Testimony of
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On Behalf of
National Mining Association

Before the
Committee on Health, Education, Labor and Pensions
United States Senate

April 27, 2010

Mr. Chairman and members of the committee, thank you for providing the National Mining Association (NMA) the opportunity to share our thoughts on: (1) whether the Federal Mine Safety and Health Act of 1969 as amended and as administered by the Mine Safety Health Administration (MSHA) is an effective tool to ensure safe worksites and safe operator behavior; and (2) whether the enforcement authorities of the Act, including the assessment and adjudication structure, are sufficient to create a culture of compliance at the nation's mines.

Allow me, again, to express the condolences of the entire mining community to the families of those who tragically lost their lives at the Upper Big Branch (UBB) mine. Our thoughts and prayers are with all who were touched by this tragedy, and our heartfelt thanks are extended to all of the rescue personnel who worked so tirelessly to recover the fallen. We also commend President Obama and Vice President Biden for giving appropriate recognition and solace to the mining community at Beckley, West Virginia last weekend.

Commitment to a Complete, Impartial and Transparent Investigation

I come here today to assure you that the full resources of American mining will join with state and federal agencies, academic institutions and other professionals to find out what happened at the Upper Big Branch mine and why it happened. This will require a thorough review of the roles played by all parties – mine management, miners and federal and state regulators – who were shaping the policies and procedures at the mine prior to the accident. We do not accept this or any mining tragedy as inevitable. Preventing a reoccurrence must include a complete and transparent examination of the actions of all parties. At the very least, we must use Upper Big Branch as a tool to further improve mine safety.

For those reasons we applaud the decision of Secretary of Labor Solis to request an independent party to undertake a review of MSHA's actions leading up to and following this tragic event. This will ensure an impartial and open investigation. As in the past, numerous valuable reports will emerge from the examination process that is now underway. Despite inevitable overlaps, the forthcoming analyses, findings and recommendations must be evaluated and decisions to implement the recommendations must be made quickly to better protect miners.

We understand the significance of the task we face—to ensure a tragedy like this one is not repeated. Our goal remains to bring all miners home safely from their important work. That is the responsibility American mining owes all who work in our mines, and it is the debt we owe those who perished.

We join with others here today to ensure that from this tragedy will emerge stronger resolve and more comprehensive cooperation in our pursuit of safer mines. Our expectation is that from this and similar hearings and from the exhaustive investigations underway we can do better what we've tried hard to do well.

Last week in remarks to the nation, President Obama stated that all miners deserve "a company that's doing what it takes to protect them, and a government that is

looking out for their safety." We agree. American mining has made significant investments in and commitment to mine safety in recent years and has successfully lowered our rate of injuries. Last year was the safest year in history for all of U.S. mining and for coal mining. We understand, however, that this accomplishment offers little solace to the families that lost loved ones. The loss of life at the Upper Big Branch Mine calls our progress into question. We understand that. Only when the lessons learned from this tragedy are clearly identified and woven into the fabric of daily operating procedures can we expect to realize the full results of our commitment to safety.

As this committee considers what it will hear today and the results of the investigations that are currently underway, it is appropriate to consider if existing enforcement authority is sufficient to protect miner safety. Put another way, we should consider whether the enforcement process is properly focused on quality workplace inspections and the appropriate application of the full range of enforcement authority provided in the law.

MSHA's Enforcement Authority is Sufficient

In our view, the enforcement authority provided MSHA under the Mine is sufficient to ensure that mine operators are providing a safe and healthy work environment for their employees. The Mine Act goes well beyond the authority provided to the Occupational Safety and Health Administration (OSHA), for example. Unlike workplaces in general industry, mines are currently subjected to mandatory inspections during which inspectors have the authority to enter without a warrant, evaluate an entire mine and withdraw miners from any area of a mine for failure to abate cited conditions, for unwarrantable failure to comply with mandatory standards, and in any area that presents an imminent danger. Withdrawal orders may be issued on the spot by any authorized representative of the Secretary. This is the most powerful enforcement tool afforded any enforcement agency.

Many mines, because of the time needed to conduct an inspection, have inspectors on site nearly every day. Additionally, the Mine Act contains individual civil penalties for corporate officers and agents for knowing violations and possible criminal sanctions of one-year for accidents not involving a fatality. In sum, the enforcement powers under the Mine Act need to be used when conditions warrant, and if MSHA was not using them to their fullest extent, Congress should examine the reasons for that before increasing the enforcement power. (Attachment 1 summarizes MSHA's critical enforcement authority.)

