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COMMISSIONERS

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Nils J. Diaz, Chairman
Jeffrey S. Merrifield
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In the Matter of EXELON GENERATION COMPANY, LLC (Early Site Permit for Clinton ESP Site)	Docket No. 52-007-ESP
In the Matter of DOMINION NUCLEAR NORTH ANNA, LLC (Early Site Permit for North Anna ESP Site)	Docket No. 52-008-ESP
In the Matter of SYSTEM ENERGY RESOURCES, INC. (Early Site Permit for Grand Gulf ESP Site)	Docket No. 52-009-ESP
In the Matter of LOUISIANA ENERGY SERVICES, L.P. (National Enrichment Facility)	Docket No. 70-3103-ML
In the Matter of USEC Inc. (American Centrifuge Plant)	Docket No. 70-7004

CLI-05-17

MEMORANDUM AND ORDER

On March 18, 2005 the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel certified to us six questions concerning the NRC's statutory duty to conduct a "mandatory hearing" -- *i.e.,* a hearing that must take place even if no intervenor contests the license application.[1] The certified questions arise out of three pending proceedings (*North Anna*, *Clinton*, and *Grand Gulf*) for a nuclear power plant early site permit ("ESP")[2] and one combined license proceeding to license a uranium enrichment facility (*LES*). USEC filed a motion for leave to submit its views on the certified questions, on the ground that it, too, seeks a license for a uranium enrichment facility. We granted review of the certified questions, gave USEC permission to file a brief, and set a briefing schedule.[3] After reviewing the records below and the parties' briefs, we answer the certified questions and, in so doing, provide guidance on how our licensing boards should conduct mandatory hearings.

STATUTORY AND REGULATORY BACKGROUND

The mandatory hearing requirement stems from section 189a of the Atomic Energy Act ("AEA"), which provides that "[t]he Commission *shall* hold a hearing ... on each application under section 103 or 104b. for a construction permit for a [utilization or production] facility."[4] In addition, section 193(b)(1) of the AEA specifically provides that "[t]he Commission *shall* conduct

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[1] LBP-05-07, 61 NRC 188 (2005).

[2] ESPs are partial construction permits. *See* 10 C.F.R. § 52.21.

[3] CLI-05-9, 61 NRC 235 (2005).

[4] 42 U.S.C. § 2239(a) (emphasis added).

a single adjudicatory hearing with regard to the licensing of construction and operation of a uranium enrichment facility under sections 53 and 63."[5]

The Atomic Energy Acts of 1946 and 1954 contained no mandatory hearing requirement.[6] That idea originated with Senator Clinton B. Anderson in 1956.[7] The original version of the statutory "mandatory hearing" requirement appeared the following year in section 7 of the Price-Anderson Act, was applicable to *all* Atomic Energy Commission ("AEC") licensing applications,[8] and remained in effect from 1957 until 1962. At the time Congress passed the Price-Anderson Act in 1957, the AEC was issuing construction permits without prior notice to the public and generally without a public hearing.[9] Moreover, the AEC was basing its construction permit decisions on reactor safety evaluations that were likewise unavailable to the public.[10]

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[5] 42 U.S.C. § 2243(b)(1) (emphasis added).

[6] S. Rep. 85-296, U.S. Code Cong. & Admin. News 1803, 1826, 1957 WL 5103 (Leg. Hist.) (85th Cong. 1st Sess., May 9, 1957)(no requirement for hearing "on all applications, but merely on those applications for which a hearing is requested by any interested party"); H.R. Rep. No. 85-435 at 25 (85th Cong. 1st Sess., May 9, 1957) (to accompany H.R. 7383) (same).

[7] William H. Berman and Lee M. Hydeman, "The Atomic Energy Commission and Regulating Nuclear Facilities" (Ann Arbor, MI, April 1961) ("Univ. of Michigan Study"), *extracts republished in* Staff of the Joint Committee, 87th Cong., 1st Sess., "Improving the AEC Regulatory Process," Vol. II, Appendix 6, 425-557, at 448 & n.43 (Joint Committee Print 1961) (hereinafter "1961 Joint Committee Print").

[8] Pub. L. No. 85-256, § 7, 71 Stat. 576, 579 (Sept. 2, 1957). *See also* H.R. Rep. No. 85-435 at 29-30; Univ. of Michigan Study at 449.

[9] "Part 2 - Rules of Practice," 21 Fed. Reg. 804, 805 (Feb. 4, 1956), promulgating 10 C.F.R. § 2.102(a); Univ. of Michigan Study at 447. Prior to April 1957, the AEC had granted only one request for hearing. *See* Staff of the Joint Committee on Atomic Energy ("Joint Committee"), 85th Cong., 1st Sess., "A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities" at 19 & n.10, 128-31 (Jt. Comm. Print 1957) ("*Joint Committee Study*"); *Power Reactor Development Co.*, 1 AEC 1 (1956).

[10] *See Joint Committee Study* at 9; Univ. of Michigan Study at 447.

These practices raised significant issues of public and congressional confidence in the agency, the need for separation of prosecutorial and quasi-judicial functions, and the need for a quasi-judicial body independent of the portion of the AEC that itself operated or promoted reactors.[11] Senator Anderson, the Vice-Chairman of the Joint Committee on Atomic Energy, explained that the mandatory hearing requirement was intended to address open-government and public-confidence issues[12] associated with the Commission's treatment of applications for power reactor construction permits.[13] When Congress next considered the mandatory hearing requirement in 1962, it amended section 189a to confine the requirement to construction permit applications only.[14] This contraction of the mandatory hearing requirement resulted from Congress' belief that separate hearings at both the construction permit and operating license

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[11] *See* Univ. of Michigan Study at 447-48; *see also Joint Committee Study* at 9; "AEC Memorandum Concerning Mandatory Hearing Requirement Under Atomic Energy Act," *published in* Hearings before the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., "Radiation Safety and Regulation" at 382-83 (GPO 1961). (hereinafter "1961 JCAE Hearings") In 1961, the AEC's and the United States military's reactors "represent[ed] the greater portion of this country's total reactor program." Joint Comm. on Atomic Energy, "Views and Comments on Improving the AEC Regulatory Process" ("Views and Comments"), dated April 12, 1961, 87th Cong., 1st Sess. at 22 (June 1961) (Reply from Mr. James H. Campbell, President, Consumers Power Co.).

[12] *Joint Committee Study* at 8 (regarding AEC's closed-door decision-making in construction permit proceedings), 73 (quoting Sen. Anderson during the 1954 floor debate on the Section 189 of the AEA: "I wish to be sure that the Commission has to do its business out of doors, so to speak, where everyone can see it").

[13] *See Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1075 (D.C. Cir. 1974).

[14] 42 U.S.C. § 2239(a), Pub. L. No. 87-615 § 2, 76 Stat. 409 (1962). *See also* AEA § 193, 42 U.S.C. § 2243(b)(1), Pub. L. No. 101-575, § 5(e), 104 Stat. 2835 (Nov. 15, 1990) ("single adjudicatory hearing" for uranium enrichment facilities).

stages constituted "overjudicialization" of the licensing process.[15] That's where the mandatory hearing requirement stands today.

