Denver Law Review

Volume 51 | Issue 2 Article 2

March 2021

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DENVER LAW JOURNAL

VOLUME 51 1974 NUMBER 2

PUBLIC INTERVENTION IN ADMINISTRATIVE LICENSING AND THE BURDEN OF PROOF

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INTRODUCTION

Governmental licensing of private developments such as broadcasting stations and power production facilities is not a new phenomenon; nor is public intervention into those proceedings. Given this background one would think that a rational, well-settled approach toward the allocation of the burdens of proof between the applicant and intervenor would have been developed. Unfortunately such is not the case. In the almost 100-year history of administrative law neither the agencies themselves nor reviewing judicial bodies have been able to agree upon an allocation which achieves the proper balance between fairness to all parties and administrative efficiency.

This article begins with the assumption that the public intervenor has already been admitted as a party to the licensing proceeding—a status which is not always easily attained. Once the obstacle of admittance has been hurdled, the applicant and intervenor each raise those issues they wish considered. The agency must then decide which party will present evidence first and who will have the ultimate burden of proof with respect to the various issues presented.

This article will focus primarily upon present practice before the Atomic Energy Commission. The sheer number of administrative agencies precludes an inclusive overview. The wealth of experience reflected in the practice before other agencies, however, will not be ignored. The AEC was chosen because it provides a topical example of the difficulties a federal agency faces when it is confronted by an intervenor intending to oppose the grant of a license.

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The Atomic Energy Act of 1954[1] was enacted to encourage, among other things, the development and utilization of atomic energy for peaceful purposes.[2] Normally such development and utilization would be left to the private sector in accordance with the theories of a capitalistic economy. But because of the hazardous nature of the source, byproduct, and special nuclear material, Congress determined that it was in the national interest to regulate not only the material, but also the facilities using the material.[3] Pursuant to this determination, a Commission was established and given the authority to regulate the use of atomic energy.[4] Concomitantly it was empowered to issue licenses to qualified persons who made application to construct and operate commercial nuclear power reactors.[5]

Under provisions of the Act an application must be in writing and contain sufficient information to permit the Commission to make a determination that the utilization of the nuclear material will be consonant with the common defense and provide adequate protection to the health and safety of the people.[6] Thus utilization of nuclear fuel is not a fundamental right, but rather a privilege specifically granted by statute to a qualified applicant.

Once the Commission receives an application for the construction or operation of a nuclear facility it is under a statutory duty to make findings with respect to the applicant's technical qualifications; the impact of the reactor's location, design, and operation upon the public's health and safety;[7] and the deleterious effects, if any, of the facility's presence and operation upon the environment.[8] To resolve these issues public hearings are held upon the request of any person whose interest may be affected by the grant of an application.[9] Any person demonstrating the requisite interest is entitled to be admitted to the proceeding as a party.[10]

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[1]42 U.S.C. §§ 2011-2296 (1970).

[2]*Id.* § 2013(d).

[3]*Id.* §§ 2012(c)-(d).

[4]*Id.* § 2031.

[5]*Id.* § 2132.

[6]*Id.* § 2232(a).

[7]*Id.*

[8]*Id.* §§ 4321-35.

[9]Actually, the licensing of a commercial facility involves two stages: (1) a mandatory construction licensing hearing, and (2) a post-construction operational licensing hearing upon the request of an interested person.

[10]42 U.S.C. § 2239(a) (1970).

Recently, as the number of applications for nuclear facilities has proliferated, members of communities affected by the proposed facility have sought to intervene in the proceedings as interested parties. Primarily their purposes have been to represent and protect their own health and safety and to preserve the endangered local environment. On several occasions the Commission has permitted organizations and citizens representing the public interest in this way to intervene to the extent that they were able to raise reasonably specific allegations about the facility and furnish a factual basis for their contentions.[11]

When an interested person successfully intervenes he does so on the basis of the contentions that he raises in his petition. During the prehearing phase these contentions are frequently amended and revised and in some cases satisfactorily answered by the applicant or the Commission. Those contentions remaining are presented to the licensing board[12] which then decides whether they are meritorious enough to become issues in the licensing hearing. Depending upon the success of prehearing negotiations between the Commission and the applicant, the staff may or may not have issues of its own to raise.

Under the Act the Commission is obligated to consider the issues and make findings with respect to the public and national interest.[13] In this regard all parties, including intervenors, may present evidence relevant to the issues, but the Act is silent as to which party must bear the burden of convincing the Commission. Inevitably the question arises whether the applicant must prove the facility "safe" with respect to each issue or whether the staff or intervenor must prove the plant "unsafe." The allocation of the burden of proof is especially sensitive with regard to the intervenor's contentions.

Conceivably the apportionment of this burden could be made in several ways. The applicant could bear the burden exclusively, or, alternatively, the onus could be imposed solely upon the intervenor. The burden could be shared between the applicant and the intervenor, each having the responsibility to present direct evidence on the issues, with the ultimate burden of persuading the licensing board imposed on either the applicant or

[11]10 C.F.R. § 2.714 (1973).
[12]42 U.S.C. § 2241 (1973).
[13]*Id.* § 2133 (1970).

the intervenor depending upon the issue. Alternatively, the Commission could adopt a policy of indifference to the burden, deciding that its distribution is immaterial and directing all parties to present their direct evidence. The board would then balance the evidence and make its determination in accordance with the public interest.

Further complications arise when the order in which the parties present their case is considered. The applicant, the staff, or the intervenor could be directed to proceed first, which in itself would be a de facto determination that that party has some burden. Alternatively, all parties could be ordered to produce their direct testimony simultaneously by filing it in written form. Such a procedure likewise would be tantamount to a determination that all parties have some burden to sustain, as no party is then able to prevail merely by controverting his opponent's prima facie case.

This inquiry will proceed with a brief examination of the allocation of the burdens of proof in the context of civil litigation, specifically for the purpose of identifying certain underlying concepts. Once identified these concepts will be analyzed in an abstract setting in order to ascertain if some useful generalizations can be derived. The concepts and generalizations will then be tested against legislation applicable to atomic energy licensing, against procedures of other federal agencies, and against the needs of the Atomic Energy Commission. Ultimately a determination will be made of the optimal apportionment of the burden of proof for purposes of nuclear power plant licensing.

I. CONCEPTS DERIVED FROM CIVIL LITIGATION

Before embarking upon a full analysis of the proper allocation of the burden of proof in administrative practice, it is desirable to explore some fundamental concepts developed in the context of civil litigation. In normal two-party civil litigation where a plaintiff and defendant appear before a judge with or without a jury, the distribution of the burden of proof is, in most instances, well settled. The plaintiff, as the initiator of the action or the proponent of an affirmative order, bears the risk of failing to persuade the jury that his cause is just. This risk is frequently called the "risk of non-persuasion," for if the plaintiff fails to present persuasive evidence he loses.[14] Having the risk of nonper-

[14] 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2485 (3d ed. 1940) [hereinafter cited as WIGMORE].

suasion, the plaintiff is naturally the one upon whom falls the initial duty of going forward with evidence. If he fails to do this, the jury can take no action and the defendant-opponent need not adduce evidence at all.[15] However, if the proponent produces sufficient evidence to persuade a jury of reasonable men that his action has merit, the burden of presenting evidence shifts to the opponent. The plaintiff's burden of going forward is met, and the defendant, if he wishes to prevail, must now sway the jury with evidence of his own.[16]

There are several ways by which a plaintiff can successfully carry his initial burden of "going forward" and pass the burden to the defendant. He may obtain a specific ruling from the judge upon the particular evidence, or invoke an appropriate presumption, or ask that a matter be judicially noticed. But because the plaintiff's evidence is subject to attack by the cross-examining opponent, the transition point is not automatically surmounted by perfunctorily presenting evidence. If the defendant can sufficiently weaken the credibility of the proponent's evidence so that it is unpersuasive to the jurors, then the plaintiff has failed to sustain his burden.

Moreover, just because the plaintiff succeeds in meeting his burden of going forward does not guarantee his ultimate success in the case. The risk of nonpersuasion is always on the proponent, and if the defendant adduces evidence sufficiently rebutting the plaintiff's evidence, the jury is to render its decision accordingly.

Specific legal consequences follow from meeting or failing to meet the evidentiary requirements. If the plaintiff fails to carry his burden of going forward, either because it was insufficient on its face or inadequate under the onslaught of cross-examination, the judge may properly direct a verdict for the defendant. Similarly, if the plaintiff succeeds in going forward and the defendant responds with no evidence, the judge may properly direct a verdict for the plaintiff. Evidence, which, if unanswered, would justify men of ordinary reason and fairness in affirming the claim which the plaintiff asserts, establishes what is often referred to as a prima facie case. If such evidence is not rebutted it may result in a directed verdict; moreover, even if rebutted, it entitles the plaintiff to have his case considered by the jury.[17]

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[15] *Id.* § 2487.
[16] *Id.* § 2487(c).
[17] *Id.* § 2494.