Much attention also has been focused on MSHA's use of the "Pattern of Violation" authority under the Act. While we can speculate on whether or not placing UBB under a Pattern of Violation would have prevented the events of April 5, we must recognize that MSHA has other enforcement tools that accomplish the same result as the pattern provision. In fact, the "imminent danger" withdrawal authority of the Act, unlike "Pattern," does not even require the finding of a violation of a mandatory health or safety standard before a withdrawal order can be issued.

Hence, “imminent danger” authority is a far more powerful enforcement tool than the “pattern” authority.

Backlog in Contested Citations is Untenable and Must be Addressed

Let me turn now to the citation and appeals process and clearly state that the current backlog in contested citations is untenable and must be addressed. Let me be equally clear that when a violation is cited, the mine operator must abate the underlying cause within the time set by the mine inspector. The abatement action is not subject to appeal: It must be taken. This requirement is also unique to American mining. (See attachment 2)

Once the underlying condition has been abated, only then can the merits of the original alleged violation and the resulting penalty be contested. Recently, attention has focused on the rate at which mine operators have been formally contesting citations and actions, including citations and withdrawal orders issued by MSHA. Attention has also focused on whether this has prevented the agency from instituting additional sanctions, including “Pattern of Violations” enforcement. This matter was thoroughly discussed at a February hearing before the House Education and Labor Committee. While reasonable people may disagree on the cause for the backlog of cases pending before the Federal Mine Safety and Health Review Commission, all agree that this situation cannot continue. The backlog does not serve the interest of miners or the interest of mine operators. We pledge to work with Congress to eliminate it.

Reducing the backlog will require, among other things, the commitment of additional resources to fund the hiring of new staff at the Commission and within the Department of Labor’s Office of the Solicitor. Attachment 3 contains a summary of the evolution of the agency’s conference system for citations and actions and our additional recommendations for improving the current system.

Potential Causes of Appeals to Citations, Orders and Penalties

Looking beyond the immediate task of reducing the backlog, we need to examine the causes and what must be done to prevent a reoccurrence. During his testimony before the House, MSHA Assistant Secretary Main outlined several steps he was considering to address this problem. While details remain to be worked out, we support the thrust of his views and look forward to working with him and all stakeholders to eliminate the backlog.

To fix an appeals process that all agree is broken, it is important to understand why it is broken. Allow me to offer our observations on the causes of the increase in appeals—many of which we share with Assistant Secretary Main. Key among the contributing factors is the subjectivity of the citation and order process, the discretionary authority of the inspector and the related influence of inspector training and experience. The regulations upon which inspectors base enforcement actions are predominately comprised of performance-based standards. The interpretation of these standards is based on individual circumstances and can vary

from inspector to inspector and between inspector and operator based on the facts unique to the cited condition or practice.

The penalty amounts, which have also increased, are not only based on the inspector's enforcement discretion in alleging a violation of a standard, but also on the inspector's conclusions on a number of other factors, all of which are discretionary based on his or her interpretation of the circumstances surrounding an alleged violation. These factors can have a profound impact on penalty amounts. They include likelihood of occurrence, severity of injury, degree of negligence and the number of persons affected by the allegations, to mention only a few of the considerations that are set out in the regulations and in the Mine Act and influence the penalty calculation.

Because there is unavoidable subjectivity in the citation and order process and wide discretion is afforded the inspector when characterizing violations under the penalty criteria, inspector training and experience can have significant influence on the outcomes as was pointed out in the recent Department of Labor, Office of the Inspector General report on required retraining of inspectors. (Report Number 05-10-001-06-001, March 30, 201)

Until Feb. 2008, an informal consultation process was used to revolve most of the disagreements between the inspector and the mine operator that arose from the subjective interpretation of performance-based standards and the discretionary authority of the inspector in assessing factors that affect penalties. When that process was suspended, all differences were, by default, thrown into the appeals process. There was, however, no commensurate increase in resources to handle the inevitable growth in what are now classified as "formal contests" simply because they are pending at the Commission, rather than at the agency. Between higher fines and the elimination of lower level conferences, appeals were inadvertently incentivized because any disagreement over any aspect of the inspector's enforcement discretion became subject to a formal contest proceeding.