Various NRC regulations implement the mandatory hearing requirement. For ESPs, the governing provision is 10 C.F.R. § 52.21.[16] For uranium enrichment facilities, the governing provisions are 10 C.F.R. § 70.23a and 10 C.F.R. § 70.31(e).[17] The Commission also has promulgated a procedural rule -- 10 C.F.R. § 2.104(b) -- specifying the issues to be addressed in both contested and uncontested construction permit proceedings.[18] This regulation is lengthy and complex, but because it is critical to today's decision, it bears quoting *verbatim.*

For hearings on *contested* applications,[19] section 2.104(b)(1) requires the Licensing Board to "consider:"

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[15] Views and Comments at 12; *see also* Univ. of Michigan Study at 431; 1961 JAEC Hearings 373 (Prof. Kenneth Culp Davis). When Congress decided in 1962 to eliminate the mandatory hearing requirement for operating license applications, it based that decision in part on the conclusion that "there would still be a mandatory hearing at the critical point in reactor licensing – the construction permit stage – where the suitability of the site is to be judged." *Union of Concerned Scientists*, 499 F.2d at 1076 (internal quotation marks omitted), citing S. Rep. No. 1677, 87th Cong., 2d Sess. 7-8, 1962 U.S. Code Cong. & Admin. News 2207, 2214 (Joint Committee). *Accord* H.R. Rep. No. 1966 at 6 (Joint Committee on Atomic Energy, 87th Cong. 2nd Sess., July 5, 1962) (to accompany H.R. 12,336) at 8 (critical point of the process); 108 Cong. Rec. 14,727 (Aug. 7, 1962) (Sen. Pastore).

[16] *See* "Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors," 54 Fed. Reg. 15,372 (April 18, 1989).

[17] *See* "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004), *petition for review denied sub nom. Citizens Awareness Network v. United States,* 391 F.2d 338 (1st Cir. 2004); Final Rule, "Uranium Enrichment Regulations," 57 Fed. Reg. 18,388 (April 30, 1992).

[18] The *Clinton*, *North Anna* and *LES* proceedings are contested. The *Grand Gulf* proceeding is not. The status of the *USEC* proceeding is currently unresolved. Although the Commission recently ruled in favor of two petitioners' standing in *USEC*, CLI-05-11, 61 NRC 309 (May 12, 2005), the Board has yet to rule on the admissibility of their contentions.

[19] Under our regulations, an application is considered "contested" if "(1) there is a controversy between the NRC Staff and the applicant concerning the issuance of a license or any of the terms thereof, or (2) a petition for leave to intervene in opposition to the application has been granted or is pending before the Commission." 10 C.F.R. § 2.4.

(i) Whether in accordance with the provisions of § 50.35(a) of [10 C.F.R., regarding the issuance of construction permits for nuclear power reactors]:

> (a) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;
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> (b) Such further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration will be supplied in the final safety analysis report;
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> (c) Safety features or components, if any, which require research and development, have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components; and
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> (d) On the basis of the foregoing, there is reasonable assurance that (1) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of the proposed facility; and (2) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;

(ii) Whether the applicant is technically qualified to design and construct the proposed facility;

(iii) Whether the applicant is financially qualified to design and construct the proposed facility;

(iv) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;

(v) If the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance

> with the requirements of Subpart A of Part 51 of this chapter, the construction permit should be issued as proposed.[20]

The first four of these requirements stem from the AEA, while the fifth derives from the National Environmental Policy Act of 1969 ("NEPA").[21]

For *uncontested* applications, section 2.104(b)(2) requires the Board to "determine:"

> (i) Without conducting a *de novo* evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on (b)(1)(i) through (iii) specified in this section [10 C.F.R. § 2.104] and a negative finding on (b)(1)(iv) specified in this section proposed to be made and the issuance of the construction permit proposed by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and
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> (ii) If the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel processing plant, a uranium enrichment facility, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether the review conducted by the Commission pursuant to [NEPA] has been adequate.[22]

The first of these requirements stems from the AEA, the second from NEPA.

And, finally, whether or not the application is contested, our regulations give the Board special responsibility for three "baseline NEPA issues." [23] The Board must:

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[20] *See also* 10 C.F.R. § 51.105(a)(5). *See generally* Miscellaneous Amendments, "Part 2 – Rules of Practice," 31 Fed. Reg. 12,774 (Sept. 30, 1966) (hereinafter "Miscellaneous Amendments"); Final Rule, "Restructuring of Facility License Application Review and Hearing Processes," 37 Fed. Reg. 15,127 (July 28, 1972).

[21] 42 U.S.C. § 4321.

[22] Regarding subsection (b)(2)(ii), *see also* 10 C.F.R. § 51.105(a)(4).

[23] *See* LBP-06-7, 61 NRC at 192, *citing* 10 C.F.R. § 2.104(b)(3) and 10 C.F.R. § 51.105(a)(1)-(3).

> (1) Determine whether the requirements of section 102(2)(A), (C) and (E) of [NEPA][24] and the regulations in this subpart [10 C.F.R. Part 51, Subpart A] have been met;
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> (2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and
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> (3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the construction permit ... should be issued, denied, or appropriately conditioned to protect environmental values.[25]

PROCEDURAL BACKGROUND

As the Chief Administrative Judge recognized, the NRC's various hearing notices in the ESP and uranium enrichment cases, read in conjunction with each other and with our regulations, created "some uncertainty" and "seeming ambiguity."[26] The Chief Administrative Judge pointed, for example, to unexplained differences between the ESP and uranium enrichment notices:

> ... in contrast to section 2.104(b)(2) and the *LES* notice that explicitly state uncontested proceedings are not to involve a de novo application review, there is no mention of such a review limitation in the ESP notices.... So too, in accord with section 2.104(b)(3)(iii), the ESP notices indicate that the NEPA review for either contested or uncontested cases is to include a determination of whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values. These notices,

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[24] These three cited subsections of NEPA's Section 102 require federal agencies to (A) "utilize a systematic, interdisciplinary approach" in making decisions on major federal actions that could significantly affect the environment, (C) prepare regarding such actions an EIS that addresses impacts, alternatives and other considerations, and (E) study and develop alternatives where there are "unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §§ 4332(2)(A), (C), and (E).

[25] 10 C.F.R. § 51.105(a)(1)-(3).

[26] LBP-05-7, 61 NRC at 193, 194. *See* Dominion Nuclear North Anna, 68 Fed. Reg. 67,489 (Dec. 2, 2003); Exelon, 68 Fed. Reg. 69,426 (Dec. 12, 2003); System Energy, 69 Fed. Reg. 2636 (Jan. 16, 2004); *Louisiana Energy Serv., L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10 (2004), 69 Fed. Reg. 5873 (Feb. 6, 2004); *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 60 NRC 426 (2004), 69 Fed. Reg. 61,411 (Oct. 18, 2004).

> however, [differ from the *LES* notice in that they] contain an additional clause not set forth in section 2.104(b)(3)(iii) directing that such a determination should be arrived at "after considering reasonable alternatives."[27]

To "develop a unified approach," each of the ESP Boards, and the *LES* Board, asked the parties to recommend mandatory hearing procedures. [28] The parties suggested options of various kinds,[29] but the Chief Administrative Judge considered them incompatible in significant respects:

> The applicant and the staff have proposed in the *LES* hearing that the Board's conclusion can be based solely upon summary documents provided by the applicant and the staff, coupled with a hearing involving questions raised by the Board on those summaries. In stark contrast, the applicants and the staff in the *Clinton* and *Grand Gulf* ESP cases have suggested that such a conclusion must rest upon a thorough review of the application, the safety evaluation report (SER) and final environmental impact statement (FEIS) and the ACRS recommendations, followed by a hearing on questions from the Board. For the *North Anna* ESP proceeding, however, the applicant and the staff have suggested an approach that appears to ... fall somewhat between these two, noting that the Board "does not make the findings itself but rather determines whether the application and the record contain sufficient information, and

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[27] LBP-05-7, 61 NRC at 193 (citations omitted).

[28] *Id.* at 194. *See System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 298 & n.7 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 274 n.10 (2004); *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 250 n.10 (2004); *Louisiana Exploration Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 75 n.20 (2004).

[29] *See* Joint Status Report Regarding the Parties' Proposed Discovery Plan and Other Adjudicatory Process Issues, dated July 29, 2004 ("LES Joint Status Report"); Joint Memorandum on the Mandatory Hearing Process, dated Oct. 8, 2004 ("North Anna Joint Memorandum"); Intervenors' Memorandum on the Mandatory Hearing Process, dated Oct. 8, 2004 ("Intervenors' *North Anna* Memorandum"); Joint Response of Exelon Generation Company and the NRC Staff to Licensing Board Request Regarding Mandatory Hearing Procedures for the Clinton Early Site Permit, dated Sept. 17, 2004 ("Clinton Joint Response"); Joint Filing of System Energy Resources, Inc. and the Nuclear Regulatory Commission Staff regarding Mandatory Hearing, dated Sept. 7, 2004 ("Grand Gulf Joint Filing").

