Written Electronic Comments

Meeting Summary of the 5/9/12 Meeting to Receive Comments on Subsequent License Renewal

Dated June 7, 2012

From:	Dave Lochbaum
To:	Sakai, Stacie; Diaz-Sanabria, Yoira; Brady, Bennett; SLR Resource; Holian, Brian; Galloway, Melanie; Hiser, Allen
Cc:	Jim Riccio; Richard Webster; Lampert, Mary
Subject:	Subsequent License Renewal
Date:	Friday, May 11, 2012 10:26:29 AM

Good Day:

I appreciated the opportunity to present our concerns on license renewal during the public meeting on May 9th and to hear the NRC staff's comments.

I'd made the point that the NRC staff has twice revised its license renewal guidance (e.g., the SRP and GALL) but hasn't applied the new safety standards to the reactors already relicensed.

I did not realize that the NRC staff imposed the higher standards outside of the 10 CFR 50.109 backfitting requirements. If I understood the NRC staff comments, the backfitting requirements did not apply because the license renewal rule is voluntary -- licensees do not have to apply for license renewal.

I still don't get it.

ALL of NRC's regulations are voluntary by that logic. All of them, every single one.

No one was compelled to apply for a Part 50 license to operate a reactor for the initial 40-year period. Applicants voluntarily applied for a Part 50 license because if they wanted to operate a nuclear power reactor, because an operating license was mandatory in order to operate the reactor. They could have built a non-nuclear generator, but they volunteered for the nuclear power reactor.

Their decision to seek renewal of the operating license is no more or less voluntary than the initial decision to obtain the operating license in the first place. They don't have to apply for license renewal. But if they want to continue operating their reactors, it is mandatory that they seek license renewal.

Thus, the NRC's position that backfitting does not apply to license renewal seems tenuous at best, laughable at worst.

I stand behind the position stated during the May 9th meeting and expressed in writing earelier this year.

I cannot understand how the NRC could revise its regulatory requirements for the safe operation of nuclear power reactors between 40 and 60 years without at the same time having those requirements apply to ALL nuclear power reactors operating between 40 and 60 years.

If, as was stated during Wednesday's meeting, the NRC cannot make the safety case that the upgraded regulatory requirements are justified for the previously relicensed reactors, then there's no legal justification for imposing them on reactors late in the license renewal queue. If on the other hand there is sufficient justification for the upgraded requirements, then the NRC has no legal reason not to also apply them for the relicensed reactors.

Simply put, the NRC cannot have it both ways. The NRC has to determine whether safety upgrades are legally justifiable and, if so, applicable to all reactors operating between 40 and 60 years. And if safety upgrades are not legally justifiable, NRC should not require them for any reactors operating past 40 years.

Thanks,
Dave Lochbaum
UCS

From:	Richard Webster
To:	"Dave Lochbaum"; Sakai, Stacie; Diaz-Sanabria, Yoira; Brady, Bennett; SLR Resource; Holian, Brian; Galloway, Melanie; Hiser, Allen
Cc:	Jim Riccio; Lampert, Mary; "Janet Tauro"; "John J. Sipos"
Subject:	RE: Subsequent License Renewal
Date:	Friday, May 11, 2012 12:25:20 PM

I would like to thank the Staff for participating in meaningful discussions at this meeting. I also request that we be notified of when the transcript is available so that we can check for any egregious errors.

Finally, I would like to reiterate my concern about the current relicensing reviews. If the Staff does not have a statistical approach to determine how often aging could be missed by the monitoring, I cannot understand how there is any the basis to design the spatial scope and temporal frequency of monitoring programs? Even if the staff relies on codes, what is the basis for designing the codes? Until we answer this fundamental issue, I think we will be doomed to miss aging effects far too often.

Thanks very much.

Richard Webster

From: Dave Lochbaum [mailto:DLochbaum@ucsusa.org]
Sent: Friday, May 11, 2012 10:28 AM
To: Sakai, Stacie; Diaz-Sanabria, Yoira; Brady, Bennett; SLR.Resource@nrc.gov; Brian.Holian@nrc.gov; Melanie.Galloway@nrc.gov; Allen.Hiser@nrc.gov
Cc: Jim Riccio; Richard Webster; Lampert, Mary
Subject: Subsequent License Renewal

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From:	Dave Lochbaum
To:	Sakai, Stacie; Diaz-Sanabria, Yoira; Brady, Bennett; SLR Resource; Holian, Brian; Galloway, Melanie; Hiser, Allen
Cc:	Jim Riccio; Lampert, Mary; "Janet Tauro"; "John J. Sipos"; Richard Webster; debbie@c-10.org
Subject:	License Renewal Commitments
Date:	Thursday, May 17, 2012 1:46:38 PM
Attachments:	12-025.i.pdf

Good Day:

Earlier today, the NRC staff issued a Confirmatory Action Letter (CAL) to the Seabrook licensee regarding commitments made to the NRC about a concrete degradation problem that was identified during the license renewal process.

Last week, I'd expressed concern during the NRC's all day meeting on Subsequent License Renewal that commitments are neither binding nor enforceable.

I'd submit that today's Confirmatory Action Letter confirms (no pun intended) my position.

If commitments made by NRC's licensees were binding and enforceable, the CAL would not be necessary. After all, the commitment themselves would carry the weight needed.

Since commitments are actually not commitments except in name, something else (in this case, a CAL by the NRC) is necessary to ensure that the things get done.

The NRC cannot and does not rely on commitments and must protect itself with CALs

What protects the public for all the many commitments not backed by CALs and CAL-like legal things?

Nothing.

That's simply not right.

Thanks,
Dave Lochbaum
UCS

From:	Mary Lampert
To:	SLR Resource
Cc:	Sakai, Stacie; Dave Lochbaum; Richard Webster
Subject:	PILGRIM WATCH ADDITIONAL COMMENTS PUBLIC MEETING SUBSEQUEST LICENSE RENEWAL, (MAY 9, 2012)
Date:	Friday, May 18, 2012 8:50:19 AM
Attachments:	17.Protecting the Public Interest The Self Help Model (Anthony Z. Roisman).pdf 2009 Roiceman Pace.pdf 03.12 Am Univ Law Funding.pdf 05.18.12 PW ADDITIONAL COMMENTS PUBLIC MEETING SUBSEQUEST LICENSE RENEWAL.pdf

Good Morning:

Please find *PILGRIM WATCH ADDITIONAL COMMENTS PUBLIC MEETING SUBSEQUEST LICENSE RENEWAL, (MAY 9, 2012)* in which Pilgrim Watch submits for consideration the attached three papers:

- *Protecting the Public Interest: The Self Help Model*, Anthony Z. Roisman, Presented Knowledge Foundation, Technology Commercialization Alliance, Nuclear Power Safety 2011, December 8-9, 2011, Washington D.C. http://www.nrdc.cn/phpcms/userfiles/download/201107/08/17.Protecting%20the%20Public%20Interest%20The%20Self%20Help%20Model%20(Anthony%20Z.%20Roisman).pdf

- *Regulating Nuclear Power in the New Millennium (The Role of The Public),* Anthony Z. Roisman, Erin Honaker, Ethan Spaner, Pace Environmental law Review, Volume 26, Issue 2, Summer 2009

- *Funding Public Participation In Agency Proceedings*, American University Law, Review, Volume 27, 981

If you have any difficulty in downloading these documents, please call Mary Lampert at 781-934-0389.

Thank-you and have a good day.

Mary

781-934-0389

May 18, 2012

PILGRIM WATCH ADDITIONAL COMMENTS PUBLIC MEETING SUBSEQUEST LICENSE RENEWAL, (MAY 9, 2012)

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- *Funding Public Participation In Agency Proceedings*, American University Law, Review, Volume 27, 981

Respectfully submitted,

(Signed electronically)

Mary Lampert
Pilgrim Watch, Director
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Duxbury, MA 02332
Tel. 781-934-0389
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PROTECTING THE PUBLIC INTEREST: THE SELF HELP MODEL

BY: ANTHONY Z. ROISMAN[1]

I. PUBLIC PARTICIPATION PROVIDES VALUABLE ASSISTANCE

As early as 1974, when faced with a broadside attack on the value of public participation in Nuclear Regulatory Commission ("NRC") licensing decisions, the Atomic Safety and Licensing Appeal Board (since abolished by the Commission), drawing on its substantial experience with individual licensing decisions and their evidentiary records, recognized the contribution of public participation to nuclear safety:

> Our own experience – garnered in the course of the review of initial decisions and underlying records in an appreciable number of contested cases – teaches that the generalization [that public participation contributes nothing to safety] has no foundation in fact. Public participation in licensing proceedings not only "can provide valuable assistance to the adjudicatory process," but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.[2]

As recently as 2008, Michael Farrar, an NRC hearing officer who has been serving as an NRC Judge for over thirty years, reaffirmed the valuable contribution that is made to NRC safety and environmental reviews by public participation:

> The Petitioners were instrumental in focusing the Board's attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages.[3]

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[1] Mr. Roisman is an attorney and has represented parties before the Atomic Energy Commission and the Nuclear Regulatory Commission since 1969. The views expressed here are Mr. Roisman's, and not his clients.

2. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974) (citing *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5 371, 374 n.13 (May 25, 1973)) (footnote omitted).

3. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098-MLA, at 49 (June 27, 2008) (Farrar, J., concurring).

These views were acknowledged by then NRC Chairman Dale E. Klein, who stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders."[4] He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."[5] Nonetheless, while the NRC today gives lip service to the value of public participation, its every action reflects a deep disdain for the usefulness of the public input on matters of safety or environmental protection.[6] Yet, as the ASLAB recognized in the River Bend case, intervenors have raised important safety and environmental issues that, but for their involvement, would not have been addressed in the NRC safety and environmental review.[7]

II. NRC IS NOT A VIGOROUS REGULATOR

How well has the NRC done without fully effective public participation? The NRC record is anything but evidence of high standards or, more importantly, of vigorous enforcement of those standards. Peter Bradford, the former NRC Commissioner and internationally recognized energy expert, compiled the following list of some of the more notorious lapses by NRC in its oversight and regulatory responsibilities, just in the last eight years:

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4. Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), http://www.nrc.gov/reading-rm/doc-collections/commission/; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co-operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/.

5. Klein, *supra* note 50, at Slide 11.

6. *See* Regulating Nuclear Power in the New Millennium (The Role of the Public) Roisman, et. al. *Pace Environmental Law Review*, Vol. 26, Number 2 (Summer 2009) for a discussion of the built in bias in the NRC procedures against effective public participation.

7. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974).

1. January 7, 2003 - A *New York Times* story reported that the NRC had ruled that terrorism was too speculative to be considered in NRC licensing proceedings, even as the Bush administration and Congress considered terrorism likely enough to suspend habeas corpus and commit torture. This position has since been rejected by the Ninth Circuit Court of Appeals, but the NRC continues to apply it elsewhere. – The original staff testimony taking this position in opposition to an intervenor contention was submitted on September 12, 2001, one day after the terrorist attacks on the World Trade Center and the Pentagon. The licensing board wanted to admit the contention despite the staff opposition but was overruled by the commission.
2. A 2002 survey of NRC employees says that 40% would be scared to raise significant safety questions. Then Chairman Richard Meserve said this was a big improvement from the 50% of five years earlier.
3. From a *New York Times* editorial of January 7, 2003 – "Unfortunately, the regulatory agency that was supposed to ride herd on unsafe plants was equally negligent. A report just released by the NRC's inspector general concludes that the regulatory staff was slow to order Davis-Besse to shut down for inspection, in large part because it did not want to impose unnecessary costs on the owner and did not want to give the industry a black eye. Although the NRC insists that safety remains its top priority, its timidity in this case cries out for a searching Congressional inquiry into whether the regulators can still be counted on to protect the public from cavalier reactor operators."
4. In 2003 the NRC submitted the name of Sam Collins, the official who had overseen the Davis Besse shutdown delay, to the Office of Personnel for the highest civilian financial award, a 35% bonus. During the time covered by the award, the NRC inspector general also concluded that Collins had knowing[ly] inserted a false statement into a letter sent by the NRC chair to David Lochbaum at the Union of Concerned Scientists. As Lochbaum observed at the time, "The NRC has a safety culture problem. The survey released last December showed that only 51% of the workers felt comfortable raising safety concerns. The Commission can only reinforce the fears by rewarding a person who has falsified documents, chided those who did their jobs, and taken repeated steps to undermine safe."
5. Immediately after the September 11th attacks, the NRC rushed out a claim that nuclear power plants were designed to withstand such crashes. This claim, which had no basis, was later withdrawn.
6. Two unprecedented speeches by Commissioner Edward McGaffigan attacking groups with a history of responsible participation in NRC proceedings.
7. The claim by Senator Pete Domenici that he had successfully persuaded the NRC to reverse its "adversarial attitude" toward the nuclear industry by threatening to cut its budget by one-third during a 1998 meeting with the chair (from PETE V. DOMENICI, A BRIGHTER TOMORROW: FULFILLING THE PROMISE OF NUCLEAR ENERGY 74-75 (Rowman and Littlefield 2004)).
8. Current NRC chair (Dale Klein) appeared in paid industry ads attesting to the safety of Yucca Mountain. When Commissioner Jaczko was appointed from the staff of Nevada Senator Harry Reid, he was required to take no part in Yucca Mountain matters for a year or two. No such requirement was placed on Klein.
9. The NRC has eviscerated the opportunities for public participation that existed 15-20 years ago. To give but one of many examples, lawyers can no longer cross examine but must submit their questions to the licensing board chair, who decides whether or not to ask them.
10. The top U.S. nuclear regulator vouched for the safety of a new Westinghouse nuclear reactor – yet to be built anywhere in the world – in a sales pitch to supply China's growing power industry. U.S. Nuclear Regulatory Commission Chairman

> Nils Diaz said that the $1.5 billion AP1000 reactor made by Westinghouse Electric Co. is "likely to receive regulatory approval in the next few months."[8]

The NRC's own Inspector General discovered that NRC Staff was copying into its reports on plant license renewal applications verbatim sections of the application itself, without attribution, and then, when the Inspector General went to test the Staff assertion that its review was thorough, even if its report writing was deficient, it was discovered the Staff had destroyed all the documents that allegedly demonstrated the thoroughness of its "independent" review.[9]

In 2008 Judge Farrar raised concerns about whether the NRC Staff was primarily committed to a safety culture or whether its primary motivation was "do it faster" using two startling examples from the *Shaw Areva Mox Services* case before the ASLB, where safety was clearly not a paramount concern.[10] Judge Farrar noted that 1) the Staff initially supported allowing a decision on an operating license to proceed to final decision even though the construction of the facility had not yet begun, much less been completed, as required by NRC regulations and 2) was willing to ignore the requirements written into its own Safety Evaluation Report as part of the construction permit process and allow the facility to proceed without compliance with those requirements. [11]

These events caused Judge Farrar to reach this conclusion:

> The approaches the Staff took to two matters during this proceeding appear to raise concerns about the robustness of the agency's internal safety culture. Perhaps those two matters were aberrational, and can be explained away as of little broader consequence.

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8. Email from Peter Bradford, former member of the U.S. Nuclear Regulatory Comm'n, to Anthony Roisman (Jan. 15, 2009) (containing the text of a letter from Congressman Peter Welch to Congressman Henry Waxman outlining Bradford's concerns) (on file with author).

9. OFFICE OF THE INSPECTOR GEN., U.S. NUCLEAR REGULATORY COMM'N, AUDIT OF NRC'S LICENSE RENEWAL PROGRAM (OIG-07-A-15) 8-11, 15-16 (2007), *available at* http:/www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last visited Feb. 5, 2009); *see also* Memorandum from Hubert T. Bell, Inspector Gen., U.S. Nuclear Regulatory Comm'n, to Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, NRC Staff Review of License Renewal Applications (May 2, 2008).

10. *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA (June 27, 2008) (Farrar, J., concurring).

11. *Id.* at 45-48.

> But, on the other hand, they may be symptomatic of safety culture deficiencies, and thus raise a serious question about a foundation of nuclear safety – the culture of the government organization responsible for promoting it.[12]

To date, there is no evidence that the NRC Staff or the Commission have taken any steps to find the root cause of these serious lapses in NRC Staff commitment to safety nor taken steps toward identifying the root causes of NRC Staff decisions that seek to so seriously undermine its own obligation to safety.

The nuclear industry itself has changed in the last decade and not toward more concern for safety. With the advent of electric power deregulation and consolidation of nuclear power plant ownership into a handful of companies, there are new and ample opportunities for profits to trump safety and, regrettably, ample examples of laxness among the nuclear power plant owners. Before deregulation and the rise of "absentee" ownership of nuclear power plants, a local utility, with roots in the community and under a regulatory regime based on a guaranteed rate of return on capital and operating costs, an owner had no economic incentive not to spend the money necessary to provide the best quality safety equipment and operating procedures. Now, as "merchant" owners, nuclear plant operators are: 1) selling power in competition with other forms of energy; 2) entering into fixed priced, long term power sale agreements to satisfy local public utility commissions focused primarily on protecting the pocketbook of electricity customers; and, 3) seeing the size of their profit margin directly affected by how much money they spend on safety, how much money they spend on license applications, how large their plant staff is and how quickly they can complete work that requires the plants to be off line. While all these are laudable goals, they must not be allowed to over-shadow the principle goal of nuclear safety. Is that what is happening?

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12. *Id.* at 46.

Without a vigorous and committed NRC Regulatory Staff fulfilling its duties as a safety watchdog, there is no comforting answer to that question. What is known is that over the last twenty years, the capacity factor for nuclear power plants has risen from the low sixties to the low nineties and there is no way to attribute that 50% improvement solely to a more efficient, and still safe, refueling process or other management initiatives implemented by the utilities.[13] Certainly, one significant factor is that during that time period the NRC severely restricted the use of backfitting, i.e. the imposition, after construction or operation has begun, of safety improvements based upon new research resolving previously unresolved safety issues or addressing the occurrence of unanticipated safety problems such as fuel densification, the Browns Ferry fire or Three Mile Island.[14] The backfit procedure was used to compensate for the fact that all nuclear plants were licensed with substantial unresolved safety issues and that the fair price for that expediency was to backfit the nuclear plants with new safety equipment and procedures when resolution of the safety issue showed that such an upgrade was warranted.

The backfit standard used to be that if resolution of a previously unresolved safety problem demonstrated that a safety improvement was warranted, it was required. Now that safety improvement is only required if the Commission finds that there is:

> A substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit *and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection*.[15]

How does the NRC justify shifting the burden from the utility, to demonstrate that a safety backfit is not required, to the NRC, to justify that a backfit will provide a "substantial increase in the overall protection of the public health and safety" and how does the NRC justify allowing the

13. NUCLEAR ENERGY INSTITUTE, U.S. NUCLEAR GENERATING STATISTICS 1971-2007, http://www.nei.org.
14. *See* 10 C.F.R. § 50.109 (2008)(emphasis added).
15. Id. § 50.109(a)(3).

cost of a safety improvement to be a factor in deciding whether to require it? At a minimum, such a drastic change in, and reduction of, safety requirements should have been proceeded by a thorough and publicly discussed analysis in the context of an adjudicatory hearing that demonstrated: that nuclear power had advanced sufficiently to be able to decisively conclude that the plants that had already been licensed were "safe" for their full term; that no important unresolved safety problems existed; and, that the industry had reached sufficient maturity to justify such a change. No such public hearings have been held and no such findings have been, or could be, made. *See e.g.* Resolution of Generic Safety Issues (NUREG-0933, Main Report with Supplements 1–33) (2010) listing ongoing NRC efforts to resolve generic safety issues. There is evidence that the nuclear industry is anything but "mature": sleeping guards, corroding pressure vessels and a shocking lack of candor by nuclear plant-owners[16] all suggest that, at best, the nuclear industry has morphed from an unsophisticated nuclear naive child to a rebellious teenager, more in need of controls today than ever before.

Increasing numbers of citizen organizations are mounting challenges to nuclear plant proposals and to NRC decisions. In one recent decision, *Massachusetts v. United States*,[17] the United States Court of Appeals for the First Circuit expressed some concern that the NRC would actually obey the procedural interpretations it placed on its own regulations in order to prevail in the case and gave this unusual warning to the NRC:

> Further, if the agency were to act contrary to these representations in this matter, a reviewing court would most likely consider such actions to be arbitrary and capricious.[18]

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16. *E.g.*, Sharon Dunwoody et al *After Environmental Accidents, Public Deserves Candor*, THE SCIENTIST, Apr. 15, 1991, at 11; JOAN B. ARON, LICENSED TO KILL? THE NUCLEAR REGULATORY COMMISSION AND THE SHOREHAM POWER PLANT 8 (1998); U.S. GEN. ACCOUNTING OFFICE, NUCLEAR REGULATION: NRC NEEDS TO MORE AGGRESSIVELY AND COMPREHENSIVELY RESOLVE ISSUES RELATED TO DAVIS-BESSE NUCLEAR POWER PLANT'S SHUTDOWN (GAO-04-415) (May 2004); Steven Mufson, *Video of Sleeping Guards Shakes Nuclear Industry*, WASHINGTON POST, Jan. 4, 2008, at A01.

17. Massachusetts v. United States, 522 F.3d 115 (1st Cir. 2008).

18. *Id.* at 130.

Those are not the words of a court that has a lot of confidence in the NRC or its credibility.

III. EFFECTIVE PUBLIC PARTICIPATION

The public has much less confidence in nuclear power today than it did several decades ago and there is ample reason for such skepticism with a profit-aggressive nuclear industry and a reluctant NRC regulator. In the face of this growing opposition to nuclear power and, increasing evidence of the lack of vigorous enforcement of nuclear safety standards by the NRC, something needs to be done if nuclear power is to have a future in the United States. If the nuclear industry is busy looking for economic shortcuts and the nuclear regulator is evading its regulatory responsibilities, the time has come to add a substantial force to the regulatory process. The most obvious candidate is the public. Public opponents of nuclear power have every incentive to identify safety and environmental problems and to pursue them aggressively. Any proponent of safe nuclear power should want to facilitate these nuclear critics so that problems that might otherwise go undetected and unaddressed would be brought to the attention of persons who could do something about them.

The NRC has a process by which public participants can raise and address concerns about nuclear safety and environmental protection without having to rely on the NRC itself to resolve the issues. The Atomic Energy Act provides that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1)(A). In fulfillment of this responsibility the NRC has created a panel of hearing judges composed of attorneys with administrative law experience and technical experts, three of whom are appointed to rule on issues raised in nuclear reactor licensing proceedings. 10 C.F.R. § 2.321. This independent panel of judges has proven to be an effective system for evaluating conflicting evidence and legal analyses and producing high quality decisions which, while often criticized by those who do not prevail, are nonetheless respected by most participants. Thus, a mechanism exists for those concerned about nuclear safety and environmental protection to have an independent evaluation of their concerns.[19]

However, although the NRC staff and the applicant have ample resources to participate in this independent hearing process, public participants lack the economic resources to fully and effectively present their position on the issues of concern to them. This situation is particularly troublesome since, unlike NRC, which operates with taxpayer money and applicants, that have an economic stake in the outcome, the public has nothing but their concern for nuclear safety and environmental protection and no ready access to the resources needed to fully and effectively address the issues of concern. In a capitalistic system this result may be seen as inevitable and merely part of the process of allowing the market place to determine outcomes. However, in the case of nuclear power there is growing evidence that leaving regulation to the industry and government regulators, is not working. The accident at Fukushima, with its many lessons to be learned, provides one clear lesson – reliance on private interests that own reactors and

[19] The hearing process is beset with numerous problems that need to be addressed to make it as effective and efficient as possible for resolution of disputes. Many of those problems and some solutions are discussed in two documents that are publicly available or can be obtained from the author of this paper. Regulating Nuclear Power in the New Millennium (The Role of the Public) Roisman, et. al. *Pace Environmental Law Review*, Vol. 26, Number 2 (Summer 2009) and Comments On Proposed Amendments To Adjudicatory Process Rules And Related Requirements (76 FED. REG. 10781) by Anthony Z. Roisman, MARCH 28, 2011

government agencies that fail to vigorously regulate reactors, is insufficient to provide the level of safety needed if nuclear power is to be allowed to play a major role in energy production.

