No. 04-1359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PUBLIC CITIZEN CRITICAL MASS ENERGY
AND ENVIRONMENT PROGRAM and
NUCLEAR INFORMATION AND RESOURCE SERVICE,

Petitioners,

v.

UNITED STATES and THE UNITED STATES
NUCLEAR REGULATORY COMMISSION,

Respondents,

On Petition for Review of a Final Rule Issued by
Respondent Nuclear Regulatory Commission

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF THE ARGUMENT

This case of first impression turns on the substantive nature of the hearing Congress intended to provide members of the public whose interests are affected by the NRC's nuclear reactor licensing proceedings. In its attempt to defend a new rule that strips the public of on-the-record hearing procedures in connection with reactor licensing cases, the NRC devotes much of its Brief to a description of hearing procedures in other contexts and cases involving other issues.

When the NRC finally focuses on whether Congress intended that Section 189a promote health and safety by guaranteeing on-the-record hearings in reactor licensing cases, the NRC is unable to refute Petitioners' showing that the legislative history, structure, and purpose of Section 189a demonstrate that Congress intended to require on-the-record hearings. Because Congress intended that Section 189a reactor licensing hearings to be on-the-record, the Court should not defer to the NRC's contrary position.

The NRC's Brief raises a defense of the new rule that is directly contrary to the premise of the rulemaking. The NRC now claims that the new informal procedures satisfy APA hearing requirements, even though the NRC based the rulemaking on its belief that only if Section 189a permitted informal hearings could it use such procedures in reactor licensing matters. The rule cannot, of course, be sustained on a theory contrary to that advanced in the rulemaking itself. Finally, the

new rule cannot be upheld because its procedures are inadequate in light of the health and safety interests at stake.

I. MUCH OF THE NRC'S DISCUSSION OF THE SECTION 189a HEARING REQUIREMENT IS IRRELEVANT TO THE ISSUE OF WHETHER ON-THE-RECORD HEARINGS ARE REQUIRED IN REACTOR LICENSING CASES.

Petitioners brought this case to challenge the NRC's new rule, codified at 10 C.F.R. Part 2, that reverses 50 years of agency practice by removing reactor licensing proceedings from the formal hearing procedures of Subpart G and relegating such hearings to the informal procedures of Subpart L. The NRC devotes nearly all of its fifteen-page statement of the case to a description of the development of various NRC hearing procedures not at issue. NRC Br. 2-16. This discussion is almost entirely irrelevant to the question of proper procedures for *reactor licensing cases*, and is useful in only one sense: It demonstrates that the type of hearing required by Section 189a depends on the context. And, here, as discussed below, the context shows that the abolition of on-the-record hearings is contrary to law or arbitrary and capricious.

The NRC suggests, without citation to any authority, that if some hearings required by Section 189a need not be on-the-record, then no hearings under Section 189a need be on-the-record.[1] It is not that simple.

Petitioners acknowledge that Section 189a applies to a broad range of different proceedings, and some of those not at issue in this case need not be on-the-record. But the NRC's claim that Section 189a "does not require that different kinds of hearings employ different levels of formality," NRC Br. 22, is directly contrary to this Court's decision in *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978), which held that the nature of the hearing Congress intended to provide will determine whether APA on-the-record hearing requirements apply. *Accord Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 46 (1st Cir. 2001). Thus, the fact that rulemaking hearings under Section 189a need not be on-the-record, for example, will not determine whether reactor licensing adjudications

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[1] NRC Br. 17 ("Section 189a applies the same 'hearing' requirement to all kinds of proceedings -- reactor proceedings as well as proceedings such as rulemaking that have long been less formal than APA 'on-the-record' hearings -- but does not require that different kinds of hearings employ different levels of formality."); *id.* 22 (Section 189a "provides for hearings in all types of proceedings -- rulemakings and materials licenses included -- without distinguishing among them.").

under Section 189a must be on-the-record, as the nature of these hearings is distinct.[2]

The NRC further errs by suggesting that Section 189a's lack of explicit language requiring on-the-record hearings with respect to reactor licensing "gives the agency wide discretion to select the adjudicatory procedures it deems appropriate . . . ." NRC Br. 23.[3] This Court and others have held repeatedly that a statute need not explicitly call for an "on the record" hearing to require application of the APA's formal hearing procedures. *See Seacoast*, 572 F.2d at 876; *Dantran,* 246 F.3d at 46 (and cases cited therein). Thus, the lack of explicit language does not instantly afford the NRC the discretion to select any adjudicatory procedures it wants; rather, the Court must look beyond the plain language of the statute to discern whether Congress has spoken to the issue. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1984) ("If a court,

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[2] Similarly, the NRC errs by suggesting that judicial decisions in other circuits dealing with issues other than reactor licensing will determine the outcome of this case. NRC Br. 17-18. The NRC concedes that no court anywhere has addressed the issue of whether on-the-record hearings are required in reactor licensing cases. NRC Br. 22.