> the review of the application by the Staff has been adequate to support the Staff's proposed findings."[30]

Hence, after consulting the several licensing boards assigned to these cases, and in an effort to save judicial resources, the Chief Administrative Judge certified the following six questions to the Commission:[31]

(1) Should a proceeding as a whole be considered as "contested" or "uncontested," or should those two categorizations instead be applied to portions of a proceeding, depending on whether or not they encompass matters that were the subject of admitted contentions?

(2) What is the boards' scope of the responsibility with respect to their findings concerning the two ESP AEA safety issues[32] and the NEPA issue?[33]

(3) In uncontested ESP proceedings, should the licensing boards' determinations regarding

(a) the sufficiency of the information in the application and record of the proceeding and the adequacy of the staff's review of the application to support a negative finding on Safety Issue 1 and an affirmative finding on Safety Issue 2, and

(b) the adequacy of the review conducted by the Commission pursuant to NEPA and subpart A of 10 C.F.R. Part 51

be made by conducting a *de novo* evaluation of the applications at issue?

(4) What is the appropriate scope of review for Licensing Boards in making findings on the three "baseline" NEPA issues, as required by 10 C.F.R. § 51.105(a)(1)-(3)?

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[30] LBP-05-07, 61 NRC at 194. *See also id.* at 194-95 n.8.

[31] *Id.* at 194-99. We have reordered and slightly rephrased the certified questions.

[32] AEA Safety Issue 1 is "whether the issuance of an early site permit will be inimical to the common defense and security or to the health and safety of the public." *See* 10 C.F.R. § 2.104(b)(1)(iv). AEA Safety Issue 2 is "whether, taking into consideration the site criteria contained in 10 CFR part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site can be constructed and operated without undue risk to the health and safety of the public." *See* 10 C.F.R. § 2.104(b)(1)(i)(*d*)(2).

[33] The overriding NEPA issue is "whether, in accordance with the requirements of subpart A of 10 CFR part 51, the early site permit should be issued as proposed." *See* LBP-04-7, 61 NRC at 197.

(5) Was the ESP and *LES* notices' omission of any reference to section 51.105(a)(3)'s cost-benefit balancing requirement[34] intended to narrow further the scope of review required to be undertaken by the Licensing Boards in these mandatory hearings?

(6) Similarly, was omitting section 51.105(a)(3)'s "after considering reasonable alternatives" clause from the *LES* notice intended to create a distinction between the responsibilities of the *LES* and the ESP Licensing Boards with regard to their findings on NEPA baseline Issue 3?

DISCUSSION

In recent decades the Commission has faced few proceedings where the mandatory hearing requirement was applicable.[35] Hence, the time is ripe for us to set out our understanding of the mandatory hearing process. The certified questions raise a number of intricate problems, which we will address below, point-by-point. Overall, we expect licensing boards conducting mandatory hearings on uncontested issues to take an independent "hard look" at NRC staff safety and environmental findings, but not to replicate NRC staff work. Giving appropriate deference to NRC staff technical expertise, boards are to probe the logic and evidence supporting NRC staff findings and decide whether those findings are sufficient to support

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[34] The language at issue is highlighted in bold typeface below:

> [The presiding officer will ... [d]etermine, **after weighing the environmental, economic, technical, and other benefits against environmental and other costs,** and considering reasonable alternatives, whether the construction permit or license to manufacture should be issued, denied, or appropriately conditioned to protect environmental values.

Section 2.104(b)(3)(ii) contains a similar balancing requirement: "the presiding officer will ... independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken."

[35] *But see Louisiana Energy Serv., L.P.* (Claiborne Enrichment Ctr.), CLI-97-15, 46 NRC 294 (1997); CLI-98-3, 47 NRC 77 (1998); and CLI-98-5, 47 NRC 113 (1998); *All Chemical Isotope Enrichment, Inc.* (AlChemIE Facility-1 CPDF; Facility-2, Oliver Springs), LBP-89-5, 29 NRC 99, *aff'd* ALAB-913, 29 NRC 267 (1989), *revocation of license sustained*, LBP-90-26, 32 NRC 30 (1990);*United States Dept. of Energy, Project Management. Corp., Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

license issuance. With that general approach in mind, we turn now to the specific certified questions.

A. Treatment of Entire or only Portions of Proceeding as Contested or Uncontested

Our regulations assign a different review function to licensing boards depending on whether a case is "contested" or "uncontested," with the former requiring "the more intense scrutiny afforded by the adversarial process."[36] The Chief Administrative Judge certified to us the question whether the "contested" or "uncontested" designations apply to the proceeding as a whole or instead to each issue of each proceeding.[37] Our key regulations, 10 C.F.R. § 2.104(b) and 10 C.F.R. § 51.105(a)(4) & (5), refer simply to contested or uncontested "proceedings," not to issues. But some parties in the ESP cases urged their boards to bifurcate contested proceedings into contested or uncontested "portions."[38] Based on our review of the intent of our regulations and prior NRC cases, we conclude that the contested and uncontested designations apply issue-by-issue, and not to proceedings-at-large.

Historically, when faced with the "contested" versus "uncontested" question, our licensing boards have repeatedly distinguished between the contested and uncontested *"portion*" of proceedings.[39] That distinction dates back to at least 1966, when in a policy

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[36] *Louisiana Power & Light Co.* (Waterford Steam Elec. Station, Unit 3), ALAB-732, 17 NRC 1076, 1112 (1983).

[37] LBP-05-07, 61 NRC at 196.

[38] *See Clinton* Joint Response at 10; *North Anna* Joint Memorandum at 5-8.

[39] *See*, *e.g.*, *United States Dept. of Energy, Project Management Corp., Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158 (1983), *vacated on other grounds*, ALAB-755, 18 NRC 1337 (1983); *Duquesne Light Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-77-29, 5 NRC 1121 (1977). Most recently, the Licensing Board in *Grand Gulf* drew this same distinction. *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 282 (2004).

statement the AEC made clear the issue-by-issue nature of boards' "mandatory" decision-making duties:

> In considering those [mandatory AEA] *issues*, ... the board will, as to *matters* not in controversy, be neither required nor expected to duplicate the review already performed by the Commission's regulatory staff and the ACRS; the Board is authorized to rely upon the uncontroverted testimony of the regulatory staff and the applicant and the uncontroverted conclusions of the ACRS.[40]

Our longstanding practice of treating contested and uncontested issues differently is grounded in sound policy. First, it leaves to the expert NRC technical staff prime responsibility for technical fact-finding on uncontested matters. Second, it promotes efficient case management and prompt decision-making by concentrating our boards' attention on resolving disputes rather than redoing NRC staff work. We emphasized in the *LES* hearing notice the importance we attach to resolving licensing adjudications promptly. We specifically stated that we would seek to "avoid unnecessary delays" and "endeavor to identify efficiencies ... to further reduce the time the agency needs to complete reviews and reach decisions" in such proceedings.[41] We instructed the Board to "expeditiously decide legal and policy issues" and also to follow the guidance in our *Statement of Policy on Conduct of Adjudicatory Proceedings*[42]

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[40] "Statement of General Policy: Conduct of Proceedings for the Issuance of Construction Permits for Production and Utilization Facilities for which a Hearing is Required under Section 189 a., of the Atomic Energy Act of 1954, as amended," attached as Appendix A to 10 C.F.R. Part 2, *promulgated in* Miscellaneous Amendments, 31 Fed. Reg. at 12,780 (section VI(b)) (emphasis added). *Accord id.* (section VI(d)). Although Appendix A was recently rescinded (Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2274 (Jan. 14, 2004)), it has not been replaced with conflicting guidance. Therefore, we rely on Appendix A as an authoritative expression of the 1966 Commission's interpretation of section 2.104(b), and also as support for our own current interpretation of that regulation.