II. ALLOCATION OF THE BURDENS OF PROOF IN THE ABSTRACT

Although the foregoing provides a basis for analysis, it is couched in the context of civil litigation which, though similar in many respects, is not identical to an administrative licensing hearing. The typical administrative hearing involves as participants at least an applicant and the regulatory staff, who in the normal course of regulation will have resolved their disagreements in advance. With intervention, contested issues arise and the number of parties to the proceeding increases to three or more, correspondingly increasing the complexity of the adversary relationships. More fundamentally, in civil litigation the judge assumes the role of an impartial arbiter, a servant of justice only, whereas in an administrative hearing a licensing board is charged with the affirmative duty of pursuing and protecting the public interest.[18] This latter distinction is a significant determinant in a licensing board's perception of evidentiary matters.

Since civil litigation is not exactly analogous, it is perhaps better to see if evidentiary rules governing the allocation of the burdens of proof can be developed in the abstract given certain axioms.

As in civil actions, the proponent of an administrative rule or order still should bear the risk of nonpersuasion. The question is how that proponent is identified. One way would be to engage in a semantic game in which identification of the proponent turns upon the positive or negative of the question, *e.g.*, the applicant is a proponent of an order granting a license, or the intervenor is a proponent of an order denying the granting of a license. Wigmore eschewed this approach and turned instead to the pleadings or applicable rules to distinguish the ultimate facts—the *facta probanda*—in the case.[19] Whoever had to prove these facts bore the risk of nonpersuasion and was therefore the proponent. In the final analysis it is the language of the pleadings and the applicable rules which determine the proponent and the imposition of the risk.

As to the burden of going forward with evidence Wigmore made the assumption that it naturally fell on the party having the risk of nonpersuasion since, without evidence, the trier of fact

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[18]Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[19]9 WIGMORE § 2485.

could properly take no favorable action at all and there would be no need for the opponent to adduce evidence.[20] While this assumption may be valid in civil litigation, it is not axiomatic in an abstract sense, nor necessarily applicable to administrative hearings. The burden of going forward could be imposed upon the opponent, with his failure to maintain the burden neutralizing his opposition but not necessarily insuring the victory of the proponent. Placement of this burden is indeterminate in the abstract and ultimately depends upon not only the pleadings and applicable rules of practice, but also upon broad considerations of policy.[21]

Before turning to statutes and regulations pertinent to atomic energy licensing hearings, one further observation by Wigmore is germane to the abstract model. In special situations "the burden of proving a fact is . . . put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false."[22]

III. Allocation of the Risk of Nonpersuasion and the Burden of Going Forward: AEC Licensing Proceedings

The Atomic Energy Act of 1954 has no provision explicitly addressing the apportionment of the burden of proof in licensing hearings.[23] It does require an applicant for an operating license to state in its application technical specifications of the nuclear material, specific characteristics of the facility, and other information which will enable the Commission to find that the utilization of the nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.[24] Other evidence is implicitly called for where the statute requires the Commission to make findings and issue licenses to applicants

> (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized;
> (2) who are equipped to observe and who agree to observe such

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[20] *Id.* § 2487.

[21] *Cf. id.* § 2488(a).

[22] *Id.* § 2486 (italics deleted). Wigmore observed that: "This principle had received frequent application in modern statutes making it an offense to pursue a certain occupation without a State *license* . . . ." *Id.*

[23] 42 U.S.C. §§ 2011-2296 (1970).

[24] *Id.* § 2232(a); 10 C.F.R. §§ 50.30-.38, .55a, .110, Apps. A-F (1974).

> safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and
> (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public.[25]

Regulations of the Atomic Energy Commission require additional showings by the applicant which will permit the Commission to find that:

> (1) Construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
> (2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
> (3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and
> (4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter; and
> (5) The applicable provisions of Part 140 of this chapter have been satisfied; and
> (6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.[26]

In essence the foregoing findings of fact to be made by the licensing board are the ultimate facts or *facta probanda* which must be proved at the hearing. Analysis of the language reveals that the findings are positively stated necessitating proof of compliance with applicable standards, safety, utility, technical ability, and financial qualification. Thus the risk of nonpersuasion is on the person who must satisfy the commission with respect to the requisite findings—namely the applicant.[27] This conclusion follows irrespective of the origin of the issues so long as they relate to the ultimate facts to be proved.

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[25]42 U.S.C. § 2133(b) (1970).

[26]10 C.F.R. § 50.57 (1973). Similar conditions are imposed for construction permits. *Id.* §§ 50.55-.55a.

[27]The opponent would normally phrase his allegations in terms of unsafeness, noncompliance, technical inability, and financial unqualification. If the ultimate facts were likewise stated in the negative, *i.e.*, a license will be denied if a facility is found to be unsafe, etc., then the opponent would bear the risk of nonpersuasion.

As in the abstract model, imposition of the risk of nonpersuasion is not necessarily dispositive of the assignment of the burden of going forward on the issues in an administrative hearing. The intervenor-opponent still may have some burden of going forward in regard to contentions that he raises even though they relate to the ultimate facts to be proved in the proceeding.

The Commission complicates the problem with an ambiguous regulation. Section 2.732 provides that: "Unless otherwise ordered by the presiding officer the applicant or the proponent of an order has the burden of proof."[28] The regulation speaks generally of the burden of proof and arguably could include both the risk of nonpersuasion and the burden of going forward with evidence. If so, the applicant, as the proponent of an order, would suffer both burdens. More likely, however, the regulation merely addresses the ultimate burden in a proceeding—the risk of nonpersuasion—leaving the allocation of the burden of going forward undecided. In addition, even though analysis of the Act has led to the conclusion that the applicant should have the risk of nonpersuasion, under the regulation, the presiding officer may decide otherwise. No standards or criteria are enumerated under which the decision to shift the burden of proof is to be made.

The clause conferring such discretion upon the presiding officer may have no force and effect whatsoever because it apparently conflicts with the Administrative Procedure Act (APA) which is incorporated by reference into the Atomic Energy Act.[29] Referring to administrative hearings, section 7(c) of the APA states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof."[30] Since the regulation is not a "statute" within the meaning of section 7(c), the Commission's attempt, absent authority under the Atomic Energy Act, to give the presiding officer some discretion in assigning the risk of nonpersuasion is without effect. But even if the exercise of discretion with regard to the risk of nonpersuasion is prevented by section 7(c) of the APA, that prohibition may not be dispositive of the ability of a presiding officer to exercise discretion with regard to the burden of going forward.

Section 7(c) uses the familiar language that "the proponent of a rule or order has the burden of proof," which thus far has

[28] 10 C.F.R. § 2.732 (1973).
[29] 42 U.S.C. § 2231 (1970).
[30] 5 U.S.C. § 556(d) (1970).

failed to yield a hint as to the apportionment of the burden of going forward. Both the House and Senate reports explained the provision in the following language:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.[31]

The House Report went on to say:

> In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated.[32]

Based upon this interpretation the applicant for a nuclear facility license apparently would have the burden of going forward with sufficient evidence to establish a prima facie case. Sufficient evidence means that there are facts in evidence which if unanswered would justify the licensing board, as men of ordinary reason and fairness, in granting the license which the applicant seeks.[33]

The language of the report would seem to be conclusive with respect to the applicant's burden of going forward on all issues whether raised by the Commission or the opponents, if it were not for the phrase that "proponents of some different result, also . . . have a burden to maintain." The phrase is capable of supporting two inferences. Conceivably it could mean that the intervenor-

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[31]H.R. REP. No. 1980, 79th Cong., 2d Sess. 36 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 22 (1945).

[32]H.R. REP. No. 1980, *supra* note 31, at 36.

[33]9 WIGMORE § 2494.

opponent has a burden of going forward regardless of the issues being raised; or it could signify that the intervenor has the burden only with respect to the affirmative issues that he raises, and as to those issues on which the Act requires the applicant to present evidence, the intervenor need only rebut the applicant's prima facie case.

