five days would be more appropriate.
- §2.315(a): The last sentence in this section should be revised to read: "Such statements of position shall be considered as part of the record in the proceeding."
- §2.315(c): First sentence: delete the phrase "federally recognized." There may be Indian tribes who are not yet federally recognized that may have legitimate interests to protect. Delete the phrase "where cross-examination is permitted," since we are taking the position that cross examination should always be permitted. Delete the last sentence, since the subject matters in question may not be known or knowable "in advance of the hearing." Or at least make clear that depending on how the evidence develops, the specified representatives may broaden their participation beyond the specification filed beforehand.
- §2.315(d): This section should track FRAP 29, which governs briefs of amici curiae, in the following respects: such briefs should be able to be filed with the consent of all parties, not merely in the discretion of the Commission (see FRAP 29(a)); and the party seeking to file the brief should be permitted to do so no later than seven days after the brief of the party being supported is filed. (FRAP 29(e)). Finally, the motion for leave to file an amicus brief may be filed with the brief itself. (FRAP 29(e)).
- §2.316: This section should be deleted. Giving the discretion to the Commission to force parties to consolidate their presentations when they have "substantially the same interest" will create chaos and injustice because: (a) it is unclear what this standard means, particularly since parties with similar goals may disagree strongly on means and strategy; the Commission will have to make value judgments based on their own views which will doubtless differ from the views of the parties themselves; (b) such a decision by the

Commission could effectively deny parties representation by counsel of their own choosing; (c) groups with the same interests may have very different legal strategies and may wish to present opposing, and even contradictory, evidence; (d) the rule may create serious ethical binds for lawyers, who could be in effect forced to represent parties with serious disagreements and force lawyers to breach the requirement of confidentiality in the process of doing so.

§2.319(b): This section should eliminate the clause beginning “upon the requestor’s showing of general relevance...” It should be up to the party receiving the subpoena to move to quash it on such grounds. Having a dual-tier requirement is inefficient and unnecessary.

§2.319(c): Same comment as §2.316.

§2.319(d): What does the word “strict” mean in this context? Either the rules of evidence apply or they don’t.

§2.319(h): Delete as vague the phrase “or similar matters.”

§2.319(m): For the sake of efficiency, predictability, and finality, there should be a legal hurdle for the re-opening of evidence. Otherwise, the proceeding could be endless, and parties would be encouraged to sandbag opponents by waiting until the last possible time to present evidence. I would add to this section the following clause: “... when newly discovered evidence exists or the taking of further evidence may be necessary to protect the public health or safety.”

§2.319(p): Replace the phrase “consistent with” with “authorized by.” I suspect there are many bad things that might be construed to be “consistent with” the act that would be ultra vires because they are not authorized by it.

§2.320: This default section is far too severe. Mere non-compliance with a pre-hearing or discovery order should not give rise to default. There should be an exception where the non-complying part can give a reason therefor (perhaps an excusable neglect standard), and any sanction should be reasonably related to the prejudice, if any, caused by the non-compliance. If there is no prejudice, or prejudice is slight and/or curable, there should be no default. Otherwise, the proposal would violate due process and the First Amendment. As written, the rule favors a party with superior resources who can overwhelm the other side with discovery requests that cannot

reasonably be complied with given the shortened deadlines provided for by these proposed regulations.