[41] *LES*, CLI-04-3, 59 NRC at 16.

[42] CLI-98-12, 48 NRC 18 (1998).

-- which was intended, among other things, to expedite the completion of adjudications without sacrificing fairness.[43]

The use of a deferential review standard for uncontested issues supports these policies of promptness and efficiency. If only a portion of a proceeding's issues are in dispute, it makes no sense for a licensing board to proceed as if the entire adjudication is contested, with consequently greater demands on the parties' and the board's time and resources. As the Commission's Appeal Board concluded when examining this issue many years ago, "the only reasonable interpretation" distinguishes "between *issues* in contest and *matters* which have not been placed in controversy."[44] As we explain further below, with respect to contested issues,[45] the Board "must resolve the controversy" itself, as a *de novo* matter.[46] But with respect to uncontested matters, the Board must merely "decide whether the *staff's* review has been adequate to support [its] findings."[47]

B. Scope of Boards' Responsibility – "Consider" versus "Determine"

The Chief Administrative Judge expresses concern that our regulations (and ESP hearing notices) call on licensing boards to "determine" certain questions in uncontested cases

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[43] *LES*, CLI-04-3, 59 NRC at 17. *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 453 (1981).

[44] *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774 n.26 (1977) (emphases in original). *See also Union of Concerned Scientists*, 499 F.2d at 1077; 10 C.F.R. Part 2, former Appendix A, § V(f)(1) (2004).

[45] "Contested issues" are those regarding which a board will issue a merits determination, either through an initial decision or a summary disposition order.

[46] *River Bend Station*, ALAB-444, 6 NRC at 774 n.26.

[47] *Id.* (emphasis added).

but merely to "consider" them in contested cases.[48] He wonders "as a practical matter ... what, if any, distinction was intended to exist" between "consider" and "determine,"[49] and whether the different terms "portend" a difference in licensing boards' "responsibility" in contested and uncontested cases.[50] As we have already suggested, and as we elaborate later in today's decision, as a general matter licensing boards *should* review contested and uncontested issues differently, giving the NRC staff considerably more deference on uncontested issues. But in reaching that conclusion we don't rest on any distinction between the terms "consider" and "determine," which in the current context we see as essentially synonymous.

The present cases are not the first instances of confusion regarding our regulations' use of the terms "determine" and "consider." For example, during the late 1960s, licensing boards indicated three times (without comment) that the AEC's hearing notices in uncontested proceedings had instructed the boards to "consider" (rather than the regulation's word "determine") issues.[51] (More on AEC hearing notices shortly.) The confusion emanates from a 1966 AEC rulemaking promulgating the original version of section 2.104(b). That version was quite similar to today's, and included the same "determine" -"consider" dichotomy that prompted the Chief Administrative Judge's certified question. But the regulatory history of the 1966 rulemaking (and subsequent rulemakings), together with hearing notices the AEC issued under

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[48] LBP-05-07, 61 NRC at 195-96, *citing* 10 C.F.R. § 2.104(b)(1) ("consider" issues in contested proceeding) and 10 C.F.R. § 2.104(b)(2) ("determine" issues in uncontested proceeding).

[49] LBP-05-07, 61 NRC at 195-96.

[50] *Id.* at 196.

[51] *Tennessee Valley Authority*, 4 AEC 136 (Initial Decision 1968); *Wisconsin Michigan Power Co.* (Point Beach Unit No.1), 4 AEC 3, 3-4 (Initial Decision 1967); *Tennessee Valley Authority* (Browns Ferry, Units Nos. 1 and 2), 3 AEC 209, 209-10 (Initial Decision 1967).

section 2.104(b), convince us that the AEC was using the words "determine" and "consider" synonymously.

The 1966 version of section 2.104(b)(1) required (just as that section now requires) boards to "consider" a particular set of AEA issues in contested proceedings.[52] Yet that same rulemaking included a Commission Policy Statement that essentially equated the terms "consider" and "determine." The 1966 Policy Statement specified that the board "will *determine*" the correct response to questions at issue in contested proceedings,[53] and likewise stated that, "[i]n contested proceedings, the board will ... *decide* whether the findings required by the Act and the Commission's regulations [*i.e.*, the mandatory AEA issues] should be made."[54] The Policy Statement's use of the words "decide" and "determine" as substitutes for section 2.104(b)(1)'s word "consider" strongly suggests that the 1966 Commission considered the three words interchangeable. The AEC's Statement of Considerations for the 1966 rulemaking offers similar support for this conclusion – indicating that boards were to "determine" the correct answers to questions in uncontested cases and "decide" issues in contested ones.[55]

When the AEC amended its 1966 Policy Statement in 1972, it used the word "determine" when describing the licensing boards' responsibility in *both* contested *and* uncontested construction permit proceedings[56] -- thus indicating that the AEC continued to view the terms

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[52] Miscellaneous Amendments, 31 Fed. Reg. at 12,776.

[53] *Id.* at 12,780 (emphasis added).

[54] *Id.* (emphasis added).

[55] *Id.* at 12,775.

[56] Final Rule, "Restructuring of Facility License Application Review and Hearing Processes," 37 Fed. Reg. 15,127, 15,141-42 (July 28, 1972), Policy Statement at § VI(c)(1).

"determine" and "consider" as synonymous. This AEC practice continued unabated over the years, as is reflected in many AEC hearing notices.[57]

Our bottom-line is that nothing of importance turns on the difference between the terms "determine" and "consider." Obviously, the *raison d'etre* of our licensing boards is to decide issues, whether contested or uncontested. So even when our regulations merely direct boards to "consider" questions, we anticipate that boards will go on to *decide* them as well. We remind the boards, however, that their review of a contested issue is quite different from their review of an uncontested one, and that this difference is reflected, to a considerable extent, in the *depth* of the boards' review (*i.e.*, *de novo* or not) -- an issue to which we now turn.

C. Scope of Board Review – "*De Novo*" or "Sufficiency"

The Chief Administrative Judge points to a difference in the language of the hearing notices for the *LES* and the ESP cases as to whether the Board should conduct a *de novo* review of the applications. The *LES* notice (and, we observe, also the *USEC* notice) states that the Board will not conduct a *de novo* review when making determinations about uncontested AEA safety matters and all non-baseline NEPA issues.[58] By contrast, all three ESP notices omit

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[57] In 1971 the AEC amended its mandatory hearing rules to comply with *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). *Calvert Cliffs'* had struck down an AEC rule eliminating NEPA reviews from the licensing boards' mandatory hearings. There are many examples prior to the 1971 Part 2 amendments where the Commission used "determine," "consider," and "decide" interchangeably. *See* 31 Fed. Reg. at 16,286 & 15,611; 32 Fed. Reg. at 827, 1003, 3235, 4549, 6305, 7503, 10,996, 13,735, & 15,404; 33 Fed. Reg. at 516, 1083, 4117, 5175, 5636, 6490, 7046-47, 7702, 7730, 8235, 8358, 10,121, 11,100, 11,422, 14,243, & 20,058; 34 Fed. Reg. at 1741, 6051, 12,804, 13,709, 17,409, & 18,440; 35 Fed. Reg. at 3247, 3693, 3837, 4664, 5639, 6675, 12,680, 14,170, 16,289, 16,385, 16,750, & 17,000; 36 Fed. Reg. at 5746, 12,323, 13,699, 23,087, & 23,267. The AEC continued to use similar terminology after 1971. *See* 37 Fed. Reg. at 4732; 36 Fed. Reg. at 23,168-69, 23,170, & 25,244; *see also* 37 Fed. Reg. at 16,561, 16,118, 14,249, & 7358.