Practice in civil litigation demonstrates the unacceptability of the first possibility. The civil defendant, if he wishes to prevail following presentation of a prima facie case by the plaintiff, must come forward with evidence sufficient to rebut the plaintiff's evidence and sway the jury.[34] Only insofar as the plaintiff is able to establish credible and credited evidence does the defendant have a burden to maintain. A similar result in the conduct of administrative proceedings seems to be contemplated by both reports noted above. While credible and credited evidence put forward by the applicant cannot be ignored or disbelieved by the agency unless the opponent of a licensing privilege offers commensurate evidence in rebuttal, only if the applicant has presented such a prima facie case do the opponents have a burden to sustain. If, instead, the applicant's evidence is impeached by cross-examination and a prima facie case is not established, the license cannot be granted and the opponents have no burden to sustain at all.

The second inference which may be drawn from the language of the reports is that the intervenor-opponent may have to maintain a burden of going forward with respect to those issues which he raises and need only rebut or impeach the evidence which the Act requires the applicant put forth.

If, on the one hand, the issues relate to the ultimate issues to be proved prior to granting a license, then the applicant should initially bear both the risk of nonpersuasion and the burden of going forward. For example, where the intervenor merely asserts that the applicant is not financially qualified or that a portion of the facility is unsafe, it is clear that the applicant, to establish its prima facie case, must present evidence on such issues irrespective of the intervenor's contention.[35] In essence, when the

[34] *Id.* § 2487(c).

[35] For example, if the ultimate issue is the safety of a nuclear facility, then the applicant, to establish a prima facie case, must come forward with credible evidence as to all safety considerations and issues including, but not limited to, safety issues raised by

opponent raises such issues, he is doing nothing more than putting the respective parties on notice that he does not believe that the applicant can present credible evidence with respect to the issue and that, if the applicant does, he is prepared to rebut with evidence of his own. The applicant, once notified of the intervenor's issues, can establish his prima facie case as to aspects outside the opponent's issues confident that such evidence will go unchallenged by the opponent.

A different result probably should be reached when the intervenor's issues fall outside the sphere of or do not relate to the ultimate issues before the board. Hence when the intervenor alleges unlawful or improper conduct on the part of an applicant, unless the statute requires a prima facie showing to the contrary by the applicant, the burden of going forward should be on the intervenor. In fact, both the House and Senate reports contemplated just such a result.[36]

In summary, after having looked at the pleadings and applicable rules of practice, one must reach the conclusion that the Atomic Energy Act, the APA, and the Commission's regulations all require that the risk of nonpersuasion be borne by the applicant. Less certain is the allocation of the burden of going forward; however, the legislative history of the APA strongly suggests that at least with respect to those issues relating to the *facta probanda* the applicant should also bear this responsibility. As to issues not relating to the ultimate facts, the burden of going forward should rest with the intervenor.

IV. ALLOCATION OF THE BURDEN OF GOING FORWARD IN ADMINISTRATIVE PROCEEDINGS

To fully develop and explore considerations of policy in the atomic energy licensing field, an understanding of the practice and experience in other federal administrative bodies is essential. In doing so at least one caveat should be noted. Administrative procedure is variable and molded to the function of the agency. Consequently, procedures of dissimilar agencies will differ. The Atomic Energy Commission in particular seems to be unique among the federal agencies. The subject matter of its regulatory

opponents. The agency should not depend upon opponents to raise important issues of fact necessary to support affirmative findings. Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971).

[36] *See* text accompanying note 33 *supra*.

responsibilities is complex and technical, with regulation requiring a high degree of scientific sophistication. Most of the information relevant to its regulatory decisions is exclusively in the hands of the applicant or the Commission. The public in general does not understand the information and hence does not accumulate it. Furthermore, nuclear energy is inherently dangerous with awesome consequences if exploitation ignores considerations of safety. For these reasons the procedure of another agency must be carefully examined before applying it to the AEC arena.

A cursory analysis of procedures in various federal agencies leads to the conclusion that there is an unsystematized approach toward apportionment of the burdens of proof. A more thorough analysis reveals that while there may be some functional justification for disparate treatment, there remains an inexplicable degree of difference among the several agencies when making the allocation.[37]

To reiterate there are basically three approaches an agency can take toward the allocation. First, it may determine that, although the applicant has the risk of nonpersuasion, the intervenor-opponent bears at least some burden of going forward with evidence. Second, the agency may decide that the applicant has both the risk of nonpersuasion and the burden of going forward on all issues. Finally, the agency may conclude that in administrative hearings it is largely immaterial which party has the burden of going forward though the applicant bears the risk of nonpersuasion. Judicial and administrative bodies have failed to settle upon a uniform approach; therefore, it is necessary to explore fully each alternative.

A. *Burden of Going Forward on Intervenor-Opponent*

The leading case imposing a burden of going forward on the intervenor-opponents is *Office of Communication of the United Church of Christ v. FCC*.[38] Familiarity with the decision's long

[37]It should be noted that there is a fundamental distinction in administrative law between proceedings initiated by the agency and proceedings initiated by an applicant. In the former the agency is usually attempting to enforce a regulation or take some remedial action against a party and therefore has at least the initial burden of going forward and, in most instances, the risk of nonpersuasion. It is the latter variety which concerns this paper although occasional reference will be made to agency initiated actions for purpose of comparison. The distinction is logical and comports with section 556(d) of the APA since, in an enforcement proceeding, the agency is the proponent of a rule or order. 5 U.S.C. § 556(d) (1970).

[38]425 F.2d 543 (D.C. Cir. 1969).

and complex history is essential to the understanding of the court's distribution of the burdens of proof. An earlier opinion of the District of Columbia Court of Appeals dealing with the same controversy directed that individuals and organizations representing the applicant's listening public be permitted to intervene and participate[39] in the Federal Communication Commission's license renewal hearing. The prospective intervenors sought a hearing, contending that the applicant had willfully practiced racial discrimination and had knowingly violated the fairness doctrine.

On remand the Commission ruled that the applicant had the burden of proof on the ultimate issue of whether renewal of its license would serve the public interest, convenience, or necessity, but that the Church of Christ and other intervenors had the burden, including the risk of nonpersuasion, of proving violation of the fairness doctrine and discrimination against significant groups within the community of the applicant's service area.[40] The Commission's allocation being unacceptable, the intervenors petitioned for reconsideration and sought an order assigning the ultimate burden of proof upon all the issues to the applicant.[41] Intervenors justified their request because the applicant knew the most about the facts, and because otherwise the burden of proof on the ultimate issue would be meaningless.[42] It is important to note that the intervenors desired to impose only the risk of nonpersuasion on the applicants while they were content to carry the burden of going forward themselves.[43] Even with this concession the Commission rejected the proposed allocations on the ground that:

> The issues involved in this proceeding are based upon the charges made by intervenors and relate largely to acts of omission rather than commission. . . . Those who allege such discrimination are in at least as good a position as the applicant to know the facts relating to it. . . .
> . . . In essence, the hearing order . . . merely requires that those making specific accusations shall come forward with their evidence and afford the one accused an opportunity to reply after he is fully informed of the charges and the evidence.[44]

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[39]359 F.2d 994 (D.C. Cir. 1966).

[40]Lamar Life Broadcasting Co., 3 F.C.C.2d 784 (1966).

[41]Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966).

[42]*Id.* at 94.

[43]Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 433 n.8 (1968).

[44]Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92, 95-6 (F.C.C. 1966). The Commission also stated:

It is evident that the Commission fell into the semantic trap of positives and negatives and made an incorrect analogy to cases involving charges of criminal conduct.[45]

Intervenors, in making their argument, had relied upon two earlier FCC cases involving serious allegations of misconduct raised in an opponent's petition to deny a license. In both cases the Commission ruled that the intervenor was to proceed with the initial introduction of evidence on the issue even though the applicant had the ultimate burden of proof.[46] In its decision concerning the burden to be placed on Church of Christ the Commission gave little attention to the two earlier cases, stating that in those cases the rationale for splitting the ultimate burden of proof from the burden of first proceeding with evidence was that the facts in issue were peculiarly within the knowledge of the applicant.[47] The Commission then issued an order renewing the broadcaster's license and noting that the intervenors had failed to come forward and sustain their serious allegations against the applicant.[48]

On appeal the circuit court vacated the order and held that the Commission had gravely misunderstood the role of the intervenors as well as the allocation of the burden of proof.[49] The court held that the applicant has the ultimate burden of proof on all the issues and that:

> The failure to present particular viewpoints and the failure to provide the opportunity for expression by significant community groups may be better known to those claiming to represent the viewpoints of groups denied access to broadcast facilities than to the broadcaster who keeps records of what he has presented rather than what he has not presented.

Id. at 95.