[3] *See also id.* 17 ("Section 189a provides for NRC 'hearings,' but does not require 'on-the-record' hearings, which would bring into play the requirements for formal adjudications under the APA."); and *id.* 22 ("section 189a provides only for a "hearing.").

employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (the traditional tools of statutory construction are the "statute's language, structure, purpose, [and] legislative history"). Indeed, the NRC's suggestion that deference is owed its novel interpretation of what Section 189a requires with respect to reactor licensing skips entirely the first step of *Chevron*.

II. THIS COURT NEED NOT REACH *CHEVRON* STEP TWO, BECAUSE THE NRC HAS FAILED TO REFUTE PETITIONERS' SHOWING THAT CONGRESS INTENDED SECTION 189a TO GUARANTEE ON-THE-RECORD HEARINGS IN NUCLEAR REACTOR LICENSING PROCEEDINGS.

A. The NRC Does Not Disagree with Public Citizen's Position Regarding the Legislative History of the 1954 Act.

In its opening brief, Public Citizen argued that the legislative history of Section 189a of the 1954 Act shows that Congress intended to guarantee formal on-the-record hearings in reactor licensing proceedings. Public Citizen Opening Br. (PC Br.) 19-21. Significantly, the NRC offers no criticism of Public Citizen's conclusions with regard to the legislative history of the 1954 Act, except to note that the legislative history of the 1954 Act rests on the comments of Senator Anderson rather than a committee report. NRC Br. 23. Apparently, the NRC agrees that

Senator Anderson was in favor of formal on-the-record hearings and stated during the 1954 debates that "[i]f the basic legislation does require a hearing, a hearing is required by the Administrative Procedure Act." PC Br. 20-21 (quoting 100 Cong. Rec. 10,485 (July 14, 1954)).[4] Rather, the NRC disagrees only with certain aspects of CAN's discussion of other parts of the 1954 legislative history, NRC Br. 24-25, but does not dispute that Senator Anderson intended for APA hearing requirements to apply and believed that the 1954 legislation achieved his objective. Indeed, when Senator Anderson introduced the Senate bill that led to the 1957 Amendments of the AEA, he quoted his remarks from the debate on the 1954 Act and concluded that his objective had been achieved. 103 Cong. Rec. 3616 (Mar. 21, 1957).

The NRC's claim that neither the Commission in *Kerr-McGee Corp.*, 15 N.R.C. 232, 247-256 (1982), nor the Seventh Circuit in *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983) (affirming *Kerr-McGee*), found the legislative history "helpful" is inapposite. NRC Br. 24. *Kerr-McGee* and *West Chicago* were limited to materials licensing and did not reach the issue of whether reactor licensing hearings must be on-the-record. *West Chicago* observed, based on the legislative

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[4] Public Citizen's Opening Brief at 20 contained an error with respect to the page number of the Congressional Record on which the quoted language appears. The correct citation is 100 Cong. Rec. 10,485 (July 14, 1954).

history, that "Congress was concerned mainly with facilities or reactor licenses" as opposed to materials licenses, and found that the statute "distinguishes between the licensing of nuclear materials and nuclear facilities." 701 F.2d at 641-43. Similarly, *Kerr-McGee* noted that there is a qualitative difference between materials and reactor licenses, because the former involve less risk than the latter. 15 NRC at 260.

B. The NRC's Discussion of Certain Legislative History of the 1962 Amendments Is Taken Out of Context and Does Not Refute Public Citizen's Argument That Congress Ratified the Commission's View That Section 189a Requires On-The-Record Hearings in Reactor Licensing Proceedings.

The NRC does not disagree with Public Citizen that Congress, in 1962, rejected a recommendation that it pass legislation to overrule the Commission's well-known view that Section 189a requires on-the-record hearings in licensing proceedings. NRC Br. 26; *see also* PC Br. 24-25. Nor does the NRC take issue with the case law Public Citizen cites to explain the significance of this fact. *Id.* Rather, the NRC claims that Public Citizen's discussion of the issue is "superficial" because a congressional committee report stated that it was not necessary to incorporate specific language in the 1962 legislation to require informal procedures.