- §2.320(a),(b): Does this mean that the finding of facts or taking of proof will be done without notice to the party that has erred during the discovery process, or the other parties involved? If so, it violates due process. In cases where several citizens' groups have intervened, and only one such group has violated a pre-hearing or discovery order, the drastic steps specified here would prevent the "innocent" groups from having an opportunity to present their cases, and thereby would violate due process and the First Amendment.
- §2.323(b): The reference to oral motions under subpart N should be deleted, since we oppose the entire subpart as well as the oral motion provision. The requirement that no motion be filed without a lawyer's certification that he or she has attempted to resolve the issue with the opposing side (which is reasonable in the discovery context) is a waste of time and resources when applied to substantive issues that will rarely if ever be negotiable.
- §2.323(d): The goal of accuracy in filing is laudable, but again, sanctions should be rationally related to the violation involved. Query as to what "striking a matter" from the record means. Does this mean striking of the offending pleading? The term "in extreme circumstances" is undefined and gives the agency far too much discretion. The dismissal of claims or parties should be permitted only when the party, by "reckless or intentional conduct that is either calculated or bound to mislead the Commission or cause irreparable harm or prejudice another party."
- §2.323(e): One should not have to ask leave to file a motion to reconsider. If the motion itself meets the legal standard of "compelling circumstances," then a request for leave to file it is surplusage.
- §2.323(g): The filing of a motion, petition, or certification of question to the Commission should automatically stay the proceedings. Otherwise the proceeding may go forward with a built-in flaw that may require starting all over from square one.
- §2.325: This section should specify what the burden of proof should be. Because cases involving nuclear power have grave implications for the public health and safety, applicants should be held to the beyond a reasonable doubt standard of proof, or at the very least,

the clear, unequivocal, and convincing standard. As the Supreme Court has held:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is 'to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.

The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal' and 'convincing,' is less commonly used, but nonetheless 'is no stranger to the civil law.' One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of

proof. Similarly, this Court has used the ‘clear, unequivocal and convincing’ standard of proof to protect particularly important individual interests in various civil cases.

Addington v. Texas, 441 U.S. 418, 423-24 (1979)(citations omitted). The public health and safety are of such paramount importance that a heightened standard of proof is constitutionally required in nuclear cases under the Due Process Clause. Given the threat to the health and safety of the public posed by the consequences of error in such cases, the nuclear industry should be required to prove each case beyond a reasonable doubt, so as, in the words of *Addington, supra*, “to exclude as nearly as possible the likelihood of an erroneous judgment.”

At the very least, the nuclear industry should be required to prove their cases before the NRC by clear, unequivocal and convincing” evidence, since, again in the words of *Addington*, “[t]he interests at stake in those cases are deemed to be more substantial than the mere loss of money...”

§2.326(b): In the second sentence in this section, the phrase “competent individual” may refer to the sanity of the affiant. While it is true that, in NRC cases, it would arguably be appropriate to require affiants to demonstrate as a threshold matter that they are mentally competent, this may not be what the Commission had in mind, and hence the phrase should be clarified.

§2.327(c): In line three, there is a spelling error. The word “therefore” should read “therefor.” The second sentence should be modified to require that the charge specified by the Administrative Judge be a reasonable one. Recordings of daily sessions should be provided free of charge to citizen’s groups and non-profit organizations. Otherwise the parties with the most resources (the nuclear industry or its allies and affiliates) will enjoy an unfair advantage.

§2.328: This section violates even minimum standards of due process of law under the Fifth Amendment because it gives the NRC unfettered discretion to determine whether the hearing will be public or not.

§2.329(b): The stated objectives should also include: fairness to all parties, taking reasonable steps to ensure that the outcome of the proceeding will not be affected by disparate resources available to

the parties; and reaching a correct result based on the best available science and a paramount concern for the public health and safety.

- §2.329(b)(10): Delete the reference to limitations on cross-examination.
- §2.329(e): The parties should be permitted ten days, not five, for filing objection to the pre-hearing conference order, and the filing of such objections should automatically stay the decision.
- §2.332(b): The following factor should also be considered: The relative resources available to the parties.
- §2.332(c): The objectives should include the additions suggested above to the objectives under §2.329(b).
- §2.333(b): Strike the word “argumentative.” Questions may be deemed argumentative; evidence is never argumentative.
- §2.334(a): First line should read “the presiding,” not “the residing.” Errors like this call into question whether the NRC has spent sufficient time considering these proposed regulations.
- §2.335(d): Should include an automatic stay provision.
- §2.336(a): Strike the exception for subparts G and J. Intervenors should have 60 days to provide discovery. Otherwise they will have to begin to gather it, generally with a substantial outlay of time and expense, before they know whether or not they have been admitted to the proceeding.
- §2.336(b)(2): The term “NRC correspondence” should be clarified so as to include all exchanges of information, including all documents and all means of communication, including electronic means.
- §2.336(b)(4). Delete the use of the pathetic fallacy. Documents are inanimate objects and hence they cannot “act” on an application. The discovery should include all documents “relevant to the application or proposal... .”
- §2.336(d): Disclosure should be “forthwith,” not within 14 days. As written, a party could wait to disclose an important document until after the hearing had been concluded.