The United States Congress, egged on by the nuclear industry and the NRC, has barred any funding of the public for its participation in nuclear licensing proceedings. Public Law 102 377, Title V, section 502, 106 Stat. 1342 (1992) (codified as amended at 5 U.S.C. 504). That shortsighted decision not only makes a mockery of the concept of public participation but deprives the regulators, the industry and the independent hearing boards of the benefit of analyses by the one group whose sole function is to aggressively pursue issues of nuclear safety and environmental protection to assure safe and environmentally acceptable operation of nuclear power plants. If the industry and NRC were doing their job the argument to provide resources to another entity to address issues would be hard to make. However, the record demonstrates that the only reason the United States has not suffered the catastrophic consequences of Fukushima is luck, not good management or good regulation. One recent example well-illustrates the fundamental defect in the current system. Following the Fukushima accident NRC initiated a number of actions to assess the status of nuclear plants in the United States. Recently NRC released the results of one of these efforts and reported the following:

> Licensee Capability to Mitigate Fires in Large Areas of the Plant in accordance with 10 CFR 50.54(hh)(2)
> • Some equipment (mainly pumps) would not operate when tested or lacked test acceptance criteria
> • Some equipment was missing or dedicated to other plant operations
> • In some cases plant modifications had rendered strategies unworkable
> • Fuel for pumps was not always readily available
>
> Licensee Capability to Mitigate Station Blackout (SBO) Conditions
> • In a few cases procedural or training deficiencies existed.
>
> Licensee Capability to Mitigate Design Basis Internal and External Events
> • Some equipment (mainly pumps) would not operate when tested or lacked test acceptance criteria

• Some discrepancies were identified with barrier and penetration seals

Licensee Capability to Respond to Beyond Basis Events involving Fires, Floods, and Seismic Events

• Some equipment to mitigate fires and SBO was stored in areas that were not seismically qualified or could be flooded

Summary of Observations Temporary Instruction 2515/183, "Followup to the Fukushima Daiichi Fuel Damage Event" (May 20, 2011).

Each of these deficiencies involved critical safety systems that would have failed if they had been called upon in an accident. Each system was deemed by NRC, prior to these inspections, to be essential for plant safety but NRC brushed off any safety concern because there were other systems designed to operate if these failed. This NRC mentality disregards its own regulations requiring redundant safety systems – redundancy deemed essential to provide "reasonable assurance that the facility can be operated without undue risk to the health and safety of the public" (10 C.F.R. Part 50, Appendix A, General Design Criteria, Introduction). These deficiencies, for which the only apparent consequence was an order to fix the problem, underscore the basis for public skepticism about nuclear power plant safety in the United States and provide ample justification for supporting the full and effective participation of nuclear critics in the decision making processes of the NRC.

Presumably the only failure that will cause the NRC to take serious actions against the operators of nuclear power reactors is one that causes widespread harm to the public, a policy that should provide no comfort to the public. The goal of effective regulation is prevention, not post-accident retribution and the only way to prevent these problems is to make the consequences of the kind of failures just documented by NRC result in serious economic consequences – fines in the tens of millions of dollars and immediate shutdown orders until the underlying root causes of the problems have been identified and corrected – would go a long way to prevent similar slipshod safety procedures. It is difficult to imagine what possible explanation

could exist – other than gross negligence – for a plant missing critical safety equipment or using it for an unauthorized purposed, or placing fire safety equipment in areas that could be flooded (by fire-fighting actions, for example), or pumps without necessary fuel, or plant modifications that disabled safety equipment.

Although a fully funded cadre of nuclear critics would provide a crucial antidote to the current cozy regulatory/industry system, such full funding is never going to happen in the United States. However, if the goal of funding public participants is not to provide them with the economic means to more effectively air their grievances and have a fair chance against their opponents, but rather to improve the safety and reduce the environmental impact of nuclear power plants, a more modest funding system would suffice. A practical system would have the following components:

- Funding would be provided only after the hearing was completed;
- Funding would be provided only for the cost of experts working for the public participant;
- Funding would be provided only to the extent the hearing board concluded the information provided by the expert was helpful to the board in reaching its decision.

This system would assure that money was not used to fund attorneys – a use that seems to raise the most objections – and would only be used to the extent the input from the experts was deemed valuable by the hearing board. Unless NRC or the industry do not trust the hearing boards, it is difficult to see what legitimate objection they would have. If they want to be sure that no public participant experts receive funds, they only need to do their job thoroughly, thus leaving no issue as to which outside input would be deemed helpful or necessary.

IV. CONCLUSION

In sum, there is a long history of evidence of the value of public participation in the NRC decision making process. There is also a long history of failures by the nuclear industry and failures by the NRC to take effective action to address those failures. NRC, the nuclear industry and the public would benefit from providing economic resources to those whose only mission is to see nuclear power achieve the level of safety and environmental protection required. No one, not NRC, not the nuclear industry and not the public, want another Fukushima, or another Three Mile Island. Unfortunately, NRC and the nuclear industry are counting on the low probabilities of severe accidents, not on full compliance with nuclear safety standards, to avoid those unthinkable consequences. Those hopeful wishes are insufficient bases for continuing with the status quo, particularly where the consequences of a miscalculation are so severe.

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Regulating Nuclear Power In The New Millennium (The Role Of The Public)

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Regulating Nuclear Power in the New Millennium
(The Role of the Public)

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I. INTRODUCTION

On October 9, 2008, the Energy Information Administration of the U.S. Department of Energy reported that twenty-five applications for new civilian commercial nuclear power reactors had been filed with the Nuclear Regulatory Commission (NRC) and are under review. In August 2008, the NRC disclosed in its 2008-2009, Information Digest Report that it "will increase staffing levels to accommodate up to twenty-three [combined construction and operating license] applications for a total of thirty-four new nuclear units over the next few years."[1] In the same Report, the NRC also disclosed that as "of February 2008, approximately half of the licensed reactor units have either received or are under review for license renewal" and "48 units (26 sites) have received renewed licenses."[2]

In short, we are in the midst of the "Second Coming" of nuclear power. Many changes have been made in the process for deciding whether to license or re-license a commercial nuclear power plant from the early days

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1. U.S. NUCLEAR REGULATORY COMM'N, 2008-2009 INFORMATION DIGEST 43 (2008), *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/.

2. *Id.* at 47.

of the "First Coming." The single most significant change has been in the public participation process by which the NRC decides whether to issue a new or renewed license. In its August 2008, Report, the NRC asserts the "new licensing process is a substantial improvement over the system used in the 1970s, 1980s, and 1990s."[3] The keystone of those "improvements" has been to substantially reduce the opportunity for public participation in the licensing process. The reason for these changes has been to address a perceived problem – unwarranted delay in completing the licensing process because of the alleged dilatory and substantively irrelevant input from an uninformed and irrational public.

On October 8, at the U.S. Department of Commerce's "Nuclear Energy Summit," NRC Chairman Dale Klein delivered a short address, tellingly entitled "Promoting Public Confidence in Nuclear Safety through High Standards."[4] In his talk, Chairman Klein emphasized that a fundamental role of the NRC and the public participation process is to "make extra efforts to explain" why certain actions are being taken by the NRC.[5] This echoes a procedure begun at the time of the earliest nuclear power plant licensing proceedings. In those days, the Atomic Energy Commission (AEC) used the "limited appearance" statement process as an opportunity for the general public to express their views, usually concerns, and then to have someone from the regulatory staff or the applicant, explain in simple terms why the expressed concerns were unfounded.[6] These "tutorials" became significant parts of the public relations program of the AEC. The process changed as the public became more sophisticated and the questions became less capable of simplistic answers so that today, while limited appearances are still allowed, there is no effort by the regulatory staff or the applicant to respond. Rather, like those contentions which, for some technical or legalistic reason, are deemed unacceptable for admission into a hearing, the questions raised during the limited appearances, no matter how substantively relevant they may be, usually go unanswered.

Underlying all of these policies is a firm conviction, often masked but never fully hidden, at the highest levels of the NRC, that public

3. *Id.* at 43.

4. Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Remarks to the U.S. Department of Commerce Nuclear Energy Summit: Promoting Public Confidence in Nuclear Safety through High Standards (Oct. 8, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2008/s-08-040.html.

5. *Id.* at 2.

6. 10 C.F.R § 2.705 (1984), now 10 C.F.R. § 2.315(a) (2008) (a person not a party to a hearing may "be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues").

participation is either a necessary evil foisted upon the agency by Congress in the original Atomic Energy Act or a public relations tool to be used as a way to convince the public that nuclear power plants are safe by allowing them to believe they are effectively participating in a process where they can see how well all legitimate concerns are addressed and resolved. As to the important business of safety, most of NRC's highest executives believe the real safety of nuclear power plants rests squarely and comfortably on the NRC's own vigorous examinations and oversight, and the industry's solid commitment to safety and security. If the NRC were right, that public participation is irrelevant to safety and that nuclear power plant safety is assured by the NRC's regulatory actions and industry's commitments, then the steps it has taken over the last couple of decades to severely restrict and control public participation would at least have some rational basis. However, there is virtually no evidence to support the NRC's opinion regarding the lack of substantive benefits to public participation nor of its confidence that nuclear reactors are safe because of the NRC's efforts and the industry's commitment. In fact, there is considerable evidence that NRC's opinion is wrong on both counts. First, the evidence demonstrates that public participation can and has contributed substantially to the safety of nuclear power plants and second, the NRC and the industry have fallen down in their safety obligations in significant ways.[7]

In an important law review article, Richard Goldsmith, Professor of Law at Syracuse University, wrote almost two decades ago, "[r]eviving public 'confidence' in 'nuclear safety' thus requires the restoration of public confidence in 'nuclear regulation,' and the history of nuclear regulation in this country teaches that such confidence cannot be obtained if the public is excluded from the licensing process."[8] Seventeen years later, the wisdom of that analysis is evident.

The NRC's present regulatory scheme, which severely limits public participation, is based on several premises, each of which is demonstrably in error. These assumptions are:

1. Over-active public participation was the cause of the demise of the nuclear industry because it delayed licensing which increased costs and made nuclear power unacceptable;

7. *See infra* Section IV.

8. Richard Goldstein, *Regulatory Reform and the Revival of Nuclear Power*, 20 HOFSTRA L. REV. 159, 160 (1991).

2. The new, more efficient, NRC has actually increased public confidence in nuclear power because the NRC has strengthened nuclear safety regulation;

3. The new regulations on public participation make for more efficient and predictable licensing outcomes.[9]

II. WHAT KILLED NUCLEAR POWER

Although some opponents of nuclear power may get pleasure in the idea that they were responsible for the death of nuclear power, the truth is, it was a suicide, not a murder. In the early days there were over-assurances about nuclear safety and the "too cheap to meter" mantra. These were followed by the unyielding insistence that all was well with nuclear power even as unforeseen problems arose, like fuel densification[10] and the Brown's Ferry fire.[11] Then, there was mounting evidence that nuclear wastes were a growing problem in search of a diminishing solution.[12] The Advisory Committee on Reactor Safeguards (ACRS), an advisory committee established by Congress,[13] regularly identifies unresolved safety problems that require regulatory attention.[14] The list of unresolved safety problems actually grew over the years, even as some of the problems were being addressed, particularly as the nuclear industry rapidly increased the size of nuclear reactors from a few hundred megawatts to 1300 megawatts.[15] All of these events were like radiation-induced embrittlement of the credibility of nuclear power and the Three Mile Island (TMI) accident, involving a nearly brand new 900-megawatt reactor, was the thermal shock that shattered that credibility.[16] TMI was not a full nuclear reactor meltdown; it was a full nuclear reactor credibility meltdown.

9. *See infra* Section III.

10. *See* Friends of the Earth v. U.S. Atomic Energy Comm'n, 485 F.2d 1031 (D.C. Cir. 1973).

11. OFFICE OF INSPECTION & ENFORCEMENT, U.S. NUCLEAR REGULATORY COMM'N, BULLETIN NO. 75-04A, CABLE FIRE AT BROWN'S FERRY NUCLEAR PLANT (Apr. 3, 1975).

12. WARREN S. MELFORT, NUCLEAR WASTE DISPOSAL: CURRENT ISSUES & PROPOSALS vii-viii (2003).

13. 42 U.S.C. § 2039 (2006); 10 C.F.R. § 1.13 (2008).

14. *See* THE REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, COMMISSION FINDINGS: G. THE NUCLEAR REGULATORY COMMISSION, ¶ 7 (1979) [hereinafter TMI REPORT], *available at* http://www.pddoc.com/tmi2/kemeny/.

15. *Id.* at ¶ 8.

16. *See generally id*; *see also* U.S. NUCLEAR REGULATORY COMM'N, FACT SHEET: THREE MILE ISLAND ACCIDENT 1 [hereinafter TMI FACT SHEET], *available at* http://www.nrc.gov/

Following the accident, no new nuclear reactors were ordered in the United States and many reactors planned or under construction were cancelled.[17] The nuclear power industry was in shambles because of its own arrogant dismissal of safety concerns and not for any other reason. The public was now convinced that nuclear power could not be operated reliably and safely. Several investigations were conducted regarding the root causes of the TMI accident[18] and, as a result of those investigations, expensive and time-consuming modifications were required to most existing plants as well as those under construction and planned.[19] The economic costs were rising rapidly and eventually it became evident to everyone but the most die-hard nuclear advocate, that any attempt to build more nuclear power plants would face powerful public opposition, in part, because the plants were economically unacceptable.[20]

III. WHO TO BLAME?

Because neither the industry nor its supporters were able to accept the fact that they were the cause of the demise of nuclear power, they chose to make the public the scapegoat and to start an aggressive campaign to modify the rules by which the public could participate in the decisions relating to the siting, construction, and operation of nuclear power plants. In the latest in a long line of attacks on public participation, Llewellyn King, a long time pro-nuclear journalist, wrote about the origins of public participation and how he perceived it was used in licensing:

> The idea was that this openness would encourage the public to take a greater interest in nuclear science and the civilian uses of nuclear. No other licensing procedure was so open or, as it turned out, so subject to distortion and abuse.
>
> The net effect of the licensing regime established for nuclear was that any member of the public, without technical background and without any identifiable stake-holding in the proposed plant, could

reading-rm/doc-collections/fact-sheets/3mile-isle.html.

17. Marsha Freeman, *Who Killed U.S. Nuclear Power?*, 21ST CENTURY SCIENCE & TECHNOLOGY, Spring 2001, at 23.

18. *See generally* TMI REPORT, *supra* note 14.

19. *See* TMI FACT SHEET, *supra* note 16, at 3-4.

20. *See* Freeman, *supra* note 17, at 4-6.

> have standing and start the process of delaying a technical decision with lay arguments.[21]

In his recent address at the Nuclear Energy Summit, NRC Chairman Klein quoted from an *Energy Daily* article by King in which King bemoaned the fact that there is more public input in nuclear power plant licensing than in drug, airplane, or bridge approval.[22] While Chairman Klein acknowledged that "transparency and public involvement must be key elements of the NRC's licensing and oversight" as noted above, his central theme is that the role of public participation is to build public confidence in nuclear power, not to enhance nuclear safety.[23] However, if one is to believe the nuclear industry claim, that not a single life has been lost due to the civilian nuclear power program, then nuclear power is doing much better with its enhanced public participation, than prescription drugs, airplane designs, or bridges where there is essentially no public input. One must wonder what lesson should be learned from King's comparison.

It is true that many NRC licensing hearings have been prolonged and stretched out over many years. But it was not the number of hearing days that made the process so long, it was how long it was taking the applicants and the NRC Staff to complete their reviews and submit their full case. Often, several days of hearings would result in months of delay while the staff and the applicant went back to the drawing board to find the answers to questions raised by intervenors or the Board, or to make changes to plant designs or procedures to eliminate problems that were exposed by the hearing process.[24] Thus, the perception that an operating license hearing that endured for more than five years was delayed due to the number of hearing days is totally without basis. In fact, then, as now, the applications and the staff documents, as lengthy as they may have been, were woefully deficient in detail and noticeably lacking in the specifics on issues of greatest concern to the intervening public.[25] Thus, it is not surprising that even today the bulk of the contentions raised in licensing hearings are based on the absence of data to support a claim rather than the substantive error in the claim itself. Thus, for instance, in the ongoing hearings regarding the

21. Llewellyn King, *Why Nuclear Power Has Languished*, NORTH STAR WRITERS GROUP, Sept. 30, 2008, *available at* http://www.northstarwriters.com/lk066.htm.

22. *See* Klein, *supra* note 4, at 2.

23. *Id.*

24. Paul Gaukler, Address at the American Nuclear Society International Topical Meeting on Operating Nuclear Facility Safety: New NRC Hearing Rules – Hard Lessons Learned from the Trenches 2 (Nov. 18, 2004).

25. *See generally id.* at 3.

proposed issuance of new, extended term licenses, for Indian Point 2 and 3, of the thirty-two contentions offered by New York State, almost half of the contentions are based on the failure of the application to contain information required by the law and regulations; of the fifteen contentions admitted for consideration by the Board in the hearings, over half are based upon the failure of the application to include information required by law or regulation.[26]

The NRC Staff is also aware that the applications as filed and accepted for docketing are seriously deficient. It devotes months of its efforts to submitting requests for additional information (RAIs) to the applicant to complete the required details of the application.[27] This iterative process is not, in and of itself, inappropriate and apparently reflects a serious commitment by the NRC Staff to improve the quality of the information it must review to make safety determinations. However, docketing the application long before the application is complete, when it often contains substantial areas in which the applicant merely promises to address an issue at a later date or leaves out most of the significant details of its proposed actions, creates the false impression that the time between when the application is "docketed" and when a final decision is rendered is attributable to the hearing process and public participation. This "delay" is then used to justify even further restrictions on the public's right to participate.[28]

26. In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), New York State Notice of Intention to Participate and Petition to Intervene, Docket Nos. 50-247-LR, 50-286-LR (Nov. 30, 2007); In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order, LBP-08-13, Docket Nos. 50-247-LR, 50-286-LR (July 31, 2008).

27. *See e.g.* Request for Additional Information from the NRC Division of License Renewal, Office of Nuclear Reactor Regulation to Mr. Michael A. Balduzzi, Sr. Vice President and COO Entergy Nuclear Operations, Inc. (Subject: Review of the Vermont Yankee Nuclear Power Station, License Renewal Application) (Aug. 29, 2007); Requests for Additional Information from the NRC Division of License Renewal, Office of Nuclear Reactor Regulation to Mr. Michael A. Balduzzi, Sr. Vice President and COO Entergy Nuclear Operations, Inc. (Subject: Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application) (Nov. 9, 2007).

28. A recent experience regarding the proposal to extend the operating license of the Vermont Yankee nuclear power plant in Vernon, Vermont, well-illustrates this point. The applicant, Entergy, has being dragging its feet on submitting a complete and accurate calculation of the impact of extended operation on metal fatigue. This problem dates back to its original application filed more than three years ago. After several efforts to produce only a partial set of calculations, Entergy was finally ordered in a partial final decision of the Licensing Board, to either produce the full calculations or have its license denied. *See* In the Matter of Entergy Nuclear Vermont Yankee, LCC and Entergy Nuclear Operations, Inc. (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3,

The effect of these deficiencies in the applications is to prolong the time required for processing an application. More significantly, it also places the public at a distinct disadvantage in attempting to meet the ever more stringent and rigid requirements to submit admissible contentions for hearings.[29] As characterized by NRC Staff in its "canned" pleading in response to public petitions to participate in the NRC licensing process for Indian Point, a contention must clear all of a large group of hurdles before it can be accepted for consideration in the hearing.[30]

There is a revealing irony in the design of these regulations. The NRC staff, which will have been in contact with the applicant for many months, if not years, before the application is filed and will have frequent private meetings at which candid exchanges occur and documents are provided, and where even so-called proprietary documents are allowed to be viewed, is excused from taking a position on the license application until it issues its final environmental report and final safety evaluation, often a year or more after the notice of opportunity for hearing is filed.[31] In fact, the NRC Staff does not even have to determine whether it will participate in the hearing until after the Atomic Safety and Licensing Board (ASLB or Board) has decided whether to admit any contentions.[32] Nonetheless, the public, which has no direct access to the applicant and cannot probe the applicant to explain its position on any matter and which only has access to the small subset of documents which an applicant has chosen to make public, is expected to meet all the many hurdles regarding contentions it wishes to file within sixty days after notice of filing of the application.[33] These hurdles include substantial substantive obligations regarding the technical basis for disagreement and the evidence upon which such disagreement is based.[34]

and 4), LBP-08-25, Docket No. 50-271-LR (Nov. 24, 2008) at 151-52. This has delayed a final decision on the application for at least 6 months while Entergy produces the required calculations and the parties are allowed to submit new contentions based on the new calculations. In its records of how long it takes to issue final decisions on license renewal applications, NRC makes no effort to identify who is the cause of the delay but critics of public participation use those statistics to urge even more restrictions on public participation.

29. *See generally* 10 C.F.R. § 2.309(f) (2008).

30. *See, e.g.*, In the Matter of Entergy Nuclear Operations (Indian Point Nuclear Generating Units 2 and 3), NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club-Atlantic Chapter, and Assemblyman Richard Brodsky, and (2) Friends United for Sustainable Energy, USA, Docket Nos. 50-247-LR and 50-286-LR (Jan. 22, 2008).

31. *See* 10 C.F.R. § 2.332(b), (d) (2008).

32. *Id.* § 2.1202(b)(1).

33. *Id.* § 2.309(b)(3).

34. *Id.* § 2.309(f).

How can it be fair or in aid of full public participation to impose on the public a high burden of production and proof as a prerequisite to participation in a licensing hearing when such a standard is not even applied to the NRC Staff with its vast array of legal and technical resources? No objective observer would see this for anything other than what it is – a deliberate and calculated plan to deprive the public of participation rights in NRC proceedings by imposing unreasonable and often unachievable evidentiary burdens as prerequisites to participation. Although some of these requirements have been partially challenged in *Citizens Awareness Network v. United States*[35] and the requirements have been upheld, no court has yet been confronted with a fully briefed challenge to the contention requirements as applied to a particular case. Such a challenge is likely to produce a far different result if the putative public participant makes a record of the inherent impossibility of meeting the standards as insisted upon by the NRC Staff.[36]

Persuasive evidence of the true motives of the NRC is well illustrated by the attitude of its Regulatory Staff to attempts by the public to participate in decisions relevant to the NRC. In two recent examples, the Staff demonstrated an overt contempt for public participation by states and Indian tribes, in proceedings that directly affect their interests, by raising

35. Citizens Awareness Network v. United States, 391 F.3d 338 (1st Cir. 2004).

36. An important ameliorating influence on the harsh application of these regulations has been the rule of reason that the ASLB has imposed when interpreting the regulations. *See, e.g.*, In the Matter of Entergy Nuclear Operations (Indian Point Nuclear Generating Units 2 and 3), Order (Granting Riverkeeper, Inc.'s Motion and Amending Briefing Schedule), Docket Nos. 50-247-LR, 50-286-LR (Apr. 9, 2008); In the Matter of Entergy Nuclear Operations, Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2) (Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions EC-4 and EC-5) (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1), Docket Nos. 50-247-LR, 50-286-LR (Dec. 18, 2008). However, as encouraging as this is for those participating in the process, so long as the Commissioners hold the ultimate power on these matters and use it to squelch contentions which are otherwise sound and reasonable with hyper-technical and disingenuous analyses, as it has done in several cases, *see* In the Matter of Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station), CLI-07-13, Docket No. 50-271-LR (Mar. 15 2007), the rule of reason adopted by the ASLB will have little lasting effect and the Commission's more draconian view of its own regulations will have the desired effect of chilling public participation by warning those who try to participate that all their efforts, regardless of the correctness of their concerns, may go for naught because of some technical requirements that could not be reasonably met.

hyper-technical objections to their attempts to be part of the process.[37] NRC Staff questioned the authority of the general counsel of the Prairie Island Indian Tribe to represent the tribe as a party in the proceeding, and demanded that counsel, contrary to the rules that apply to all other parties, provide an affidavit from a tribal officer confirming that he had authority to represent the tribe.[38] Not surprisingly, the Board had no problem easily disposing of this claim by NRC Staff.[39]

In a recently filed appeal by the NRC Staff to a ruling of the ASLB in *Entergy Nuclear Vermont Yankee, LCC and Entergy Nuclear Operations, Inc.* (Yankee Nuclear Power Station),[40] several states sought to file an *amicus* brief in opposition to the appeal based upon the fact that the issue which the Staff sought to challenge was also an issue in licensing proceedings in which they were parties.[41] NRC Staff opposed the filing on several highly technical grounds, including the fact that the states had not previously sought to intervene in the *Vermont Yankee* proceeding, that they did not sufficiently detail how their participation as an *amicus* would be beneficial to the Commission, and that their participation would set a precedent that would allow states to "jump from proceeding to proceeding in an effort to further their plant-specific interests," as though it were undesirable for a state to seek to protect its interest in a specific case by participating in the resolution of issues that were directly relevant to those interest in another case.[42] But most disturbingly, the Staff, in its zeal to prevent public participation by these interested states, cited to the Atomic Energy Act provision that assures states the right to participate in licensing

37. In the Matter of Nuclear Management Company, LLC (Prairie Island Nuclear Generating Plant, Units 1 and 2), NRC Staff's Answer to the Prairie Island Community's Petition for Leave to Intervene, Docket Nos. 50-282-LR, 50-306-LR (Sept. 12, 2008).