Id. 26-27 (citing H.R. Rep. No. 87-1966, at 6 (1962)). However, the language quoted by the NRC is taken out of context.[5]

The 1962 legislation did two things that "are closely interrelated." H.R. Rep. No. 87-1966, at 9 (1962). First, it added Section 191a, 42 U.S.C. § 2241(a), which authorizes the Commission to establish Atomic Safety and Licensing Boards and permits those Boards to preside at hearings in lieu of hearing examiners (which the APA's requirements for on-the-record hearings otherwise would not permit). Second, it eliminated a requirement that had been added in 1957 that mandated hearings on applications for reactor operating licenses even where no affected member of the public intervened to contest the application. The language the NRC quotes reflects only that Boards may preside in lieu of hearing examiners (notwithstanding APA provisions to the contrary), and that hearings need not be held in *uncontested* cases, because they are "unnecessary and burdensome in the absence of bona fide intervention." H.R. Rep. No. 87-1966, at 8 (1962). As explained in the committee report in text that follows closely the text quoted by the NRC:

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[5] The Nuclear Energy Institute (NEI), intervenor in support of the NRC, makes the same error. *See* NEI Br. 21-22.

> *The great bulk of the provisions of the Administrative Procedure Act will remain applicable* . . . and the only exceptions authorized by these amendments are to permit the Board to preside at hearings in lieu of a hearing examiner, and to permit the Board to render final as well as intermediate decisions.
>
> With this explanation as background, the committee does not believe it necessary to limit the applicability of [the use of Boards in lieu of a hearing examiner] to noncontested cases. *Without question, more formal procedures are required in contested cases* . . . .

Id. at 7 (emphasis added). Thus, Congress rejected the suggestion that it require informal procedures because Congress meant to retain on-the-record adjudications in contested reactor licensing cases, except that it provided for a Board rather than a single hearing examiner to preside.

Moreover, the language quoted by the NRC on page 27 of its Brief cannot possibly mean that Section 189a never requires formal adjudicatory hearings, because the text of Section 191a explicitly states that Boards are authorized to preside at hearings "[n]otwithstanding the provisions of sections 556(b) and 557(b)" of the APA. This language was necessary because the APA otherwise allows contested hearings to be considered only by the agency, its members, or an administrative law judge. 5 U.S.C. § 556(b). Because Sections 556 and 557 of the APA apply only to on-the-record adjudications, 5 U.S.C. § 554, Congress would not have needed to begin Section 191a with the language "notwithstanding the

provisions of sections 556(b) and 557(b)" unless APA hearing procedures were required under Section 189a.

Beyond its attempted reliance on an out-of-context quote from a 1962 Committee report, the NRC offers no coherent explanation for Congress's use of this language. As explained in Public Citizen's Opening Brief at 23-24, Congress's decision to amend the Act in a way that incorporated the Commission's position that Section 189a requires on-the-record hearings in contested reactor licensing cases amounts to a ratification and demonstrates that Congress intended the Commission's interpretation to continue. The NRC never discusses this point or the cases cited by Public Citizen. In fact, the NRC concedes that "'[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction.'" NRC Br. 25 (quoting *Loving v. U.S.*, 517 U.S. 748, 770 (1996)) (emphasis added by the NRC).

The NRC attempts to minimize the significance of the "notwithstanding" language in the 1962 amendment by speculating that it was superfluous but somehow intended to eliminate ambiguity and counter the argument advanced by Petitioners in this case. NRC Br. 37-38. The NRC does not offer this bare speculation until ten pages after its admission that Congress in 1962 rejected a recommendation to overrule legislatively the Commission's position that Section

189a requires on-the-record hearings in licensing proceedings. NRC Br. 26. Perhaps the NRC did not want to argue in the same section of its Brief that Congress was affirmatively adding the "notwithstanding" language in a subtle attempt to eliminate ambiguity as to whether APA hearing procedures apply while simultaneously rejecting a recommendation that it explicitly do so.

Moreover, the NRC mentions only in a footnote Congress's use of similar "notwithstanding" language in the Nuclear Non-Proliferation Act of 1978 (NNPA), 42 U.S.C. § 2155a, and then rejects the significance of that legislation for the "same" reason it found insignificant the "notwithstanding" language in the 1962 amendment. NRC Br. 38 n.10. In the NNPA, Congress provided for the Commission to establish procedures that would "constitute the exclusive basis for hearings in nuclear export licensing proceedings before the Commission and, notwithstanding section 2239(a) of this title [Section 189a of the AEA], shall not require the Commission to grant any person an on-the-record hearing in such a proceeding." 42 U.S.C. § 2155a(c). Congress's use of "notwithstanding" again confirms through subsequent legislation its intention that Section 189a provide on-the-record hearings in certain adjudications.