Allow me to restate our commitment to work with Congress and MSHA to eliminate the backlog while preserving operators' due process rights. NMA and MSHA have both offered suggestions for achieving that objective, and we look forward to additional productive recommendations from this committee and others.

Mine Safety Goes Beyond Regulatory Requirements and Enforcement

Beyond the enforcement arena, we need to examine what programs, procedures and practices are working and disseminate that information across all of mining. We have worked with companies to foster the implementation of risk management processes, and we've launched a risk-based safety awareness campaign targeting known hazards. We initially focused attention on selected areas of mining operations with the highest accident rates and then built voluntary awareness programs around each one. Going forward, we envision a larger effort to ensure that best practices and procedures and information on promising techniques and technologies for reducing accidents on the job are shared throughout mining

Our efforts are singular in focus, to bring all miners home safely from their important work. In the end, mine and miner safety is the operator's obligation and must be their highest priority. To the extent they fall short regulators provide a needed safety net in the full meaning of the term. If unintended consequences of policies have diminished MSHA's perception of its authority, we have a shared mission to rectify that situation.

Attachment 1

CRITICAL ENFORCEMENT AUTHORITY OF THE FEDERAL MINE SAFETY AND HEALTH ADMINISTRATION

I. Enforcement Authority

Citations

- MSHA may issue a citation for violation of the 1977 Mine Act or for violation of a mandatory health or safety standard, rule, order or regulation. A citation requires that corrective action be taken by the mine operator to correct the condition or practice cited, but it does not result in the cessation of the activity or equipment at issue. A citation shall be issued with reasonable promptness, shall be in writing, and shall describe with particularity the nature of the violation, including reference to the statutory or regulatory provision alleged to have been violated. Further, "the citation shall fix a reasonable time for the abatement of the violation." Citations may be characterized as "significant and substantial."
    - The term "significant and substantial" refers to the gravity of, or the degree of hazard or risk posed by, the alleged violation. The Commission has held that "[a] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazards contributed to will result in an injury or illness of a reasonably serious nature."
- Additionally, MSHA may issue an unwarrantable failure citation for a violation that could significantly and substantially contribute to a health or safety hazard and resulted from a heightened degree of negligence, such as indifference to health and safety. This starts the cumulative enforcement action known as the "unwarrantable failure" withdrawal order chain, which the operator remains on until there is an intervening inspection that reveals no further violations resulting from heightened negligence.
    - The term "unwarrantable failure" refers to the operator's degree of fault or negligence in causing a violation or allowing it to exist. The term has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence."

Withdrawal Orders

- A withdrawal order may be issued on the spot and without a hearing and results in the immediate closure of the area, equipment, or practice that is alleged to be in violation of the standards. All personnel associated with the condition or practice must be withdrawn, except those persons necessary to correct the violation.
- Every withdrawal order issued requires that the inspector determine the "area affected" by the condition, which depends on the nature and extent of the hazard specifically identified. Depending on the facts and circumstances, a withdrawal order could include, for example, a piece of equipment or area of a mine, or it could affect an entire mine depending on the nature and extent of hazard.
- Withdrawal orders may result from failure to abate a violation within the time prescribed under section 104(b).
- An unwarrantable failure withdrawal order may be issued subsequent to a section 104(d)(1) citation during the same inspection or within 90 days after issuance of such a citation if violations result from heightened negligence (and regardless of whether any serious hazard is presented) until a complete inspection of the mine reveals no further heightened negligence violations.
- MSHA has withdrawal order authority under section 104(e) of the Mine Act for significant and substantial violations following written notice from MSHA of a "pattern of violations." This is also a cumulative enforcement process that results in the issuance of a withdrawal order every time a violation is found to "significantly and substantially" contribute to a serious hazard until an entire inspection of the mine reveals no further "significant and substantial" violations.
- MSHA has the authority to issue a withdrawal order under section 107(a) if an imminent danger is found by an inspector, which is a condition or practice "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." A finding of an imminent danger does not require a finding of a violation of a mandatory health or safety standard.
- MSHA may issue a withdrawal order for untrained miners under section 104(g) of the Mine Act, which affects every miner deemed to have inadequate training and forces the withdrawal of such miners until they have received the required training.

II. Injunctive Authority

- The 1977 Mine Act authorizes MSHA to pursue a civil action against an operator in federal district court seeking relief, including temporary or permanent injunctive relief or a restraining order. MSHA may seek such relief whenever a mine operator or its agent refuses to comply with any order or decision issued under the 1977 Mine Act; interferes with, hinders, or delays MSHA from carrying out its duties; refuses to allow an inspection or accident investigation; or refuses to provide other information or documents.