38. *Id.* at 6; In the Matter of Northern States Power Co. (formerly Nuclear Management Company, LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2), Memorandum and Order (Ruling on Petition to Intervene, Request for Hearing, and Motion to Strike), LBP-08-26, Docket Nos. 50-282-LR, 50-306-LR, at 7-9 (Dec. 5, 2008).

39. Northern States Power Co., LBP-08-26, at 7-9.

40. NRC Staff's Petition for Review of the Licensing Board's Partial Initial Decision, LBP-08-25, Docket No. 50-271-LR (Dec. 9, 2008).

41. In the Matter of Entergy Nuclear Vermont Yankee LLC, Motion for Leave by the States of New York and Connecticut, Hudson Riverkeeper, Inc., Hudson River Sloop Clearwater, Inc., and the Prairie Island Indian Community to Submit Brief *Amicus Curiae* in Opposition to Staff's Petition for Review and in Support of Intervenors State of Vermont and the New England Coalition, Docket No. 50-271-LR (Dec. 19, 2008).

42. In the Matter of Entergy Nuclear Vermont Yankee LLC, NRC Staff's Reply to Motion to Submit Brief *Amicus Curiae*, Docket No. 50-271-LR, at 3 (Dec. 23, 2008).

proceedings by selectively quoting an excerpt from that statute that distorted its plain meaning.[43]

The provisions of 42 U.S.C. § 2021(*l*) guarantee every state the right to participate in NRC licensing decisions:

> With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.[44]

The obligation to give notice to a state is limited to the state in which the activity will occur.[45] However, the "reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission" applies to "State representatives," appears in a phrase separated by a semicolon from the "notice" phrase and is not limited to a state in which the facility is located.[46] NRC Staff in quoting from this provision and arguing that it is limited to states in which the facility is located, provided the following truncated version of the statute:

> The Commission shall give prompt notice to the State or States *in which the activity will be conducted* of the filing . . . [of an application] and shall afford reasonable opportunity . . . for the State to . . . advise the Commission with regard to the application.[47]

By truncating the citation and leaving out the semicolon, Staff gives the misleading impression that the state, which receives notice of Commission action, is the only state that has a right to advise the Commission.

These examples of the Staff's crabbed view of the rules and regulations that govern public participation are hardly in step with the Commission's

43. *Id.* at 3-4.

44. Atomic Energy Act § 274(*l*), 42 U.S.C. § 2021(*l*) (2006).

45. *See id.*

46. *Id.*

47. In the Matter of Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), NRC Staff's Reply to Motion to Submit Brief *Amicus Curiae*, Docket No. 50-271-LR, at 3-4 (Dec. 23, 2008).

oft-expressed, but rarely implemented, goal of encouraging public participation in NRC decisions.

IV. PUBLIC PARTICIPATION PROVIDES VALUABLE ADDITIONS TO PUBLIC HEALTH AND SAFETY

If public participation were substantively valueless, as people like Llewellyn King, the nuclear industry, and many at the NRC believe, then restricting that participation would be of much less consequence. But the available evidence strongly rejects that assumption.

As early as 1974, when faced with a broadside attack on the value of public participation in NRC licensing decisions, the Atomic Safety and Licensing Appeal Board (since abolished by the Commission), drawing on its substantial experience with individual licensing decisions and their evidentiary records, recognized the contribution of public participation to nuclear safety:

> Our own experience – garnered in the course of the review of initial decisions and underlying records in an appreciable number of contested cases – teaches that the generalization [that public participation contributes nothing to safety] has no foundation in fact. Public participation in licensing proceedings not only "can provide valuable assistance to the adjudicatory process," but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.[48]

As recently as this last summer, Michael Farrar, an NRC hearing officer who has been serving as an NRC Judge for over thirty years, reaffirmed the valuable contribution that is made to NRC safety and environmental reviews by public participation:

> The Petitioners were instrumental in focusing the Board's attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can

48. In the Matter of Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974) (citing Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5 371, 374 n.13 (May 25, 1973)) (footnote omitted).

> make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages.[49]

These views were acknowledged by Chairman Klein, who recently stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders."[50] He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."[51] Nonetheless, while the NRC today gives lip service to the value of public participation, its every action reflects a deep disdain for the usefulness of the public input on matters of safety or environmental protection. Yet, as the ASLAB recognized in the River Bend case, intervenors have raised important safety and environmental issues that, but for their involvement, would not have been addressed in the NRC safety and environmental review.[52]

But has public confidence in nuclear power increased? Since, as Chairman Klein has declared, it is the goal of the new NRC tactics to increase public confidence in nuclear power, it is worth looking at that issue to see if there is in fact increasing public confidence in nuclear power. One measure of the public attitude regarding nuclear power is how politicians view the issue. In recent years, an increasing number of elected officials have been raising serious questions about nuclear reactor safety. One of the leading public officials challenging nuclear power is Andrew Cuomo, Attorney General of New York State, who has expressed his unalterable opposition to the further operation of Indian Point and whose staff has filed one of the largest and most comprehensive challenges to a proposed license

49. In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098-MLA, at 49 (June 27, 2008) (Farrar, J., concurring).

50. Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), http://www.nrc.gov/reading-rm/doc-collections/commission/; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co-operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/.

51. Klein, *supra* note 50, at Slide 11.

52. In the Matter of Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974).

renewal.[53] Attorneys General in many other states are adding their voices of concern, including Massachusetts, Connecticut, California, and Nevada, to mention only a few. Similarly, President Barack Obama has endorsed the use of nuclear power only if high level waste disposal and critical safety problems can be resolved.[54]

Increasing numbers of citizen organizations are mounting challenges to nuclear plant proposals and to NRC decisions. In one recent decision, *Massachusetts v. United States,*[55] the First Circuit expressed some concern that the NRC would actually obey the procedural interpretations it placed on its own regulations in order to prevail in the case and gave this unusual warning to the NRC:

> Further, if the agency were to act contrary to these representations in this matter, a reviewing court would most likely consider such actions to be arbitrary and capricious.[56]

Those are not the words of a court that has a lot of confidence in the NRC or its credibility.

But Chairman Klein has indicated that the key to public confidence is high standards. He may be right, but the NRC record is anything but evidence of high standards or, more importantly, of vigorous enforcement of those standards. Peter Bradford, the former NRC Commissioner and internationally recognized energy expert, compiled the following list of some of the more notorious lapses by NRC in its oversight and regulatory responsibilities, just in the last seven years:

> 1. January 7, 2003 – A *New York Times* story reported that the NRC had ruled that terrorism was too speculative to be considered in NRC licensing proceedings, even as the Bush administration and Congress considered terrorism likely enough to suspend habeas corpus and commit torture. This position has since been rejected by the Ninth Circuit Court of Appeals, but the NRC continues to apply it elsewhere. – The original staff testimony taking this position in

53. Press Release, New York State Executive Chamber, Governor Spitzer & Attorney General Cuomo Announce Effort to Halt Indian Point Relicensing (Dec. 3, 2007), http://www.state.ny.us/governor/press/1203072.html.

54. Stephen Power, *In Energy Policy, McCain, Obama Differ on Role of Government*, WALL ST. J., June 9, 2008, at A2. *See also* Environment & Energy Daily which reported on April 22, 2009 ("No new nuclear or coal plants may ever be needed in the United States, the chairman of the Federal Energy Regulatory Commission said today. 'We may not need any, ever,' Jon Wellinghoff told reporters at a U.S. Energy Association forum.").

55. Massachusetts v. United States, 522 F.3d 115 (1st Cir. 2008).

56. *Id.* at 130.

opposition to an intervenor contention was submitted on September 12, 2001, one day after the terrorist attacks on the World Trade Center and the Pentagon. The licensing board wanted to admit the contention despite the staff opposition but was overruled by the commission.

2. A 2002 survey of NRC employees says that 40% would be scared to raise significant safety questions. Then Chairman Richard Meserve said this was a big improvement from the 50% of five years earlier.

3. From a *New York Times* editorial of January 7, 2003 – "Unfortunately, the regulatory agency that was supposed to ride herd on unsafe plants was equally negligent. A report just released by the NRC's inspector general concludes that the regulatory staff was slow to order Davis-Besse to shut down for inspection, in large part because it did not want to impose unnecessary costs on the owner and did not want to give the industry a black eye. Although the NRC insists that safety remains its top priority, its timidity in this case cries out for a searching Congressional inquiry into whether the regulators can still be counted on to protect the public from cavalier reactor operators."

4. In 2003 the NRC submitted the name of Sam Collins, the official who had overseen the Davis Besse shutdown delay, to the Office of Personnel for the highest civilian financial award, a 35% bonus. During the time covered by the award, the NRC inspector general also concluded that Collins had knowing[ly] inserted a false statement into a letter sent by the NRC chair to David Lochbaum at the Union of Concerned Scientists. As Lochbaum observed at the time, "The NRC has a safety culture problem. The survey released last December showed that only 51% of the workers felt comfortable raising safety concerns. The Commission can only reinforce the fears by rewarding a person who has falsified documents, chided those who did their jobs, and taken repeated steps to undermine safe."

5. Immediately after the September 11th attacks, the NRC rushed out a claim that nuclear power plants were designed to withstand such crashes. This claim, which had no basis, was later withdrawn.

6. Two unprecedented speeches by Commissioner Edward McGaffigan attacking groups with a history of responsible participation in NRC proceedings.

7. The claim by Senator Pete Domenici that he had successfully persuaded the NRC to reverse its "adversarial attitude" toward the nuclear industry by threatening to cut its budget by one-third during a 1998 meeting with the chair (from PETE V. DOMENICI, A BRIGHTER TOMORROW: FULFILLING THE PROMISE OF NUCLEAR ENERGY 74-75 (Rowman and Littlefield 2004)).

8. Current NRC chair, Dale Klein, appeared in industry-funded advertisements attesting to the safety of Yucca Mountain. When Commissioner Jaczko was appointed from the staff of Nevada Senator Harry Reid, he was required to take no part in Yucca Mountain matters for a year or two. No such requirement was placed on Klein.

9. The NRC has eviscerated the opportunities for public participation that existed 15-20 years ago. To give but one of many examples, lawyers can no longer cross examine but must submit their questions to the licensing board chair, who decides whether or not to ask them.

10. The top U.S. nuclear regulator vouched for the safety of a new Westinghouse nuclear reactor – yet to be built anywhere in the world – in a sales pitch to supply China's growing power industry. U.S. Nuclear Regulatory Commission Chairman Nils Diaz said that the $1.5 billion AP1000 reactor made by Westinghouse Electric Co. is "likely to receive regulatory approval in the next few months."[57]

The NRC's own Inspector General discovered that NRC Staff was copying into its reports on plant license renewal applications verbatim sections of the application itself, without attribution, and then, when the Inspector General went to test the Staff assertion that its review was thorough, even if its report writing was deficient, it was discovered the Staff had destroyed all the documents that allegedly demonstrated the thoroughness of its "independent" review.[58]

57. Email from Peter Bradford, former member of the U.S. Nuclear Regulatory Comm'n, to Anthony Roisman (Jan. 15, 2009) (containing the text of a letter from Congressman Peter Welch to Congressman Henry Waxman outlining Bradford's concerns) (on file with author).

58. OFFICE OF THE INSPECTOR GEN., U.S. NUCLEAR REGULATORY COMM'N, AUDIT OF NRC'S LICENSE RENEWAL PROGRAM (OIG-07-A-15) 8-11, 15-16 (2007), *available at* http://www.nrc.gov/reading-rm/doc-collections/insp-gen/; *see also* Memorandum from Hubert T. Bell, Inspector Gen., U.S. Nuclear Regulatory Comm'n, to Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, NRC Staff Review of License Renewal Applications (May 2, 2008).

In 2008 Judge Farrar raised concerns about whether the NRC Staff was primarily committed to a safety culture or whether its primary motivation was to "do it faster" using two startling examples from the *Shaw Areva Mox Services* case before the ASLB, where safety was clearly not a paramount concern.[59] Judge Farrar noted that 1) the Staff initially supported allowing a decision on an operating license to proceed to final decision even though the construction of the facility had not yet begun, much less been completed, as required by NRC regulations and 2) was willing to ignore the requirements written into its own Safety Evaluation Report as part of the construction permit process and allow the facility to proceed without compliance with those requirements. [60]

These events caused Judge Farrar to reach this conclusion:

> The approaches the Staff took to two matters during this proceeding appear to raise concerns about the robustness of the agency's internal safety culture. Perhaps those two matters were aberrational, and can be explained away as of little broader consequence. But, on the other hand, they may be symptomatic of safety culture deficiencies, and thus raise a serious question about a foundation of nuclear safety – the culture of the government organization responsible for promoting it.[61]

To date, there is no evidence that the NRC Staff or the Commission has taken any steps to find the root cause of these serious lapses in NRC Staff commitment to safety nor taken steps toward identifying the root causes of NRC Staff decisions that seek to so seriously undermine its own obligation to safety.

Finally, the nuclear industry itself has changed in the last decade. With the advent of electric power deregulation and consolidation of nuclear power plant ownership into a handful of companies, there are new and ample opportunities for profits to trump safety and, regrettably, ample examples of laxness among the nuclear power plant owners. Before deregulation and the rise of "absentee" ownership of nuclear power plants, a local utility, with roots in the community and under a regulatory regime based on a guaranteed rate of return on capital and operating costs, an owner had no reason not to spend the money necessary to provide the best

59. In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA (June 27, 2008) (Farrar, J., concurring).

60. *Id.* at 45-48.

61. *Id.* at 46.

quality safety equipment and operating procedures. Now, as "merchant" owners, nuclear plant operators are: 1) selling power in competition with other forms of energy; 2) entering into fixed priced, long term power sale agreements to satisfy local public utility commissions focused primarily on protecting the pocketbook of electricity customers; and, 3) seeing the size of their profit margin directly affected by how much money they spend on safety, how much money they spend on license applications, how large their plant staff is and how quickly they can complete work that requires the plants to be off line. While all these are laudable goals, they must not be allowed to over-shadow the principle goal of nuclear safety. Is that what is happening?

Without a vigorous and committed NRC Regulatory Staff fulfilling its duties as a safety watchdog, there is no comforting answer to that question. What is known is that over the last twenty years, the capacity factor for nuclear power plants has risen from the low sixties to the low nineties and there is no way to attribute that 50% improvement solely to a more efficient, and still safe, refueling process or other management initiatives implemented by the utilities.[62] Certainly, one significant factor is that during that time period the NRC severely restricted the use of backfitting, i.e. the imposition, after construction or operation has begun, of safety improvements based upon new research resolving previously unresolved safety issues or addressing the occurrence of unanticipated safety problems such as fuel densification, the Browns Ferry fire or Three Mile Island.[63] The backfit procedure was used to compensate for the fact that all nuclear plants were licensed with substantial unresolved safety issues and that the fair price for that expediency was to backfit the nuclear plants with new safety equipment and procedures when resolution of the safety issue showed that such an upgrade was warranted.

The backfit standard used to be that if resolution of a previously unresolved safety problem demonstrated that a safety improvement was warranted, it was required. Now that safety improvement is only required if the Commission finds that there is:

> A substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from

62. NUCLEAR ENERGY INSTITUTE, U.S. NUCLEAR GENERATING STATISTICS 1971-2007, http://www.nei.org.

63. *See* 10 C.F.R. § 50.109 (2008).

> the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.[64]

How does the NRC justify shifting the burden from the utility, to demonstrate that a safety backfit is not required, to the NRC, to justify that a backfit will provide a "substantial increase in the overall protection of the public health and safety" and how does the NRC justify allowing the cost of a safety improvement to be a factor in deciding whether to require it? At a minimum, such a drastic change in, and reduction of, safety requirements should have been proceeded by a thorough and publicly discussed analysis in the context of an adjudicatory hearing that demonstrated: that nuclear power had advanced sufficiently to be able to decisively conclude that the plants that had already been licensed were "safe" for their full term; that no important unresolved safety problems existed; and, that the industry had reached sufficient maturity to justify such a change. No such public hearings have been held and no such findings have been made. There is evidence that the nuclear industry is anything but "mature:" sleeping guards, corroding pressure vessels and a shocking lack of candor by nuclear plant-owners[65] all suggest that, at best, the nuclear industry has morphed from an unsophisticated and nuclear naive child to a rebellious teenager, more in need of controls today than ever before.

In short, the public has much less confidence in nuclear power today than it did several decades ago and there is ample reason for such skepticism with a profit aggressive nuclear industry and a reluctant NRC regulator.

V. THE NEW HEARING REGULATIONS ARE NOT MORE EFFICIENT

Even though the NRC has wrongly blamed public participation as a major source of the nuclear industry's problems and ignored the evidence that public participation "not only 'can provide valuable assistance to the

64. *Id.* § 50.109(a)(3).

65. *E.g.*, Sharon Dunwoody et al *After Environmental Accidents, Public Deserves Candor*, THE SCIENTIST, Apr. 15, 1991, at 11; JOAN B. ARON, LICENSED TO KILL? THE NUCLEAR REGULATORY COMMISSION AND THE SHOREHAM POWER PLANT 8 (1998); U.S. GEN. ACCOUNTING OFFICE, NUCLEAR REGULATION: NRC NEEDS TO MORE AGGRESSIVELY AND COMPREHENSIVELY RESOLVE ISSUES RELATED TO DAVIS-BESSE NUCLEAR POWER PLANT'S SHUTDOWN (GAO-04-415) (May 2004); Steven Mufson, *Video of Sleeping Guards Shakes Nuclear Industry*, WASHINGTON POST, Jan. 4, 2008, at A01.

adjudicatory process', but on frequent occasions demonstrably has"[66] done so, and even though the NRC has totally failed to increase public confidence in the safety and benefit of nuclear power due to its own lapses in regulatory oversight and the nuclear industries own shortcomings, has the NRC achieved its stated goal of making the nuclear licensing process more efficient? Again, the evidence is compelling that the nuclear licensing process has become less efficient, more convoluted, and ultimately vastly more vulnerable to attack in court as a result of misguided and, in many instances, just plain irrational changes to the NRC licensing process.

The core of the changes implemented by the NRC were to impose a series of barriers to any member of the public able to participate in the hearing process and inflict severe limitations on the issues that could be raised in the licensing hearing, including both substantive and procedural barriers. One of the more complete explanations of this draconian procedure is provided in the essentially canned analysis provided by NRC Staff in its opposition to the bulk, if not all, of the contentions proposed in license renewal proceedings. The following is taken from the NRC Staff's January 22, 2008, filing in the Indian Point relicensing hearings:

> A. Legal Requirements for Contentions
>
> 1. General Requirements.
>
> The legal requirements governing the admissibility of contentions are well established, and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)). Specifically, in order to be admitted, a contention must satisfy the following requirements:
>
> (f) Contentions.
>
> (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

66. In the Matter of Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, Docket Nos. 50-458 and 50-459, 7 A.E.C. 222, 227-28 (Mar. 12, 1974).

> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
>
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.
>
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report . . .

10 C.F.R. § 2.309(f)(1)-(2).

The Licensing Board in this proceeding has previously addressed these standards at length, in its Orders denying certain petitions to intervene for failure to state an admissible contention. The Licensing Board summarized the standards in 10 C.F.R. § 2.309(f)(1), as follows:

> An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application

> is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

Memorandum and Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene) (Dec. 5, 2007), slip op. at 3; footnote omitted. As the Licensing Board further observed, sound legal and policy considerations underlie the Commission's contention requirements:

> The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." The Commission has emphasized that the rules on contention admissibility are "strict by design." Failure to comply with any of these requirements is grounds for the dismissal of a contention.

Id. at 4 (footnotes omitted).

The requirements governing the admissibility of contentions have been strictly applied in NRC adjudicatory proceedings, including license renewal proceedings. For example, in a recent decision involving license renewal, the Commission stated:

> To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design," and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." "Mere 'notice pleading' does not suffice." Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.

Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006); footnotes omitted; emphasis added.

Finally, it is well established that the purpose for the basis requirements is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further

> inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom, supra*, 8 AEC at 20-21.[67]

The use of terms such as "strict," "sufficient," "demonstrate," and similar admonitions underscores the rigidity with which NRC Staff and the Commission interpret these requirements. What is most notable is that in imposing the requirements for safety or even procedural requirements on the applicant, no similar rigidity is displayed. For example, pursuant to 10 C.F.R. § 54.13, all applications for license renewal must be "complete and accurate in all material respects."[68] Anyone who has participated in a license renewal proceeding knows how this requirement is ignored and how applicants are allowed to make major, substantive additions to their applications long after the application has been accepted and docketed by the NRC Staff. Perhaps the most notable of these afterthought amendments is the one that Entergy routinely files when it is challenged for its failure to demonstrate, as required by the regulations, that it has an aging management plan to address metal fatigue during extended license operation.[69] A similar laxity is evident in the manner in which NRC Staff, almost every month, grants an exemption under 10 C.F.R. § 50.12 from the safety standards imposed by 10 C.F.R. Part 50 because an applicant finds it too difficult or expensive to meet the requirements and offers a technically facile analysis to justify its entitlement to an exemption. If, as the NRC Staff and Commission delight in reminding intervenors, the requirements for public participation are "strict by design," fairness and good policy would dictate that safety regulations and filing requirements for applicants should also be "strict by design."

Of course, there have been hearings where issues were raised that lacked substantive merit and questions were asked that were pointless, but there are ample ways to prevent or substantially reduce such occurrences without excluding legitimate concerns about nuclear plant safety because of

67. In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 and 2), NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club – Atlantic Chapter, and Assemblyman Richard Brodsky, and (2) Friends for United Sustainable Energy, USA), Docket Nos. 50-247LR and 50-286-LR, at 23-27 (Jan. 22, 2008) (footnotes omitted).

68. 10 C.F.R. § 54.13 (2008).

69. In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3, and 4), LBP-08-25, Docket No. 50-271-LR (Nov. 24, 2008).

hyper-technical regulations and hyper-strict implementation of those regulations. The effects of these highly restrictive entry requirements have become evident to NRC's independent judges who see these requirements in action every day and who also have the best vantage point to judge the value of public participation.[70] One of the most pernicious aspects of the hearing regulations is the use of time limits as a one-way restriction to disadvantage the public.[71] In essence, any prospective intervenor who does not raise every conceivable contention within the sixty day time period allotted for filing intervention petitions must face the additional hurdle of justifying a "late filed" contention even if the late filed contention is necessitated by the late filed application amendment or information from the applicant.[72] There are no restrictions on when the applicant can file its license amendment or when the Staff must complete its safety or environmental reviews. However, there are strict deadlines on how soon after the amendment is filed when an intervenor must file a contention based on that amendment. This situation provides numerous opportunities for applicants and the NRC Staff to "game" the system to the detriment of public participation.[73]

For example, when Entergy filed its application for license renewal at Vermont Yankee, it left out of the application the crucial information on

70. In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA, at 45, 49-58 (June 27, 2008) (Farrar, J., concurring).

71. *Id.* at 55-58.

72. 10 C.F.R. §§ 2.309(c), (f)(2)(iii) (2008).

73. A recent filing in the *Indian Point* relicensing proceeding illustrates the point. The staff sent its draft Supplemental Environmental Impact Statement (DSEIS) to the applicant on December 22, 2008. *See* Notice of Availability to Entergy Nuclear Operations Inc. from the NRC Division of License Renewal, Office of Nuclear Reactor Regulation (Subject: The Draft Plant-Specific Supplement 38 to the Generic Environmental Impact Statement For License Renewal of Nuclear Plants (GEIS) Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3) (Dec. 22, 2008). The applicant argued that a January 9, 2009, request for an extension of time to file contentions based on that filing was untimely because it should have been filed on January 2, 2009, in accordance with the ten-day time limit to file a motion based on an event. *See* In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Entergy's Answer to NYS and Riverkeeper's Motions for Extension of Time to File Contentions Related to Draft SEIS, Docket Nos. 50-247-LR and 50-268-LR (Jan. 12, 2009); 10 C.F.R. § 2.323(a) (2008). The Commission provides no allowance for intervening holidays or weekends so Christmas, Christmas weekend and New Years are ignored. This left the party seeking to file a motion for an extension of time to file new contentions based on the DSEIS less than five working days. It is unlikely that the filing of the DSEIS on December 22, was a mere accident, particularly since the filing was more than a month after the date the Staff indicated the document would be filed, having granted itself an extension of time without the need to ask permission from anyone.

how it would address the issue of metal fatigue during the extended license period.[74] It listed three options, any one of which it might choose to implement in the future.[75] A contention based on the deficiency in any one of those approaches would be attacked as premature and speculative, since Entergy had not yet decided which approach to take. Thus, the only arguably "admissible" contention was one that criticized the application for not having a program.[76] Of course, once that contention was admitted, the applicant then chose one of the methodologies - it would recalculate the metal fatigue numbers to show they were not excessive but the actual recalculation was not provided.[77] Entergy filed its "final" recalculation, which the intervenor's expert promptly eviscerated.[78] Entergy then had to redo the recalculation (called a confirmatory analysis) and a new contention, which was opposed, had to be filed, and was allowed.[79] The NRC Staff joined in Entergy's opposition. Eventually, the Board found that additional calculations for other components had to be completed and were subject to challenge in the hearing, not deferred until the hearing was concluded as Entergy urged.[80] This illustrates how wasteful and inefficient a process is, which allows an incomplete application to trigger a contention filing obligation and then subjects the public to even greater barriers when it seeks to raise issues when they are ripe and which could not have been raised earlier. Not surprisingly, but still disappointingly, when NRC amended its rules, the only efficiencies with which it was concerned were those of applicants, not the public.