Congress's repeated use of "notwithstanding" when it has excused the Commission from otherwise applicable hearing requirements reflects Congress's

long-term understanding that Section 189a otherwise requires all APA on-the-record procedures in these circumstances, and the NRC has failed to offer any credible explanation to the contrary. The NEI ignores completely the "notwithstanding" clauses of 42 U.S.C. §§ 2241(a) and 2155a(c), even though the NEI mimics the NRC on almost all other issues. Apparently, the NRC's conjecture that the "notwithstanding" clauses represent unnecessary language somehow intended to eliminate ambiguity is too great a stretch even for the NEI.

C. The NRC's "Relevant Case Law" Does Not Support its New-Found Position Regarding the Type of Hearing Required in Reactor Licensing Adjudications.

3. The NRC fails to grasp the fundamental distinction between rulemaking and adjudication.

The NRC claims support for its new reading of Section 189a by citing *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742, 757 (1972), and *Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968), which held that APA hearing procedures apply to *rulemakings* only where the agency statute explicitly so provides. NRC Br. 28. The agency acknowledges that these decisions are confined "to the exercise of 'legislative rulemaking power rather than adjudicatory hearings,'" *id.* (quoting *Allegheny-Ludlum*, 406 U.S. at 757), but claims, without citation to any authority, that "[s]ince *Allegheny-Ludlum*, the circuits have disagreed about whether the same

presumption -- that a hearing required by statute is assumed not to be 'on the record' unless the statute includes the words 'on the record' or their equivalent -- should be extended to agency adjudication." NRC Br. 28. Regardless of what other circuits have done, *this* Court has held that a statute need not explicitly call for an "on the record" hearing to require application of the APA's formal hearing procedures. *Seacoast*, 572 F.2d at 876; *accord Dantran,* 246 F.3d at 46.

Under *Seacoast*, this Court will "presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." 572 F.2d at 877. Based on the distinction between rulemaking and adjudication, this Court explained that it "will place less importance on the absence of the words 'on the record' in the adjudicatory context," than it might in the rulemaking context. *Id.* The NRC ignores this distinction when it suggests that *Seacoast* be read as "primarily concerned that agency procedure should provide a record adequate for judicial review." NRC Br. 32. As the NRC concedes, courts routinely review agency rulemakings and informal adjudications conducted with procedures less formal than those required by the APA for on-the-record hearings.[6] *Id.* 32-33.

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[6] The NRC's refusal to recognize that *Seacoast* rests primarily on the distinction between rulemaking and adjudication (and not on the need for a record sufficient for review) may explain its view that "*Seacoast* seems incompatible with the Supreme Court's holding in *U.S. v. Florida East Coast Ry.*, 410 U.S. 224, 234

The fundamental issue in this case is not whether a reactor licensing hearing held under the informal hearing procedures of 10 C.F.R. Part 2 Subpart L will produce a record adequate for judicial review. Rather, it is whether Congress intended that the affected public have formal hearing rights with respect to reactor licensing in order to promote health and safety. Petitioners' concern is that the NRC's new rule denies the public the ability to participate meaningfully in the reactor licensing process before the agency, not that the record resulting from an informal hearing would not allow for judicial review.

4. None of the decisions cited by the NRC reaches the issue of whether Section 189a requires on-the-record hearings in reactor licensing cases, but they suggest that it does.

The NRC states correctly that the Seventh Circuit upheld the use of informal hearing procedures in the context of an amendment to a materials license, but did not reach the issue of whether a formal hearing is required in reactor licensing proceedings. NRC Br. 29 (citing *West Chicago*). But the NRC errs in concluding that *West Chicago* "did not distinguish between materials licensing and reactor licensing." *Id.* In fact, *West Chicago* observed, based on the legislative history,

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(1973), that a general statutory 'hearing' requirement is not 'equivalent' to a requirement for an 'on-the-record' hearing." NRC Br. 34. The answer is simple — *Florida East Coast* is a rulemaking case that rests on the distinction between rulemaking and adjudication. 410 U.S. at 244-245.

that "Congress was concerned mainly with facilities or reactor licenses" as opposed to materials licenses, and found further that the statute "distinguishes between the licensing of nuclear materials and nuclear facilities." 701 F.2d at 641-43.[7] Thus, *West Chicago* found that its conclusion that Congress did not mandate formal hearings for materials licensing would not preclude a finding that formal procedures are required in reactor licensing cases. *Id.* at 643; *see also id.* at 645 (finding "no evidence that Congress intended to require formal hearings for *all* Section 189(a) activities," (emphasis added), as opposed to *any* Section 189(a) hearings).