- §2.336(e)(1): Again, sanctions should be reasonably related to the issues of prejudice to an opposing party or intentional or reckless conduct calculated or bound to mislead the tribunal. It would be ludicrous to dismiss a contention, for example, simply because an intervenor had failed to disclose the telephone number of an expert witness.
- §2.337(4)(d): Documents disclosed during any settlement negotiations were almost certainly discoverable to begin with, and so there should be no need to go through the discovery or subpoena process as a predicate to their use at a hearing. This paragraph should instead provide that, by disclosing a document at a settlement conference, the party producing the document does not waive any claim of privilege.
- §2.337(h)(2): The waiver of further proceedings should not extend to fraud, newly discovered evidence, or a substantial change in material circumstances.
- §2.339(b): Delete. There should instead be an automatic stay provision.
- §2.339(c): Delete. This section, if enacted, would effectively moot the appellate process, thereby violating Due Process of Law.
- §2.339(f)(2): The proposed section providing that “the Commission will not decide that a stay is warranted without giving the affected parties an opportunity to be heard” is skewed in favor of the nuclear industry. If hearings are to be required, the Commission should hold one when the shoe is on the other foot.
- §2.339(i): This list of factors to be considered should specifically include the public health and safety, and provide that this consideration should be of paramount and dispositive weight.
- §2.340(b)(1): A party should have 30 days to file a petition for review, and an opposing party should have an additional 10 days to file a cross-petition. (The Commission has 40 days— see §2.340(a)(2).)
- §2.340(b)(3): The petitioning party should have ten days, not five, to file a reply brief, and the page limit should be ten pages, not five.
- §2.340(b)(4): See discussion of §2.339(i) for inclusion of public health and safety among the factors to be considered.

- §2.340(b)(6): This is inefficient and inflexible. The Commission should have the discretion to decide such petitions for review to save time, or remand them for consideration along with the petition for reconsideration.
- §2.340(e): This should be deleted and replaced with an automatic stay provision.
- §2.340(f)(1)(I): Should include the possibility of irreparable harm to the public health or safety, not merely harm to a party.
- §2.340(f)(1)(ii): This sentence is awkward and inadequate. Interlocutory review should be permitted if the failure to permit review could result in substantial prejudice to a party or to the public health or safety in the conduct of the proceeding.
- §2.341: Stays should be automatic. These provisions should apply to parties who wish to apply for relief from the automatic stay.
- §2.341(e): Again, the factors should include the public health and safety as paramount and generally dispositive concerns.
- §2.344(b): Delete the phrase “which could not have been reasonably anticipated.” It is irrelevant whether a particular error of law in an NRC decision could have been anticipated by a party. The point is that the decision was erroneous. In any event, errors in the decisions of the NRC are arguably foreseeable as a matter of law. No federal agency is infallible. That is why we have judicial review.
- §2.345(a): Add the following: “prescribe *fair and reasonable* procedures... .”
- §2.345(c): Add the following: “unless good cause *or excusable neglect* is shown for the late filing, *or acceptance of the document would be in the interests of fairness, justice, the public interest, or no party would be substantially prejudiced thereby.*”
- §2.345(i): Add the following: “... where the request *substantially and materially* fails to comply with the Commission’s pleading requirements... .”
- §2.346(d): Add the following: “... require the party to show cause why its *application, claim or interest...*” Again, any sanction should be reasonably related to the nature and degree of the misconduct, and the prejudice to other parties or to the integrity of the tribunal.