[45]*See* 10 C.F.R. § 2.732 (1973) and dissenting statement of Commissioner Cox in Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966). *See also* 9 WIGMORE § 2488(a). The Commission cited as precedent for its allocation of the burden of proof D & E Broadcasting Co., 1 F.C.C.2d 78 (1965), which involved a charge that the applicant had violated the law by smuggling horses into the United States from Mexico. The Commission ruled that where an issue involving serious misconduct has been raised, the party making the charges has not only the burden of going forward with the evidence, but the ultimate burden of proof as well.

[46]Elyria-Lorain Broadcasting Co., 6 R.R.2d 191 (1965); Washington Broadcasting Co., 3 F.C.C.2d 777 (1966). In the latter opinion the Commission stated that placement of the burden of going forward upon the intervenor was in accord with concepts of basic fairness. However, the Commission also explicated that the purpose of so placing the burden was to delineate the facts in issue and to inform the applicant of precise factual issues to be resolved.

[47]*See* Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966).

[48]Lamar Life Broadcasting Co., 14 F.C.C.2d 495, 549 (1967).

[49]Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

> We did not intend that intervenors representing a public interest be treated as interlopers. Rather, . . . a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.[50]

The court's opinion is dispositive of the allocation of the ultimate burden—the risk of nonpersuasion. But since the intervenors had assumed from the beginning that the burden of going forward with respect to their contentions was on them, the assignment of the burden of going forward was never decided. In dictum, however, the court concluded that the intervenors did have to sustain a burden of going forward. Judge, now Chief Justice, Burger, writing for the majority, analogized to the situation where a complaining witness must present evidence before a prosecutor will act. In a footnote to the analogy the court approvingly referred to a memorandum statement prepared by it in denying intervenors' motion for clarification of the earlier *Church of Christ* opinion.[51] In that statement the court impliedly sanctioned imposition of the burden of going forward on intervenors by making the assumption that the Commission's reference to the burden of proof with respect to issues raised by intervenors was intended to mean "only the burden of going forward with evidence in the first instance."[52]

In short, the *Church of Christ* court assumed, but did not decide, that the intervenors had a burden of going forward with respect to the issues raised by them. The validity of this assumption is questionable. The court regarded the public intervenors as complaining witnesses. Without a doubt they were; but they were not complaining of criminal misconduct to a prosecutor as in the court's analogy; rather they were complaining of a violation of public trust by the applicant to an agency established to protect the public interest. In a criminal complaint, where probable cause is required before action can be taken, a complainant must certainly come forward with some evidence. Whether a public interest organization making allegations similar to the ones made

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[50]*Id.* at 546.

[51]*Id.* at 546 n.6.

[52]*Id.*

by the Church of Christ must initially present evidence should depend upon the applicable statute, rules of practice, and considerations of policy.[53]

If the applicant had an affirmative duty under the Communication Act or FCC regulations to demonstrate compliance with the fairness doctrine and to show nondiscriminatory practices, then the burden of going forward would properly be upon it irrespective of the intervenors' contentions. On the other hand, in the absence of an affirmative duty the APA precludes an agency from presuming that the conduct of any person is unlawful or improper, and therefore an evidentiary burden of going forward with some evidence should lie with the intervenors.[54] It is this rationale which the court misses and which justifies the assumption the court made.

Additional grounds for assigning the burden to the intervenors may have been implicit in the court's assumption. Both the Commission and the court seem to have been under the impression that the intervenors' knowledge of programming violations was just as good as the applicant's. In fact, the court noted that the intervenors had made a monitoring study covering one week's broadcasts and had several witnesses willing to testify to discriminatory practices.[55] When such evidence is within the grasp of public intervenors there is little reason why they should not be expected to sustain an initial burden of going forward.

In addition the allegations of misconduct or other improper behavior may have evoked a feeling in the court that the intervenor must proceed with evidence so that the applicant can have reasonable notice as to the charges he is expected to meet. But the requirement of notice could as easily be met by compelling the intervenor to make reasonably specific contentions in his pleadings.

If it is accepted that the court is correct in its judgment that intervenors bear some burden of going forward there are several distinctions which may require a different result in the context of nuclear facility licensing. Contentions raised before Atomic Safety and Licensing Boards normally relate directly to the ultimate issues before the Board, they are not allegations of miscon-

[53]*See* text accompanying note 21 *supra*.
[54]*See* text accompanying note 32 *supra*.
[55]425 F.2d at 547-48.

duct or unlawful behavior. Atomic Energy Commission regulation requires that contentions be put forward in reasonably specific detail; therefore, there is no notice problem.[56] Finally, in a field as technical as that of nuclear energy there can be little question that the applicant is unique in its position of knowledge.

Other administrative cases which have placed a burden upon opponents or intervenors have done so for a variety of reasons.

In rate proceedings the burden shifts between the regulated body and the opponent depending on whether the objection is against a proposed change or against a change that has already taken place but has yet to receive official sanction. In the proposed rate-change situation there is an applicant who is the proponent of an order and, as such, has the burden of going forward as well as the ultimate risk of nonpersuasion. Where the change is in effect and is only questioned if an investigation is conducted there is theoretically no applicant but only a complainant who, in the context, is a proponent of an order vacating the change.[57]

The shift in the burden from the regulated body to the intervenor-opponent is a result of the presumption of validity given the increased or changed rate. If it is already in effect and thus presumed valid, then the regulated body's initial burden is ipso facto met, and the opponent must then present evidence to overcome the presumption. Where a rate change is proposed the regulated body must come forward with evidence in the first instance before the opponent is required to do anything. Aside from the existence of the presumption, the shift in the burden makes little sense, since information in the hands of the parties is the same regardless of the status of the rate. However, from a theoretical standpoint the result is consistent with the APA, which places the burden upon the proponent of a "rule" or "order."[58]

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[56]10 C.F.R. § 2.714 (1972).

[57]In IML Freight, Inc. v. United States, 30 Ad. L. Dec. 2d 712 (D. Utah 1972) the motor carrier published rates that greatly exceeded the national classifications. The hearing examiner ruled the intervenor-complainants had the burden of going forward and that the burden had been met by a presumption of unreasonableness which attached to the published rates because they so grossly exceeded the recommendations. The court upheld the procedure as warranted. *See also* Terminal Charge, at Various Points, on Order Bill of Lading Shipments, 315 I.C.C. 327 (1962), where the Commission indicated that where a charge becomes effective prior to the institution of an investigation there is no changed rate in issue. Accordingly, the proponent of the change does not have the burden of proof and the complainant does.

[58]5 U.S.C. § 556(d) (1970).

In two related rate proceedings[59] before the Federal Power Commission, the burden of going forward with evidence as to excessive contractual rates was placed on the FPC's regulatory staff. The applicant in both cases, Seaboard Oil Company, had sought a certificate authorizing it to sell natural gas in interstate commerce, and the FPC staff had injected the issue of rates into the proceeding. Although the ultimate risk of nonpersuasion was on Seaboard, the Commission ruled that imposition of the burden of going forward to justify the rates would present an impossible task to any applicant. Since the staff failed to present sufficient evidence to justify a different rate, the applications were granted.[60]

The rationale underlying the Commission's allocation of the burden of going forward is far from clear. The Commission believed that the question of reasonable rates was an essential element of the ultimate issue in the application, *i.e.*, whether the production and sale of natural gas in interstate commerce by Seaboard would be consistent with the public interest, convenience, and necessity.[61] Since Seaboard had the risk of nonpersuasion with respect to the ultimate issue, logic would suggest that it should also have had a burden to maintain with respect to the question of reasonable rates. Undoubtedly rates that are not reasonable cannot be in the public interest.

Conceivably the Commission might have attached a presumption of reasonableness to the contract rates. If so, any initial burden of going forward which the applicant had was automatically satisfied and the burden of proof shifted to the staff to overcome the presumption. Unfortunately, the Commission's opinion reveals no such presumption. However, an indication that it might have existed can be inferred from a dissenting opinion which pointed out that there is a distinction between a rate schedule submitted in evidence to support an application for a certificate on the one hand, and, on the other, a rate schedule filed by an already certified natural gas company.[62] A presumption of reasonableness, it would seem, might be appropriate in the latter case. The dissent further stated that:

[59]Seaboard Oil Co., 19 F.P.C. 416 (1958); Transcontinental Gas Pipeline Corp., 20 F.P.C. 264 (1958).

[60]Seaboard Oil Co., 19 F.P.C. 416, 420 (1958).

[61]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 271 (1958).

[62]Seaboard Oil Co., 19 F.P.C. 416, 435 (1958) (dissenting opinion).

