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Balancing Openness and Efficiency in the NRC Hearing Process

An Industry Lawyer Perspective

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First Principles

- NRC Encourages Openness and Public Stakeholder Participation in Agency Processes
 - Not a controversial principle
 - Industry benefits from a transparent regulatory process
- NRC Licensing Processes and Decisions Should Be Efficient and Timely
 - This also should be non-controversial
 - Public benefits from governmental efficiency

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Key Considerations

- What is the Role of the Hearing Process in Promoting Openness?
 - Hearing process is best suited to very specific factual/legal disputes
 - Hearing process is not the only forum/mode for public participation
- How Can Specific Disputes Subject to Hearing Be Resolved in an Efficient Manner?
 - Purpose is to resolve the dispute between the parties
 - Extraneous issues and processes may not be consistent with the first principles

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Standing to Participate

- Participation Limited to "Interested" Parties – With Specific Admissible Contentions
- NRC Applies Judicial Concepts of Standing: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
 - Injury-in fact (concrete and particularized)
 - Causation
 - Redressibility
- 50-Mile Proximity Presumption — a proxy for judicial standing
 - Is risk of an accident really an injury in fact?
 - *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009)
 - Is there causation and redressibility?
- In NRC Hearings Any Petitioner Can Raise Any Issue, Regardless of Basis for Standing

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NRC Defines Who Can Participate (And On What)

- Is a Recalibration to Judicial Concepts Warranted?
 - NRC is not bound by judicial concepts
- Is Time/Expense of Pleading/Arguing Standing Case-By-Case Justified?
- Should Rules Address Difference Between Contentions Based on Operational Impacts and Contentions Based on Accident Risks?
- What About NEPA Issues?
- Consider the Plight of Pro-Project Petitioners?

Current Practices May Be Open, But Not Always Efficient

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Appeal Process Issues

- Section 2.311 Scheme for Interlocutory Appeals
 - NRC Staff and applicant can appeal decision on grounds that no party/contention should be admitted
 - Petitioner can appeal on grounds that standing or all contentions should not have been denied
- ASLBP Proposal: Eliminate Appeal of Right; Use Standard for Interlocutory Appeals
 - Prevents early determination of contention admissibility; may lead to unnecessary hearings
- Alternative Approach: All Appeals on Contention Admissibility Filed Immediately
 - Has clear efficiency advantages; may reduce openness – at least for inadmissible contentions

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Other Issues

- **Time for Briefing Appeals: Extend to 25 Days**
 - Adds time to schedule
 - May improve quality of briefs
 - Time to a decision will control timeliness
- **Mandatory Hearings: Original Purpose to Provide Openness in Process Has Been Fulfilled by Other Means**
 - Limited usefulness
 - Could impact schedule for license issuance

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Other Issues (Cont.)

- **Timeliness for Contentions: Current Rules Provide 60 Days From Notice of Opportunity For Hearing**
 - Available time is greater than 60 days
 - Time is ample
- **Late-Filed Contentions: Replaced By "New or Amended"**
 - Section 2.309 would apply "good cause" standard to all new/amended contentions
 - Would adopt Section 2.309(f)(2)(i)-(iii) to define "good cause"
 - OK!

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