Another example of the absurdity of the "strict by design" procedural rules for intervenors and the need to seek leave to file a "late filed contention" every time new information is released, is the rule applied to challenges to the NRC Staff's environmental impact statement. Pursuant to the National Environmental Policy Act (NEPA), every major federal action, which includes decisions to license or relicense a nuclear power plant, must be preceded by an environmental impact statement.[81] The final is always preceded by a draft on which public comments are submitted. Common

74. In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Yankee Nuclear Power Station), Partial Initial Decision (Ruling on Contentions 2A, 2B, 3, and 4), LBP-08-25, Docket No. 50-271-LR, at 13 (Nov. 24, 2008).

75. *Id.*

76. *Id.* at 14.

77. *Id.*

78. *Id.* at 14-15

79. *Id.*

80. *Id.*

81. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

sense would say that a concerned member of the public should participate in the impact statement process by filing comments on the draft but waiting to file any contentions challenging the impact statement only after the agency has had a chance to consider the comments and to issue its final impact statement, modified as it sees fit by considering the public comments. However, the NRC position, relying on 10 C.F.R. § 2.323(a), is that all contentions challenging the impact statement are untimely if they are not filed shortly after the draft impact statement is issued or unless the final impact statement contains positions not previously identifiable from the draft. If, in the final impact statement, the NRC modifies the draft impact statement such that the initial contention is no longer accurate, the intervenor must file a new contention and meet all the special rules for filing such a new contention.

These problems are complicated by another bizarre requirement. Pursuant to 10 C.F.R. § 2.309(f)(2), environmental contentions arising under NEPA must be based on the environmental report filed by the applicant, even though the obligations imposed on the applicant are those contained in the NRC Regulations, 10 C.F.R part 51 and not those contained in NEPA.[82] When the NRC Staff issues a draft impact statement under NEPA, contentions can be based on the draft only if it can be shown that they are based on information or conclusions that differ significantly from the information contained in the applicant's environmental report. However, a contention that challenges the applicant's environmental report because it does not comply with NEPA is rejected because an applicant cannot be required to comply with NEPA. So, how does a NEPA challenge become a contention if the Staff merely parrots what the applicant has said in the environmental report?

These multiple hurdles that intervenors face are not merely annoying, they are resource intensive and sap the limited resources of intervenors on procedural issues making it less likely they will have resources to address the substantive issues. Because they are procedural hurdles, they also challenge the pro se intervenor, without legal assistance, to meet every technical requirement, each of which is "strict by design," thus creating multiple opportunities for the applicant and NRC Staff to find a "flaw" in the intervenor's pleading. This allows an applicant or NRC Staff to expose a procedural misstep, while avoiding a hearing on the substantive concerns that have motivated the public participation by the intervenor.

82. "On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." 10 C.F.R. § 2.309(f)(2) (2008).

In a recent concurring opinion, Judge Farrar explored, at length, the inequities and inefficiencies in the NRC hearing procedures.[83] He focused primarily on barriers to the public to entry into the hearing process and inappropriate deadlines on the public once the hearing process begins. He reached the following conclusion:

> In my view, a set of conditions that fosters these approaches and disparities should not have been allowed to continue to develop within the bounds of the Commission's adjudicatory system . . . the adjudicatory system ought to operate in the way it would if it were "really trying" (1) to encourage the participation of those who are protected by the Atomic Energy Act's grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.[84]

Judge Farrar's comments were echoed by another long time NRC hearing judge, Alan Rosenthal, at the outset of an oral argument in nuclear waste repository (Yucca Mountain) hearings:

> As the parties to the proceeding are likely aware, I became a member of this Board very recently. Upon joining it, I discovered to my amazement that the Department of Energy was taking the position that not a single one of the 100 -- of the 229 separate contentions filed by the State of Nevada was admissible. In addition, to my further amazement, I learned that the Nuclear Regulatory Commission staff had told the Boards that, in its view, only a very small number of those 229 contentions met the standards for admission contained in the Commission's rules of practice, more particularly, Section 2.309(f)(1). That amazement stemmed from the fact that, on the face of it, it seemed most unlikely that experienced Nevada counsel, which included a former deputy general counsel of this agency were unable to come up with even one acceptable contention relating to this extraordinarily and unique proposed facility. Put another way, I found it difficult offhand to believe that Nevada counsel were so unfamiliar with the requirements of section 2.309(f)(1) that they simple were unable to fashion a single contention that met those requirements.

83. *See* In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Ruling on Contentions and all Other Pending Matters), LB-08-11, Docket No. 70-3098-MLA, at 45, 49-58 (June 27, 2008) (Farrar, J., concurring).

84. *Id.* at 58, 59.

> Now, it might turn out that despite this initial reaction, at day's end it will be determined by the members of the three boards, myself included, that, in fact, none of Nevada's contentions is admissible. In that connection, DOE and the NRC staff can be assured that each of their objections to the admissibility of contentions will have received full consideration by the time of our decision. Should, however, upon that full consideration, we conclude that a significant number of the Nevada contentions are clearly admissible, with the consequence that the objection to their admission was wholly insubstantial, for me at least, both DOE and the NRC staff will have lost credibility.
>
> Obviously DOE has an interest in fending off at the threshold as much of the opposition to its Yucca Mountain proposal as responsibly can be done. It is not responsible conduct, however, to interpose objections that are devoid of substance on an apparent invocation of the old adage, nothing ventured, nothing gained. Insofar as concerns the NRC staff, unlike DOE, it is the regulator, not the promoter of the proposal. That being the case, it would be even more unseemly for it to interpose to the admission of contentions objections that are plainly without substance. Indeed, in such circumstances, the staff would, to its detriment, create the impression that it is not a disinterested participant in the licensing process but rather a spear carrier for DOE. Once such impression has been garnered, there would remain little reason to credit anything that the staff might have to offer.[85]

VI. TRUNCATED AND CONVOLUTED HEARING PROCEDURES

Even if a member of the public overcomes all the hurdles and actually manages to meet the requirements for a hearing, the path to full and fair exploration of the few issues that survived the procedural gauntlet is littered with potholes and roadside bombs designed to further impede a full exploration of the issues pressed by a public participant. Until fairly recently, adjudicatory hearings before the NRC provided full use of trial type procedures, including discovery tools like interrogatories, document production requests, depositions and requests for admissions and the availability of cross-examination, during the hearing. In 2004 the NRC

85. In the Matter of U.S. Department of Energy (High-Level Waste Repository) Docket No. 63-001-HLW, Transcript of Proceedings (Interim Draft) Apr. 1, 2009 at 338-41.

drastically changed its hearing regulations to substantially curtail the availability of all these procedures. Its stated reason for the change was "to make the NRC's hearing process more effective and efficient."[86] What it created instead was a labyrinth of confusing and arguably inconsistent procedural regulations which create an enormous amount of litigation potential over the meaning and application of these regulations. In addition, because the "system" created by NRC has no counterpart in other agencies or in federal or state courts, each time an issue arises under the regulations it is a case of first impression. While this "lawyers' full employment act" type of regulation may be comforting to the lawyers for license applicants who are well-paid for their time, it is an enormous drain on the resources of the public to struggle through the regulations to assert their right to full and fair hearings. After four years of the new regime, what is evident is that the process is neither effective nor efficient. The following discussion illustrates the difficulty a party will face in attempting to assert the right to use the full panoply of discovery and hearing procedures in those cases where their use is warranted.

Three statutory provisions address the choice of hearing procedures: 42 U.S.C. §§ 2021(*l*), 2231 and 5 U.S.C. § 556. Four NRC regulations also address the choice of hearing procedures: 10 C.F.R. §§ 2.309(g), 2.310(d), 2.336(f), and, to the extent Subpart L is chosen, § 2.1204(b)(3). The underlying rationale behind all of these provisions is that procedures to be used in an NRC licensing hearing governed by the provisions of 42 U.S.C. § 2239(a), which require a hearing in "any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . upon the request of any person whose interest may be affected by the proceeding . . . " shall be those procedures that have been shown to be necessary for "resolution of material issues of fact which may be best determined through the use of the identified procedures."[87] Although this concept is relatively simple, based on a practical showing of the need for particular procedures, NRC has encrusted the concept with a series of complicated hurdles that a party must overcome before they can get to argue for the use of any of these procedures. In this way, the NRC regulations are neither effective nor efficient and their principal effect is to make it virtually impossible for any but the most well-financed members of

86. Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2182, 2182 (Jan. 14. 2004).

87. 10 C.F.R. § 2.309(g) (2008); *see also* 10 C.F.R. § 2.1204(b)(3) (2008) (cross-examination allowed under Subpart L where it is shown that it is "necessary to ensure the development of an adequate record for decision").

the public to obtain meaningful hearing procedures. The following discussion explores the current NRC regulations governing the hearing procedures available to a party to the proceeding and the difficulty involved in attempting to use these procedures. Instead of allowing a procedure to be used if it's shown that it is the best procedure for the purpose, a series of alternative tests have been developed that are not only virtually impossible to meet but also depart substantially from the practical test, endorsed by the Administrative Procedure Act (APA) and ostensibly adopted by the NRC.

NRC and applicants claim that in the 2004 regulatory amendments, the NRC announced two basic principles. First, by requiring all parties to a hearing to disclose all documents relevant to the issues raised in the proceeding, the need for any additional discovery would be negligible.[88] Second, the only way to gain the right to ask for additional discovery procedures (absent gross misconduct by a party in fulfilling its mandatory disclosure obligations)[89] is for the hearing board to decide at an early stage in the hearing that certain draconian tests have been met to justify placing the hearing in a special category where the opportunity to use other discovery procedures is available. In order to carry out its grand plan in 2004, the NRC created several hearing tracks, called Subparts. The Subparts most relevant to issuance of new extended operating licenses are Subparts G and L. To understand how complicated this procedure is, it is necessary to explore it in some detail because, as noted, it too is "strict by design."

According to the provisions of 10 C.F.R. § 2.336(f), the mandatory disclosure requirements of § 2.336 are "the sole discovery permitted for NRC proceedings [under 10 C.F.R. Part 2] unless there is further provision for discovery under the specific subpart under which the hearing will be conducted." NRC Staff and applicants maintain that the choice of hearing procedure is solely governed by 10 C.F.R. § 2.310, entitled "Selection of hearing procedures."[90] The provisions of 10 C.F.R. § 2.310(a) provide that

88. *See* Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2182, 2194 (Jan. 14. 2004). However, unlike the federal rules which, in addition to the mandatory disclosures in FED. R. CIV. P. 26(a)(1), also allow interrogatories, document production requests, depositions, and requests for admissions, NRC essentially forecloses any other discovery. If the federal courts, with their extensive experience, do not believe the mandatory disclosures alone are sufficient, it is difficult to see what basis the NRC has for its assertion that such disclosures are enough. NRC offered none when it adopted the new rules.

89. 10 C.F.R. § 2.336(e) (2008).

90. As discussed, *infra*, there is an alternative interpretation of the regulations in which the choice of individual discovery procedures is not governed solely by whether the entire proceeding is under Subpart L or Subpart G, but is done on an issue-by-issue basis, as

a relicensing proceeding "*may* be conducted under the procedures of subpart L" (emphasis added) but do not mandate such use and in § 2.310(c), set forth one way in which a Subpart G proceeding (where provisions allowing for the full use of discovery and cross-examination exist) might be justified. Additional discovery and cross examination by the party are allowed in Subpart G but prohibited in Subpart L, except cross-examination may be available if a special showing is made under Subpart L.[91] Thus, the choice of the hearing Subpart itself is a significant hurdle that must be overcome and the factors that apply to determine which hearing Subpart will be used are, at best, confusing. The most sensible interpretation of these confusing regulations, as discussed below, is that any particular discovery procedure in Subpart G is available in any case where the use of the procedures can be shown to be necessary for "resolution of material issues of fact which may be best determined through the use of the identified procedures."[92]

A determination of whether to use Subpart G or Subpart L is done on a contention by contention basis, creating the possibility that in a single hearing both Subparts might be applicable. This could prove confusing if, as is often the case, issues with regard to one contention have some bearing on a different contention. Separating the procedures so that they stay within the confines of the contention to which they are applicable is the kind of line-drawing exercise that invites constant challenges from the party opposing the use of the procedure and wastes legal resources squabbling over discovery which, in many instances, will be less time-consuming and expensive than the actual battle over whether the appropriate procedure is being used for the appropriate issue.

There is a more rational interpretation of the regulations than the one advanced by NRC Staff and applicants that is both consistent with the regulatory language and more efficient. Although Subpart G includes a number of adjudicatory procedures and allegedly provides the sole basis for use of such procedures,[93] application of Subpart G discovery procedures to

authorized by 10 C.F.R. §2.309(g) (2008), which is also entitled "Selection of hearing procedures".

91. 10 C.F.R. §§ 2.336(f), 2.1204(b)(3) (2008).

92. 10 C.F.R. § 2.309(g) (2008).

93. In its brief to the First Circuit in Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004), the NRC emphasized the availability of subpart G procedures as a "sanction" for failure to comply with the requirements of 10 C.F.R. § 2.336. Brief for the Federal Respondents at 49; *see also* 10 C.F.R. § 2.336(e)(1) (2008) (among the sanctions available against a party for its "continuing unexcused failure to make the disclosures required" is "use of the discovery provisions in subpart G"). However, there are many

a contention may be justified on the basis of the likely need for only one of those procedures. Under § 2.309(g), use of Subpart G is required whenever it can be shown that, as to any of the Subpart G procedures, "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." That does not mean that all Subpart G procedures are available with regard to the contention. The regulations provide wide discretion to the ASLB to determine whether, and to what extent, a party may use discovery tools identified in Subpart G.[94]

Thus, arguably, the regulations create a two-step process. Step one, set forth in § 2.309(g), is to demonstrate that it is reasonable to anticipate that the use of one or more Subpart G procedures will be required for certain contentions. Once the Board accepts that analysis, it will still be necessary for the party seeking to use a particular Subpart G procedure to justify its use with regard to a particular contention. In this way, the Board would control the use of each procedure and assure that its use (1) would not unduly delay the hearing, (2) would involve the use of a procedure that was best to obtain the necessary information, and (3) would serve the goal of developing an adequate record. As discussed, *infra*, one of the principle goals of discovery, if conducted properly, is to reduce hearing time and make the entire process more efficient. Thus, the standard for deciding whether any particular Subpart G discovery procedure should be used in a particular proceeding is set forth in § 2.309(g) and unequivocally identifies a functional test, drawn from the Administrative Procedure Act (see discussion *infra* of 5 U.S.C. § 556). The touchstone for deciding on the use of Subpart G procedures is whether "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."[95] Under § 2.309(g), a petitioner "must demonstrate by reference to the contention and the bases provided and the specific procedures" that this test is met in order to proceed under Subpart G.

instances in which full compliance with the requirements of § 2.336 may still leave substantial gaps in the available information with regard to material facts needed to develop an adequate record or where it will not be possible to demonstrate that the § 2.336 disclosures are incomplete. This is the kind of phantom discovery right that pervades the NRC regulations but that is almost impossible to exercise in practice. Either this choice was deliberate or the authors of the regulations were unfamiliar with the practicalities of litigation.

94. *See* 10 C.F.R, §§ 2.319(f), (g), (k), (q), (r); 2.705(a), (b)(2) (2008).

95. 10 C.F.R. § 2.309(g) (2008).

While this appears to be the most rational interpretation of the NRC regulations, NRC Staff and applicants see the matter quite differently. In their view, the choice between Subpart G and Subpart L is an all-or-nothing proposition in which intervenors lose the right to any additional discovery unless they can demonstrate that they can prove the hearings must be conducted under Subpart G. The test they assert that must be met is set forth in 10 C.F.R. § 2.310(d), a test which is totally unrelated to any of the discovery procedures and is, at best, a test for determining whether to allow a party to conduct cross-examination.[96]

There is no doubt that the NRC regulations are confusing because both the provisions of 10 C.F.R. §§ 2.309(g) and 2.310(d) appear to address the test for which hearing procedure to use. The test set forth in § 2.310(d) applies a different, and perhaps more lenient, test than § 2.309(g), and includes additional alternative tests which are uniquely relevant only to the use of cross-examination but of no relevance to whether requests for admissions, interrogatories, depositions or document production requests should be allowed. It should be possible to ignore the test in § 2.310(d) where a party can meet the test in § 2.309(g). However, in *Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station)[97] the licensing board ruled, 1) the only test for Subpart G use is contained in § 2.310(d) and 2) § 2.310(d) requires a showing that the credibility of a witness or the witnesses intent or motive must be at issue before any Subpart G procedures are available.[98] The

96. 10 C.F.R. § 2.310(d) (2008):

> In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

97. In the Matter of Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) LBP-04-31, Docket No. 50-271-OLA, 60 N.R.C. 686, 694-95 (Dec. 16, 2004).

98. The Board concluded that § 2.309(g) "simply specifies how to submit a request for a particular hearing procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d)." *Id.* at 695 n.7. With due respect to that Board, no fair reading of the language of § 2.309(g) supports the proposition that it is simply a procedural regulation describing "how" to submit a request for Subpart G proceedings. A more logical interpretation is that because the focus on much of the controversy about the proposed new regulations was on the use of cross-examination, the Commission was focused on cross-examination when it wrote the test in § 2.310(d) and did not consider the instances in which

decision offers no analysis of the bearing those concepts have on the need for additional discovery procedures.

As noted *supra*, § 2.310(a) does not mandate the use of Subpart L in licensing proceedings but merely says that a hearing board *may* use that Subpart unless it finds the standard in § 2.310(d) has been met. Another Vermont Yankee ASLB, addressing the issue of hearing procedure choice in a license renewal proceeding, emphasized the discretion afforded the hearing board in deciding whether to use the procedures of Subpart L.[99] The Board found:

> If a specific hearing procedure is not mandated, the plain language of 10 C.F.R. § 2.310(a) uses the term 'may' in describing our options in selecting the appropriate hearing procedures. The use of the permissive 'may' instead of the mandatory 'shall' indicates that even if a petitioner fails to demonstrate that Subpart G procedures are required, the Board 'may' still find that the use of Subpart G procedures is more appropriate than the use of Subpart L procedures for a given contention.[100]

Thus, if a party meets the provisions of § 2.309(g) for use of Subpart G procedures for a contention, then, even if it is a Subpart L proceeding, Subpart G procedures should be available. This is essentially the ruling adopted by the ASLB in the *Indian Point* license renewal proceeding where it concluded that it would defer ruling on whether to use Subpart G or Subpart L hearing procedures until the case could be made for the need for the use of a particular procedure. *Id.* Memorandum And Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G), December 18, 2008 at 13.

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other Subpart G procedures might be needed even though the credibility of a witness or the intent of a party were not at issue. *See* Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2182, 2205, 2222 (Jan. 14. 2004) (where the Commission's discussion of the issue is focused on cross-examination and not discovery procedures). This view is supported by the fact that the Commission does allow cross-examination in a Subpart L proceeding if a showing can be made that cross-examination is "necessary to ensure the development of an adequate record for decision" (10 C.F.R. § 2.1204(b)(3) (2008)) when the § 2.310(d) test is not met. 10 C.F.R. § 2.309(g) (2008) is the counterpart for discovery procedures to be used in a Subpart L proceeding on a contention by contention basis when the § 2.310(d) test is not met.

99. In the Matter of Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, Docket No. 50-271-LR, at 86 (Sept. 22, 2006).

100. *Id.*

But, there is another issue created by insisting that the sole test for choosing the Subpart to use is contained in § 2.310(d). It is arguable that § 2.310(d), if read "strictly" would allow for an even broader use of Subpart G procedures than applying § 2.309(g). Under § 2.310(d) the test is whether the ASLB finds that:

> In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that [1] resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, [2] where the credibility of an eyewitness may reasonably be expected to be at issue, and/or [3] issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter *will be conducted under subpart G* of this part.[101]

The plain reading of this regulation is that Subpart G must be used if any one of the three enumerated standards is met.

As written, by using commas to separate each of the three phrases as well as the conjunctive "and/or" phrase between the second and third phrase, § 2.310(d) establishes three separate standards that can be read either disjunctively or conjunctively.[102] As a general rule of statutory construction, the use of a conjunctive (such as "or") before the last term in a series indicates that each term in the series is intended to be read in the disjunctive and given separate meaning.[103] In addition, the use of the commas, along with the "and / or," signals that each phrase is to be read separately.[104] Basic grammar principles do not allow for any other reading

101. 10 C.F.R. § 2.310(d) (2008) (emphasis added) (brackets added).

102. *Id.*

103. *See* United States v. Urban, 140 F.3d 229, 232 (3d Cir.1998).

104. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 2 (3rd ed. 1979) ("In a series of three or more terms with a single conjunction, use a comma after each term except the last . . . This comma is often referred to as the 'serial' comma."); THE CHICAGO MANUAL OF STYLE ONLINE § 6.19 (The Univ. of Chicago ed., 15th ed., 2007), http://www.chicagomanualofstyle.org ("Items in a series are normally separated by commas. . . . When a conjunction joins the last two elements in a series, a comma – known as the serial or series comma or the Oxford comma – should appear before the conjunction. Chicago strongly recommends this widely practiced usage, blessed by Fowler and other authorities . . . since it prevents ambiguity."); *see generally* LYNNE TRUSS, EATS, SHOOTS & LEAVES 68-103 (2004).

of the text.[105] Thus, on its face, the plain meaning of § 2.310(d) establishes three separate tests and either all three tests have to be met or any one of them can be met.[106]

In bypassing the plain text of the regulation, the Vermont Yankee Board's September 22, 2006, decision also eschewed a second rule of construction: when a statute's language is plain, "the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms."[107]

The Statement of Consideration accompanying the amendments to NRC's adjudicatory process in 69 Fed. Reg. 2182 contains statements that support the view that § 2.309(g) provides the standard to be used for selecting Subpart G procedures and that § 2.310(d) has a more limited role. The ASLB panel in *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station) referred to this regulatory history when it addressed the choice of procedures issue.[108] In its decision, the ASLB panel recognized that the standard set forth in § 2.310(d) was primarily intended by the Commission to be tied to a claim for the right to cross-examine.[109] The ASLB quoted from the Statement of Consideration, where, in adopting the current test in § 2.310(d), the Commission offered the following extended discussion of its reasoning in adopting the language in that section, showing clearly, that it was focused on the portion of Subpart G that relates to cross-examination when it developed the standards in § 2.310(d), not on discovery:

> Rather, the Commission agrees with the thrust of the commenters opposing this criterion that, inasmuch as neither the AEA nor the

105. I am grateful to John Sipos, Assistant Attorney General, Office of the Attorney General for the State of New York, for the grammatical insights and references related to this point.

106. As written, § 2.310(d) is not a model of clarity as to the criteria for tests 2 and 3, particularly test 3, which appears to have dropped a verb between "eyewitness" and "material." This merely underscores the conclusion that if the standard for Subpart G hearing procedures set forth in § 2.309(g) has been met there should be no reason to enter the § 2.310(d) maze. Since both sections are titled "Selection of hearing procedures" an either/or approach makes the most sense and gives meaning to both provisions.

107. *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 4 (2000) (internal citations omitted); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) ("in any case of statutory construction, a court's analysis begins with the language of the statute . . . [a]nd where the statutory language provides a clear answer, *it ends there as well*" (emphasis added)).

108. Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures), RAS 11713, Docket No. 50-0219 LR, at 2-3 (June 5, 2006).

109. *Id*. at 3.