[58] Both of these notices take their language regarding *de novo* review almost *verbatim* from the NRC's earlier notice of hearing for LES's proposed Claiborne Enrichment Center. *See* "Notice of Receipt of Application for License[;] Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission

(continued...)

the phrase "without conducting a *de novo* review." Omitting this language from the ESP hearing notices could be read to imply that the ESP boards are authorized to conduct a *de novo* review and then base their safety and environmental determinations on the results of that review. Accordingly, the Chief Administrative Judge certifies the question whether in uncontested cases the boards should conduct a *de novo* review regarding (a) the sufficiency of the information in the application and record of the proceeding and the adequacy of the NRC Staff's AEA review of the application to support AEA safety findings, and (b) the adequacy of the NRC staff's NEPA review.[59]

We hold that the boards should conduct a simple "sufficiency" review of uncontested issues, not a *de novo* review. Only when resolving contentions litigated through the adversary process must the boards bring their own "*de novo"* judgment to bear. In such cases, boards must decide, based on governing regulatory standards and the evidence submitted, whether the applicant has met its burden of proof (except where the NRC Staff has the burden).[60] But when considering safety and environmental matters not subject to the adversarial process – so-called "uncontested" issues -- the boards should decide simply whether the safety and environmental record is "sufficient" to support license issuance. In other words, the boards should inquire whether the NRC staff performed an adequate review and made findings with reasonable support in logic and fact.[61] "An analogy is to the function of an appellate court, applying the 'substantial evidence' test, although it is imperfect because the ASLB looks not only to the

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[58](...continued)
Order; Louisiana Energy Services, L.P.; Claiborne Enrichment Center," 56 Fed. Reg. 23,310 (May 21, 1991); *Louisiana Energy Serv., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 84 (1998).

[59] LBP-05-07, 61 NRC at 197 & n.11.

[60] *See* 10 C.F.R. § 2.325.

[61] *See, e.g., AlChemlE Facility*, ALAB-913, 29 NRC at 268.

information in the record, but also to the thoroughness of the review that the Staff ... has given it."[62]

It is true that our hearing notices in the present cases, and our regulations themselves, arguably introduce confusion in this area. As the Chief Administrative Judge pointed out, while our uranium enrichment hearing notices expressly prohibit *de novo* board review of uncontested matters, our ESP notices say nothing at all about it.[63] Similarly, our regulations expressly prohibit *de novo* board review of uncontested AEA issues, but do not apply the bar to NEPA issues.[64] But nothing in our regulations or hearing notices *directs* boards to engage in *de novo* review of uncontested AEA *or* NEPA issues. Today we decide as a general matter that *de novo* review of uncontested issues is prohibited, whether the issues arise under the AEA or NEPA. Our decision today rejecting *de novo* review overrides any ambiguity or uncertainty deriving from our regulations or notices.

We add a *caveat*. In the next part of today's decision (Part D), we hold that certain so-called "baseline" NEPA conclusions require independent licensing board judgments that some might consider tantamount to *de novo* review. Even there, however, as we shall explain, the NRC staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC staff review inadequate or its findings insufficient.

This is not to say that we expect our licensing boards to follow a cursory, hands-off approach to uncontested NRC staff findings. On the contrary, as we outline below, we

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[62] *Union of Concerned Scientists,* 499 F.2d at 1076.

[63] LBP-05-07, 61 NRC at 196-97.

[64] *See* 10 C.F.R. § 2.104(b)(2). Only subsection (i) of 10 C.F.R. § 2.104(b)(2) contains the *de novo* prohibition. Subsection (ii) does not. Subsection (i) addresses AEA safety issues, whereas subsection (ii) deals with NEPA issues.

anticipate that our boards will carefully probe those findings by asking appropriate questions and by requiring supplemental information when necessary, and thereby undertake the kind of "truly independent review"[65] that Congress anticipated when it established the mandatory hearing requirement.

From the start it was understood that a "truly independent review" at mandatory hearings meant that licensing boards were not to "rubber stamp" the findings of the NRC staff.[66] The boards' role is "to constitute a check on the understanding of the staff"[67] and "to decide whether the staff's safety findings, on which so much depends, were the right ones."[68] But "truly independent review" by licensing boards, in the interest of public safety, does not mean that multiple reviews of the same *uncontested* issues – first by the NRC Staff, then by the ACRS, and finally by a licensing board – would be necessary to serve this purpose.[69] Rather, full-scale (or *de novo)* board review of uncontested issues would in our view amount, as was feared in 1962 when Congress confined the mandatory hearing requirement to construction permit applications only, to "overjudicializing" the process.[70] It defies common sense for this agency to insist that both it and its applicants expend the same kind of "*de novo*" judicial effort for uncontested issues as for contested ones.

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[65] *Calvert Cliffs*', 449 F.2d at 1118.

[66] David F. Cavers, *Administrative Decisionmaking in Nuclear Facilities Licensing*, 110 U. Pa. L. Rev. 330, 348 (1962) ("Cavers"). Professor Cavers was a consultant to the Joint Committee when its Staff drafted the *Study*.

[67] 1961 JCAE Hearings 376 (Mr. Lee Hydeman).

[68] *Id.* at 369 (testimony of former AEC General Counsel William Mitchell).

[69] *See* 1961 JCAE Hearings 340 (former ACRS Chairman Theos J. Thompson), 343 (former ACRS Chairman Leslie Silverman); Views and Comments at 2, 11 (Reply from ACRS and from Atomic Industrial Forum).

[70] Views and Comments at 12; *see also* Univ. of Michigan Study at 431; 1961 JAEC Hearings 373 (Prof. Kenneth Culp Davis).

Moreover, applying a less stringent "sufficiency" standard when examining uncontested issues merely recognizes "the inherent limitations on a board's review of a matter not in contest and therefore not subject to the more intense scrutiny afforded by the adversarial process."[71] "As a practical matter ... it would simply not be possible for the two technical members of the panel to evaluate the totality of the material relevant to safety matters that the Staff and ACRS have generated through many months of work. This fact is so obvious that it borders on the ludicrous to suggest that Congress intended the [licensing boards] to so function."[72]

The Chief Administrative Judge recognized as much when in his certification decision he offered an "estimate that a full review of an application, including the SER, FEIS, and ACRS recommendation, followed by hearing on issues raised by such a review will consume not less than 1000 person-hours (and, perhaps, double that for complicated applications)."[73] While we certainly expect our boards to undertake a reasonable review of NRC staff findings on

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[71] *Waterford Elec. Station*, ALAB-732, 17 NRC at 1112.

[72] *Union of Concerned Scientists*, 499 F.2d at 1077.

[73] LBP-05-7, 61 NRC at 199 n.15. In the brief it filed with us, Dominion offers some sense of the enormous amount of time involved in the NRC Staff's safety and environmental review that a board, if conducting a true *de novo* review, might have to duplicate:

> In the ESP proceedings, the NRC Staff is undertaking a two-year technical and environmental review. The NRC Staff's review is performed by numerous subject matter experts including support from the national laboratories. For example, forty-two experts ... contributed to the Staff's environmental review of the North Anna ESP application.... Based on NRC Staff review fees, Dominion estimates that on the order of 7,500 person-hours was spent [to] produce the draft SER and 12,000 person-hours was spent preparing the DEIS in the North Anna ESP proceedings (and obviously, additional time will be required to finalize these documents and complete the NRC Staff's review). As part of the environmental review, the NRC Staff has consulted with federal and state agencies, has held public meetings to obtain comments on the scope of the review and later on the draft EIS, and has received and reviewed hundreds of written comments.

Dominion's May 18 Brief at 5.

uncontested issues, we don't think the task need consume anything close to 1000 (or 2000) person-hours.