> There is no burden of proceeding which shifts to the Commission or the Staff in a . . . licensing proceeding. Neither the Commission nor our staff are proponents. Either the standards are met or they are not.[63]

An alternative ground for the Commission's assignment of the burden of going forward may be found in the skepticism of several Commissioners who questioned the FPC's authority to alter or set the initial contract rates between producers and purchasers.[64] However, even if the Commission lacked the authority, such an inadequacy should not be dispositive of the allocation of the burden of proof. Certainly rates set by contract could be found unreasonable without the Commission, at the same time, having to set reasonable rates. A finding by the Commission that the contract rates were unreasonable would only mean that Seaboard would have to renegotiate the rate and resubmit it to the Commission with proof of reasonableness.[65] Thus, the question of the allocation of the burden of going forward as to reasonable rates is independent of the Commission's authority to fix such rates. Since the reasonableness of a rate is germane to the inquiry of public interest, convenience, and necessity the initial burden of presenting some evidence as to reasonableness should have been upon the applicant. By assigning the initial burden to the staff the Commission was in error unless it entertained the presumption noted above.[66]

There are several instances where a burden of going forward has been placed upon the intervenor-opponent with apparent jus-

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[63]*Id.* at 429 (dissenting opinion).

[64]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 272 (1958), *citing* Phillip Petroleum Co. v. FPC, 258 F.2d 906 (10th Cir. 1958) where the court held that under the Natural Gas Act the rate to be charged for natural gas is initially fixed by contract between the seller and the purchaser and the Commission had no initial rate making powers. An initial rate fixed by contract remained in effect unless and until it was changed in a proceeding under section 5(a) of the Natural Gas Act. *But see* Atlantic Refinery Co. v. Public Service Comm'n, 360 U.S. 378 (1959), in which the Court decided that the rate level issue was a factor bearing on the public convenience and necessity. This opinion did not overrule *Seaboard* because it did not address the respective burdens of proof. However, it does support the inference that the applicant must come forward with evidence to show that the contractual rate is in the public interest. *Id.* at 391-92.

[65]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 290 (1958) (dissenting opinion). It should not be impossible for the applicant to establish the reasonableness of his contractual rate, and, if found unreasonable, then renegotiate the rate with the producer before reapplying for certificate.

[66]Seaboard Oil Co., 19 F.P.C. 416, 421-24 (1958). There are also overtones in the opinion to the effect that consideration of a rate issue, although within the scope of the ultimate issue, was too burdensome for the agency to undertake.

tification even though normally the opponent has no such burden.

In *National Airlines, Inc. v. CAB*[67] the CAB conducted an adequacy-of-service investigation and ordered National to institute a Baltimore-Miami flight. As the proponent of a rule or order the Board theoretically had the ultimate burden of showing that the additional service was warranted, as well as the burden of going forward. In spite of this it placed the burden of going forward with evidence as to financial infeasibility upon National and justified the imposition by saying that the Board was not asking the airline to come forward with evidence on the entire subject of economic feasibility, but only with evidence as to facts particularly within the airline's knowledge.

National objected to the imposition as contrary to the APA and sought review. The court upheld the agency's assignment of the burden of going forward because, as the Board had indicated, the knowledge was peculiar to the airline even though the agency had access to some of the data. The court considered that

> cities petitioning for adequate service and the Board would be unduly hampered by any requirement for overly detailed profit and loss projections to establish the economic feasibility of adequate service. This could not only intolerably protract adequacy of service proceedings, but might create an insuperable barrier to petitioning civic groups lacking both the relevant operating data and the assistance of experts.[68]

The rationale of the court is equally applicable to the placement of the burden of going forward in a nuclear facility licensing hearing. Where an applicant utility possesses particular knowledge about the nuclear facility—as it must—imposition of the burden of going forward upon a public intervenor will certainly protract the proceedings and create an insuperable barrier to the citizen organization which lacks the relevant data and the assistance of experts.[69]

In an FPC proceeding,[70] the intervenor, American Louisiana Pipe Line Company, sought to show that the application before the Commission should be extended to cover Upper Michigan.

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[67]300 F.2d 711 (D.C. Cir. 1962).

[68]*Id.* at 715.

[69]9 WIGMORE § 2486. *See also* Clarke v. United States, 101 F. Supp. 587, 594 (D.D.C. 1951).

[70]American La. Pipe Line Co., 19 F.P.C. 1 (1958).

The applicant had purposefully excluded the area, intending to apply for coverage of the area in the future. The intervenor sought to prove its case solely by cross-examination, but the Commission, in granting the certificate as originally applied for, held that American Louisiana could not sustain its contention in that manner and should have submitted direct evidence as requested.

The burden of going forward was placed upon American Louisiana because its contention was outside the scope of whether the applicant could demonstrate that the public interest, convenience, and necessity required an extension of service into the region it had selected. The intervenor raised an issue which according to the Commission was unrelated to the ultimate issue involved. The peninsula was specifically excluded from the application, and intervenors, by seeking to enlarge the area of service, became a proponent of an order with at least a burden of going forward if not the risk of nonpersuasion.[71]

In *Hall v. FCC*[72] the applicant for modification of a construction permit relied upon an agency study of reception probabilities to show that reception would be reduced unless its permit were modified. The opponent contended that since the study was related to a normal area, and the area in which the applicant operated might be abnormal, the applicant had the burden of proving the normality of its broadcast area. The court held, however, that the opponent must prove the area to be abnormal.

Upon first analysis it appears that the burden of going forward with initial evidence in regard to the issue of normality was placed on the opponent. But this is incorrect. The applicant had the initial burden of going forward, and the risk of nonpersuasion; but under the circumstances the court was willing to entertain a presumption that the region was normal. This presumption was sufficient to establish a prima facie case and cast the burden of producing rebuttal evidence on the opponent.[73]

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[71] *See* Ashworth Transfer, Inc. v. United States, 27 Ad. L. Dec. 2d 494 (D. Utah 1970), where the court placed the burden of proof on the intervenors to demonstrate that proposed restrictions on a certificate were in the public interest. The restrictions were outside the scope of the issues considered in granting certificate of public convenience and necessity.

[72] 6 Ad. L. Dec. 2d 419 (D.C. Cir. 1956).

[73] 9 WIGMORE § 2488(a). This case has implications for issues attacking the interim criteria for emergency core cooling systems. If a presumption is raised by an applicant's compliance with the criteria then the burden shifts to the intervenor to come forward with special circumstances demonstrating why the criteria are inapplicable.

It is evident, then, that a burden of going forward can be imposed justifiably upon the intervenor-opponent in some instances, but not without regard to the circumstances and issues involved. When an intervenor becomes a proponent of a rule or order either by statute or because the issues it raises fall outside the scope of those which are expected to be or are normally raised therein, then an initial burden of going forward can be properly placed upon the intervenor. Likewise when an intervenor-opponent has peculiar knowledge, or where the commission or court is willing to entertain a presumption, the intervenor may have an initial burden to sustain. The question remains whether a public interest intervenor raising contentions directly related to and circumscribed by the ultimate factual issues involved should have any initial burden except in those instances noted above, or whether an applicant should have the burden of going forward with respect to those issues. Judicial and administrative bodies have seldom, and then only indirectly, placed this burden upon the applicant.

B. *Burden of Going Forward on Applicant*

The issue of whether an intervenor has any burden to sustain arose obliquely in *Deep South Broadcasting Co. v. FCC.*[74] There the Commission authorized the applicant to increase its broadcasting power over the objections of the intervenor, Deep South. The applicant had not been required to show that the increase in power would have no deleterious impact upon future assignments to other stations. On appeal the Commission attempted to rationalize the shortcoming by claiming that Deep South could have done nothing in a hearing, or in meeting evidence brought forward by the applicant that would have altered the result reached. The Commission also claimed that its review board had made an "independent evaluation" of the impact of the power increase, and subsequently had indicated its willingness to hear any challenge to the evaluation's accuracy. Since Deep South had failed to ask the review board to reopen the hearings at that time, the Commission argued that the intervenor should not be heard to complain on appeal.[75]

The court rejected the attempted rationalization stating that neither the Commission's "independent evaluation" or its will-

[74]347 F.2d 459 (D.C. Cir. 1965).

[75]*Id.* at 464.

ingness to reopen the proceeding had the effect of shifting the burden of proof on a controlling issue from the applicant to the intervenor, who theoretically begins with no burden at all.[76] The court explained that the intervenor was not an applicant and

> had no burden of proof of any kind on this issue either affirmative or negative. It was entitled to see what evidence [the applicant] could or would bring forward on that issue, and to test it by cross-examination or to counter it by evidence of its own.[77]

The court believed that since the question of the impact of the power increase was directly related to the ultimate issue of whether the increase would be in the public interest, the applicant should have both the burden of going forward and the ultimate risk of nonpersuasion.