> APA require the use of the procedures provided in Subpart G, they should be utilized only where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters. *In the Commission's view, the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination which challenges their recollection or perception of factual occurrences.* This also appears to be the position of several citizen group commenters, judging by the reasons given for their opposition to greater use of Subpart L procedures. *Hence, the Commission focused on criteria to identify those contested matters for which an oral hearing with right of cross-examination would appear to be necessary for a fair and expeditious resolution of the contested matters.* Common sense, as well as case law, lead the Commission to conclude that oral hearings with right of cross-examination are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event." [110]

Another reason why the test under § 2.310(d) should not be applied to a request for Subpart G discovery procedures is that the test, as interpreted by the Vermont Yankee and Oyster Creek ASLBs, is focused on witness credibility and intent, thus creating substantial opportunity for delay in the proceeding. For example, at an early stage in the proceeding where the provisions of § 2.310(d) are intended to be applied, it is not possible to even know the names of the witnesses, much less their proposed testimony. Thus, it would be impossible for the Board or the parties to intelligently address whether "credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter [are involved]," until after the mandatory disclosures required by § 2.336 and the final witness lists were submitted. The ASLB in Vermont Yankee recognized this dilemma and chose to postpone a final decision on whether to use the Subpart G procedures until after the final witness list was submitted.[111]

But there are problems with the Vermont Yankee approach, which was necessitated by the ASLB's earlier decision interpreting § 2.310(d) to

110. Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2182, 2205 (Jan. 14, 2004) (quoting Union Pac. Fuels v. FERC, 129 F.3d 157, 164 (DC Cir. 1997)) (emphasis added) (footnote omitted).

111. *See* Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Initial Scheduling Order, RAS 9241, Docket No. 50-271 LR, at 3 (Feb. 1, 2005).

require a showing on credibility and/or intent as a prerequisite to a Subpart G hearing. First, if the required showing were made at the time of the filing of the final witness list, the full panoply of discovery procedures would be available for the first time and their use at that time would almost certainly cause delay in the hearing procedure, thus defeating the most significant justification offered by the Commission for adopting the 2004 rule changes as they relate to discovery.[112] Second, without the benefit of depositions and other discovery procedures it will be extremely difficult to mount a challenge to a witness's truthfulness. Finally, in the unlikely event a case can be made that a witness's truthfulness is at issue, there is nothing to prevent the party from substituting someone else for the offending witness. Once again, the apparent availability of trial type procedures is more illusory than real.

The § 2.310(d) test focuses exclusively on the truthfulness of an eyewitness or the intent of that witness. Neither of those considerations has any relevance to whether to allow a deposition, interrogatory, document production request or request for admission where the principal goal is to "discover" what are the bases for a party's position and/or to eliminate from controversy in the hearing issues and facts on which there is no disagreement. It makes no sense to limit access to those important and useful discovery tools by tests that have nothing to do with the need for their use. The practical standard set forth in § 2.309(g) ("resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures") is easy to implement and serves the real goal of the hearing – establish the facts relevant to a fully informed decision on the issues in contention.

Thus, reading the literal language of the relevant regulatory sections and applying the policy considerations that underlay the Commission's adoption of the 2004 amendments to Part 2, a more rational reading of the NRC regulations is that, in a rare case where witness credibility appears to be central to the issues and this can be shown at an early date, a party can seek to have the entire hearing on that contention conducted under Subpart G. However, in the more normal case, after the mandatory disclosure requirements of 10 C.F.R. § 2.336 are met, a party can seek to use the provisions of § 2.309(g) to justify the use of discrete discovery procedures

112. *See* Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2182, 2194 (Jan. 14, 2004) ("The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery.").

applied to discrete issues to fully develop their case. To obtain the use of any Subpart G procedure, the party seeking its use must demonstrate that the particular instance "necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."[113]

As the preceding discussion illustrates, even if the NRC were to accept this common sense interpretation of its regulations, there is a complicated series of tests and analyses that must be performed to reach that conclusion. That does not encourage efficiency nor meaningful public participation. In addition, by pressing the relevance of § 2.310(d) instead of the more common sense approach suggested above, NRC Staff is pushing a test that is so narrow it is virtually impossible to meet. This position by NRC Staff supports the earlier conclusion, that NRC Staff and the NRC believe the public has nothing useful to contribute to the relevant issues and that all hearings are a waste of time and resources that could be better spent by the Staff and applicant on other more fruitful endeavors. It would be refreshing if this hidden motivation were openly acknowledged so that there could be an open and vigorous debate on the topic. If the Staff and applicants were correct, they could convince Congress to abolish public participation in the licensing process, much as advocates like Llewellyn King assert is the case for other federal regulatory agencies. However, if they cannot defend their undisclosed premise, which many knowledgeable members of the NRC hearing boards and others believe they cannot, then NRC would have to abandon this multi-year and multi-pronged effort to cripple public participation and could direct its efforts to really making public participation more effective and more efficient. Some modest steps in that direction are suggested at the end of this article.

VII. SUBPART G: DISCOVERY TOOLS PROMOTE JUDICIAL ECONOMY

Each of the discovery procedures in Subpart G must be justified by the party seeking its use and the Board, using its broad discretion, may limit the use of a particular discovery tool by, for example, placing a limit on the number of interrogatories, requests for admissions, or document production requests or by placing time limits on depositions. This will allow discovery to be used as intended in the Federal Rules of Civil Procedure (FRCP), which is to shorten the hearing by discovering and clarifying facts and pinning down the position of parties.

113. 10 C.F.R. § 2.309(g) (2008).

When the Commission adopted the 2004 amendments to 10 C.F.R. Part 2, it specifically noted that it was drawing upon the Federal Rules of Civil Procedure.[114] Significantly, when Congress implemented the 1993 Amendments to the FRCP it did not abolish the right to other discovery procedures such as interrogatories, depositions, requests for document production, and admissions. Rather, it strengthened the power of courts to control the use of those procedures while continuing other procedures, which, when they were adopted, were intended to improve the efficiency of the process. For example:

> Rule 36 [requests for admissions] serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.[115]

Depositions can make the entire process more efficient by assuring that persons possessing the knowledge offer the information provided by the opposing party rather than persons who the opposing party merely wants to have offer the information:

> The testimony of a Rule 30(b)(6) witness is binding on the entity and goes beyond the individual's personal knowledge. A corporation has an affirmative duty to produce a representative who can answer questions that are within the scope of the matters described in the notice. *In Bracco Diagnostics Inc. v. Amersham Health Inc.*, C.A. No. 03-6025(SRC), 2005 U.S. Dist. LEXIS 26854, at *3 (D.N.J. 2005) (citations omitted), the Court succinctly summarized the benefits of a Rule 30(b)(6) deposition:
>
> > A 30(b)(6) deposition more efficiently produces the most appropriate party for questioning, curbs the elusive behavior of corporate agents who, one after another, know nothing about facts clearly available within the organization and suggest someone else has the requested knowledge, and reduces the number of depositions for which an organization's counsel must prepare agents and employees.[116]

114. *See* Nuclear Regulatory Commission Regulations, Changes to the Adjudicatory Process 69 Fed. Reg. 2128, 2194 (Jan. 14, 2004) ("The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, have been tailored to reflect the nature and requirements of NRC proceedings.").

115. FED. R. CIV. P. 36, 1970 (Advisory Committee's Note).

116. Harris v. New Jersey, No. 03-2002 (RBK), 2007 WL 2416429, at 2* (D.N.J. 2007) (footnote omitted).

As one district court noted, in chiding the parties for failing to cooperate to allow depositions to proceed "any eventual trial of this case will undoubtedly be more efficient if the depositions at issue go forward."[117]

In addition, courts have recognized that mandatory disclosures, similar to those provided under 10 C.F.R. § 2.336, are often insufficient to meet the legitimate goals of the opposing parties and that additional discovery will be required:

> Plaintiff has requested more specific information in response to the request that each person listed in the Supplement to Attachment "A" to Defendants' Initial Disclosures (Motion to Compel, Exhibit D) be identified and a summary of the discoverable information possessed by each provided. The defendants have provided the identification information for the persons listed, but the summary of the information possessed by that person is often couched in generalizations such as . . . " has information concerning certain matters alleged in the pleadings, including Tinley's business practices." The court finds this level of response to be inadequate. The plaintiff is entitled to a more complete factual summary of the individual's alleged knowledge about the issues relevant to this case and the basis for such knowledge. The plaintiff is entitled to enough basic information to allow him to determine, for instance, why the individual is placed on the defendants' list of initial disclosure in the first instance. If the defendants more fully describe the information possessed by the person listed, the plaintiff can more readily cull his list of necessary potential interviews or depositions and therefore save time and expense in trial preparation. Given that the defendants chose to include the person in their initial disclosures, the defendants are already knowledgeable about, at least, the general nature of the prospective witness's potential testimonial knowledge.[118]

A request for a further specification of information following § 2.336 disclosures is not clearly contemplated by Subpart L or § 2.336, but it would be readily available under Subpart G procedures.

The judicial recognition of the valuable assistance and improved efficiency associated with the proper use of pretrial discovery is also endorsed by administrative law judges. In discussing formal hearings under the APA, the Manual for Administrative Law Judges notes that "if [the]

117. Landeen v. Phonebillit, Inc., No. 1:04-cv-01815-LJM-WTL, 2007 WL 2902212, at 2* (S.D. Ind. 2007).

118. Tinley v. Poly-Triplex Technologies, Inc., No. 07-cv-01136-WYD-KMY, 2008 WL 732590, at 2* (D.Colo. 2008).

exchange of evidence is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced."[119]

Much time is wasted at evidentiary hearings while the Board attempts to determine precisely what each witness is claiming, or what commitments have been made by the applicant or are being imposed by the Staff. Allowing carefully controlled discovery with limits on the time for discovery will not only not delay the start of the evidentiary hearing, but will undoubtedly allow the hearings to be more focused and proceed more efficiently.

VIII. NRC REGULATIONS AND THE ADMINISTRATIVE PROCEDURE ACT

Pursuant to the Atomic Energy Act, the NRC is required to follow the mandates of the Administrative Procedure Act.[120] The APA, 5 U.S.C. §§ 551 (2006), provides the minimum obligations that an agency must meet when it provides an opportunity for a hearing, as the NRC does, pursuant to 42 U.S.C. § 2239(a). In *Citizens Awareness Network, Inc. v. United States*,[121] the court upheld the NRC procedures for licensing hearings insofar as the provisions related to discovery rights and cross-examination.

The ruling in *Citizens Awareness Network* regarding the interplay between the APA and the AEA, plus the Commission's representation to the court about the meaning of its own regulations, provides conclusive support for the proposition that the only proper interpretation of the Commission regulations is that § 2.309(g) sets an acceptable standard for when Subpart G procedures may be used. Even if § 2.310(d) is an alternative test for application of Subpart G rights, *Citizens Awareness Network* provides support for the view that under this regulation, a Subpart G proceeding is authorized "where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity."[122] In *Citizens Awareness Network* the Commission argued that its procedure for allowing the use of cross-examination was wholly consistent with the mandate of the APA. It

119. MANUAL FOR ADMINISTRATIVE LAW JUDGES 56 (Morell E. Mullins ed., William H. Bowen School of Law 2001) (1993), http://ualr.edu/malj/malj.pdf.

120. 42 U.S.C. § 2231 (2006).

121. Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004).

122. *Id.* at 345 n.3.

referred to the following language in § 2.1204(b)(3) to support that proposition:

> The presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.[123]

The *Citizens Awareness Network* court agreed that the cited language meets the APA standard. In reaching that conclusion the court made the following ruling:

> The APA does require that cross-examination be available when "required for a full and true disclosure of the facts." If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges.[124]

Thus, the *Citizens Awareness Network* decision supports the proposition that cross-examination rights, regardless of the Subpart that is being applied, "must be allowed in appropriate instances," and those appropriate instances are where it is "required for a full and true disclosure of the facts."[125]

However, if § 2.310(d) is interpreted to require either that "the credibility of an eyewitness may reasonably be expected to be at issue" or that "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" must also be shown to get a Subpart G proceeding, then the barrier to the right of cross-examination under Subpart G would be higher than the *Citizens Awareness Network* decision established or than the Commission represented to the court when it provided its own interpretation of the regulations.

In sum, the only reading of 10 C.F.R. Part 2 that is consistent with the regulations as written, consistent with the NRC's representations made to the First Circuit, and consistent with the ruling in *Citizens Awareness Network* is that a party is entitled to use Subpart G procedures on any contention for which it can demonstrate, pursuant to § 2.309(g), that it is likely "that resolution of the contention necessitates resolution of material

123. *Id.* at 351.
124. *Id.* at 354 (citing 5 U.S.C. § 556(d) (2006)).
125. *Id.*

issues of fact which may be best determined through the use of the identified procedures."[126] This practical test for cross-examination is equally applicable to providing parties with the right to seek to use discovery procedures whenever they are able to show that such procedures are needed to best determine the issue.

The ability to use discovery procedures in appropriate circumstances is also important to enable a party to demonstrate the need for direct cross-examination by the party. For example, depositions during which the witness must answer questions from the opposing party often disclose weaknesses in the witness's testimony that can not be easily explained in a written cross-examination plan. However, the NRC regulations require that cross-examination proposals be submitted to the hearing board for its consideration and only the board, not any party, decides which questions to ask and how to pursue lines of inquiry based on the answers given. While the licensing boards have been diligent in probing witnesses on lines of inquiry that they believe are worthy of review, if the board is not convinced that the line of inquiry proposed is fruitful or warranted, it does not pursue it. However, it is often the case that the best information concerning why an area should be explored comes from the live answers to preliminary questions regarding that area, answers which cannot easily be anticipated. In addition, the instincts that make a lawyer a good cross-examiner are not easily translated into words or disclosed in a cross-examination plan. Allowing depositions provides an opportunity to demonstrate the value of cross-examination in certain areas using techniques that can either convince the Board to allow the party to conduct the cross-examination or to provide the Board with evidence of why it should conduct cross-examination on a certain topic in a certain way or why no further examination of the witness is required.

The recent movie, *Frost/Nixon*,[127] about the David Frost interview of Richard Nixon, focuses on one of those moments in questioning that could not have been adequately explained in advance. Frost pressed Nixon on the illegality of the cover up of the Watergate break-in and the President's role in that cover-up. When pressed relentlessly by Frost, Nixon finally admitted that his view of the Presidency was that a President can never break the law because, by definition, if the President does it, it is legal. How could Frost have justified that area of questioning or anticipated where his inquiries would lead him in a cross-examination plan?

126. *See generally id.*

127. FROST/NIXON (Imagine Entertainment 2008).

IX. FAIR AND EFFICIENT REGULATORY PROPOSALS

There is no reason why the NRC hearing process cannot be efficient and fair. The problem appears to be that the current regulations were not written with any effort to make them fair and the only concept of efficiency that was promoted was one that would prevent the public from participating in the decision making process or, if it managed to overcome all the adversity built into the regulation, to severely restrict the scope of that participation.

There are several steps the NRC can take to make the process more efficient and fair:

1. NRC Staff refuses to accept applications as filed unless they fully meet the requirement of being complete in all material respects. This will not prevent post-docketing amendments to applications or prevent the Staff from raising questions during the review process, but it will reduce those to a reasonable minimum;

2. Require the applicant to make available, in readily accessible form, within ten days of Staff acceptance of the application, all the information now required under 10 C.F.R. § 2.336 as to all matters contained in the application (i.e. treat the application as though it were a complaint filed in a lawsuit and require the applicant to provide access to all information in its possession or control that is relevant to the allegations contained in the application, much as is now required by Rule 26(a)(1) of the Federal Rules of Civil Procedure);[128]

3. Allow the public at least 120 days from when the applicant makes the required disclosures to file contentions and demand a high degree of specificity in the contention pleading based on the material in the application and the disclosures;

4. Allow oppositions to the petition to intervene only to reference facts or opinions that are included in the original application and the disclosures;

128. A salutary benefit of this procedure would be that applicants would have to develop an efficient system for storing information relevant to its application, thus improving its own ability to retrieve information for operational and regulatory purposes and making it easier for Staff inspectors to locate quickly the information they need to do their work. Complaints from applicants that organizing this material and providing access to will be burdensome is either a phony argument or reveals how chaotically applicants maintain their important information.

5. Require all parties, including Staff and interested states, who are on the same side of an issue to file a single pleading within the page limits set by the Board for each side of the issue;

6. If the applicant files a license amendment or a response to an RAI, require it to include all the disclosures it would have had to make if the material had been filed with the original application;

7. If any amendment or RAI is substantially based on material that could have been included with the original application and its disclosures, allow the public and any admitted party 120 days to file any petition to intervene based on the new information or any new contention. Otherwise, amended contentions must be filed within thirty days and the same for new petitions;

8. Require applicants to file amendments to applications within the same time period as any other party is required to file amendments or additions to its pleadings and to make the same showing of timeliness as to such amendment as any other party must make;

9. The procedures for hearings will be the full panoply of discovery allowed in federal court except, that after the initial disclosures under § 2.336, any party seeking additional discovery or cross examination would have to demonstrate that the discovery or cross examination was needed to fully develop the record and that it was the best or most efficient way to obtain the information sought;

10. Technical assistance grants would be available to public parties, other than governmental entities, of up to a total of $150,000 for each hearing to be used solely to pay for the assistance of experts. A party would announce at the time of filing a petition to intervene its intention to seek such assistance and identify the experts it is retaining for which reimbursement would be sought. The determination of entitlement to the funds would be made by the licensing board upon application at the end of the hearings; no party could file a response to such an application unless it could support an allegation that the application was untruthful and the Board's decision would be final and not subject to appeal to the Commission.

X. CONCLUSION

There is irrefutable evidence of the value of public participation in the NRC licensing process. NRC procedures as now written and implemented are antagonistic to such participation. While no one believes that either the NRC or the nuclear industry wants to have unsafe nuclear plants, it is clear

that considerations other than safety are dominating many of the decisions being made regarding the wisdom of licensing nuclear plants and the conditions applicable to such licenses. One party, the public, has demonstrated a commitment to safety and a fierce determination to see that safety standards are set and implemented. The nuclear power program in the United States cannot tolerate another TMI. If there is a role for nuclear power in the energy future it will only fulfill that role if the public has confidence in the safety of the technology. That confidence is lacking and will not be restored until the public is enabled to play a full and meaningful role in the licensing process. It is lapses by NRC Staff and the nuclear industry which have created the need to increase public participation and add their skeptical analyses to the licensing process. As Judge Farrar stated, the goal of the NRC hearing process should be: (1) to encourage the participation of those who are protected by the Atomic Energy Act's grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.[129] Not until that happens will, or should, nuclear power have an increased role in meeting our energy demand.

129. In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098s-MLA, at 59 (June 27, 2008) (Farrar, J., concurring).

FUNDING PUBLIC PARTICIPATION IN AGENCY PROCEEDINGS

INTRODUCTION

Once the illusion that an administrative agency alone can adequately represent the public interest is shattered,[1] and public participation is recognized as an essential ingredient of proper regulatory functioning,[2] a device must be developed to insure that the public will be heard. Recognition of the benefits of public participation has prompted many courts to relax the rules governing standing to intervene in agency proceedings.[3] Liberalized standing requirements alone, however, have been inadequate to promote sufficient public intervention; these liberalized requirements

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1. The failure of regulatory agencies to carry out their legislative mandate to protect the public interest in dealing with regulated industry has been well documented in congressional hearings, *see, e.g., Establishing an Agency for Consumer Protection: Hearings on H.R. 7575 Before the House Comm. on Gov't Operations*, 94th Cong., 1st Sess. (1975), and analyzed in legal literature. *See, e.g.*, Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971). Johnson attributes the agencies' failure to four fundamental inadequacies in the administrative process: (1) the agencies' lack of necessary facts for adequate decisionmaking; (2) the domination of regulatory decisionmaking by the so-called "subgovernmental phenomenon;" (3) the ad hoc nature of the decisions; and (4) the regulatory delay that tends to suffocate those reform movements that do arise. For an extensive analysis of the reasons why the independent regulatory ideal has not worked, see *id.* at 875-90.

2. Increased public participation assures vigorous representation of frequently unrepresented interests. This in turn assures that the fairest and best possible case has been presented to the agency and results in a well-balanced administrative decision rather than a decision that favors the one side that was able to afford the representation necessary to present its view adequately. *See* Letter from David M. Lenny and Joan Claybrook to Senator Edward M. Kennedy (Apr. 2, 1976), *reprinted in Public Participation in Federal Agency Proceedings: Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 225, 230 (1976) [hereinafter cited as *Hearings on S. 2715*]. In addition, public intervention can provide agencies with a safety valve allowing interested persons and groups to express their views before policies are announced and implemented, as well as ease the enforcement of administrative programs relying upon public cooperation, satisfy judicial demands that agencies observe the highest procedural standard, and increase public confidence in the fairness of administrative hearings. *See* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972).

3. *See* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (listening public's interest in programming content sufficient to confer standing to intervene in FCC adjudicatory proceeding involving license renewal); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) ("private attorney general" concept justifies intervention in agency hearing by those without a direct personal or economic interest in agency decision).

These courts reasoned that there is a logical nexus between the right to seek judicial review of an administrative decision and the right to participate in the agency's decisionmaking process. As the rules governing standing to seek judicial review of agency decisions were liberalized, *see* Gellhorn, *supra* note 2, at 363-65, so were the rules governing standing to intervene in agency proceedings. *See id.* at 365-69.

do not help interested parties overcome the significant cost barrier that often prohibits their intervention.[4]

Short of pervasive regulatory reform to eliminate the institutional infirmities that prevent agencies alone from adequately representing the public interest,[5] public funding of citizen representatives is accepted widely as the immediate, although merely temporary and partial, solution.[6] In order for the public's right to intervene to be meaningful, agencies either must subsidize public intervenors or otherwise reduce the cost of participation and support effective intervention at a reasonable price.[7] Support for public funding as the solution is based on the notion that it is inequitable to expect citizens to discharge that which fundamentally would be the government's duty while not compensating those citizens for legal fees and out-of-pocket expenses incurred in doing so.[8] Although no single public interest group can represent the multifarious public interest adequately, society at large benefits from easier access to and a more meaningful voice in government decisionmaking. It therefore is reasonable to expect the general public to help bear the costs necessary to secure those benefits. A denial of agency funds could well eliminate the benefits enjoyed by the public from its participation, by reducing the frequency of such intervention.

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4. Attorneys' fees in typical cases may range from $4,000 for comparatively simple Interstate Commerce Commission (ICC) tariff proceedings to $40,000 for formal rulemaking proceedings at the Food and Drug Administration (FDA). Intervention in major proceedings of the Civil Aeronautics Board (CAB), Federal Communications Commission (FCC), Federal Power Commission (FPC), or Federal Trade Commission (FTC) might cost more than $100,000 in fees. Gellhorn, *supra* note 2, at 394. The cost obviously will vary according to the nature and scope of the proceeding and the degree of the intervenor's participation.

5. *See* S. REP. No. 863, 94th Cong., 2d Sess. 8-9 (1976). *See generally* Jaffe, *supra* note 1; Johnson, *supra* note 1.

6. The public funding solution is not, however, without strident critics. These critics maintain that taxpayer-funded public participation misconstrues the problem facing the federal agencies and appellate courts because the real source of the problem is the growing backlog of work and the agencies' inability to render prompt justice, rather than a lack of intent on the part of the agencies to administer the laws in accordance with the public interest and congressional intent. These critics fear that funding public participants will encourage frivolous suits, which in turn will result in delays of administrative proceedings. *See Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 75 (1977) [hereinafter cited as *Hearings on S. 270*] (statement of Sen. James B. Allen).

7. *See* Gellhorn, *supra* note 2, at 389. "If public intervention is in fact a 'right' which agencies have a mandate to foster, failure to render some assistance amounts to a practical subversion of that mandate." *Id.* This comment will focus on direct agency reimbursement of legal fees and other costs incurred by public participants in agency proceedings. For a discussion of alternative methods by which to reduce the cost of participation, see *id.* at 389-98.

8. *Hearings on S. 2715, supra* note 2, at 95 (statement of B.J. Hooks, Commissioner of FCC).

Agency programs to fund public participation currently are in an experimental period fraught with confusion. For the majority of agencies, the confusion is caused primarily by the absence of express statutory authority to reimburse public participants;[9] the legal basis of agency-initiated programs thus is uncertain. Although the Comptroller General of the United States has ruled that agencies possess inherent authority to provide reimbursement,[10] courts have vacillated on the adequacy of such a legal basis to legitimize agency programs.[11] Therefore, it is likely that confusion will continue until the legitimacy of the programs is clarified either by statutes authorizing reimbursement or by a consistent line of judicial decisions holding inherent authority as a sufficient legal basis upon which to reimburse intervenors.

This comment will attempt to evince the need for further congressional action in the area of public funding by focusing on the interaction among the key figures to the public funding debate—the Comptroller General, the agencies, and the courts. After a brief examination of the Comptroller General's rulings on the funding of public participation in agency proceedings, this comment will examine the responses of various agencies to these rulings. This will entail looking at those agencies that possess express statutory authority, those that have instituted funding programs or have reimbursed public intervenors on an ad hoc basis based upon the Comptroller General's rulings, and those that are opposed to reimbursing public intervenors even though they may be authorized to do so.