- §2.346(f): This section should explicitly state that public communications, such as statements to the news media, conversations in an elevator, etc., which may be overheard by the Commission or its staff, do not constitute ex parte communications.
- §2.390(a): The NRC violated this proposed rule in connection with the rule-making process. Describe here the issue of the inadequacy of the Adams system. Delete the phrase “in the absence of a compelling reason ... and the public interest in disclosure.” The list of exemptions set forth immediately below should be all-inclusive.
- §2.390(a)(7)(iv): Add the following: “Could reasonably be expected, *even with appropriate redaction of identifying information*, to disclose the identity of a confidential source *whose identity is required by law to be protected*.” Delete the clause beginning “including a State...” And ending with “which furnished the information on a confidential basis...” As written, this clause is overly broad and would mandate the suppression of a great deal of relevant information that should in the public interest be disclosed.
- §2.402(b): Add to the laundry list in the last sentence, the following factors: “the relative resources available to the parties, the availability of convenient and affordable public transportation to the place of the hearing, and considerations of fundamental fairness.”
- §2.604(c): The requirement that an intervenor file a notice of intent to remain as a party with supporting documentation is unnecessary and unduly burdensome, particularly to parties with limited means. It should be deleted.
- §2.702: The issuing officer should not be able to require a threshold showing of “general relevance of the testimony or evidence sought.” Instead, the attorney or person seeking the subpoena should be subject the requirement of FRCP 45(c)(1) to “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena,” and to the sanctions provided in the rule for breach of this duty.
- §2.702(f)(1): The ability of the issuing officer to quash or modify a subpoena “if it is unreasonable” is vague and vests unfettered discretion in the agency in violation of due process of law. It would be preferable for the Commission to adopt FRCP 45(c)(3), which sets forth detailed standards for the quashing of a subpoena. In general, it would be preferable for the Commission to adopt the tried and

true Federal Rules of Civil Procedure where applicable rather than attempting to devise rules of procedure that have not stood the test of time and have not been thoroughly thought through.

§2.702(h): Delete or modify to provide for a fair and equitable procedure to compel the testimony of NRC personnel, or the production of NRC records or documents.

§2.703(b): Delete the second sentence. Its meaning is unclear and it is overly broad. A lawyer cannot be responsible for the way in which a layperson or expert witness cross-examines a witness. In the American system of justice, guilt is personal. In any event, what does such a “responsibility” imply? Is the lawyer strictly liable for the peccadillos of the questioner? The rule does not specify. It will cause more problems than it can possibly solve.

§2.704: General Comment: The truncated deadlines unfairly favor the parties with the most resources and burden those with the least resources. The NRC has made no showing that these shortened discovery procedures are necessary or reasonable. Hence they violate due process.

§2.704(a): Delete the exemption for the NRC staff.

§2.704(a)(2): The term “documents” should be expanded to explicitly include within its scope electronic information, such as emails, information on computer drives, etc.

§2.704(a)(3): Forty-five days is unreasonably short. At least 60 days should be allowed.

§2.704(b)(3): The next-to-last sentence, beginning “If the evidence is intended solely to contradict...” Is not a complete sentence, and is utterly incomprehensible. Such glaring errors cast grave doubt on the time and thought given to these proposed regulations.

§2.704(c)(1): There should be no exemption for the NRC staff.

§2.704(c)(3): Fourteen days for the filing of objections is patently insufficient, and unfairly favors the parties with the most resources and penalizes the impecunious. At least 30 days should be permitted. Add to the final clause of the last sentence of this section, the following: “... for good cause shown, *including, without limitation, facts*

disclosed on cross-examination of a witness that render a document inadmissible.”