The NRC also cites *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995), and *Chemical Waste Management v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), neither of which addresses the degree of formality required for Section 189a hearings in reactor licensing cases. NRC Br. 30. The NRC cites *Chemical Waste* to emphasize the D.C. Circuit's view that, in the absence of support in the statutory text, exceptional circumstances may be necessary to overcome an agency's interpretation in the first instance that a formal hearing is not required. NRC Br. 30. But the NRC relegates to a footnote the fact that *Chemical Waste* suggested that Section 189a is

[7] *See also Kerr-McGee,* 15 NRC at 260 (discussing qualitative difference between materials and reactor licensing: "as a general proposition the risks associated with materials licenses are frequently of lesser magnitude than those associated with reactor licenses").

just such an exceptional case. *Id.* n.7. Moreover, the NRC overlooks the significance that *Chemical Waste* placed on the "NRC's consistent position, over a twenty year period, that the statute required formal procedures." 873 F.2d at 1481-82. The NRC mentions only that *Chemical Waste* built on a statement from *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) (*UCS I*), that Congress had rejected a recommendation that it pass legislation to relieve the Commission of the burden of on-the-record hearings under Section 189a. The NRC finds it significant that *UCS I* attributed the recommendation to the Commission rather than to two consultants to the Joint Committee of Congress on Atomic Energy; the NRC then repeats its citation to the out-of-context statement from a Committee report discussed above in section II.B. NRC Br. 30-31 n.7. Whatever the *source* of the recommendation to Congress, the salient point is that the recommendation was *rejected,* even though Congress knew that the Commission considered itself bound by Section 189a to provide on-the-record hearings in reactor licensing cases.[8]

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[8] The NRC does not contest that *UCS I* found "much to suggest" that Section 189(a) requires on-the-record hearings in reactor licensing adjudications. *Id.* at 1445 n.12; *see* PC Br. 26-28.

III. THE COMMISSION'S NEW INTERPRETATION OF SECTION 189a IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

A. The Traditional Tools of Statutory Construction Show That Congress Intended Section 189a to Require On-The-Record Hearings in Reactor Licensing Cases.

This Court should not reach *Chevron* step two because, as explained in Public Citizen's Opening Brief and above, Section 189a requires on-the-record hearings in reactor licensing cases. Although the NRC is correct that the text of Section 189a is not by itself determinative of the level of formality required in reactor licensing hearings, NRC Br. 39-40, a review of the text is not the end of the inquiry under *Chevron* step one. Rather, the Court must use the traditional tools of statutory construction to ascertain Congress's intent.[9] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987). When Congress has spoken to an issue — as it has here — Congress's view binds agencies regardless of whether statutory text could be

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[9] Despite the NRC's suggestion to the contrary, NRC Br. 39 n.12, the use of such tools to ascertain Congress's intent does not present a conflict between this Court's *Seacoast* presumption and *Chevron*. One of the traditional tools of statutory construction is an examination of a statute's purpose. *Thunder Basin*, 510 U.S. at 207. This Court's presumption that "an adjudicatory hearing subject to judicial review must be on the record," *Seacoast*, 572 F.2d at 877, is based on the purpose of adjudications. *Id.* at 876 (because the proceedings at issue were conducted to adjudicate disputed facts on which the agency would base its decision to grant or deny a license to a specific applicant, the agency hearings were "exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended.").

clearer. *E.g., MCI Telecom. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994); *Cardoza-Fonseca*, 480 U.S. at 447; *Bureau of Alcohol, Tobacco, & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983).

B. Even If the Traditional Tools of Statutory Construction Did Not Reveal That Congress Intended Section 189a to Require On-The-Record Hearings in Reactor Licensing Cases, the NRC's New Interpretation Would Not Be Entitled to Deference.

1. The NRC is not entitled to deference where the fundamental issue is the interpretation of the APA rather than the AEA.

Although the NRC and the NEI concede that *Chevron* deference does not apply to agency interpretations of statutes administered by multiple agencies, they argue that the NRC is not interpreting the APA, but rather Section 189a of the AEA, the NRC's organic statute. NRC Br. 41; NEI Br. 29. Based on this argument, the NRC and the NEI dismiss as inapposite this Court's holding in *Dantran. Id.*

As in *Dantran*, the fundamental issue in this case is whether a hearing provided under a statute administered by a single agency must be an on-the-record hearing within the meaning of the APA. 246 F.3d at 47-48. In *Dantran*, the hearing at issue was required by § 354(a) of the Service Contract Act (SCA), a statute administered by the Department of Labor (DOL), but this Court did not accord deference to the DOL's position that the hearing required by the SCA was not an

on-the-record hearing under the APA. On the contrary, this Court rejected the DOL's interpretation of the SCA's hearing requirement based on the substantive nature of the hearing Congress intended to provide. *Id.* Similarly, this Court owes no deference to the NRC's position that the hearing required by Section 189a in the reactor licensing context is not an on-the-record hearing within the meaning of the APA. Rather, the Court should decide the issue by examining the substantive nature of the hearing at issue.