How, then, should our licensing boards approach their mandatory review function? During deliberations over the 1962 AEA amendments, AEC Commissioner Loren K. Olson offered the following apt description of the hearing examiner's (licensing board's) important but limited role:

> [T]he hearing examiner is supposed to make a decision based upon the record on the ultimate question of safety. He is not to contribute evidence from his own mind to that record. He is to take the evidence of the record and to try to conclude whether all evidence available, whatever it be, fact and opinion, is expressed on the record. He then proceeds to try to evaluate the record and to try to evaluate this question of risk as identified on the record, to ascertain whether that record supports a conclusion, a policy and technical judgment on the ultimate question of reasonable assurance of safety.[74]

This is not to say that the Commission believes the licensing boards must demand that *all possible views* and *facts* relating in any way to the matters in question must be placed in the evidentiary record. Rather, the licensing boards need only ensure that the evidentiary record contains evidence sufficient to allow them to make a decision on the ultimate question of safety.

Our past rulemakings and adjudications also give useful guidance on how licensing boards should proceed when examining uncontested issues. Boards are not to "conduct a *de novo* evaluation of the application, [but] rather ... test the adequacy of the staff's review."[75] In doing so, boards have authority to ask clarifying questions of witnesses,[76] to order the record to

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[74] 1961 JAEC Hearings 313. *See also* Cavers, 110 U. Pa. L. Rev. at 359-60.

[75] Miscellaneous Amendments, 31 Fed. Reg. at 12,779.

[76] Letter from Commissioner L.K. Olson to Mr. James T. Ramey, Executive Director, Joint Committee, dated Nov. 30, 1960, *republished in* 1961 Joint Committee Print, Vol. II, Appendix 9, at 580; *see Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 243 (1978), *aff'd*, CLI-79-5, 9 NRC 607, 608 (1979); *Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330, 352, *aff'd*, ALAB-238, 8 AEC 656 (1974).

be supplemented,[77] to reject the proposed action,[78] or even to deny the construction permit outright,[79] and to set conditions on the approval of the construction permit.[80]

As for the actual procedure to be followed at mandatory hearings, licensing boards have considerable flexibility. The AEA's mandatory hearing requirements in Sections 189a and 193(b)(1) are phrased generally. "[T]he Act itself nowhere prescribes the content of a hearing or prescribes the manner in which this 'hearing' is to be run."[81] The word "hearing" can refer to any of a number of events,[82] including trial-type evidentiary hearings,[83] "paper hearings,"[84] paper

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[77] Miscellaneous Amendments, 31 Fed. Reg. at 12,779. *See also Union of Concerned Scientists*, 499 F.2d at 1077; *Public Service Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526 (1977), *aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 95 (1st Cir.1978).

[78] *Calvert Cliffs'*, 449 F.2d at 1118; *Midland*, ALAB-123, 6 AEC at 335; *Seabrook*, CLI-77-8, 5 NRC at 526.

[79] *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 23A, 1B and 2B), LBP-76-44, 4 NRC 637, 645 (1976).

[80] *See*, *e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-4, 7 NRC 92, 144-46 (1978); *Duquesne Light Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-77-29, 5 NRC 1121, 1131-32 (1977); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 23A, 1B and 2B), LBP-76-44, 4 NRC 637, 645 (1976).

[81] *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 (D.C. Cir. 1990). *See also Sholly v. NRC*, 651 F.2d 780, 791 n.27 (D.C. Cir. 1980), *vacated on other grounds*, 459 U.S. 1194 (1983).

[82] *See* Kenneth Culp Davis, *Nuclear Facilities Licensing: Another View*, 110 U. Pa. L. Rev. 371, 380 (1962). *See generally* 10 C.F.R. Part 2, Subparts A-M.

[83] *See* 10 C.F.R. Part 2, Subpart G.

[84] *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers Nuclear Regulatory Commission," 63 Fed. Reg. 66,721, 66,729 (Dec. 3, 1998). ("Subpart L provides for paper hearings unless oral presentations are ordered by the Presiding Officer").

hearings accompanied by oral arguments,[85] hearings employing a mixture of procedural rules,[86] and legislative hearings.[87] The AEA's hearing requirement does not demand a "one size fits all" approach.[88] Thus, we do not dictate any particular procedure in the current cases, but we would expect the boards to select the most appropriate and expeditious approach given the specific circumstances of a case.

D. Scope of Review for Three "Baseline" NEPA Issues

The Chief Administrative Judge raises questions about the following three "baseline" NEPA issues set forth in 10 C.F.R. § 2.104(b)(3) and 10 C.F.R. § 51.105(a)(1)-(3) and on which licensing boards must rule regardless of whether the proceeding is contested:

> (i) Determine whether the requirements of section 102(2)(A), (C) and (E) of the National Environmental Policy Act and Subpart A of Part 51 of this chapter have been complied with in the proceeding;[89]

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[85] *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001); *see also* 10 C.F.R. § 2.343; 10 C.F.R. § 2.1113.

[86] *See, e.g., Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fabrication Facility), CLI-01-13, 53 NRC 478, 479 (2001). See also 10 C.F.R. § 2.1500 *et seq.*

[87] *See*, *e.g.*, *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, CLI-85-18, 22 NRC 877, 882 (1985). *See also Rulemaking Hearing Acceptance Criteria for Emergency Core Cooling Systems for Light-Water-Cooled Nuclear Power Reactors*, CLI-73-9, 6 AEC 171, 172 (1973). *See also Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), ALAB-425, 6 NRC 199, 201 (1977).

[88] A "sufficiency" review of uncontested issues may, for example, prove suited to NRC staff summaries of key safety and environmental findings, along with witnesses (from the NRC staff, on the one hand, and separately from the license applicant) prepared to answer board inquiries. Or, if the uncontested issues prove relatively straightforward, a simple "paper" review may suffice.

[89] As noted *supra*, the three cited subsections require federal agencies to (A) "utilize a systematic, interdisciplinary approach" in making decisions on major federal actions that could significantly affect the environment, (C) prepare regarding such actions an EIS that addresses impacts, alternatives and other considerations, and (E) study and develop alternatives where there are "unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §§ 4332(2)(A), (C), and (E).

> (ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and
>
> (iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

The Chief Administrative Judge questions whether licensing boards should take the NRC staff's recommended approach of simply relying on "the testimony of the Staff and the applicant and the conclusions of the ACRS, rather than duplicating the NRC Staff's review."[90] He directs our attention to *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, where the court of appeals held that a hearing board must examine the Staff's EIS carefully to determine the adequacy of the staff's review and "must *independently* consider the final balance among conflicting factors that is struck in the staff's recommendation."[91] Based on the D.C. Circuit's holding in *Calvert Cliffs'*, the Chief Administrative Judge asks (as to the three baseline NEPA issues) whether a licensing board must

> study the relevant parts of the record, such as the applicant's environmental report and the staff's F[inal] EIS, pose written or oral questions to the staff and applicant, request that they submit additional information, and conduct whatever hearings that may be deemed necessary to resolve any questions or concerns, so that the Board can make an independent initial decision on each "baseline" NEPA Issue.[92]

The Chief Administrative Judge, however, certifies a less detailed question: what is the appropriate scope (*i.e.*, standard) of review for boards in making findings on the three baseline NEPA issues as required under sections 51.105(a)(1)-(3) and 2.104(b)(3)?[93]

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[90] LBP-05-07, 61 NRC at 197, quoting *North Anna* Joint Memorandum at 5.

[91] *Id.* at 198, quoting 449 F.2d at 1118 (emphasis added).