In spite of the unconditional language appearing in the opinion the decision is not dispositive of the allocation of the burden of going forward with regard to issues raised by an intervenor because the issue before the court was initially raised by a member of the licensing board. Thereafter, the issue was adopted and pursued by the intervenor, but it is apparent that the court regarded the question as one raised by the Commission.[78]

In another rate proceeding,[79] Union Oil Company of Califor-

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[76] *Id.* at 464 n.3. The court stated that:

> It is said that Deep South should not now be heard to complain because it did not ask the Board to reopen the hearings at that time. But Deep South was not an applicant for a licensing privilege, nor was there any burden of proof on it to establish that WKTG's application should be denied. It was entitled to lay before the Commission, as it did, alternative contentions that WKTG had not sustained its burden of proof as to the merits of its application, and that the application should be denied; or that the procedure followed in assembling the quantum of proof on behalf of the application had been so irregular that, if the Commission was not disposed to deny the application without more, it should remand the application to a hearing examiner so that WKTG could seek to sustain its burden of proof on the record.

Id. at 464.

[77] *Id.* at 465.

[78] The court relied upon section 309(e) of the Communications Act of 1934 which provided that:

> The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented in a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

47 U.S.C. § 309(e) (Supp. 1974). If the court had viewed the issue as raised by the intervenor then it would have referred to the discretionary authority vested in the Commission by statute to assign the burdens of proof. Instead the court found that the statute required both burdens be placed upon the applicant.

[79] *In re* Union Oil Co., 16 F.P.C. 100 (1956).

nia applied for a rate increase on the sale of natural gas.[80] Following the applicant's presentation intervenors waived cross-examination and moved to dismiss the application because Union Oil had failed to produce evidence that the increased rates were no higher than necessary to encourage exploration for and production of known and future gas reserves. The Commission gave Union Oil further time to adduce evidence and, upon its failure to do so, held that the applicants had failed to submit evidence on which it could be determined as a matter of law that the rates were just and reasonable.[81]

The Commission stated that the applicant had the burden of proving that the proposed rate increase was just and reasonable, and the discharge of that burden must be affirmative, concrete, and persuasive.[82] Further,

> [n]o burden of proof rests with intervenors or the staff to present negative evidence that the increased rate is unreasonable, for until the applicant has presented a *prima facie* case opposing parties have no burden of going forward.[83]

In *Railway Express Agency, Inc.*,[84] the Civil Aeronautics Board instituted an investigation of the tariff schedule by which REA proposed to increase its charges. The burden of going forward was placed upon REA to show that the proposed rate was just and reasonable because the proponent had within its possession the major portion of the evidence supporting the charge,

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[80]The distinction between seeking a rate increase and attacking an existing rate should be remembered. *See* text accompanying note 57 *supra*. In this case Union Oil is the proponent of an order permitting it to raise its rates on the sale of natural gas.

[81]16 F.P.C. at 113.

[82]*Id.* at 111, *citing In re* Mississippi River Fuel Corp., 2 F.P.C. 170, *aff'd* 121 F.2d 159 (8th Cir. 1941).

[83]*Id. See also* Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963), where the Interstate Commerce Commission denied a carrier's application for a certificate because the applicant had failed to establish that present and future public convenience and necessity required the grant of the application, and had failed to establish its fitness, willingness, and ability to properly conduct the proposed operation. In affirming the Commission's action the court held that the applicant had a burden of proof to show inadequate service, and that burden cannot be met by inferences drawn from failures of protesting carriers to prosecute their cause. *See also* Pacific Intermountain Express Co., 8 Ad. L. Dec. 2d 235 (I.C.C. 1958) where the Commission, denying the merger application because applicant had failed to sustain its burden of proof, stated:

> Nor are we relieved of this application by the fact that many of the competing carriers refrained from intervening and introducing evidence . . . . The burden is upon applicants to submit the necessary evidence . . . .

Id. at 237.

[84]8 Ad. L. Dec. 2d 543 (C.A.B. 1958).

evidence which was not readily available to other parties.[85] The Board concluded that to place such an onus upon an opponent would create a heavy obstacle in its path by requiring it to make an initial presentation on the basis of evidence readily available only to the proponent. Moreover, substantial delay to the administrative process would ensue if the opponent were forced to gather evidence sufficient to support a prima facie case.[86]

The ICC easily disposed of intervenors' numerous contentions in *Atlanta-New Orleans Motor Freight Co. v. United States.*[87] There M.R. & R. Trucking Company made application to extend its motor common carrier service by annexing approximately 150 shipping points, all to be serviced from Atlanta. At the hearing 10 protesting intervenors contended that the applicant could not and did not show need for improved service with respect to each and every one of the points involved. The applicant did offer direct testimony relating to 22 of the points, and this showing convinced the Commission that the proposed service was required by the present and future public convenience and necessity.

On judicial review intervenors alleged that the certificate was granted without being supported by substantial evidence. The court, however, refused to impose the burden of presenting direct evidence with respect to all of the points upon the applicant. Instead the evidence which was introduced was sufficient to support a presumption of need at other points within the area as to which no specific testimony was offered.[88] The inference shifted the burden to the intervenors who, in order to rebut it, were required to demonstrate by direct evidence that the public convenience and necessity did not require the proposed operations of the applicant.

The applicant had the initial burden of going forward in the face of intervenors' contentions, but because of an interest in

[85] *Id.* at 545. The attitude of the CAB toward a rate increase is somewhat different than that of the FPC. In an FPC investigation the increased rate has a presumption of validity with the consequence that the opponent has the burden of proof. The CAB views its investigation as an application for a rate increase with no presumption attached.

[86] The dissenting Board members argued that the CAB, as a proponent of an order rescinding the charges, should have the burden of establishing a prima facie case before shifting the burden to REA.

[87] 197 F. Supp. 364 (N.D. Ga. 1961).

[88] *Id.* at 369.

administrative efficiency, its burden was deemed satisfied by a rebuttable presumption.[89]

None of the foregoing decisions placing a burden of going forward upon an applicant squarely faced the question of the apportionment of this burden in instances where an intervenor raised contentions. In *Deep South* the language strongly suggests that there would be no burden whatsoever upon the intervenor, but the court's decision related solely to an issue raised initially by the licensing board and considered important by it. In the remainder of the cases in which the applicant was found to have a burden of initially presenting evidence, the court or administrative body, in effect, merely held that the applicant had the burden of going forward on issues normally involved in a licensing hearing even without the presence of intervenors.[90] Logically the language and rationale of these cases would support the conclusion that if an intervenor raises a contention, which contention is or would be considered by the board to be part of the applicant's case even without intervention, then the applicant should have the initial burden of going forward with evidence. But this conclusion is not the one best suited to the efficient conduct of administrative proceedings, nor is it generally applicable to all contentions raised by an intervenor or all circumstances in which administrative agencies function.

Certain rate cases illustrate the third approach which administrative agencies have adopted toward the apportionment of the burden of going forward.

C. *Burden of Going Forward Immaterial*

Terminal Charge, at Various Points, on Order Bills of Lading Shipments[91] involved an investigation of existing motor carrier

[89] *Id.* A petition for leave to intervene in proceedings before the Interstate Commerce Commission must set forth "the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought." 49 C.F.R. § 1100.72 (1974). Under the regulation, although the opinion of the court does not mention it, intervenors must have raised contentions with regard to each one of the points in question.

[90] In *In re* Union Oil Co., 16 F.P.C. 100 (1956) the applicant had the burden of going forward on the issue of just and reasonable rates irrespective of the intervenor's presence. Similarly, Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963), Pacific Intermountain Express Co., 8 Ad. L. Dec. 2d 235 (I.C.C. 1958), and Atlanta-New Orleans Motor Freight, 197 F. Supp. 364 (N.D. Ga. 1961), were all cases involving issues normal to the administrative inquiry and not regarded as contentions placed in issue by intervenors.

[91] 315 I.C.C. 327 (1962).

charges by the Interstate Commerce Commission. Because there was no changed rate in issue, the proponents of the existing rate did not have the burden of proof; instead the protesting intervenors as proponents of an order changing the rate had the burden.

The Commission, considering the case important because of the burden of proof issue, cautioned that the allocation of the burden of proof was primarily a rule of evidence designed to insure orderly procedure; but if viewed solely in quantitative terms, it soon would become master of the administrative process rather than the servant.