- §2.705(b)(1): This proposed rule is workable and fair only if the ADAMS document system is fixed to permit general computer access of documents with ease of location, reading on screen, and high speed downloads of documents.
- §2.705(b)(2)(iii): This factor cannot reasonably be applied without advance disclosure of the information sought. Hence it is irrational and an obstacle to a fair and efficient discovery process.
- §2.705(b)(5): The Commission should set a limit of 100 on the number of interrogatories to prevent oppressive tactics and giving the parties with relatively greater resources an unfair advantage. Cf. FRCP 33(a), which limits the number of interrogatories to 25, “including all discrete subparts.”
- §2.705(g)(2)(iii): The proposed factor of “the amount in controversy” should be deleted and replaced with “public health and safety.”
- §2.705(g)(3): This is the proper way to deal with pleadings that are unsigned. Cf. §2.304(e), *supra*, which is in conflict with this provision and is unreasonable and inflexible.
- §2.705(g)(4): Once again, sanctions should be reasonably related to the nature and degree of the violation, whether a party has been prejudiced, or whether the integrity of the tribunal has been eroded or threatened. The termination of a person’s right to participate in the proceeding should occur only in the most egregious of circumstances.
- §2.706(a)(7): Add to the second sentence, the following: “...any party may introduce any other *parts that are admissible in evidence.*”
- §2.706(b)(1), n.4: This footnote appears to be out of place, and speaks of “financial snactions” [*sic*], errors that suggest that the Commission failed to spend adequate time and thought in the preparation and promulgation of these proposed rules.
- §2.706(b)(2): The person answering the interrogatories should reproduce each question along with each answer in order to make them readily comprehensible to the reader. To facilitate this process, the party propounding the interrogatories should provide an electronic copy (disk or email) to the person to whom they are directed. Fourteen

days is a grossly inadequate time to respond to interrogatories, particularly where, as here, the matters in question are detailed and highly technical. The time period allowed should be at least 30 days, as provided by FRCP 33(b)(3). Otherwise a party with greater resources could overwhelm a party with relatively scant resources. This is particularly the case where, as here, no limit has been set on the number of interrogatories. N.B. that proposed rule §2.707(d) provides 30 days for a response to document requests, which generally require less response time. There is no rational reason for permitting only 14 days to respond to interrogatories.

- §2.709: Discovery against NRC staff should be permitted in the same manner as with other parties. Hurdles such as the one in §2.709(a)(1) (“showing of exceptional circumstances” required to compel testimony of an NRC employee) are fundamentally unfair, unduly burdensome, unnecessary, and violate due process.
- §2.709(d)(4),(e): For “reasonably obtainable from another source” substitute “readily obtainable from another source.”
- §2.710(a): The party opposing a motion for summary disposition should have 30 days to respond, not 20.
- §2.710(d): The summary disposition procedure should never be used to grant the issuance of a permit. The Commission should always make an independent determination as to whether such issuance is appropriate.
- §2.711(b): There is no evidence that the use of pre-filed testimony saves time, and this procedure denies the finder of fact the opportunity to observe the demeanor of the witness during a live direct examination and by its nature results in “canned” testimony. If pre-filed testimony is used, it should be provided to the opposing parties 30 days in advance, not 15.
- §2.711c(1): The provision for a cross-examination plan is inefficient, unduly burdensome (especially to parties with limited resources) and disregards the fact that the most effective cross-examination can sometimes be “exploratory” and unplanned, particularly in the hands of a skilled cross-examiner. In general, cross-examination should not be constrained by a tribunal except for the most weighty of reasons.

- §2.711(h): It is unduly burdensome, and exalts form over substance, to require that an original and two copies of a document be offered to the tribunal as a predicate for admissibility. Presumably the NRC has photocopying capability.
- §2.712(a)(2): The party opposing the permit or other NRC action should have 30 days, not just 10, to file proposed findings after the proponent has filed its proposed findings.
- §2.10013(b): The first sentence should be amended to provide that exhibits used only in connection with the cross-examination of a witness need not be tendered in advance to the opposition.
- §2.1023(a): Modify to provide for an automatic stay in all cases.
- Subpart L: Strike in its entirety.
- §2.1200: If adopted, it should not apply to the post-construction licensing phase of high-level waste repositories.
- §2.1202(a): Should be modified to provide for an automatic stay, rather than immediate effectiveness, in all cases.
- §2.1203: ADAMS problems need to be solved or else this rule will not make the documents readily available, hence the prohibition of discovery will mean that intervenors do not have access to any documents during the evidentiary presentation in the hearing. It must be clarified that before any intervenor is required to make an evidentiary presentation, the hearing file must be complete. This means that any safety evaluation, environmental assessment, environmental impact statement, or other significant licensing document has been placed in the hearing file with a reasonable amount of time available to the intervenor to obtain, review, and obtain expert review of that material.
- §2.1204(b): No permission to cross-examine should be required. See testimony at NRC hearings and Judge Bollwerk's memo suggesting changes to the proposed rules.
- §2.1207(a)(3)(i),(b)(6): Delete these sections. The parties or their lawyers should be permitted to examine the witness.