[92] *Id.*

[93] *Id.*

The NRC staff asks the Commission to prohibit *de novo* licensing board review of the three NEPA baseline questions.[94] In the preceding section of today's decision, we held that as a general matter we do not expect *de novo* board review of uncontested issues. That ruling applies fully to the three NEPA baseline issues insofar as NRC staff factual or technical judgments are concerned. But we acknowledge that, under our regulations, boards must "[*i*]*ndependently* consider the final balance among conflicting factors contained in the record of the proceeding."[95]

We direct our boards to follow the approach spelled out in the D.C. Circuit's seminal *Calvert Cliffs*' decision. There, the court indicated that while NEPA demands independent environmental judgments by NRC licensing boards – as the body with responsibility for authorizing issuance of construction permits – the boards need not rethink or redo every aspect of the NRC staff's environmental findings or undertake their own fact-finding activities:

> [C]onsideration which is entirely duplicative is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function. A truly independent review provides a crucial check on the staff's recommendations. The Commission's hearing boards automatically consider nonenvironmental factors, even though they have been previously studied by the staff. Clearly, the review process ... provides an important opportunity to reject or significantly modify the staff's recommended action.
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> * * * * * * * * * * *
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> The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own determine whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative findings on various nonenvironmental factors. NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not necessarily go over the same ground covered in the detailed [environmental impact] statement. But it must at least examine the statement carefully to determine whether the review ... by the Commission's regulatory staff

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[94] NRC Staff's May 25 Brief at 27-28.

[95] 10 C.F.R. § 51.105(a)(2).

> has been adequate. And it must independently consider the final balance among conflicting factors that is struck in the staff's recommendation.[96]

In sum, under *Calvert Cliffs'* and under NRC regulations, licensing boards must reach their own independent determination on uncontested NEPA "baseline" questions – *i.e.,* whether the NEPA process "has been complied with," what is the appropriate "final balance among conflicting factors," and whether the "construction permit should be issued, denied or appropriately conditioned."[97] But in reaching those independent judgments boards should not second guess underlying technical or factual findings by the NRC staff. The only exceptions to this would be if the reviewing board found the staff review to be incomplete or the staff findings to be insufficiently explained in the record. "What *Calvert Cliffs'* requires is an independent review of staff proposals by the Board, and conclusions independently arrived at *on the basis of evidence in the record*, including the Staff's Final Environmental Impact Statement."[98] A licensing board's NEPA review must not be so intrusive or detailed as to involve the board in "independent basic research" or a "duplicat[ion of] the analysis previously performed by the staff."[99]

E. Boards' Responsibility under NEPA to "Weigh" Costs and Benefits

The Chief Administrative Judge also certifies the question whether omitting section 51.105(a)(3)'s cost-benefit "weighing" language from both the *LES* and the ESP notices was

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[96] 449 F.2d at 1118 (footnote and internal quotation marks omitted).

[97] *See* 10 C.F.R. § 2.104(b)(3);10 C.F.R. § 51.105(a)(1)-(3).

[98] *Midland*, ALAB-123, 6 AEC at 335-36 (emphasis added).

[99] *Id.* at 335.

intended to narrow the boards' scope of NEPA review in mandatory hearings.[100] The answer is no.

Our response to this question is governed by 10 C.F.R. § 51.105(a)(3). It *requires* boards to weigh benefits against costs, and could not be altered absent a notice-and-comment rulemaking.[101] The hearing notices' failure to refer specifically to the weighing requirement is inconsequential.[102]

We turn next to how these general principles apply to the ESP and uranium enrichment cases before us. In uranium enrichment facility construction permit proceedings such as *LES* and *USEC*, a boards' duty to conduct, at *this* stage of the proceedings, the "weighing" specified in section 51.105(a)(3) is beyond question. As we stated in an earlier *LES* proceeding, involving the proposed Claiborne Enrichment Center, "NEPA is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal."[103] We went on to point out that our own regulations "direct the

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[100] *Id.* at 198. The *USEC* notice likewise omits this language. The "missing" language states:

> "The presiding officer will ... [d]etermine, after weighing the environmental, economic, technical, and other benefits, against environmental and other costs, and considering reasonable alternatives, whether the construction permit or license to manufacture should be issued, denied, or appropriately conditioned to protect environmental values."

[101] *See* 5 U.S.C. § 553; *see also*, *e.g.*, *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629-30 (5th Cir. 2001); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). *But cf. National Whistleblower Center v. NRC*, 208 F.3d 256, 258 (D.C. Cir. 2000) (NRC may issue case-specific order overriding procedural regulation).

[102] In fact, the hearing notices require compliance with Part 51, which in turn expressly requires cost-benefit "weighing." *See, e.g., USEC*, CLI-04-30, 60 NRC at 428, 437.

[103] *Claiborne Enrichment Ctr.*, CLI-98-3, 47 NRC at 88.

Staff to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives."[104]

It is telling that, although the earlier *LES* proceeding was governed by a Notice of Hearing which lacked the same "weighing" language that is absent from the current *LES* notice of hearing, the Board nonetheless conducted a weighing and balancing.[105] And although we did not fully agree with the Board's NEPA balancing analysis on the merits, we did not question the Board's threshold decision to "weigh" and "balance" the facility's advantages and disadvantages in the first place. In sum, the Licensing Boards in our two currently pending uranium enrichment facility proceedings must conduct, at *this* stage of the proceedings, the "weighing" specified in section 51.105(a)(3).

By contrast, the Licensing Boards in our three currently pending ESP cases cannot perform cost-benefit "weighing" -- because an ESP is only a "partial" construction permit and 10 C.F.R. § 52.21 explicitly exempts both the NRC Staff and the applicant from assessing the ESP's benefits.[106] Because the environmental report will lack such an assessment, neither the NRC staff nor the Licensing Boards can conduct the "weighing" in its EIS ordinarily required under NEPA.[107] This does not equate to evading the NEPA cost-benefit analysis, but merely postpones the analysis until the next (combined operating license) phase of licensing.[108] At that

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[104] *Id.* at 89.

[105] *Id.* at 84-86 (1998), *aff'g in part and rev'g in part* LBP-96-25, 44 NRC 331, 336-75 (1996).

[106] *See also* 10 C.F.R. §§ 52.17(a)(2), 52.18; Final Rule, "Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors," 54 Fed. Reg. 15,372 (April 18, 1989).

[107] The Board's analysis is limited to material "contained in the record of the proceeding." 10 C.F.R. § 51.105(a)(2).

[108] *See* 10 C.F.R. §§ 51.97, 52.79(a)(1), 52.89. *See generally Duke Cogema Stone & Webster*, CLI-02-9, 55 NRC 245, 249 (2002).

time, the NRC staff and ESP applicants will have much more cost-benefit information to provide reviewing licensing boards. Postponing the NEPA cost-benefit balancing simply reflects the limited scope of an ESP proceeding, as compared with that of a full construction permit case (addressing both site and plant design) or a combined license proceeding (such as *LES* and *USEC*).

F. Boards' Responsibility under NEPA to Consider Reasonable Alternatives

The ESP notices state that the licensing boards must make the third threshold NEPA determination (whether the license should be issued, denied or appropriately conditioned to protect environmental values) only "after considering reasonable alternatives." The *LES* and *USEC* notices, however, contain no language referring to consideration of reasonable alternatives. This difference is the basis for the Chief Administrative Judge's final certified question to us: Was omitting the phrase "after considering reasonable alternatives" from the *LES* and *USEC* notices intended to create a distinction between the responsibilities of the *LES* and the ESP Licensing Boards?[109]

The short answer is no. Both our regulations[110] and NEPA itself[111] require the NRC to consider alternatives before deciding whether to take major Federal actions significantly affecting the environment. But, as with the cost-benefit issue discussed above, the "reasonable

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[109] LBP-05-7, 61 NRC at 198-99.

[110] *See* 10 C.F.R. § 51.71(d) (NRC staff obligation to analyze "alternatives"); 10 C.F.R. § 51.105(a)(3) (licensing boards' obligation to consider "reasonable alternatives"). *See also* 10 C.F.R. §§ 52.17(a)(2), 52.18 ("an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed").