The Commission found that the intervenors had failed to establish that the charges were unlawful even though they had submitted as much evidence as could reasonably be expected in light of information available to them. Nevertheless, the Commission held that the existing charge was unreasonable because the carriers had failed to produce evidence justifying the charges on the basis of facts peculiarly within their knowledge. This seemingly injudicious regard for the consequences of bearing the burden of proof was brought about because the Commission was confronted with a situation where identical rates in other proceedings had been found unreasonable. If the rates in *Terminal Charge* had been permitted to stand simply because the intervenor had failed to meet its burden of proof there would be an irrational and unacceptable inconsistency. Thus the Commission explained that even if the intervenor had offered no evidence at all, the Commission as protector of the public interest would have been obliged to supplement the record to determine if the rates were reasonable.

Although the ICC in *Terminal Charge* did not explicitly so indicate, it seemed to regard the administrative hearing as fundamentally different from the ordinary civil litigation between two private parties. According to the Commission the agency's determination could not be based upon who proved what by a preponderance of the evidence, or by which party came forward with evidence to establish a prima facie case. Rather, as the protector of the public interest, it had the affirmative duty to search out all the evidence as well as draw upon its own technical expertise before rendering a decision. In essence, if the Commission's judgment is correct, the question of who has the burden of going forward may be irrelevant in the administrative process except in terms of orderly procedure and the public interest. If an agency

believes that imposition of the burden upon an intervenor would best assist the Commission in protecting the public interest, then according to the reasoning in *Terminal Charge* it may do so.[92]

The FPC adopted a similar approach towards the burden of going forward in *Area Rate Proceeding*[93] when it ordered simultaneous written presentation of direct cases by all parties including intervenors, followed by simultaneous presentation of rebuttal evidence. After considering intervenors' motion to revise the schedule to permit them to present their direct cases after the staff and respondent had presented theirs, the Commission remarked that

> [it] unquestionably [had] the authority in discharging its duties to establish an appropriate hearing procedure. It has done so in this proceeding. Whether or not the staff or any of the parties has the burden of proof or the burden of going forward in no wise calls for any change in the requirement that simultaneous direct presentations be made.[94]

The intervenors contended that fair procedure dictated that they be allowed to see the respondent's direct case before presenting their own because they needed more time. They also argued that simultaneous submission of direct evidence would be inefficient as there was bound to be much duplication by staff and intervenors or staff and applicant. Rejecting these contentions, the Commission found the approach to be the fairest and most expeditious means of conducting the proceeding.[95]

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[92]*Id. See also* Great Northern Ry. Discontinuance of Service, 307 I.C.C. 59 (1959), where the hearing examiner, after considering carrier's request that the burden of proof should be upon the parties complaining that public convenience and necessity required continuation of service, ruled that the carrier seeking to abandon passenger service must proceed with the presentation of evidence. Noting that the carrier had not been prejudiced by the procedure, the Commission declined to decide who had the burden of proof in investigation proceedings and stated:

> In any event, the question is of more theoretical than practical importance . . . . Regardless of where the burden of proof lies, a carrier subject to our regulation is expected to aid in the disposition of proceedings to which it is a party by making available all pertinent facts within its knowledge.

Id. at 61.

[93]30 F.P.C. 512 (1963).

[94]*Id.* at 512.

[95]*See also* Midwestern Gas Transmission Co., 29 F.P.C. 723 (1963), where the intervenor in a rate proceeding requested that the presiding examiner follow a procedure whereby the cases in chief of the proponents would be served upon all parties prior to the cases in chief of any intervenors. The presiding officer declined, adopting a plan requiring intervenors to proceed first. On review the Commission upheld the examiner's procedure stating that

Thus far the decisions analyzed have disclosed three alternative approaches toward the apportionment of the burden of proof. In general there seems to be no consistent formula applied by either administrative or judicial bodies. As an outsider to the numerous varieties of agency adjudicatory hearings, one should hesitate to conclude that the agencies and courts approach the apportionment of the burden on an ad hoc basis. Perhaps no comprehensive scheme can or should be developed. Arguably the kinds of privileges applied for, whether they be a motor carrier's certificate, a rate increase, renewal of a broadcast license, or construction permit, are dissimilar enough to justify a different approach by each agency.

If the analysis of the three alternatives has not provided a consistent approach, it has at least imparted a sense that administrative hearings are not procedurally similar to two-party civil litigation. The ultimate issue before a licensing board is not who wins or loses, but, more importantly, whether grant of the privilege will best serve the public interest. And thus the agency's apportionment of the burdens of proof becomes less a substantive rule with legal significance in terms of dismissal or directing a verdict and more a procedural rule serving the interests of the administrative body and the public.

In the abstract the question of who has the burden of going forward, or even the risk of nonpersuasion with regard to issues raised by an intervenor, might and probably should be immaterial, as suggested by the third alternative. And if the allocation is in the first instance a neutral proposition, then perhaps the agency should have the discretion to assign the burdens in such a way as to facilitate its statutory duty. In fact, there is one federal agency with statutory authority to adopt a discretionary approach. Section 309(e) of the Communications Act of 1934 provides:

> Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the

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considerations of who may ultimately bear the burden of proof in these proceedings have little bearing on the real problem confronting the Examiner, *i.e.*, establishing a schedule which most nearly balances the needs and conveniences of the parties against the interests of expedition.

Id.

> applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.[96]

The legislative decision to give the Federal Communications Commission this discretion was not without reference to practical experience. Predecessor sections of section 309(e) had categorically stated that with respect to issues set forth in protest and not adopted or specified by the Commission, both the burden of going forward and the ultimate burden of proof would be on the protestant.[97] Although the legislative history is unclear, the categorical approach seems to have been abandoned because of a legislative feeling that it was sometimes difficult for a legitimate opponent to sustain the burdens and that the Commission required the flexibility to effectively ascertain the public interest.[98]

Now that courts have begun to recognize that administrative agencies can no longer rely solely upon the evidence presented by the parties, but instead must affirmatively search out all aspects relevant to the public interest,[99] the flexibility authorized by section 309(e) and assumed by other agencies is essential. It is also essential, when the public interest is at stake, to impose upon all parties participating in the administrative proceeding a duty to make available all pertinent facts within their knowledge irrespective of any burden of proof.[100]

Determination of the order in which disclosure of the pertinent facts is made should rest with the agency, but its discretion should not be exercised arbitrarily, frivolously, or with malice toward any party. Since by statute all parties participate with equal right, the allocation should be made, as Wigmore sug-

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[96]47 U.S.C. § 309(e) (Supp. 1974).

[97]*Id.* § 309(c) (1956). *See* Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958), where a competitor of an applicant for a broadcasting license alleged that the grant of a license would be adverse to the public interest because it would impair his (the competitor's) economic position. Although the burden of proof issue was not squarely presented, the court found that the intervenor had the burden of showing potential economic injury and that it was "certainly a heavy burden." *Id.* at 444. At the time section 309(d) of the Communications Act placed both burdens of proof upon the protestant. However, the result is also justified because the facts relevant to a competitor's economic vulnerability are peculiarly within the control of the competitor.

[98]S. REP. No. 690, 86th Cong., 1st Sess. 2, 4 (1959). Ironically Clay T. Whitehead, director of the White House Office of Telecommunications Policy, recently proposed legislation which seeks to reinstate the burden of proof upon the challenger in a license renewal hearing, as reported in the Chicago Tribune, March 14, 1972.

[99]*See* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

[100]*See* cases cited note 92 *supra.*

gested, on the basis of broad considerations of policy.[101]

An agency should consider numerous facts when making its determination, not the least important of which is that the applicant is asking the public to grant it a privilege. Important also is the nature of the party and of the regulated subject matter. Additional consideration should focus upon the particular party's access to relevant information, and his ability to process facts and hire competent expert witnesses. Administrative efficiency, while not paramount, should also receive attention.

Thus in proceedings before the Atomic Energy Commission, the hearing examiner should be vested with the discretion to assign the burdens of proof as considerations of policy dictate.

V. ALLOCATION OF THE BURDENS OF PROOF IN AEC PROCEEDINGS

Before analyzing the considerations relevant to the question of whether a public interest intervenor should have a burden of going forward or even the ultimate burden of persuasion, it is best to understand the procedure that the Commission has provided for intervention. Under the applicable rules of practice intervention is only permitted when the prospective intervenor is able to set forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene.[102]

Once intervention is permitted, an intervenor is entitled to utilize the discovery devices available to gather facts relevant to the contentions raised.[103] Upon the discovery of new information which was not previously available to the intervenor, it has been the Commission's policy to permit amendments to the contentions.

Historically, public interest intervenors in each AEC licensing proceeding have presented to the licensing board an average of 150 contentions. In the course of discovery a substantial number of these are normally explained to the intervenor's satisfac-

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[101] 9 WIGMORE § 2488(a).