After examining the Comptroller General's rulings and the responses of various agencies to the rulings, this comment will attempt to illuminate the confusion that currently exists over agency funding of public intervention by reviewing the Second Circuit Court of Appeals' vacillating response to one intervenor's recent attempt to procure reimbursement. Finally, the comment will analyze a bill recently debated in the 95th Congress that attempted to resolve this confusion and will discuss a proposal for further congressional action in the area.

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9. This comment will be limited in its discussion to the efforts of the Civil Aeronautics Board (CAB), the Consumer Products Safety Commission (CPSC), the Federal Power Commission (FPC), (which is now the Federal Energy Regulatory Commission (FERC), the Federal Trade Commission (FTC), the National Highway Traffic Safety Administration (NHTSA), and the Nuclear Regulatory Commission (NRC). The actions of these agencies are representative of the actions of most agencies regarding the handling of public participation funding programs. The FTC is the only agency with express statutory authority for an agencywide public participation funding program. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 202(a), 15 U.S.C. § 57a(h)(1) (1976). In addition, the Environmental Protection Agency (EPA) has express authority to provide reimbursement of attorneys' fees incurred in proceedings falling within the purview of the Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (1976).

10. *See* notes 15-29 & accompanying text *infra*.

11. *See* notes 82-124 & accompanying text *infra*.

I. THE ROLE OF THE COMPTROLLER GENERAL

Many agencies recently have created or considered creating funding programs through which they would reimburse public participation in agency proceedings.[12] The Comptroller General of the United States has played a major role in the ensuing debate concerning the legitimacy of such programs.[13] In various opinions issued between 1972 and 1976,[14] the Comptroller General has supported agency-initiated programs, citing as the basis for his support his determination that federal agencies have inherent statutory authority to reimburse public participants.

A. Early Recognition of Inherent Authority

The recent flurry of agency proposals to create public funding programs and the consequent debate concerning their legitimacy began in

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12. *See, e.g.*, 43 Fed. Reg. 23,560 (1978) (to be codified in 16 C.F.R. § 1050) (CPSC interim regulations governing temporary reimbursement program); 42 Fed. Reg. 8663 (1977) (CAB notice of proposed rulemaking); 42 Fed. Reg. 2864 (1977) (NHTSA regulations establishing procedures to govern one-year demonstration program of financial assistance to participants in NHTSA proceedings; notice of proposed rulemaking regarding whether such assistance should be established on a permanent basis); 42 Fed. Reg. 1492 (1977) (EPA notice of proposed rulemaking); 41 Fed. Reg. 50,829 (1976) (NRC statement of considerations terminating rulemaking); 41 Fed. Reg. 35,855 (1976) (FDA notice of proposed rulemaking).

13. When an agency is uncertain of its authority to expend its appropriated funds for certain purposes, it can request a ruling from the Comptroller General's as to the propriety of the expenditure. *See* The Dockery Act of 1894, § 6, 31 U.S.C. § 74 (1976).

As head of the General Accounting Office (GAO), the Comptroller General has exclusive responsibility for making decisions concerning the legality of administrative expenditures. *See* 22 OP. ATT'Y GEN. 178, 181 (1895). He is authorized to determine in advance the legality of an expenditure by an agency; in turn, the GAO must authorize expenditures the Comptroller General previously has approved. *See* 31 U.S.C. § 74 (1976). The Comptroller General's decision also is binding on the applying agency. Unless the agency obtains judicial reversal of the Comptroller General's decision, the agency may not justify its failure to make the expenditures in question by relying on a lack of authority to make such an expenditure. *See* Greene County Planning Bd. v. FPC, 559 F.2d 1237, 1239 (2d Cir. 1976) (en banc), *rev'g* 559 F.2d 1227 (2d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (although Comptroller General has authority to approve or disapprove disbursements by executive agencies, his decisions may be contested in court); 22 OP. ATT'Y GEN. 468 (1901). The Comptroller General's power, however, is not affirmative. *See* R. KOEBEL, THE LEGAL ASPECTS OF THE CONTROL EXERCISED BY THE COMPTROLLER GENERAL OVER FEDERAL AGENCIES (1940). For this reason, the Comptroller General's decision merely authorizes expenditures; it does not require expenditures.

14. *See* Comp. Gen. No. B-139,703 (Dec. 3, 1976) (unpublished opinion) [hereinafter cited as FDA Opinion] (FDA may reimburse costs of intervention), *reprinted in Hearings on S. 270, supra* note 6, at 455; Comp. Gen. No. B-92,288 (Feb. 19, 1976) (unpublished opinion) [hereinafter cited as NRC Opinion] (NRC may reimburse costs of intervention), *reprinted in Hearings on S. 270, supra* note 6, at 418; Letter from Comptroller General Keller to Congressional Black Caucus (Sept. 22, 1976) [hereinafter cited as FCC Letter] (FCC may reimburse costs of intervention), *reprinted in Hearings on S. 270, supra* note 6, at 439; Letter from Comptroller General Keller to Hon. John E. Moss (May 10, 1976) [hereinafter cited as Moss Letter] (listing nine agencies that may reimburse

1972, when the Federal Trade Commission (FTC) requested the Comptroller General's opinion on the Commission's authority to pay certain expenses incurred by indigent intervenors in FTC adjudicative proceedings.[15] In 1969, the FTC had ruled that upon an adequate showing of financial need, an indigent respondent was entitled to have legal counsel furnished by the government.[16] In 1972, the Comptroller General endorsed the FTC's authority to provide comparable compensation to indigent intervenors, basing his decision on two factors: the Commission's express authority to grant intervention "upon good cause shown"[17] and the normal availability of the Commission's appropriations for necessary expenses.[18]

The determination of what constitutes "necessary expenses" is left to the reasonable discretion of the Commission.[19] In addition, the Commission has authority to determine all steps necessary for the full preparation of cases before it.[20] This authority includes the power to determine that the full preparation of a case requires the participation of indigent intervenors, and thus, as the Comptroller General reasoned, the use of Commission funds to assure full preparation of a case by indigent intervenors constitutes a proper exercise of administrative discretion.[21]

Shortly after the Comptroller General's decision on the FTC's authority, Congress evinced its support of his reasoning on two occasions. During consideration of the Energy Reorganization Act of 1974, the congressional conference committee deleted an amendment that would have provided the Nuclear Regulatory Commission (NRC) with express statutory authority to fund indigent intervenors.[22] The committee made it clear that the deletion of the amendment did not indicate that such author-

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costs of intervention), *reprinted in Hearings on S. 270, supra* note 6, at 428; Letter from Comptroller General Staats to Hon. Miles J. Kirkpatrick (July 24, 1972) [hereinafter cited as FTC Letter] (FTC may reimburse costs of intervention), *reprinted in Hearings on S. 2715, supra* note 2, at 281.

15. *See* FTC Letter, *supra* note 14, at 1, *reprinted in Hearings on S. 2715, supra* note 2, at 281.

16. *See* American Chincilla Corp., 76 F.T.C. 1016 (1969).

17. *See* Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45(b) (1976).

18. *See* FTC Letter, *supra* note 14, at 2-3, *reprinted in Hearings on S. 2715, supra* note 2, at 281-82.

19. The Commission has discretion to determine what constitutes necessary expenses because Congress normally enacts appropriations in the form of lump sums with no specific limitations on how they may be used. *Id.* at 2. Although 31 U.S.C. § 628 (1976) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, the Comptroller General has long held that where an appropriation is made for a particular purpose, it is available for expenses that are reasonably necessary and proper or incidental to the execution of that purpose. *See, e.g.*, 50 Comp. Gen. 534 (1971); 29 Comp. Gen. 421 (1950); 6 Comp. Gen. 621 (1927).

20. *See* 15 U.S.C. § 45(b) (1976).

21. *See* FTC Letter, *supra* note 14, at 2, *reprinted in Hearings on S. 2715, supra* note 2, at 281-82.

22. *See* 120 CONG. REC. 28,607 (1974).

ity did not or should not exist, stating that there was nothing in the then-existing Atomic Energy Act that would preclude the NRC from reimbursing parties where it deemed such reimbursement necessary.[23] One year later, Congress provided the FTC with express statutory authority to compensate public intervenors in FTC proceedings when it enacted the Federal Trade Commission Improvement Act.[24]

In 1976, the NRC also requested the Comptroller General's opinion as to whether the Commission had authority to provide assistance to public participants in its adjudicatory and rulemaking proceedings.[25] Utilizing the same reasoning as he had in his 1972 decision on the FTC's authority,[26] the Comptroller General ruled that the NRC had such authority. The Comptroller General based his decision on both the Commission's authority to conduct hearings and to admit as a party anyone whose interests might be affected by the hearings[27] and the Commission's appropriations act, which allows it to use appropriations for necessary expenses.[28] The key question in each case is whether the Commission believes that it is necessary to pay the expenses of indigent intervenors in order to perform its statutory functions. The Comptroller General stressed that this was a matter for the discretion of the Commission. His decision held only that the NRC has the inherent authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when it believes such participation either is required by statute or is essential to dispose of the matter before it, as long as it also finds the intervenor is indigent or otherwise unable to bear the costs of participation.[29]

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23. H.R. REP. NO. 1445, 93d Cong., 2d Sess. 37, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5538, 5551.

24. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a (1976).

The Comptroller General determined that the Act was not intended to overrule or modify the basis of his 1972 decision. He reasoned that since the Act substantially formalized the FTC's rulemaking procedures, it was likely the Act also was intended to formalize the compensation allowable for intervenors as well. *See* NRC Opinion, *supra* note 14, at 5, *reprinted in Hearings on S. 270, supra* note 6, at 422.

25. *See* NRC Opinion, *supra* note 14, at 1, *reprinted in Hearings on S. 270, supra* note 6, at 418.

26. *See* text accompanying notes 17-21 *supra.*

27. 42 U.S.C. § 2239(a) (1976).

28. NRC Opinion, *supra* note 14, at 3, *reprinted in Hearings on S. 270, supra* note 6, at 420.

29. *Id.* at 7, *reprinted in Hearings on S. 270, supra* note 6, at 424. An intervenor will be considered unable to bear the costs of participation if he lacks financial resources to participate effectively. The Commission, moreover, must determine that both the participation and payment therefore are necessary. FCC Letter, *supra* note 14, at 3. Recently, the test for whether participation is necessary has been modified substantially. *See* text accompanying note 32 *infra.*

B. The Effect of the Comptroller General's Rulings on Funding Programs

Through the FTC and NRC decisions, the Comptroller General attempted to provide a legal rationale for agency reimbursement programs that were intended to open the doors of administrative decisionmaking to the public.[30] The Comptroller General's delegation to the agencies of exclusive and discretionary authority to determine whether funding is appropriate in each case, however, provided the agencies with a basis for avoiding the necessity of instituting a funding plan. The decisions merely gave to the agencies the option to institute funding programs; they did not *require* the initiation of such programs.[31] The net effect of this emphasis on agency discretion may have been to impede the development of funding programs where they are urgently needed.

The Comptroller General subsequently modified the test for determining whether an applicant is a necessary participant in the proceedings so that the applicant's participation no longer must be essential to dispose of the matter. Participation now is considered necessary if the agency determines that a particular expenditure for participation reasonably can be expected to contribute substantially to a full and fair determination of the issues before the agency.[32] The broad discretion given to agencies, however, has undercut the significance of this liberalization.

This liberalized necessity standard admittedly has made it more difficult for an agency that is opposed to increased public participation to avoid reimbursing applicants, because the agency no longer can justify its refusal to provide funds by relying on the necessity factor and claiming that the intervenor's participation was not essential to dispose of the matter. The determination of necessity, however, remains entirely discretion-

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30. Using the same reasoning as presented in the NRC Opinion, *see* note 14 *supra*, the Comptroller General has determined that the FCC, FPC, ICC, CPSC, SEC, FDA, EPA, and NHTSA also possess inherent authority to fund public particpants. *See* Moss Letter, *supra* note 14, at 1, *reprinted in Hearings on S. 270, supra* note 6, at 428.

31. It is doubtful the Comptroller General even had the authority to require the initiation of funding programs. In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court had held that in the absence of a statutory provision otherwise, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1971), the court had stated it had no power to order either the opposing parties or the agency to pay the costs of intervenors. The Comptroller General was able to distinguish both cases on the grounds that there was no question of shifting fees between parties or of forcing the agencies to provide funds involved in his decision that the NRC has authority to provide such funds. *See* NRC Opinion, *supra* note 14, at 7, *reprinted in Hearings on S. 270, supra* note 6, at 424.

32. FDA Opinion, *supra* note 14, at 5, *reprinted in Hearings on S. 270, supra* note 6, at 459; *see* notes 54, 60 & accompanying text *infra*.

ary and thus virtually final. This unbridled discretion in effect permits an agency to reject an applicant on the basis of the applicant's substantive viewpoint rather than on the basis of a genuine lack of need for a balance of representative and diverse viewpoints. Various agencies, in turn, have exercised their discretion differently. As a result, the inconsistencies appearing from these differing responses eventually stimulated congressional action.[33]

II. AGENCY RESPONSE TO THE COMPTROLLER GENERAL'S DECISIONS

Agency funding programs fall into three categories: (1) those of agencies with express statutory authority to fund public participants; (2) those of agencies with inherent authority as recognized under the Comptroller General's decisions; and (3) those of agencies opposed to any funding program to foster public participation. Each agency may develop its own program, and although some agencies already have instituted funding programs, many agencies still are engaged in rulemaking to determine whether to institute a program.[34]

A. Agencies with Express Statutory Authority

The FTC, the subject of the Comptroller General's initial determination that agencies have inherent authority to fund public participants,[35] was also the first agency to receive express statutory authority to do so. The FTC initially had not responded well to increased demands for meaningful public participation in its proceedings. After the Comptroller General's 1972 decision, the FTC provided funds to only one intervenor.[36] Because of the FTC's reluctance to offer financial assistance to public participants, Congress included in the Federal Trade Commission Improvement Act[37] a provision granting the Commission express authority to provide such reimbursement.[38] The Act gave the Commission notice that Congress intended such authority to be exercised;[39] in turn, the FTC

33. *See* notes 126-36 & accompanying text *infra*.

34. *See* note 12 *supra*.

35. *See* FTC Letter, *supra* note 14, *reprinted in Hearings on S. 2715*, *supra* note 2, at 281; notes 15-21 & accompanying text *supra*.

36. 42 Fed. Reg. 15,711 (1977); *see* Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972).

37. 15 U.S.C. § 57a (1976).

38. The Act authorizes the Commission to provide reimbursement for attorneys' and experts' fees, travel and secretarial expenses, and other out-of-pocket expenses directly attributable to participation. *Id.* § 57a(h)(1); *see Hearings on S. 270*, *supra* note 6, at 228.

39. Although Congress did not make the funding mandatory, it clearly desired the FTC to be more liberal in disbursing funds than it had been formerly. After noting that the disbursement of

responded by developing a funding program that has functioned as a preliminary sketch for other agencies' efforts to promulgate funding rules.

Under the FTC's program,* compensation is available for participation in four phases of rulemaking proceedings: preparation of testimony, development of evidence, participation in a hearing, and preparation of rebuttal submissions.[40] Compensation is not available for expenses incurred for petitions seeking to initiate rulemaking or for participation in judicial review of a rule because they are not technically a part of the rulemaking proceeding.[41] The Commission also will reimburse applicants only for reasonable expenses actually incurred.[42]

The FTC's program identifies two distinct elements to be examined before the Commission will reimburse an applicant: the financial need of the participant and the interest the participant represents. Although these are the same factors that the Commission examined when it relied on its inherent authority,[43] the test for financial need is now different under the FTC Improvement Act. In order to qualify as financially needy under the Act, a participant merely must be unable to pay the costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in the proceeding.[44] In addition to being financially needy, the applicant must represent an interest that otherwise is not represented adequately at the proceeding, with representation of the interest necessary to a fair determination of the issues of the proceeding. Whether the need for the applicant's participation is sufficient to justify funding him is determined by considering the number and complexity of the issues involved and the importance in the proceeding of a balanced representation of all views.[45]

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funds under the FTC Improvement Act may be critical to the full disclosure of material facts in rulemaking proceedings, the Senate conferees stated that they "expect the Commission to assign a high priority to [the] proper expenditure [of the funds]." S. CONF. REP. NO. 1408, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7768.

40. *Hearings on S. 270, supra* note 6, at 386-87.

41. A rulemaking proceeding commences upon the issuance of an initial notice and concludes when the Commission promulgates a final rule. Thus, petitions precede and judicial review follows the rulemaking proceeding. *Id.* at 387.

42. 16 C.F.R. § 1.17(e) (1978).

43. *See* notes 17-29 & accompanying text *supra*.

44. Under the FTC Improvement Act, the Commission may reimburse an applicant who is unable to participate effectively in the proceeding, even though the applicant actually may not be indigent. *Hearings on S. 270, supra* note 6, at 22 (statement of Calvin J. Collier); *see* 15 U.S.C. § 57a(h)(1). The inability to pay the costs of making oral presentations, conducting cross-examination, and making rebuttal submissions is deemed inability to participate effectively. 16 C.F.R. § 1.17(a) (1978). Agencies that rely on their inherent authority require applicants to satisfy stricter indigency criteria before the agency will reimburse them. *See* notes 55, 61-64 & accompanying text *infra*.

45. The FTC has developed a number of guidelines to assist the determination whether a particular applicant will receive funding. One of the key factors is the specificity with which the applicant

The FTC has been far more liberal in providing reimbursement under the Act than it was when it was able to rely only on the Comptroller General's ruling of inherent authority. In the first two years after the funding program was initiated in 1975, the Commission granted approximately seventy-five percent of all requests for reimbursement.[46] FTC sources indicate that funded participation substantially benefits the proceedings and adds materially to the quality of the record of the proceedings.[47] Although there remains a risk that the participants' purportedly independent viewpoint is not actually independent, it clearly appears that the most successful funding programs will be those formulated by agencies with express statutory authority to institute the programs. This is evidenced by the disparity between the amount of reimbursement the FTC provided when it relied merely on its inherent authority and the amount it has provided since being granted express authority to fund public participants,[48] as well as by the experiences of other agencies that still must rely on their inherent authority under the Comptroller General's decisions.

B. Agencies Acting on Inherent Authority

At least two agencies, the National Highway Traffic Safety Administration (NHTSA) and the Consumer Products Safety Commission (CPSC), have established temporary funding programs premised on the Comptroller General's ruling that certain agencies have inherent authority to com-

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sets forth the issues in the proceedings, he intends to address the point of view he represents, and the nature of the information he intends to develop; the more clearly the applicant sets these forth, the more likely he is to be funded. *Hearings on S. 270, supra* note 6, at 395. The Commission also looks to the applicant's experience and expertise both in the substantive area involved and in general, on the theory that a more experienced applicant will make a more valuable contribution than will an applicant who has shown no prior interest in the area. *Id.* at 396. Finally, the Commission will consider the applicant's willingness to spend some of his own money on the proceeding. An applicant who is willing to spend his own money is more likely to believe that the problem is significant to the interest he represents and that his participation is important. *Id.* at 397.

46. By February 1, 1977, the FTC had granted, at least in part, 44 of 66 original applications and 32 of 37 requests for supplemental funding. Over $800,000 had been distributed to 30 different applicants, most of them public interest groups. *See id.* at 23-29. Even under the FTC Improvement Act, however, the amounts the Commission may distribute is limited. The aggregate amount of compensation to all persons in any fiscal year may not exceed $1 million. The aggregate amount paid to any one applicant may not exceed 25% of the aggregate amount paid to all persons in the fiscal year. *See* 15 U.S.C. §§ 57a(h)(2)(B), (3) (1976).

This liberal disbursement of agency funds to public participants is in marked contrast to the FTC's actions when it was able to rely only on its inherent authority. Then, the Commission had disbursed funds to only one person in three years. *See* note 36 & accompanying text *supra*.

47. *See Hearings on S. 270, supra* note 6, at 20.

48. *See* note 46 *supra*.

pensate public participants. A number of other agencies have reimbursed public participants on an ad hoc basis. All these agencies have encountered a significant drawback to relying on the Comptroller General's rulings in that they have felt constrained to adhere strictly to the guidelines set forth in these rulings.[49]

The appropriations acts for the Department of Transportation and its component agencies (one of which is the NHTSA) allow expenditures for "necessary expenses."[50] According to the Comptroller General's decisions, this authorizes agencies within the Department to reimburse intervenors in their proceedings if the agency believes that the intervenors' participation is necessary for the agency to carry out its statutory duties and that reimbursement is necessary in order for the intervenors to be able to participate.[51] In January 1977, the NHTSA established an experimental funding program, using the Comptroller General's guidelines as the basis for its eligibility criteria.[52]

In order for an applicant to receive reimbursement under the NHTSA program, he must represent an interest whose representation reasonably can be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding.[53] It also must appear that the applicant can represent that interest competently and that participation by the applicant is reasonably necessary to represent that interest adequately.[54] Finally, the applicant must satisfy the Comptroller Gener-

49. The General Counsel of the Department of Transportation, in ascertaining the range of compensable costs and activities permitted under the Department's program, stated that "[b]ecause DOT lacks express statutory authority to spend funds for this purpose, it must adhere closely to the criteria for lawful administration of such a program under its implied authority as interpreted by the Comptroller General." Opinion of General Counsel of Department of Transportation regarding Program to Provide Financial Assistance for Certain Participants in NHTSA Proceedings (Feb. 9, 1977) (unpublished opinion). The NHTSA also stated it felt compelled to define financial need more narrowly than it would have if it had express statutory authority. *Hearings on S. 270, supra* note 6, at 100 (statement of William T. Coleman, Jr., former Secretary of Department of Transportation). Administrators of the NHTSA program believe the necessity of strict adherence to the Comptroller General's criteria standards is an unnecessary limitation because of the narrow financial need test. Telephone interview with Richard Lorr, General Counsel's Office of the National Highway Traffic Safety Administration, in Washington, D.C. (Oct. 14, 1977) (hereinafter cited as Lorr Interview).

50. *See* Department of Transportation and Related Agencies Appropriations Act of 1977, Pub. L. No. 94-387, 90 Stat. 1178 (1976).

51. *See* text accompanying notes 17-21 *supra*.

52. *See* 42 Fed. Reg. 2864 (1977). At the same time, the Department of Transportation considered department-wide implementation of a funding program. That decision was postponed, pending a determination whether the increased public access would benefit NHTSA's rulemaking proceedings. *Id.* In the first six months of the program, the Administration awarded approximately $70,000 to seven different public interest groups in four separate proceedings, and apparently is satisfied that the public participation has improved the quality of its proceedings. Lorr Interview, *supra* note 49.

53. 49 C.F.R. app. § 6(c)(1) (1977).

54. *Id.* § 6(c)(2), (3). In evaluating whether the applicant reasonably can be expected to contribute substantially, the Administration considers the number, complexity, and potential significance of

al's indigency test: he must not have available and must not reasonably be able to obtain sufficient funds to participate effectively in the proceeding.[55]

Even if an applicant has satisfied these criteria for eligibility for reimbursement, the Administration still retains discretion whether to finance the applicant. The decision normally will depend on the availability of funds and on whether the applicant's proposal can be timely developed and presented.[56] Compensable expenses are limited to reasonable attorneys' and expert witnesses' fees and other reasonable costs of participation actually incurred.[57]

The CPSC instituted a temporary funding program and adopted regulations to govern the program in May 1978.[58] In addition, the Commission previously had provided financial assistance to public participants on an ad hoc basis on at least two occasions.[59] The Commission's standards for eligibility under the program are the same as they were when the Commission provided funds on an ad hoc basis and are similar to the NHTSA's standards. In order to qualify as a necessary participant, an applicant must reasonably be expected to contribute to a full and fair determination of the issues involved in the proceeding.[60] In order to qualify as financially needy, however, the applicant must satisfy a second criterion in addition to not having sufficient resources available for effective participation in the proceeding. The applicant's financial stake in the outcome of the proceeding also must be small in comparison to the cost of effective participation in the proceeding.[61] This additional criterion that must be satisfied under the CPSC program makes it more difficult

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the issues affected by the proceeding and the novelty, significance, and complexity of the ideas advanced by the applicant. *Hearings on S. 270, supra* note 6, at 215.

55. 49 C.F.R. app. § 6(c)(4) (1977).

56. 42 Fed. Reg. 2865 (1977).

57. 49 C.F.R. app. §§ 7(a)-(b) (1977).

58. *See* 43 Fed. Reg. 23,560, 23,562 (1978); 16 C.F.R. § 1050 (1978).

59. 42 Fed. Reg. 15,711 (1977); *see* Esquire Carpet Mills, Inc., FTC No. 8913 (June 2, 1975) (unreported decision) (Commission paid for counsel for two individual respondents in adjudicative proceeding involving an alleged violation of carpet and rug flammability standards); Fireworks Devices, CPSC No. 74-3 (Oct. 7, 1974) (unreported decision) (Commission paid transportation expenses of witness to rulemaking proceeding on grounds it was necessary for full and complete hearing).