III. Penalty Assessments Criteria

- A mine operator who receives a citation or a withdrawal order is subject to a maximum civil penalty of $70,000, unless the violation is deemed to be "flagrant," which can result in a maximum civil penalty of $220,000. "Flagrant" violations are "[a] reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."
- Any operator who fails to correct a violation for which a section 104(a) citation has been issued may be assessed a civil penalty of not more than $7,500 per day that the condition is allowed to continue unabated.
- MSHA must impose a minimum penalty of $5,000 for failure to timely notify MSHA of an accident involving the death of an individual at the mine or an injury or entrapment of an individual at the mine that has a reasonable potential to cause death. And, minimum penalties must be assessed for unwarrantable failure violations at $2,000 for citations or orders issued under section 104(d)(1) and $4,000 for orders issued under section 104(d)(2).
- Civil and/or criminal penalties may be imposed by MSHA/DOJ on agents, officers and directors who knowingly authorize, order or carry out violations of mandatory standards.
- Criminal penalties may be imposed on any person who knowingly falsifies a record or document required to be maintained under the 1977 Mine Act.

Attachment 2

MSHA/OSHA Comparison

MSHA	OSHA
No state Plans	State plans
Annually, two (2) mandatory complete inspections for surface operations; four (4) mandatory complete inspections for underground operations	No mandatory inspections
No general duty clause	General duty clause requirement that employers correct hazards irrespective of defined regulatory requirements
Mandatory penalties for all citations	No mandatory penalties for all citations
Inspectors have closure order authority for failure to abate, unwarrantable failure, and imminent danger conditions	Closure orders by court order only
Individual civil penalties for corporate officers and agents for knowing violations and possible. criminal sanctions of one year possible for accidents not involving a fatality	No individual civil penalties for corporate officers. Six-month criminal sanctions for fatality-related incidents
Injury &illness reports and statistics are required to be submitted to MSHA for each incident by each mine site	Injury & illness reports and statistics are required to be maintained in a log and made available for review but not reported
Mandatory new employee training: 40 hours for underground miners, 24 for surface miners. Mandatory refresher and task training	No mandatory minimum general training required. Training required by specific standards
Regulatory requirements are supplanted by required site operating plans that must be approved by MSHA. Plan provisions are enforceable as if they were regulatory requirements	No general plan approval authority
Employee representative entitled to inspection walk-around pay	No walk-around pay
Individual employees may bring discrimination cases based on safety even if MSHA refuses to prosecute a case	No private right of action for safety discrimination case

Attachment 3

Mine Safety and Health Administration
Citation/Conference System

I. History of Enforcement Actions (The Initial System)

Mine Safety and Health Administration regulations in 30 C.F.R. Part 100.6 provide for an informal resolution of questions regarding enforcement actions. This history timeline begins with the adoption of the Alternative Case Resolution Initiative (ACRI).

During the Clinton Administration in 1994, ACRI was developed with MHSA and the Office of the Solicitor joining together and designating Conference/Litigation Representatives (CLR). The CLR was an inspector trained by the Solicitor to handle the informal conferences that the District Manager was required to conduct. By 2001, the CLRs were handling all the safety and health conferences and about 35 percent of the total number of cases that operators contested (the Solicitor placed limits on what type of cases the CLRs could handle). An MSHA Fact Sheet (95-9) has the following quote:

> Mine operators may also seek informal conferences following the issuance of the citation or order under 30 C.F.R. Part 100.6. The CLRs in Coal Districts and Supervisory Mine Inspectors in Metal/Nonmetal Districts primarily serve on behalf of the District Manager and meet with the operator to attempt an informal resolution of the dispute before a civil penalty is assessed.
>
> This widely recognized and highly commended program is one of the few times that non-lawyers have represented a Cabinet-level official in a legal proceeding. As of Aug. 30, 2001, MSHA has trained over 100 enforcement personnel to act as CLRs for the ACRI program and there are CLRs designated in each MSHA district office. The CLRs are currently responsible for processing approximately 35 percent of the total number of cases contested by mine operators.
>
> MSHA and the mining community are reaping the benefits of the ACRI program. The CLRs efforts have reduced formal litigation, improved relations between MSHA and the mining community, improved communications between MSHA's inspectors and the legal community, and permitted the dedication of legal resources to more complex and serious cases.