[102] 10 C.F.R. § 2.714 (1973). The new regulations require that the petition to intervene shall set forth the interests of the petitioner in the proceeding, how that interest may be affected by Commission's action, and other contentions including the facts and reasons why he should be permitted to intervene. The petition must be accompanied by supporting affidavits setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene.

[103] The anomaly has been pointed out previously that the contentions have to be supported initially, otherwise intervention is denied. 10 C.F.R. § 2.714 (1973).

tion. The remaining contentions are again given to the licensing board for a determination of relevancy and merit. After hearing argument from each of the parties, the board decides whether the contentions will become issues in the licensing hearing. The number of contentions surviving this prehearing process is usually no more than 20.

Almost invariably the issues raised by the intervenor relate directly to the ultimate findings of fact that the board must make before granting or denying a license. For example, an intervenor's contention might postulate a steam line rupture leading eventually to a serious accident. There can be no question that the steam line is adequately constructed and is within the sphere of the required finding of safety. In most instances intervenors simply deny that the applicant has complied with an explicit AEC standard which must be met before a license can be issued. This, then, is the context in which the various policy considerations must be analyzed and balanced.

Applicants eager to begin constructing or operating a nuclear facility vigorously argue that fairness and administrative efficiency require that some burden of going forward be placed upon intervenors. They contend that without imposing some evidentiary burden there is no way to protect the administrative process or the applicant from frivolous contentions contrived to delay the licensing of a multimillion dollar facility. The floodgate argument, used to bar public intervenors so many times in the past, is here resurrected once again.[104]

Viscerally, one might be inclined to sympathize with the applicant. Perhaps a modest burden should be imposed upon a public intervenor to show that his claims have merit. Otherwise, if they are frivolous, the applicant and the agency will suffer needless delay and expense.[105] There are, however, countervailing considerations.

In order to obtain permission to utilize special nuclear material, with all of its inherent hazards, an applicant must demon-

[104]In *Church of Christ*, Judge Burger gave short shrift to the floodgate argument raised against allowing intervention. He noted that the prohibitive cost of participating in litigation would serve to discourage the bringing of frivolous claims.

[105]Giving the intervenor the benefit of the doubt for the moment, its original petition to intervene is prepared without the benefit of discovery. Consequently some of the contentions will be well founded while others may be based upon a misunderstanding. However, once intervention is granted and discovery proceeds, the responsible intervenor will

strate to the satisfaction of the Commission that the proposed facility meets all of the requirements of the Atomic Energy Act as well as the Commission's regulations. These requirements include the ultimate findings that must be made, as well as detailed design and operational criteria.[106] The applicant, as the proponent of an order granting the license, must bear the risk of nonpersuasion on these issues and the burden of presenting sufficient evidence to establish a prima facie case. Presumably, absent intervention or a contested proceeding, the applicant could sustain this burden solely with the introduction of documentary evidence addressing the applicable standards and criteria.[107]

After viewing the applicant's evidence, the board then makes findings on the ultimate issues, *e.g.*, the plant has been designed and constructed in accordance with the Commission's rules and regulations; the applicant is technically and financially qualified; and there is reasonable assurance that the facility can be operated without endangering the health and safety of the public.

As noted earlier, an intervenor's contentions will frequently deny an applicant's compliance with certain specific criteria, criteria on which the applicant must make a prima facie showing irrespective of the intervenor's presence. In such a case the intervenor has done nothing more than place the parties and the board on notice that it intends to challenge the applicant's evidence and rebut it if his fears are not assuaged or if he considers it necessary. To impose any initial burden upon an intervenor when the Commission's own criteria are in question makes little sense and can result only in delay and inefficiency.

Those contentions which do not call into question the appli-

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narrow its contentions, making them more accurate and more specific. If discovery works properly, *i.e.*, if there is a free interchange of information between all parties, then those contentions based upon a misunderstanding will be satisfied and laid aside. A serious intervenor should not wish to jeopardize his valid claims by alienating the board with frivolous ones.

[106]10 C.F.R. §§ 50.55-.55(a), .57 (1973).

[107]Commission regulation requires an applicant to prepare a multivolume Final Safety Analysis Report (F.S.A.R., Preliminary Safety Report for a construction license) and draft a Detailed Environmental Statement covering all aspects of the facility's compliance with design and construction standards and all deleterious effects upon the environment. These documents form the basis of the applicant's evidence and if unchallenged might be sufficient to establish a prima facie case. 10 C.F.R. §§ 2.743(g), 60.34(a), (b) (1973). Section 2239 seems to contemplate just such a result where the Commission can make the requisite findings upon an operational license application without a hearing absent a protest by any person whose interest may be affected. 42 U.S.C. § 2239 (1970).

cant's compliance with existing specific criteria but are nevertheless directly related to an ultimate finding do nothing more than focus upon deficiencies in the applicant's case. If, for example, the applicant must prove that his plant is safe, then he must convince the board by direct evidence, by inference, or whatever, that every aspect of the facility is safe. It is of course beyond the mortal competence of the applicant to show that his plant is universally safe; however, when licensing the use of such inherently hazardous material, the board should not compromise the goal or the public interest. It should not permit the applicant to escape his duty when deficiencies in his case are revealed.[108] If the intervenor's issue relates to safety, or any other required finding, then as part of the whole it is legitimately a component of the applicant's case. As such, the applicant must meet the specific issue in order to establish its prima facie case or suffer an unfavorable finding on the ultimate or general issue. Administrative economy would dictate that the issue should be met by the applicant at the same time it comes forward with evidence with respect to other specific issues in the proceeding.

Ideally, the question of who should come forward with evidence in an administrative hearing should have no quantitative legal significance for any of the parties. Once all the evidence is before the board it is sufficient that a determination whether the grant of a license would be in the public interest can be made. If an intervenor is to have any initial burden with regard to issues related to the ultimate findings, neither the applicant nor the Commission should be free to ignore such issues simply because the intervenor fails to establish a prima facie case.[109] Nuclear energy is so hazardous that no question about safety ought to remain unresolved. The applicant and the Commission have a duty to the public to explore every conceivable hazard, every perceived problem, without imposing legal standards that operate to foreclose inquiry.

The risk of litigating frivolous issues is considerably lessened by the Commission's prehearing procedure. It is arguable that, because the board makes a judgment as to the merit of an issue before permitting it to be litigated, it has, in effect, adopted the issue, and the intervenor need not establish a prima facie case at all.

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[108] *See* Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

[109] *See* text accompanying note 92 *supra*.

The danger posed by procedural traps inherent in requiring an intervenor to come forward and establish a prima facie case is greatly enhanced in a field as technical as nuclear engineering. A facility is designed and built by an applicant with all of its multifarious experts. The Commission with its expert regulatory staff reviews the design and monitors the construction. But a public intervenor with limited resources and limited expertise is severely handicapped in the gathering and processing of information.

The information relevant to the intervenor's contentions is peculiarly in the hands of an applicant. With its vast resources and abundance of experts, the imposition of the burden of going forward upon an electrical utility will create slight inconvenience. Any hardship would be miniscule when compared with the risk which would be created by placing an evidentiary burden upon an intervenor.

Availability of information has frequently been used to determine the placement of the burden of going forward. When a party is specially or peculiarly in possession of information relevant to the proceeding, then it has, and rightfully should bear, the burden of initially coming forward with evidence on the issue.[110] When it is recognized that a party lacks the expertise and the resources to effectively establish a prima facie case, then no initial burden should be placed upon it.[111]

Congress provided for public participation in nuclear facility licensing proceedings primarily because it wanted local citizens to be informed about the awesome and hazardous force placed in the midst of their community. Secondly, legislators wished to insure that the agency would be accountable to the public for its actions. Both of these reasons argue in favor of full discussion of all the issues raised irrespective of any burden of going forward.

CONCLUSION

In conclusion, the placement of the burden of going forward in administrative proceedings is initially a neutral factor whose eventual assignment depends ultimately upon considerations of policy. A public interest intervenor participating in atomic energy litigation is under a duty to present all of the information within its possession to the licensing board. But because of its role

[110]9 WIGMORE § 2486.

[111]National Airlines, Inc. v. CAB, 300 F.2d 711 (D.C. Cir. 1962).

in the proceedings and because of its relative lack of information and expertise, the attention given the intervenor's issues should not depend upon whether he is able to establish a prima facie case. All of the issues raised should be fully explored and resolved to the satisfaction of all the parties. On balance, it would seem that the most efficient approach would be to have the applicant proceed first with regard to all the issues raised in the proceeding, with the intervenor following.