60. 16 C.F.R. § 1050.4(b)(1) (1978). In evaluating the applicant, the Commission considers the importance of the proceeding in terms of the potential impact on public health and safety, the need for representation of one or more particular interests or points of view, the capability of the applicant to represent his or her interest, and the extent to which the interest reasonably can be expected to be represented if the Commission does not provide any compensation. *Hearings on S. 270, supra* note 6, at 215. These considerations are slightly different from those that the NHTSA considers. *See* note 54 *supra*.

61. 16 C.F.R. § 1050.4(b)(2) (1978).

for a public participant to qualify for reimbursement from the Commission.

The CPSC has attempted to mitigate the harsh consequences of the Comptroller General's indigency test by utilizing a narrow definition of "funds available" in applying the test. In ascertaining whether an applicant has sufficient funds available to participate effectively in the proceedings, the Commission classifies sources already committed to other purposes as unavailable for participation in the particular proceeding.[62] Because the Commission may fund a participant not having sufficient funds to participate effectively in the proceeding, a more restrictive definition of funds available naturally should increase the likelihood the Commission will fund an applicant.

The major problem facing agencies[63] relying on their inherent authority to reimburse public participants is the stringency of the Comptroller

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62. 42 Fed. Reg. 15,713-14 (1977). Resources committed to any other legitimate purpose, such as rent, salaries, lobbying activities, participation in proceedings of other agencies, and participation in other CPSC proceedings, would not be "available" for purposes of the indigency criterion. *Id.* at 15,714.

63. The Civil Aeronautics Board (CAB) is another agency that has interpreted the Comptroller General's decisions as authorizing the Board to fund public intervenors. *See* 42 Fed. Reg. 8664 (1977). Because certain important issues remain unresolved, however, the Board has not yet initiated a funding program. The Board is not sure whether it should identify the interests to be represented prior to the selection of representatives. *Id.* Once it has identified the interests, the Board can favor either applicants that attempt to present a balanced picture of public opinion or applicants that are prepared to articulate one position. Further, the Board must determine whether it will place a positive or a negative value on the amount of previous awards the applicant has received. Although these issues have not prevented other agencies such as the NHTSA and the CPSC from establishing funding programs, the CAB does not expect to implement a program until it has resolved these issues satisfactorily. *Id.* For a summary of other issues the CAB believes must be resolved, see *id.* at 8664-66.

Rather than implement a funding program, the CAB has attempted to answer the need for public representation through its Office of the Consumer Advocate, an in-house consumer interest guardian. *See* Letter from Jack Yohe, Director, Office of the Consumer Advocate, CAB, to Senator Kennedy (Feb. 23, 1976), *reprinted in Hearings on S. 2715, supra* note 2, at 163. Although its existence evidences a positive effort by the Board to represent the public interest, the Office has had only limited success. Its resources and position within the Board restrict the number of matters it can address and inhibit its independent assessment of issues. Despite the paucity of public input it has received on many issues for which it has been the public representative, the Office has supported the establishment of a funding program for public participants. *Id.*

Two other agencies have reimbursed public participants on an ad hoc basis. The Federal Aviation Administration has reimbursed a public interest group for travel expenses and counsel fees after refusing to relocate a hearing to a city more convenient for the public interest group whose petition for a hearing it had granted. *See Hearings on S. 270, supra* note 6, at 94-95. The Federal Energy Administration (FEA) has reimbursed Consumers Union (CU), a nonprofit consumer information and service organization, for counsel fees incurred when CU intervened in a FEA proceeding regarding petroleum price regulations. *See* FEA Dec. No. FSG-0037 (Feb. 18, 1977) (unpublished opinion) [hereinafter cited as FEA Dec. No. FSG-0037], *reprinted in Hearings on S. 270, supra* note 6, at 484. The FEA first denied CU's petition for appointment of a special public counsel, which would

General's indigency test. Under this test, an agency may not extend financial assistance to an applicant who has the financial resources to participate, but does not wish, for whatever reason, to use its resources for the purpose of participating.[64] Using this criterion often may preclude participation by persons or groups that have a legitimate interest in the proceedings. A public interest group's interest simply may be insufficient to justify the outlay of the often enormous costs of participation, or the limited resources that are available may be committed to an array of equally pressing and legitimate concerns.

One potential solution to the unfairness caused by the stringent indigency criterion would be to permit reimbursement of applicants whose financial interest in the proceeding is minor in comparison to the costs necessary for effective participation.[65] Although this appears to be a fair and logical approach, the Comptroller General already has rejected it as inconsistent with his prior decisions because it is not based on financial need in a strict sense.[66] Both the "relative financial stake" approach and the CPSC's "narrow definition of available funds" approach would facilitate reimbursement of public interest groups that currently do not qualify for reimbursement because they have resources that they choose not to use to intervene in agency proceedings. Until one of these two approaches is adopted widely, public interest groups will have difficulty qualifying for reimbursement from an agency that must rely on its inherent authority.

C. Agencies Opposed to Reimbursement Programs

Agencies that have initiated programs based on inherent authority generally recognize that, although their programs labor under the strictures of too stringent criteria, reimbursement of public participants allows the private sector to capitalize on the expertise of the bar and thereby provides a

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have involved substantial sums of money in which consumers had a substantial interest and which was not authorized by the Comptroller General's decisions. FEA Dec. No. FSG-0037, *supra*; *see* NRC Opinion, *supra* note 14, at 10, *reprinted in Hearings on S. 270, supra* note 6, at 427. The Comptroller General had stated specifically that agencies have no authority to supply funds for an independent public counsel. *Id.* After CU established its financial need, its capability of being a good representative of the public interest, and its principal function as the protector of consumers, the FEA granted CU's petition for reimbursement of its expenses for counsel. FEA Dec. No. FSG-0037, *supra*.

64. FDA Opinion, *supra* note 14, at 6, *reprinted in Hearings on S. 270, supra* note 6, at 460 (emphasis added).

65. Consumers Union proposed this standard in a petition to the FDA requesting the institution of a funding program. *See id.* at 7, *reprinted in Hearings on S. 270, supra* note 6, at 460. The petition is reprinted in 41 Fed. Reg. 35,856 (1976).

66. FDA Opinion, *supra* note 14, at 7, *reprinted in Hearings on S. 270, supra* note 6, at 461.

nongovernmental point of view. Certain other agencies, however, have chosen not to utilize their inherent authority to promote these ends. For example, the Nuclear Regulatory Commission and the Federal Communications Commission have declined to provide financial assistance to participants in their proceedings, while the Federal Power Commission compensated intervenors only after it was ordered to do so by a federal appellate court.[67] The NRC, which Senator Edward Kennedy has characterized as hostile to the idea of subsidizing public participation,[68] has declined to initiate a program in the face of particularly compelling reasons favoring such action.[69] The NRC's position rests both on policy considerations and on its perceptions of the limited extent of its authority under the Comptroller General's rulings.[70]

The NRC believes that public participation is not vital to balanced decisionmaking. Although the Commission purportedly recognizes that public participants have made valuable contributions to many agencies' proceedings[71] the Commission claims it is self-sufficient and apparently is opposed to any increase in the adversarial nature of its proceedings.[72] The Commission believes that its staff has developed substantial expertise in the areas on which it holds hearings and that the need for citizen input is therefore minimal.[73] The Commission also has interpreted the stan-

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67. *See* notes 85-103 & accompanying text *infra*.

68. *Hearings on S. 270, supra* note 6, at 2.

69. *See* BOASBERG, HEWES, KLORES & KASS, POLICY ISSUE RAISED BY INTERVENOR REQUESTS FOR FINANCIAL ASSISTANCE IN NRC PROCEEDINGS (July 18, 1975) (report to NRC by Washington, D.C. law firm), *reprinted in Hearings on S. 2715, supra* note 2, at 331. The report outlines five basic arguments in favor of intervenor financing that should be particularly compelling for the NRC: (1) intervenors can make significant contributions to the hearing process; (2) intervenors serve as a gadfly to the staff and boards of regulatory agencies; (3) funding will increase the public's education and confidence in the efficacy and safety of nuclear technology; (4) no modest effort should be spared to review thoroughly all the health, safety, economic and environmental factors involved in licensing nuclear facilities; and (5) intervenors represent an outside view that should be heeded in an area dominated by governmental and other powerful interests. *Id.* at 87.

70. 41 Fed. Reg. 50,829 (1976) (statement of considerations terminating rulemaking); *see* NRC Opinion, *supra* note 14.

71. 41 Fed. Reg. 50,832 (1976).

72. Just how adversarial NRC proceedings currently are is questionable. NRC Commissioner Gilinsky has admitted that there rarely is a dispute over a license application unless the dispute is raised by a third party or an intervenor. *Id.* at 50,837. Although it does not necessarily mean that a better result is achieved, Mr. Gilinsky also has admitted that the staff is better prepared and the record is developed in greater depth on issues in which intervenors show an interest. *Id.* at 50,832.

73. *Id.* In proceedings such as those examining the safety factors of individual reactors, there is little need for public input because the Commission has a comprehensive, expertly staffed, and well-developed regulatory regime. *Id.* at 50,831. In proceedings involving environmental issues, public input is not necessary because the Commission has developed standardized remedies to mitigate environmental impact. *Id.* In addition, proceedings often will include participation by other agencies and input from federal, state, and local governments. *Id.*

dards prescribed by the Comptroller General's ruling so narrowly as to preclude qualification by virtually any public interest participants.[74]

The NCR also is opposed to intervenor funding for reasons other than its belief that public intervenors do not add materially to the Commission's proceedings. According to the NRC, a major disadvantage of intervenor funding is the possible delay in the licensing of needed power facilities.[75] Funding would increase the number of interventions and cause the cases to be more extensive. Because the Commission denies that the intervention of public participants results in better balanced decisions, it believes that *any* delay is unprofitable.[76]

The NRC sees the substantial cost of a funding program as another significant disadvantage.[77] In addition to questioning whether the expenditure of such large sums of money is justified, the Commission believes that there currently is a strong presumption that public funds should be spent only for the presentation of positions by governmental organizations ultimately subject to congressional control.[78] The Commission has stated that it is for Congress, not the Comptroller General, to alter that presumption.[79] Undoubtedly, the NRC's hostility to funding intervenors is manifested by its refusal to recommend that Congress provide for funding of public participation in ordinary licensing or rulemaking proceedings.[80]

As previously stated, the NRC's hostility to funding intervenors stems from its belief that public intervenors do not add materially to the proceedings. This belief ignores the benefits that an outside view may pro-

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74. The Commission interpreted the Comptroller General's tests for intervenor funding as mandating that the agency not fund intervenors unless the agency "'cannot make' the necessary licensing or rulemaking determinations unless financial assistance is extended . . . [and unless such subsidized] participation is 'essential' to their disposition of the issues." *Id.* at 50,830. Maintaining that it would be unable to make such determinations, the Commission suggested that, in any event, these requirements rarely could be met by public participants. *Id.*

75. *Id.* at 50,832.

76. *Id.* If, however, the issues that the intervening parties were pursuing were so vital to the public health and safety as to make their further investigation "essential" to the decisionmaking process, even NRC Commissioner Gilinsky would concede that the attendant delay would be warranted. *Id.* at 50,838 n.16. In this case, the intervenors would qualify for reimbursement even under the NRC's strict criteria.

77. The Commission has estimated that full funding of intervention in a significant portion of the total number of proceedings in a single year may cost more than $1 million. *Id.* at 50,832.

78. *Id.* at 50,833.

79. *Id.*

80. *Id.* at 50,831. After stating that an express congressional mandate would be required before the NRC would reimburse intervenors, the Commission stated that "[f]or the reasons described herein, we do not recommend that Congress provide funding for ordinary licensing or rulemaking proceedings." *Id.* The reasons stated therein include delay of proceedings, substantial costs, and the NRC's belief that public intervenors do not add materially to the proceedings.

vide, particularly in proceedings where policy issues predominate or where the matter at issue has been dominated by governmental or other powerful interests. Intervenors potentially are most effective in NRC rulemaking proceedings, where the very purpose of the proceedings is to solicit broad and diverse viewpoints on a matter of great public interest or importance. The Commission's concern that public funds might be used to support private viewpoints not necessarily reflective of the views of the public overlooks the position that the goal of a funding program is to open the administrative process to *all* valid viewpoints that will contribute substantially to fair and full decisions.[81]

The Comptroller General's decisions have been encouraging to most agencies interested in developing funding programs for public participants. Such agencies, however, want the dissolution of the aura of uncertainty that surrounds agency funding and the liberalization of the prerequisites to reimbursing intervenors. On the other hand, for agencies opposed to subsidizing citizen input, the Comptroller General's emphasis on agency discretion has facilitated the avoidance of instituting a program. These agencies would like Congress to disapprove the idea of funding programs and will continue to discourage public participation. Nevertheless, agencies on both sides of the public funding debate recognize the need for congressional action to set forth precisely when and under what conditions agencies may reimburse public participants.

III. JUDICIAL RESPONSE: GREENE COUNTY PLANNING BOARD V. FPC

Greatly intensifying the omnipresent confusion and debate created by the public funding issue is the vacillating attitude of the courts toward the propriety of agencies providing reimbursement in reliance on the Comptroller General's decisions. In particular, the United States Supreme Court denial of certiorari that let stand the Second Circuit's en banc decision in *Greene County Planning Board v. FPC*[82] has placed in jeopardy many existing or proposed agency funding programs.[83] The *Greene County* litigation has undermined the strength of the Comptroller General's decisions' effect on both agencies and courts. In reaffirming the im-

81 42 Fed. Reg. 2865 (1977); *see* Levanthal, *Attorneys' Fees for Public Interest Representation*, 62 A.B.A.J. 1134, 1135-36 (1976).

82. 559 F.2d 1227 (2d Cir. 1976), *rev'd en banc*, 559 F.2d 1237 (2d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

83. At least one agency has not been deterred by the *Greene County* litigation. The National Oceanic Atmospheric Administration initiated rulemaking proceedings to establish a funding program in August 1977, shortly after the Second Circuit's en banc decision. *See* 42 Fed. Reg. 40,711 (1977).

portance of the FPC's interpretation of its own powers in the face of congressional silence, the Second Circuit has left the decision whether to provide funding to intervenors solely to the discretion of the particular agency.[84]

The *Greene County* litigation arose out of a FPC licensing proceeding involving the appropriate routing of a power transmission line that the Power Authority of the State of New York (PASNY) sought to construct through Greene County, New York. In August 1968, the PASNY filed an application with the FPC for a license to construct and operate a power plant, which would entail running three transmission lines through Greene County.[85] The Commission issued the license in June 1969, but requested more detailed information about the transmission lines.[86] The license expressly prohibited construction of the transmission lines without further Commission approval of plans for preservation of the environment.[87]

In May 1970, the FPC granted the Greene County Planning Board (Greene County) and others leave to intervene in the proceedings.[88] In 1971, Greene County requested the FPC either to pay or to order the PASNY to pay Greene County's legal expenses.[89] The FPC denied the request on the grounds that it had no authority to grant it.[90] Greene County then petitioned the Court of Appeals for the Second Circuit to review the orders of the FPC, but the court refused to order the Commission or the PASNY to pay Greene County's expenses.[91] The court found that it lacked statutory authority to order the Commission to award reimbursement; it did not reach the question whether the Commission

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84. 559 F.2d at 1239 n.2 (en banc) (FPC interpretation of Federal Power Act entitled to great deference from the court).

85. Greene County Planning Bd. v. FPC, 455 F.2d 412, 415 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

86. Power Auth. of N.Y., Project No. 2685, 41 F.P.C. 712, 718 (1969).

87. *Id.*

88. 455 F.2d at 416; Power Auth. of N.Y., Project No. 2685, 46 F.P.C. 1101, 1102 (1971). Greene County opposed the proposed routing of one of the transmission lines because it was to run through the Durham Valley, an area of scenic and historic value. 455 F.2d at 416.

89. 455 F.2d at 417. Greene County also moved that the Commission rescind the June 1969 license and stop further construction, on the grounds that such construction violated the Federal Power Act, 16 U.S.C. § 825h (1976), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976). 455 F.2d at 417.

90. 46 F.P.C. at 1102-03.

91. 455 F.2d at 426. In response to Greene County's petition, the FPC argued it had foreclosed only the present award of fees and that it had left open the question whether ultimately to award fees when the proceedings ended. *Id.* at 425.

itself had discretionary authority to provide reimbursement in appropriate cases.[92]

In January 1976, the FPC authorized construction of the disputed power line, choosing a route that reflected the influence of Greene County's persistence.[93] After discussing the applicability of *Alyeska Pipeline Service Co. v. Wilderness Society,*[94] in which the Supreme Court held that absent congressional authorization or an enforceable contract litigants must pay their own costs, and the Second Circuit's opinion in the initial *Greene County* case, the FPC found that it had no authority to award attorneys' fees or other costs to Greene County.[95] The Commission also stated that Greene County did not qualify as a public interest intervenor because it represented local towns and landowners who could have been damaged by the power line and was therefore protecting its own interests.[96] The Commission then rejected the intervenors' petitions for rehearing.[97]

Greene County sought judicial review of the FPC decision that had approved the route for the transmission line and that had denied the intervenors' reimbursement. In December 1976, a Second Circuit panel affirmed the Commission's decision to permit construction of the transmission line.[98] At the same time, however, the court ruled that the FPC apparently had authority to award counsel fees and expenses to the intervenors and remanded the case to the Commission for further consideration of the intervenors' request for reimbursement.[99] The panel's decision that the Commission had authority to award fees rested largely on the Comptroller General's prior rulings.[100] The court recognized that the Comptroller General is Congress' agent for the purpose of determining

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92. The court held that, at that stage of the proceedings, under the existing circumstances, and without a clearer congressional mandate, it was unable to order the FPC or the PASNY to pay Greene County's expenses or fees. *Id.*

A further interlocutory petition by Greene County to the Second Circuit was denied in 1973. 490 F.2d 256 (2d Cir. 1973). The court dismissed as premature Greene County's request for review of the adequacy of the FPC's order for an environmental impact statement. In 1975, Greene County again sought review of a FPC order. This time the court dismissed the petition on grounds that it lacked jurisdiction to review an order granting the PASNY a permit to construct a transmission facility on the Canadian border. *See* 528 F.2d 38, 46 (2d Cir. 1975).

93. Power Auth. of N.Y., Project No. 2685, FPC Opinion No. 751 (Jan. 29, 1976).

94. 421 U.S. 240 (1975).

95. Power Auth. of N.Y., Project No. 2685, FPC Opinion No. 751, at 20-21 (Jan. 29, 1976).

96. *Id.* at 21.

97. Power Auth. of N.Y., Project No. 2685, FPC Opinion No. 751-A (Apr. 27, 1976).

98. 559 F.2d at 1230 (panel).

99. *Id.* at 1230.

100. *See* note 14 *supra*.

the legality of administrative expenditures and found that his decisions were not clearly incorrect.[101]

Shortly after the *Greene County* panel decision, the Second Circuit en banc reversed the panel's finding that the FPC had inherent authority to reimburse the intervenors.[102] The court, relying largely on *Alyeska*, the FPC's interpretation of its own authority, and the court's belief that the Comptroller General's rulings conflicted with the court's finding in the initial *Greene County* decision, held that its own interpretation of the Act must prevail.[103] The court read its initial *Greene County* decision as holding that the Federal Power Act did not authorize the FPC to reimburse these intervenors.[104] In the course of ruling that the Comptroller General's decisions conflicted with the initial *Greene County* case, the court may have misread its initial *Greene County* holding. The court held in *Greene County I* merely that it could not *require* the FPC to reimburse the intervenors; statements implying that the FPC had no *authority* to reimburse the intervenors if it so desired were dicta.[105]

The court's reliance on *Alyeska* and on *Turner v. FCC*,[106] which also held that only Congress can authorize an exception to the general rule that litigants bear the expenses of their litigation, also appears misplaced. The issue in *Greene County* was whether the FPC had authority to dis-

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101. 559 F.2d at 1234-35 (panel). The court found that, because public hearings are integral to the functioning of the FPC, authorization for reimbursement of indigent intervenors who make important contributions in the hearings reasonably could be found in the Commission's general statutory mandate. In addition, however, the court may have based its decision partially on its belief that the FPC had based its decision not to reimburse the intervenors on the Commission's conclusion that the intervenors were only protecting their own self-interests by intervening. The Commission had implied it would not have granted fees to the intervenors even if it had had the authority to do so. *See* Power Auth. of N.Y., Project No. 2685, FPC Opinion No. 751-A (Apr. 27, 1976). The court, in remanding the case to the Commission for a determination whether the intervenors met the Comptroller General's standards, recognized that all intervenors in agency proceedings are protecting their own interests. The essential test, according to the court, is whether the intervenors also serve the broader public interest and thereby substantially aid the agency. 559 F.2d at 1235 (panel).

Judge Van Graafeiland dissented from the court's opinion, stating that the Comptroller General had no power to issue what was in effect a declaratory judgment giving the FPC authority to disburse public funds, particularly in the face of the Commission's own determination that it did not have such power. *Id.* at 1236 (Van Graafeiland, J., dissenting).

102. 559 F.2d at 1237 (en banc).

103. 559 F.2d at 1238 (en banc). In holding that its own interpretation of the Act was to prevail, the court relied on the provisions of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), that mandate that the reviewing court "decide[s] all relevant questions of law" and "interpret[s] constitutional and statutory provisions." *See* 559 F.2d at 1238 (en banc). The court also invoked the broad language of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, which provides that "absent statute or enforceable contract, litigants [must] pay their own attorneys' fees." 421 U.S. 240, 257 (1975).

104. 559 F.2d at 1238 (en banc).

105. *See* 455 F.2d at 425-27; note 92 & accompanying text *supra*.

106. 514 F.2d 1354, 1356 (D.C. Cir. 1975).

burse its appropriated funds for the compensation of a party that intervened in a proceeding before the agency; it was not a question of shifting fees between private litigants, as was the issue in *Alyeska* and in *Turner*.[107] Because Greene County was an intervenor rather than a litigant, invocation of the general rule of *Alyeska* that litigants must pay their own expenses was misplaced.

In ruling that the FPC had no authority to reimburse the intervenors, the Second Circuit court, en banc, glossed over the bases of the Comptroller General's decisions that held that the FPC, among other agencies, had such authority.[108] The Comptroller General has recognized the authority in many agencies because the agencies' appropriations generally are in lump sums and because the Government Accounting Office has long held that an appropriation made for a particular purpose may be used for expenses reasonably necessary to achieve that purpose.[109] The en banc court did not state that the Comptroller General's logic was faulty or invalid; it merely stated that the authority of a commission to disburse funds must come from Congress.[110] The court never took account of the claim that Congress had given agencies authority to disburse funds by providing appropriations for "necessary expenses in carrying out the purpose of a given act."[111] The court also failed to acknowledge the Comptroller General's authority as Congress' agent to determine the legitimacy of administrative expenditures.[112]

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107. There are many good reasons not to permit fee shifting, in which one litigant pays the prevailing litigant's expenses, particularly where the public interest is involved. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); *Hearings on S. 270, supra* note 6, at 687-88. Even the most compelling reasons—the desire to avoid penalizing unsuccessful litigants or discouraging the poor from instituting actions to vindicate their rights—are unpersuasive when applied to fee reimbursing, in which unsuccessful litigants are not penalized and there is no direct exercise of compulsion against a private party. 559 F.2d at 1242 (en banc) (Lombard, J., dissenting).

108. *See* Moss Letter, *supra* note 14, *reprinted in Hearings on S. 270, supra* note 6, at 428. The Comptroller General had ruled that the FTC, along with eight other agencies, had discretion to reimburse public participants in agency proceedings if the Commission found that the applicant was indigent and that the applicant's participation in the proceeding was necessary in order for the Commission to carry out its functions properly. *Id.* at 2, *reprinted in Hearings on S. 270, supra* note 6, at 429.

109. *See* NRC Opinion, *supra* note 14, at 3, *reprinted in Hearings on S. 270, supra* note 6, at 420.

110. 559 F.2d at 1239 (en banc) (quoting Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975)).

111. *See* NRC Opinion, *supra* note 14, at 2-3, *reprinted in Hearings on S. 270, supra* note 6, at 419-20.

112. *See* 559 F.2d at 1241 (en banc) (Lombard, J., dissenting) (opinions of Comptroller General, as Congress' chief agent for guarding the public fisc, are comparable to those of any agency in its area of special responsibility); note 13 *supra*.