If the NRC and the NEI were correct that the issue here is an interpretation of the AEA on which the NRC is owed deference, then this Court would have had to accord deference to the DOL's interpretation of the SCA in *Dantran,* and the Court in *Dantran* would have reached a different result.

Indeed, *Dantran* is not the only case where the NRC and the NEI seek to avoid a precedent of this Court. Both also reject this Court's holding in *Seacoast.* *See* NRC Br. 30-33, 39 n.12; NEI Br. 23. The NRC's position on deference is fundamentally at odds with this Court's holding in *Seacoast* that *the APA* requires the Court to presume that an adjudicatory hearing is on-the-record unless the statutory text or legislative history demonstrate the contrary. 572 F.2d at 877. The agency's claim to deference cannot obscure that its real position is that this Court

was wrong in *Seacoast* about the meaning of the APA — an issue on which the agency is entitled to no deference whatsoever.

2. The NRC is not entitled to deference because it has reversed its position without legal authority or adequate explanation.

Ironically, the NRC argues that it should be given deference because the NRC "has been conducting hearings on technical matters within the agency's expertise for decades." NRC Br. 41. But the Commission conducted only *formal on-the-record hearings* in reactor licensing matters from 1954 until the rule at issue took effect in 2004.

Similarly ironic is the NRC's claim that its new position in favor of informal hearings in reactor licensing is entitled to deference because, "[d]ue to the technical nature of such hearings, the NRC is specially positioned to understand what is necessary for effective hearings." *Id.* The part of the agency with technical expertise and the best understanding of what is necessary for effective hearings is the Atomic Safety and Licensing Board Panel (ASLBP), the Commission body that presides at licensing adjudications. The ASLBP agrees with Petitioners both that Section 189a requires formal procedures for reactor licensing cases and that such procedures are necessary for effective hearings. *See* JA 87-99, JA 552-568. Thus,

to the extent that expertise militates in favor of deference, deference should be given to the view of the ASLBP.

The NRC does not explain or cite any authority to support its statement that "the Commission has been consistent in its interpretation of section 189a for over 20 years," NRC Br. 42, and the statement is clearly false.[10] The NRC first suggested that Section 189a does not require on-the-record hearings in the reactor licensing context when it improperly raised the issue before the D.C. Circuit sitting en banc in *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1180 (D.C. Cir. 1992) ("the Commission's arguments on this score were not raised before the panel, nor advanced during the rulemaking process"). *See* JA 8-9. Indeed, in 1989, the NRC's Office of General Counsel (OGC) issued a Memorandum, JA 798-830, concluding that Congress intended that Section 189a provide on-the-record hearings in reactor licensing cases and noting that this was the Commission's longstanding and consistent position. JA 826.[11]

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[10] Perhaps the NRC is referring to the position it took in 1982 in *Kerr-McGee* and the regulations reflecting that position that were issued in 1989. 54 Fed. Reg. 8276. But that position was carefully limited to materials cases and did not implicate reactor licensing. *See* discussion in sections II.A. and II.C.2., above.

[11] The NRC's General Counsel thus concluded (at JA 829):

> In sum, Section 189a does not explicitly require a formal, trial-type hearing, but its legislative history does suggest that formal hearings are

The NRC quotes *Chemical Waste,* 873 F.2d at 1480-81, to show that it would be entitled to change its position *if* its new interpretation were "otherwise legally permissible" and "adequately explained," which it is not. NRC Br. 42. But the NRC does not dispute that the degree of deference due an agency depends on, among other things, the consistency of the agency's position. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).[12]

That the Commission has reversed its position after insisting for decades that the law required it to hold on-the-record hearings in reactor licensing cases is significant for other reasons as well. First, an agency's construction of a statute and its legislative history adopted at or near the statute's enactment has particular force.

> required for power reactor licensing cases. Section 191 and the legislative history of that [amendment] strongly indicate that Congress intended the hearings afforded by Section 189a in power reactor licensing cases to be "on the record." The 7th Circuit has held that Section 189a does not require formal hearings in all licensing proceedings, but the decision was carefully limited to materials licensing. Also, the D.C. Circuit has twice suggested that formal hearings are required in facilities licensing proceedings and there has been a longstanding agency interpretation that Section 189a requires formal hearings in nuclear power plant adjudications.

[12] Contrary to the agency's and the NEI's characterization, NRC Br. 55 n.22; NEI Br. 44, Public Citizen's position is not that the 1989 position of the General Counsel is entitled to "more deference" than the later reversal of position by the General Counsel, but that the flip flop limits any deference that might be owed the agency's current position.