- §2.1208(a)(2-4): The times allotted are patently unreasonable. E.g., time must be provided following rebuttal for written questions rather than filed with rebuttal testimony.
- §2.1210(d): Delete or modify to provide for automatic stay in all cases.
- §2.1213: Should apply only to application for relief from stay.
- §2.1213(d): Again, the issue should not be whether a party might be irreparably injured, but whether the public health or safety might be jeopardized.
- Subpart N: Delete in Entirety.
- §2.1402c: The parties should be able to do their own cross-examination. See testimony at NRC hearing on proposed regulations and Judge Bollwerk's memo to the Commission suggesting changes to the proposed rule.
- §2.1405(f): Written briefs and memoranda should be permitted as a matter of course.
- §2.1406(a): Bad policy for the decision-maker to issue bench rulings.
- §2.1406c: Should be an automatic stay.
- Appendix D: Modify in accordance with preceding comments.
- §50.91(a)(4): Delete or modify and provide for automatic stay.
- §51.109(a)(2): At least 60 days are needed to file contentions on adoption of the DOE EIS, given the complex scientific and technical issues involved, and the length of the environmental documents and the administrative record. Contentions should not in all cases be required to be accompanied by affidavits, since the environmental documents may be flawed on their face—for example, by containing inconsistent, contradictory, or patently unreasonable conclusions.
- §52.21: Delete the word “undue” from the phrase “undue risk.”

IV. REQUESTED RELIEF AND CONCLUSIONS.

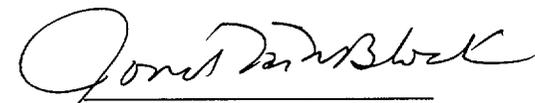
For the reasons stated above, the rule-making in this matter is defective. The requested remedy is for the Commission to withdraw the rule. Additionally, for the reasons stated above, the proposed rules are defective. The remedy is for the Commission to withdraw the rulemaking. By 'defective' we intend to incorporate all of the reasons of law, policy, and errors set forth herein above. We also contend that the proposed rulemaking violated the Commission's own policy concerning building public confidence in the NRC process. For that reason alone, as referenced also herein above, the Commission should withdraw the rule.

If the Commission wants to go forward with changes to Part 2 that will actually build public confidence and encourage public participation in NRC proceedings, we request that the Commission: (i) withdraw the rule changes at issue; (ii) schedule, upon reasonable notice and in reasonable places and at reasonable times, public meetings to discuss the public perception of the current NRC hearing process and what could be done, from the point of view the affected public, to make that process one which inspires public confidence in the agency; (iii) commission a study of the history of NRC adjudications in order to have accurate, quantitative data concerning the reasons for any delays in NRC process and suggestions for improving that process, conducted with the requirement that public comments be included and responded to prior to publication of the final study; (iv) be sure that the study of NRC process is completed and available to the public for comment prior to conducting public meetings as requested in item (i) above; (v) direct that the ADAMS system be revamped along the lines of the LEXIS or WESTLAW systems so that all documents may easily be downloaded and that all documents can easily be searched using effective research tools; (vi) invite the public to fully participate in all

NRC meetings that are open to the public--not just get to listen and/or ask questions after the meeting is over.

We believe that the above requests for relief offer the NRC the basic tools to begin to achieve "public confidence" in NRC process. Implementing these suggestions, and trusting the public you are supposed to serve, we go a long way toward improving public confidence in the agency.

Respectfully submitted on behalf of the above listed parties:


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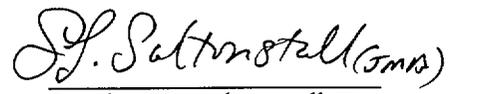

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EXHIBIT 'A'

From: Teresa Linton <TDL@nrc.gov>
To: <jonb@sover.net>
Subject: Part 2 Rulemaking
Date: Thursday, August 09, 2001 1:54 PM

Dear Mr. Block

I have attached the Regulatory History of this proposed rulemaking. I found it in ADAMS, but not on the Rulemaking webpage.