The posture of the *Greene County* case changed dramatically in 1977 when, while Greene County was petitioning the Supreme Court to review the en banc decision, the FPC was abolished and its activities transferred to the Federal Energy Regulatory Commission (FERC).[113] As the new respondent to the petition for a writ of certiorari,[114] the FERC reversed the position of the FPC. The FERC informed the Supreme Court that it believed that it was authorized under the Federal Power Act[115] and the Department of Energy Organization Act to reimburse intervenors in FERC proceedings for their expenses.[116] In light of the reversal in policy by the FERC, the new Commission requested the Supreme Court to grant the writ of certiorari, vacate the judgment of the en banc court of appeals, and remand the case to the court of appeals for reconsideration.[117] The FERC argued that its own interpretation of its organic acts should be given as much weight as was given the interpretation by its predecessor,[118] but did not indicate whether it would award compensation to Greene County in this case.[119] The question was deemed moot when the Supreme Court declined the FERC's advice and denied Greene County's petition for a writ of certiorari.[120]

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113. *See* Department of Energy Organization Act, Pub. L. No. 95-91, §§ 401-407, 91 Stat. 565 (1977).

114. The Department of Energy Organization Act provides for substitution of the FERC for the FPC in litigation pending at the time the Act became effective. *Id.* § 705, 91 Stat. 606.

115. 16 U.S.C. §§ 792-828(c) (1976), *as amended by* Department of Energy Organization Act, Pub. L. No. 95-91, § 301(b), 91 Stat. 565 (1977).

116. The FERC's position was based on its reading of the two enabling acts as permitting the Commission to disburse funds whenever it believes that doing so would assist the Commission in carrying out its statutory functions. Brief for FERC at 9, 11, Greene County Planning Bd. v. FERC, 434 U.S. 1086 (1978).

The Federal Power Act imposes a wide range of regulatory responsibilities on the Commission. Under that Act and the Department of Energy Organization Act, the FERC is given broad powers to carry out these responsibilities. In addition, courts frequently have recognized that the Commission's powers must be construed broadly to include not only powers explicitly conferred on the Commission, but also such implied powers as are necessary and proper for the discharge of the Commission's statutory functions. *See, e.g.*, Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 153 (D.C. Cir. 1967); Northern States Power Co. v. FPC, 118 F.2d 141, 143 (7th Cir. 1941). This was essentially the same rationale the Comptroller General had relied upon in ruling that the Commission had inherent authority. *See* Moss Letter, *supra* note 14, at 2-3, *reprinted in Hearings on S. 270, supra* note 6, at 429-30.

117. Brief for FERC at 19, 434 U.S. 1086 (1978).

118. *Id.* at 18.

119. Although the FERC also did not indicate what procedures and standards it thought appropriate to make the determination, *see id.* at 9, 18. It stated that it did not believe that the intervenors were foreclosed from reimbursement merely because they may have been acting to protect their own interests. *Id.* at 9, 11. Unlike the FPC, the FERC recognized that the intervenors could merit reimbursement for protecting the public interest even though they also were protecting their own interests. *See* text accompanying note 96 *supra*.

120. 434 U.S. 1086 (1978).

The outcome of the *Greene County* litigation is susceptible to two interpretations. The narrow interpretation is that the Second Circuit's en banc decision involved only the FPC's interpretation of the Federal Power Act and did not announce a rule governing similar situations arising under other statutes. The broader, more threatening interpretation is that explicit statutory authority is required before any agency may reimburse public participants.[121] The Department of Justice has determined that the narrower reading of *Greene County* is more appropriate and that the decision therefore does not prevent other agencies from construing their respective organic statutes and any other relevant statutes and determining that Congress has authorized the agency to reimburse participants in proceedings before it.[122]

Notwithstanding the Justice Department's determination, the *Greene County* en banc decision raises questions about the wisdom of agencies continuing to rely on their inherent authority to reimburse public participants. Although the narrower interpretation of *Greene County* is preferable because it preserves the possibility that an agency may fund public participants based on the particular agency's interpretation of its enabling laws, it still is undesirable from a public policy viewpoint because it leaves completely to the agency's discretion the decision whether to establish a funding program. Thus, the status of agency funding programs has regressed to where it was before the Comptroller General's NRC opinion in 1972.[123] Whether an agency has authority to reimburse public participants will be determined according to how it interprets its own organic laws; the Comptroller General's decisions no longer are even colorable authority.

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121. Senators Eastland and Thurmond suggested to the Department of Justice that the Second Circuit's holding may have gone beyond merely the FPC's interpretation of the Federal Power Act. *See* Memorandum from John M. Harmon, Office of Legal Counsel of Department of Justice, to Attorney General Bell (May 25, 1978) [hereinafter cited as Harmon Memorandum]. The appellate court had no jurisdiction to decide whether federal agencies other than the FPC have authority to reimburse intervenors. In order for the Second Circuit's decision to bind other agencies, one would have to find that the Supreme Court's denial of certiorari imported an expression of opinion upon the merits of the case. This effect has been denied many times. *See* United States v. Carver, 260 U.S. 482, 490 (1923). In any other instance, a court of appeals decision binds only the case before it. *See* Harmon Memorandum, *supra*, at 3.

Senators Eastland and Thurmond also found support for the broad interpretation of *Greene County* in the sharp division in Congress on the propriety of such expansive readings of agency enabling statutes. *See id.* at 2. The Supreme Court, however, has held that the views of a later Congress are not to be given any significant weight in interpreting a statute passed by an earlier Congress. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). Therefore, whether the current Congress believes the enabling statutes were intended to supply agencies with authority to reimburse intervenors is irrelevant to a determination of whether the statutes supply such authority.

122. Harmon Memorandum, *supra* note 121.

123. *See* note 14 *supra*.

If the current state of uncertainty over the legal authority of agencies to reimburse public participants persists, some agencies will have no incentive to institute funding programs. Agencies opposed to funding again will have an additional veil to mask their opposition to funding; they will be able to rely on their "lack of authority to reimburse" to justify their failure to institute programs.[124] Agencies in favor of funding presumably will be able to interpret their own enabling acts in the same manner the Comptroller General has and thereby find authority to reimburse intervenors. There is, however, the danger that an agency may hesitate to take this action.[125] For this reason, as well as to provide uniform procedures and eligibility criteria among all programs, Congress should appropriate money specifically for funding and establish a comprehensive and flexible framework that will assure vigorous and independent representation of the public interest and avoid potential abuses.

IV. CONGRESSIONAL RESPONSE

A. Congressional Efforts to Encourage Public Funding

Congress recently attempted to clarify the authority of agencies to reimburse public participants in agency proceedings by considering a bill that would provide a framework for a comprehensive financial assistance program. After the Senate failed to act on the Public Participation in Government Proceedings Act of 1976 (S. 2715),[126] Senator Edward Kennedy introduced essentially the same bill as the Public Participation in Federal Agency Proceedings Act of 1977 (S. 270).[127] Because it reflects the FTC's experiences administering the program that the FTC initiated during the intervening year, S. 270 would have improved upon S. 2715 in several ways.[128] Although Congress unfortunately did not enact the

124. *See* notes 32-33, 67-81 & accompanying text *supra*. The unfortunate reality is that an agency may be able to delay the adoption of a compensation program for years, then finally adopt regulations that are severely restrictive. 123 CONG. REC. S679 (daily ed. Jan. 14, 1977) (remarks of Sen. Kennedy).

125. Many agencies simply do not see the importance of public participation and will not take action on their own initiative. The public should not be required to wait while each agency undertakes lengthy rulemaking proceedings to determine whether it has the authority recognized by the Comptroller General or to determine how to exercise such authority. 123 CONG. REC. S679 (daily ed. Jan. 14, 1977) (remarks of Sen. Kennedy).

126. S. 2715, 94th Cong., 1st Sess., 121 CONG. REC. S20,542 (daily ed. Nov. 20, 1975). The Senate was unable to act on the bill by the time Congress adjourned in October 1976, but the attention given the bill produced significant developments within the agencies themselves. *See Hearings on S. 270, supra* note 6, at 2.

127. S. 270, 95th Cong., 1st Sess., 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

128. *See* 123 CONG. REC. S678 (daily ed. Jan. 14, 1977). S. 270 strengthened S. 2715 by clarifying the kinds of agency proceedings to which the bill applied, by eliminating provisions for

bill, the scheme embodied in it may serve as a model for future legislation.

1. The S. 270 scheme

The S. 270 scheme would grant agencies authority to award reasonable attorneys' fees, expert witnesses' fees, and other reasonable costs of participation in rulemaking, ratemaking, and licensing proceedings, and in any other proceedings involving issues that relate directly to health, safety, civil rights, the environment, or the economic well-being of consumers in the marketplace.[129] In order to qualify for reimbursement, an applicant would have to make or be capable of making a substantial contribution to a fair resolution of the issues involved in the agency proceeding.[130] Capability of making a substantial contribution would be determined by considering the number and complexity of issues presented, the importance of widespread public participation, the need for representation of a fair balance of interests, and whether the applicant represented an interest not adequately represented by a participant other than the agency itself.[131] In addition, the applicant would have to be unable to sustain the costs of participation. Financial need would arise if the applicant's economic interest in the outcome of the proceeding were small in comparison to the costs of effective participation in the proceeding, or if the applicant did not have sufficient resources available to participate effectively in the proceeding in the absence of an award.[132]

The primary purpose of S. 270 was to set up a funding scheme on an experimental basis; it would have authorized the appropriation of funds for agency reimbursements for a three-year period.[133] Under the S. 270 scheme, the particular agency involved would determine which applicants would receive awards and how the funds would be allocated among eligi-

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funding of class actions in agency proceedings, by expressly authorizing agencies to require consolidation of duplicative presentations, and by setting monetary limits on the rates of compensation at which attorneys and experts may be compensated. *Id.*; *see* S. 270, 95th Cong., 1st Sess. §§ 2(b)(1)(A)-(B), (f)(2), (f)(6), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

129. *See* S. 270, 95th Cong., 1st Sess. §§ 2(b)(1)(B), (c), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

130. *Id.* § 2(c). Each agency would be authorized to reimburse intervenors prior to the agency proceeding if the intervenor's ability to participate in the proceeding would be impaired in the absence of an advance payment. *Id.* § 2(f)(4). An intervenor who received an advance, however, would be required to repay such payments if, at the conclusion of the proceeding, he had failed to represent the interest for which the payments had been made. *Id.* § 2(f)(5).

131. *Id.* § 2(d)(1)(A)-(D).

132. *Id.* § 2(d)(2)(A)-(B).

133. *Id.* § 5(b).

ble applicants when the funds would be insufficient to compensate all applicants fully.[134] The amount each applicant would receive would be based on prevailing market rates rather than the amount the applicant actually expended for counsel. A maximum rate, however, would be set.[135] In order to minimize agency abuses in making eligibility and reimbursement determinations, the S. 270 scheme also would provide for judicial review of final agency decisions denying an applicant any reimbursement or granting the applicant insufficient reimbursement.[136]

2. *The effects of the model S. 270 scheme*

The standards established in the S. 270 scheme would improve upon the FTC's and other agencies' programs[137] in several significant respects. As a threshold matter, the S. 270 scheme would be far more liberal than existing programs because it would authorize reasonable fees for participation in any agency proceeding in which the public interest is involved directly.[138] Other programs have limited reimbursement to costs incurred in rulemaking proceedings.[139]

By specifying the factors an agency should consider to determine whether a participant is necessary to a proceeding, the S. 270 scheme would reduce agency discretion and minimize the possibility that different agencies would interpret "necessary" differently.[140] The S. 270 plan would further reduce agency discretion in determining eligibility by examining whether the applicant represents an interest not adequately represented by a participant other than the agency itself.[141] In comparison, the FTC program requires that intervenors represent an interest not otherwise represented, which gives agencies the opportunity to exclude

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134. *Id.* § 2(f)(2).

135. *Id.* § 2(f)(6). The primary rationale behind providing for reimbursement for attorneys' fees at prevailing market rates rather than limiting fees to actual expenses incurred was to avoid creating an enormous administrative burden. *See* Questions and Answers on the Public Participation in Federal Agency Proceedings Act (undated) (unpublished memorandum on file in Sen. Kennedy's office, Washington, D.C.) [hereinafter cited as Question on S. 270]. In addition, Congress did not want to encourage public interest groups to retain a profitmaking law firm or to set up a special section of higher-paid attorneys to participate in agency proceedings. *Id.*

136. S. 270, 95th Cong., 1st Sess. § 2(g)(1)-(3), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

137. *See* notes 40-45, 53-62 & accompanying text *supra*.

138. *See* S. 270, 95th Cong., 1st Sess. § 2(b)(2)(A), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

139. *See* 16 C.F.R. § 1, 17(a) (1978) (FTC); *id.* § 1050.2 (CPSC); 49 C.F.R. app. § 2(c) (1978) (NHTSA).

140. Questions on S. 270, *supra* note 135, at 8.

141. *See* note 129 & accompanying text *supra*.

citizen input by relying on a claim that the agency's own staff adequately represents the interests in question.[142] The S. 270 scheme would replace the old FTC "uniqueness" test with a more sensitive standard that would focus on the applicant's substantive viewpoint rather than on the applicant's ability to present novel facts.[143] The use of "substantially contributes to the proceedings" rather than "necessary to the proceedings" also would encourage agencies to make awards by leaving the agency with less discretion.[144]

The S. 270 plan also would facilitate qualification for reimbursement by adopting the "alternate financial need" test rather than the Comptroller General's traditional indigency test. Because an applicant would be eligible for reimbursement under this test if he merely had insufficient resources available to participate effectively in the absence of an award *or* had an economic interest in the outcome of the proceeding that would be small in comparison to the cost of effective participation in the proceeding,[145] public interest groups with limited, widely obligated funds would qualify more easily. Under the Comptroller General's traditional indigency test, an applicant qualified only if he had no money at all to pay.[146] The alternate financial need test would provide the means for increased consumer representation by experienced advocates.

B. A Proposal for Improved Legislation

1. Shortcomings of the S. 270 scheme

Although the S. 270 plan would clarify greatly the status of agency funding programs and increase citizen involvment in goverment de-

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142. Questions on S. 270, *supra* note 135, at 8.

143. Under S. 270, an applicant did not have to represent a point of view otherwise unrepresented at the proceedings. S. 270 merely sought a fair balance of interests before the agency. *Id.*

144. If the "necessary to the proceedings" criterion were used, awards might depend on whether the agency is in favor of or opposed to public participation. Although the individual agency retains almost complete discretion, the lower level of necessity that the applicant must meet facilitates a finding that the applicant merits reimbursement. It would be more difficult for an agency to find that an applicant could not be expected to contribute substantially to the proceeding than it would be to find the applicant was not necessary to the proceeding.

145. *See* S. 270, 95th Cong., 1st Sess. § 2(d)(2)(A)-(B), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).

146. *See* notes 64-66 & accompanying text *supra*. Although this financial need test has been liberalized, other agencies still require an applicant to have insufficient funds to participate effectively. *See* notes 43-44, 55 & accompanying text *supra*. At least one agency requires that the applicant also have a relatively small economic interest in the proceedings. *See* notes 61-62 & accompanying text *supra*.

cisionmaking, it is not a talisman for all problems of public funding. Even under the S. 270 scheme, agencies would retain an undesirable amount of discretion over the entire sequence of eligibility decisions. The ultimate decision, whether to reimburse an applicant at all, would be totally within the individual agency's discretion. Although this is desirable as a means of ensuring that the bill would not encourage frivolous suits or superfluous contributions by forcing the agency to award reimbursement where there was only a minimal contribution, it also would enable a hostile agency to decline an award of any compensation to public participants.[147]

Certain pressures on both the agency and the applicant for funding, inherent in any plan in which the agency conducting the proceeding determines the compensation to be awarded, also may render the S. 270 plan less than a satisfactory solution. Agencies, particularly an agency reluctant to incorporate public participants into the proceeding, may have a natural tendency to avoid hostile or adverse intervenors and to seek more moderate or well-mannered representatives. The presiding officer, who has authority to determine which representatives will receive funds, may not be able to avoid the influence of his vested interest and may attempt subconsciously to vindicate the carefully considered agency position. The applicant, on the other hand, may tailor his presentation just enough to attract the favorable eye of the presiding officer. In each instance, the result may be a proceeding that does not reach the most impartial decision possible. The wrong interests may be represented, the wrong representatives may be compensated, or the applicant's presentation may not represent adequately the interests the applicant was chosen to represent.

2. *Alternative Solutions*

There are two alternatives that would minimize the problems associated with a plan under which the agency has discretion to determine which representatives are eligible for and are to receive compensation. The FTC has implemented one alternative, in which an independent officer, not associated with the parties dealing directly with the substantive matter, makes the determinations of eligibility and compensation.[148] The more

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147. *See* note 74 *supra*.

148. Under the FTC's program, the Director of the Bureau of Consumer Protection reviews all applications and the presiding officer's initial determinations and determines, in his own discretion, to what extent compensation will be authorized. *See* 16 C.F.R. § 1.17(d)(2) (1978).

appealing alternative, however, is to vest the responsibility of managing the entire funding program for all agencies in one independent agency.

Vesting responsibility in a single agency has advantages other than minimizing the actual or perceived occurrence of favoritism. S. 270 would have authorized $10 million to be allocated among various agencies, proceedings, and applicants; allocation of the $10 million would be a major task.[149] A single agency, however, would be more efficient at performing this task.[149] In turn, congressional oversight of a single agency would be more effective than it would be of many agencies. Vesting management of funding programs in a single agency also would result in more uniform criteria and procedures.[151] Uniform and fair administration of the funding program under the S. 270 plan would be essential. Although the S. 270 plan would achieve a relatively high degree of uniformity of criteria and reimbursement levels among agencies, it would leave too much discretion to the individual agency. Centralization of authority is necessary to avoid "needless and confusing variations in a program that should become, over time, a basic and important feature of Federal administrative practice."[152]

Although no single agency is ideally suited to administer this program, a number of agencies would be acceptable. Any of the agencies that currently have responsibilities that cut across the entire federal governmental structure would face conflicts less severe than those faced by the agencies themselves.[153] Of these agencies, the General Accounting Office or the Department of Justice appear to be the best candidates. The Department of Justice has been recommended because of its experience in the local economics of law practice, yet also has been criticized in its administration of the fee program under the Criminal Justice Act for granting fees that are unrealistically low.[154] Either agency, however, would effectively prevent regulatory agencies from taking advantage of their discretion to avoid reimbursing public participants equitably.

CONCLUSION

The legitimacy of most agency funding programs remains in doubt. Two agencies have express statutory authority to reimburse intervenors in

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149. *See* S. 270, 95th Cong., 1st Sess. § 5(a), 123 CONG. REC. S610 (daily ed. Jan. 14, 1977).
150. *Hearings on S. 270, supra* note 6, at 21 (statement of Hon. Calvin J. Collier).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

their proceedings, with the legitimacy of their funding programs therefore not in question. Most agencies, however, must rely on their inherent authority to expend appropriated funds in any manner that is necessary to carry out the purposes for which the funds were appropriated. The Comptroller General has ruled that inherent authority is a sufficient legal basis for agencies to reimburse public participants. On the other hand, the Second Circuit has ruled that the individual agency's interpretation of its own organic and appropriations acts are to be given great judicial deference. Whether this holding also mandates that congressional authorization be granted before any agency may institute funding programs has yet to be clarified.

As a result of these conflicting forces, agencies interested in fostering increased public participation have been reluctant to proceed with their contemplated programs. Moreover, agencies opposed to increased public participation can interpret their statutes as not enabling them to reimburse public participants, or can decline to use their authority absent express congressional approval.

The confusion that permeates the federal bureaucracy in dealing with the public funding issue requires a uniform solution divorced from the noted interests of any particular agency or administrative decisionmaker. Authority to administer funding programs should be vested in a single independent agency not involved in the substantive issues of the proceeding in question, but sufficiently apprised of them to make intelligent evaluations of the need for balanced representation of various interests. Only congressional action can resolve the unanswered questions and lead the agencies out of the quagmire of the public funding issue.

SUSAN B. FLOHR

From: VAUCHER Rachel
To: SLR Resource
Subject: Subsequent License Renewal
Date: Friday, May 25, 2012 8:01:39 AM

Good morning,

Please find below 3 questions about the future process for potential subsequent license renewal:
a/ will other SSCs than the long-lived passive ones be addressed in subsequent license renewal?
b/ how the issue of obsolescence (e.g. availability of electronic spare parts) will be considered in subsequent license renewal?
c/ how the issue of maintaining skills (utility, vendor, regulator…) will be taken into account in subsequent license renewal?

Thanks,

Rachel VAUCHER
Autorité de sûreté nucléaire – Direction des centrales nucléaires
10 route du panorama - 92266 Fontenay aux Roses Cedex
Tél. : 01 43 19 70 57 – Fax : 01 43 19 70 66 – mél : rachel.vaucher@asn.fr

Rachel VAUCHER
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10 route du panorama - 92266 Fontenay aux Roses Cedex
Tél. : 01 43 19 70 57 – Fax : 01 43 19 70 66 – mél : rachel.vaucher@asn.fr

From:	EARLS, Chris
Subject:	Industry Comments – NRC Public Meeting Regarding Subsequent License Renewal (SLR) on May 9, 2012
Date:	Thursday, May 24, 2012 4:34:48 PM
Attachments:	05-24-12_NRC_Industry Comments – NRC Public Meeting Regarding Subsequent License Renewal (SLR) on May 9, 2012.pdf

May 24, 2012

Ms. Yoira K. Diaz-Sanabria
Chief
Division of License Renewal
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Industry Comments – NRC Public Meeting Regarding Subsequent License Renewal (SLR) on May 9, 2012

Project Number: 689

Dear Ms. Diaz-Sanabria:

NEI, as a representative of the commercial nuclear industry, was pleased to participate in the referenced public meeting regarding the NRC plans and processes for Subsequent License Renewal. This process, codified in 10 CFR Part 51 and 10 CFR Part 54, has proven effective in renewing nuclear power plant operating licenses. As companies do long-range planning, there is tremendous benefit in having a stable and predictable regulatory process in place that results in continued operation of the nuclear asset. In that same context, companies are looking beyond the first license renewal period and considering subsequent renewal.

The current license renewal process assures safe plant operation and provides a stable and predictable regulatory platform. The existing regulations will serve us well as we move into the second renewal period, and we do not envision the need for any substantive changes to this regulatory process. Some significant features of the existing process are:

- Sound, mature process with transparency in procedures and data
- Proven in over 14 years of use and 72 renewed licenses granted
- Continuous and on-going incorporation of operating experience and lessons learned as documented in periodic revisions to industry and regulatory guidance documents
- Proactively addresses aging management issues
- Collaborative process working with industry and other stakeholders

As we move toward this next phase of license renewal, the commercial nuclear industry, along with EPRI and the DOE, are taking directed initiatives to further improve our understanding of the systems, structures, and components (SSC) aging processes and

mechanisms and improve the suite of tools for aiding in aging identification and management process. Some of these initiatives are:

- Active and ongoing replacement of major plant SSCs with SSCs that often incorporate advanced materials that are more resistant to aging effects
- Coordination with the DOE's Light Water Reactor Sustainability Program for R&D in materials and component degradation studies
- Coordination with EPRI for research on long-term operation of existing plants
- Industry studies using actual plant data and pilot plants
- Coordination with international research bodies studying long term operation and SSC aging mechanisms

Throughout the original licensed period and the extended license, the industry has effectively utilized operating experience and R&D efforts to identify and resolve aging issues as a part of routine plant operations and maintenance. The key concept behind this continuous learning and improvement process is to incorporate insights and observations related to SSC aging effects as soon as they are discovered and then modify the inspection/repair/replacement activities and requirements to maintain the necessary margins for continued safe and efficient operations. The industry has made significant investments into advanced condition monitoring and preventative/predictive maintenance and inspection programs in order to enhance equipment condition and take necessary corrective action well before a loss of a safety function could occur due to aging effects.

To date, there have been no new aging effects identified that are unique to the period of time between 60 and 80 years of plant operations. However, if a new aging effect were to be identified (through the rigorous application of the operating experience and R&D efforts), the licensees will address it immediately as part of the ongoing plant operation activities and procedures.

NEI will continue to work with the industry and our technical partners to sustain and develop projects and initiatives that will support SLR and continued safe operation of clean, reliable, carbon-free electricity generating nuclear power plants.

Thank you for conducting this public meeting on this very important topic. If you have any questions or require additional information, please contact me or Jason Remer (202-431-8204; sjr@nei.org).

Sincerely,
Chris Earls
Director, Safety-Focused Regulation

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NUCLEAR ENERGY INSTITUTE

Christopher E. Earls
DIRECTOR
SAFETY-FOCUSED REGULATION
NUCLEAR GENERATION DIVISION

May 24, 2012

Ms. Yoira K. Diaz-Sanabria
Chief
Division of License Renewal
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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Sincerely,

Christopher E. Earls

c: Ms. Stacie Sakai, NRR/DLR, NRC