National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146, 157 (2000) (FDA's contemporaneous disavowal of jurisdiction over tobacco confirms "Congress's specific intent"); *Mountain States Teleph. & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (an agency's contemporaneous interpretation is "far more likely to [reflect] the actual intent of Congress"). Second, Congress was well aware of the Commission's interpretation of the statute, took no action to correct the Commission's interpretation, and repeatedly ratified that construction through later legislation. *See* PC Br. 21-26. Finally, the NRC explicitly premised the portions of the rule at issue on its new interpretation of the level of formality required by Section 189a with respect to reactor licensing hearings. Thus, to the extent the Commission's decades-long interpretation of Section 189a was correct, its new rule cannot be sustained.

IV. THE NRC'S NEW RULE CANNOT BE SUSTAINED ON THE ARGUMENT THAT THE NEW SUBPART L MEETS APA STANDARDS FOR ON-THE-RECORD HEARINGS BECAUSE THE NRC PREMISED THE RULEMAKING ON THE OPPOSITE VIEW.

From the beginning of the process that led to the rule at issue, the NRC has grounded its position that reactor licensing adjudications need not be afforded the formal procedures of Subpart G on its new position that Section 189a does not

require on-the-record hearings in such cases. Indeed, the preamble to the final rule, and the earlier iterations on which it is based, goes to great lengths to describe why the Commission was wrong during the decades that it maintained the position that Section 189a requires on-the-record hearings in reactor licensing adjudications. *See* 69 Fed. Reg. 2182-86; JA 1-10; 117-18; 379-98e; 613-19.

The agency's attorneys also advised it that its action depended critically on whether on-the-record hearings were required. In advising the Commission that it could move forward with a rulemaking to provide less-formal hearing procedures based on the view that Section 189a does not require on-the-record hearings, the NRC's Office of General Counsel (OGC) was less than confident that its new interpretation would be upheld: "We do not wish to leave the Commission with the impression that the question of formal vs. informal proceedings under Section 189 is free from doubt, or that if the Commission were to take the position that informal hearings were permitted, it could be sure of prevailing in court." JA 10; *accord* JA 13 (declaring that the NRC can move away from APA hearing requirements "if we are correct in advising, as this paper does, that Section 189 of the Atomic Energy Act does not require an 'on the record decision'").

Similarly, in authorizing the rulemaking, the individual Commissioners each recognized that the new rule would be upheld only if the OGC's legal interpretation

was valid. Thus, Commissioner McGaffigan explained that, based on OGC's opinion that Section 189a does not require on-the-record hearings in reactor licensing cases, the NRC should "institute by rulemaking informal procedures in all licensing cases, both materials and reactors." JA 109. Recognizing the risk of this approach, McGaffigan further opined that the NRC "should seek legislative confirmation of the flexibility we believe we have under section 189a of the Atomic Energy Act." JA 111; *accord* JA 104 (Commissioner Discus); JA 106 (Commissioner Diaz); JA 113 (Commissioner Merrifield recognizing that a new rule that "would not distinguish between materials and reactor licensing proceedings" would be an "extensive change" and carry "litigation risk"). Indeed, the OGC suggested that a "minor change that the Commission could make, with negligible litigative risk, is to repeal those elements of Subpart G that go beyond the Administrative Procedure Act's requirements for 'on-the-record' hearings." JA 17 n.29. The NRC did not opt for this "minor change" and instead implemented the new Subpart L, which it calls "a significant change from current hearing practice for reactor licensing matters." 69 Fed. Reg. 2206.

Incredibly, the NRC now claims that the rule should be upheld, not because Section 189a permits informal hearings, but because the new Subpart L informal procedures meet APA on-the-record requirements after all. NRC Br. 43. The NRC

even goes so far as to claim that Petitioners waived the issue by not anticipating, on the basis of stray comments in the preamble to the final rule, that the NRC would flip its position on the major premise of the rulemaking. *Id.*

The rulemaking cannot be sustained on the basis that the new Subpart L procedures satisfy APA on-the-record requirements, because the rule was expressly premised on the NRC's view that the new informal procedures of Subpart L were appropriate because on-the-record hearings were not required by the APA and AEA. As the Supreme Court held in the seminal case of *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Accord Honeywell Intern., Inc. v. EPA,* 2004 WL 1635626, *8 (D.C. Cir. 2004) (refusing to sustain a rule based on a construction of the statute that the agency did not offer below); *Alabama Power Co. v. FCC,* 773 F.2d 362, 366 (D.C. Cir. 1985) ("We refuse to speculate on whether or not the end result of an agency's flawed analysis could, in fact, have been legitimately reached under a theory upon which the agency never relied.").