I searched in ADAMS (used the Advance Search with the field Case/Reference Number "like" 66FR19610* and found 3 letters regarding extension of the comment period and 10 comments. I have attached the listing of these items. The same 13 documents are on the rulemaking page.

The rulemaking page is at the following URL:
http://ruleforum.llnl.gov/cgi-bin/rulemake?source=CAP_PRULE .
I hope this helps!

Best regards,
Teresa

From: Geary Mizuno <GSM@nrc.gov>
To: <jonb@sover.net>
Subject: Re: List of materials in the Part 2 rulemaking docket
Date: Friday, August 10, 2001 2:54 PM

Jon:

I am not sure what you mean by "rulemaking file."

To the best of my knowledge, the Commission's docket for the rulemaking begins when the proposed rule is published. The Secretary keeps a copy of all comments received, and these are available on the web site, as far as I can tell, and are placed into ADAMS. The Secretary keeps copies of all SECY Papers which are the important communications from the Staff to the Commission. However, it is my understanding that these are filed in chronological order, and are not kept together based upon subject matters.

>>> "Jon Block" <jonb@sover.net> 08/09/01 12:56PM >>>
Dear Geary:

- (1) Is there a list of what documents comprise the rulemaking file for the Part 2 rules change?
- (2) If so, (a) is it docketed, (b) what is the file or accession number to retrieve it from ADAMS.

Thanks.

Jon Block

UNITED STATES OF AMERICA
Before the
NUCLEAR REGULATORY COMMISSION

EXHIBIT 'B'

In the matter of)
Changes to Adjudicatory Process)
66 FR 19609-19671 (April 16, 2001))

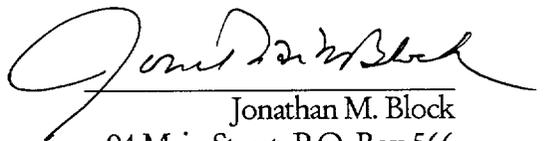
September 14, 2001

DECLARATION OF JONATHAN M. BLOCK CONCERNING DIFFICULTIES LOCATING
AND OBTAINING NRC DOCUMENTS USING THE ADAMS SYSTEM.

I, Jonathan M. Block, declare under penalty of perjury to the United States Nuclear Regulatory Commission in the above captioned matter that:

1. My name is Jonathan M. Block. I am an attorney licensed to practice before the Supreme Court of the State of Vermont and admitted to practice before the Federal District Court for Vermont. I have also practiced before the Atomic Safety and Licensing Board. My office is in Putney, Vermont.
2. Conducting business in my office, I use a computer with a 56kbps modem connection to an local ISP. The computer runs at 450 MHz, has 128 MB of RAM and a large hard-drive. I am familiar with Boolean searches, and use LEXIS, WESTLAW, and NUDOCS.
3. Since the NRC eliminated Local Public Document Rooms and switched to ADAMS, I have had great difficulty researching NRC documents. The bibliographic system used in NUDOCS is a superior finding tool to the one available on ADAMS. The retrieval system in the old Public Document Room in Washington was superior to ADAMS. On my computer, at 56kbps, it is extremely difficult to use the ADAMS finding tools. The connection often freezes. When that does not happen, the interface sometimes does not accept characters typed into it. An OCR (scanned) form document takes an impractical amount of time to "page" through. Attempting to print an OCR document can take as long as an hour or more even for just 15 pages. Sometimes the printing stops or the screen freezes. Then, one has to reconnect and go through the finding process anew before recommencing printing.
4. ADAMS is not a useful way to access NRC documents. ADAMS inhibits free access information. It does not permit the research I could accomplish on NUDOCS. This has necessitated using PDR librarians to attempt to find documents. Sometimes they do so quickly. Sometimes they need a day or more to provide assistance. This makes it difficult—if not practically impossible—to effectively research NRC documents for case preparation.

DATED this 14th day of September, 2001, at Putney, Vermont.


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