[111] NEPA §§ 102(2)(C)(iii), 102(2)(E), 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). *See generally United States Dept. of Energy, Project Management Corp., Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 76, 79, 81, 89 n.28, 90-91, 92 (1976); *Louisiana Energy Serv., L.P.* (Claiborne Enrichment Ctr.), LBP-96-26, 44 NRC 331, 340-41 (1996), *aff'd in part and rev'd in part on other grounds*, CLI-98-3, 47 NRC 77 (1998).

alternatives" issue does not apply with full force to ESP (or "partial" construction permit) cases. At the ESP stage of the construction permit process, the boards' "reasonable alternatives" responsibilities are limited because the proceeding is focused on an appropriate *site*, not the actual construction of a reactor. Thus, boards must merely weigh and compare alternative sites, not other types of alternatives (such as alternative energy sources).[112] By contrast, the requirement for consideration of "reasonable alternatives" has a broader scope in construction permit proceedings for uranium enrichment facilities. Because the scope of these latter proceedings is not limited to mere site selection, the quoted phrase -- "after consideration of reasonable alternatives" -- as applied in those proceedings is not limited to a consideration of alternative sites.

We close our discussion of this final certified question by offering what we believe is the reason for the disparity among the different notices of hearing. The discrepancy in all likelihood stems from the slight wording difference between 10 C.F.R. § 51.105(a)(1)-(3) (referring to alternatives) and 10 C.F.R. § 2.104(b)(3) (not referring to alternatives). It appears that the drafter of the ESP notices relied on section 51.105, while the drafters of the *LES* and *USEC* notice relied on section 2.104 and also tracked almost *verbatim* the language of the 1991 Notice of Hearing in the earlier construction permit proceeding for LES's Claiborne Enrichment Center.[113] A review of our mandatory hearing notices for the thirty years preceding our publication of the *USEC* notice on October 18, 2004, reveals that the instant discrepancies are not isolated occurrences. Although fourteen notices have included the phrase "after considering reasonable alternatives" or "considering available alternatives,"[114] six others have omitted those

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[112] *See* 10 C.F.R. §§ 52.17(a)(2), 52.18.

[113] 56 Fed. Reg. 23,310 (May 21, 1991).

[114] 69 Fed. Reg. 2636; 68 Fed. Reg. 67,489 & 69,426; 42 Fed. Reg. 8441 & 8439; 41 Fed. Reg. 44,761; 40 Fed. Reg. 52,768, 47,219, 25,708, & 6835; 39 Fed. Reg. 44,065, 42,938,

(continued...)

phrases.[115] We resolve that discrepancy today by instructing the NRC staff to include in all future mandatory hearing notices the language from the *Clinton* notice describing the NEPA elements of construction permit and early site permit proceedings – language that includes the requirement to "consider[] reasonable alternatives."[116]

Finally, we observe that, even though section 2.104(b) contains no direct reference to considering reasonable alternatives, it still imposes that same requirement indirectly, by mandating that applications satisfy the standards of Part 51, Subpart A.[117] That Subpart includes section 51.105(a)(3), which in turn requires licensing boards to "consider reasonable alternatives."

G. Extent of Intervenors' Participation in Mandatory Hearings

Although the Chief Administrative Judge did not certify a question to us regarding the extent of intervenor participation in the mandatory hearings at issue, the Board in *North Anna* did raise this question and requested the parties' comments.[118] The question is relevant to the *LES*, *Clinton* and *North Anna* proceedings, in each of which intervenors are participating, and also may be relevant to the *USEC* proceeding, where two petitions to intervene are pending.[119] We therefore choose to address the *North Anna* Board's question *sua sponte*.

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[114](...continued)
38,013, & 37,528. *See also* 39 Fed. Reg. 33,588.

[115] 69 Fed. Reg. 5873; 66 Fed. Reg. 19,994; 56 Fed. Reg. 23,310; 53 Fed. Reg. 15,317 & 15,315; 44 Fed. Reg. 26,229.

[116] 68 Fed. Reg. 69,426, 69,427 (Dec. 12, 2003).

[117] 10 C.F.R. § 2.104(b)(3)(i).

[118] *See North Anna* Joint Memorandum at 1, citing Transcript of Sept. 15, 2004 Pre-hearing Conference at 439.

[119] As noted above, the *Grand Gulf* proceeding is uncontested.

The scope of the intervenors' participation in adjudications is limited to their admitted contentions, *i.e.*, they are barred from participating in the uncontested portion of the hearing. Any other result would contravene the objectives of our "contention" requirements. Our 2004 revisions to the Subpart L procedural rules permit intervenors (and other parties) to submit written testimony *only* on admitted *contentions*[120] and to submit proposed findings of fact and conclusions of law relevant *only* to those *contentions* that were addressed in the oral hearing.[121] Similarly, our 1989 amendments to the Subpart G procedural rules limited both an intervenor's proposed findings and its appeals to *only* those *contentions* that the intervenor had itself placed in controversy. Our purpose there was "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issues."[122] This same purpose likewise justifies our limiting the scope of intervenor participation in mandatory hearings.

H. Other Matters

The intervenors (joined by petitioner in *USEC)* offer a set of suggestions, all aimed at ensuring that various documents reflect the non-final nature of the environmental reviews to date. They suggest that the titles of the Boards' decisions should reflect the fact that they did not include some NEPA issues in their review.[123] The intervenors and petitioner also suggest

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[120] 10 C.F.R. § 2.1207(a)(1).

[121] 10 C.F.R. § 2.1209.

[122] Final Rule, "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,178 (Aug. 11, 1989).

[123] Intervenors' *North Anna* Memorandum at 3; Intervenors' Response to Certified Questions (CLI-05-09), dated May 18, 2005, at 6-7.

styling the draft and final EISs as "partial,"[124] and styling any issued ESP as a "conditional ESP," due to the absence of any determination as to compliance with section 401 of the Clean Water Act.[125] While we have no objection in principle to the Boards and parties using such clarifying language, we consider the language to be quite unrelated to the certified questions regarding NEPA. Therefore, we decline to address the suggested language here.

Finally, the intervenors and petitioner urge the Commission to consider the effect of any approvals on cultural resources, pursuant to the National Historic Preservation Act.[126] This matter is also unrelated to the certified questions.

CONCLUSION

We instruct the Licensing Boards in the three ESP cases and the two uranium enrichment cases before us today to follow the guidance set forth above when conducting mandatory hearings.

IT IS SO ORDERED.

For the Commission[127]

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

[124] Intervenors' *North Anna* Memorandum at 3.

[125] Intervenors' *North Anna* Memorandum at 3-4, citing 33 U.S.C. § 1341; Intervenors' Response to Certified Questions (CLI-05-09), dated May 18, 2005, at 6-7. The intervenors in the *North Anna* proceeding alternatively propose requiring Dominion to obtain a certification from the Commonwealth of Virginia stating that the site will meet Federal water quality standards. Intervenors' Response to Certified Questions (CLI-05-09), dated May 18, 2005, at 8.

[126] Intervenors' Response to Certified Questions (CLI-05-09), dated May 18, 2005, at 8, citing 16 U.S.C. § 470(f).

[127] Commissioner Merrifield was not present when this item was affirmed. Accordingly the formal vote of the Commission was 2-1 in favor of the decision. Commissioner Merrifield, however, had previously voted to approve this Memorandum and Order and had he been present he would have affirmed his prior vote.

Dated at Rockville, MD
this 28th day July, 2005.

Commissioner Gregory B. Jaczko respectfully dissents, in part:

While in large part I concur with my fellow Commissioners in this Order, I dissent as to the Commission's decision to determine, at this stage of the proceedings, the extent of an intervenor's ability to participate in the uncontested portions of a mandatory hearing.

The question as to the intervenors' role in a mandatory hearing was not certified to the Commission for resolution. The Commission has, instead, elected to address this issue under its *sua sponte* authority. In doing so, the Commission did not request, and therefore did not receive the benefit of having this issue fully addressed in the briefs filed by the parties. This is an extremely important issue and if the Commission elects to determine this issue in a *sua sponte* fashion, the resulting decision should be as well-informed as possible.

Without having the views of all the parties regarding this issue on the record before me, I do not have an adequate basis to conclude that this decision's discussion and ruling on the intervenor's role meets those standards, and thus I am required to dissent.