The NRC's claim in its Brief that it believed at the time of the rulemaking that the new Subpart L satisfied the requirements for an on-the-record hearing is belied by the preamble to the rule itself. The preamble examines in detail the history of

Section 189a and concludes that only because the NRC has changed its view of what Section 189a requires can it attempt to move reactor licensing from the formal procedures of Subpart G to the informal procedures of Subpart L. 69 Fed. Reg. 2182-86. There would have been no need for page after page of argument that Section 189a does not require on-the-record hearing procedures in reactor licensing cases if the NRC had believed that the new Subpart L procedures conformed to those requirements.

Even more telling is the NRC's retention of Subpart G procedures in the single instance where the NRC continues to acknowledge the requirement for an on-the-record hearing. The NRC cited Congress's explicit mandate that uranium enrichment facility licensing proceedings be conducted on-the-record as its sole explanation for retaining Subpart G procedures for such cases. 69 Fed. Reg. 2203. The retention of Subpart G procedures for enrichment facility hearings confirms that the NRC concluded in the rulemaking that *only* Subpart G provided on-the-record hearing procedures. The rulemaking cannot now be upheld under the theory that its premise was wrong.

V. THE NEW SUBPART L DOES NOT PROVIDE PROCEDURES ADEQUATE TO PROTECT HEALTH AND SAFETY, PROMOTE PUBLIC CONFIDENCE, OR ALLOW MEANINGFUL PUBLIC PARTICIPATION.

The NRC argues that because "the APA does not guarantee unlimited cross-examination," but "only such cross examination 'as may be required for a full and true disclosure of the facts,'" NRC Br. 45 (quoting 5 U.S.C. § 556(d)), the loss of Subpart G cross-examination opportunities in reactor licensing cases is inconsequential. However, implicit in the APA is a recognition that what is necessary depends on what the situation requires. When the stakes are high, as they are in the ultra-hazardous field of nuclear power, cross-examination is particularly important to protect public safety and the environment. As the Ninth Circuit explains:

> The type of administrative procedure due in a particular case turns on the nature of the issues presented. Fairness may dictate cross-examination on crucial issues, even though a strict reading of the APA does not. In particular, cross-examination may be necessary if a "proceeding involves specific issues of critical importance that cannot be adequately ventilated" by normal procedures. Here, the issue upon remand is of a highly complex and technical nature; cross-examination will help crystalize the varying contentions of the experts and help guarantee that both parties' experts are responsive to criticisms and counterarguments.

Bunker Hill Co. v. EPA, 572 F.2d 1286, 1305 (9th Cir. 1977) (plaintiff should have been allowed to cross-examine defendant's experts on the technological feasibility of EPA sulfur burner standards).

Similarly, the determination of appropriate procedures "must turn upon an analysis of the regulatory scheme envisioned by Congress . . . and a determination of what is necessary to effectuate the policies of [the] regulatory statute." *Mobil Oil Corp. v. Federal Power Commission,* 483 F.2d 1238, 1254 (D.C. Cir. 1973). In this case, the policy of the statute is to protect health and safety and build public confidence. These policies can be served only by allowing the public to participate meaningfully in the reactor licensing process. Thus, while cross-examination and discovery may not be required in all APA on-the-record proceedings, the loss of these Subpart G tools in reactor licensing cases has undermined the goals and policies of the AEA.

Finally, regardless of whether the APA mandates such procedures, the NRC's rationale for stripping these tools from the public in reactor licensing cases cannot withstand scrutiny under 5 U.S.C. § 706(2)(A) because the NRC has elevated its desire for efficiency over the policies of the AEA. By placing cross-examination in the hands of the hearing examiner and instructing the hearing examiner that party cross-examination will be allowed only in rare instances, 69 Fed. Reg. 2188 ("the

Commission expects that the use of cross-examination in Subparts L, M or N proceedings will be rare"), the NRC has effectively precluded cross-examination, *particularly* with regard to expert witnesses. But the ASLBP found that cross-examination is of "enormous potential value," *especially* "with regard to expert testimony." JA 568. The NRC's new protestation that "Subpart L provides for cross-examination where necessary," NRC Br. 57, is contrary to the NRC's rationale for the change — *i.e.,* that the goal of greater efficiency can be attained only by *limiting* the hearing procedures available to the affected public. NRC Br. 51-53. Thus, the NRC's claim that cross-examination will still be available as necessary rings hollow, given that the NRC can achieve its efficiency objective only by limiting cross-examination. As noted above, the NRC has instructed its presiding officers that cross-examination should be "rare," and presumably limited to the types of cases for which the NRC retained Subpart G cross-examination procedures — *i.e.,* those that turn on the credibility of *fact* witnesses.

CONCLUSION

The Court should vacate the final rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certifying that the foregoing Reply Brief for Petitioners complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (not including those parts excluded under the Federal Rules of Appellate Procedure) contains 6,866 words.

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