As noted, this system worked reasonably well. Some key points as to why the conferences seemed to work include:

1. The request for a safety and health conference had to be made within a 10-day period.
2. Most CLRs did not require the operator to list in writing the arguments to be presented at the conference.
3. Non-Significant & Substantial (non-serious) violations were assessed at a set dollar value regardless of the inspector evaluation. Few non-S & S violations ever went to conference and very few ever were entered in the ALJ system.
4. In many instances the CLRs were used by the District Managers as "instructors of the law" so that changes in evaluations were passed through the MSHA system as a teaching tool to reduce improper enforcement. Conversely, the same applied to operators, who learned why a violation was appropriately evaluated in a certain manner and how its impact on safety could be used to train employees on preventative actions.
5. The CLR made decisions based on the facts of the case presented at the safety and health conference.

II. The Interim System

Beginning early in the last decade, MSHA embarked on a "new hiring" process to replace retiring inspectors. Additionally, as a way to accomplish MSHA's mandate to complete "100 percent" inspection, MSHA determined that a reallocation of resources was needed. A casualty of that reallocation was the demise of the consultation process. In sum, the agency initiated several actions that, when viewed in total, wrecked the previous safety and health conference system and gave rise to the situation we find ourselves in today. The following timeline of administrative actions shows the evolution of today's flawed system:

Oct. 26, 2006

- MSHA publishes the standard that is intended to be used for determining flagrant violations. (PIL I06-III-04 now released as PIL I08-III-02) Repeat history is defined as the third allegation of unwarrantable failure of the same standard in 15 months.

April 27, 2007

- The new Part 100 civil penalty regulations are released. Assessments for violation are dramatically increased. In addition the single price penalty for non-serious, non-S&S violations is dropped. (Attachments 2 and 3 document the significance of these changes for hypothetical, but routinely issued violations, under the old and new penalty formulas).

June 14, 2007

- MSHA issues its first list of Pattern of Violation (POV) mines. Two of the many selection requirements are: two elevated enforcement actions and 10 (surface) or 20 (underground) S&S violations in a 24-month period.
- Note that on Dec. 7, 2007; June 17, 2008; March 16 2009; and Oct. 7, 2009, additional lists of mines that were categorized as potential POV mines were released.

Oct. 4, 2007

- MSHA announces the "100 percent" plan for meeting mandatory inspection requirements. CLRs, who were already postponing citation conferences, were now assigned to inspections.

Feb. 4, 2008

- MSHA issues PIL I08-III-1. This PIL essentially formalizes the end to manager's conferences. Informally, prior to this date, and for most of 2007, conferences were not being scheduled. After this date, all the previously requested but unscheduled conferences were placed in the administrative system.

IV. Present System

On March 27, 2009, MSHA published a new model for conferences. Rather than conducting an informal conference prior to receiving an assessment and filing with the Commission, the new system requires the operator to wait until an assessment is received and file after the enforcement action in question is docketed. Now all conferences will take place only after civil penalties are proposed and timely contested. This means that an operator eager to avoid litigation through the conference process must contest the citation, file a written request for a conference within 10 days, wait for a period of at least four to six weeks, receive the proposed penalty assessment, contest the penalty within 30 days of receipt and then have a conference within 90-days, unless an extension is requested (usually by MSHA).

In short, all of the enforcement actions that in the previous conference system would not have reached the Commission are now included as part of the total number of docketed enforcement actions and each such case will remain on the list of contested cases until resolved. The delay created by MSHA's changes to the contest system increases the number of cases that are being challenged through the ALJ system, and it is likely that this number will continue to increase.

The system also creates other bottlenecks that need to be addressed:

- The new system requires the operator to wait for the assessment and to formally contest those violations with which he disagrees.

The Solicitor is then required to respond, and the operator may then be required to formally respond (generally through attorneys). In some districts, the CLR routinely asks for a 90-day stay so that an attempt to settle the case can be made, as is contemplated in the new conference system.

- All of the enhanced conferences require some type of legal paperwork to the Commission to finalize whatever agreement is reached. Again, the more informal pre-assessment system did not include this requirement. Clearly the informal system allowed for a more nimble system where the operator and CLR could resolve a larger amount of cases without burdening the Commission.

- The requirement to contest a citation(s) within 30 days of receipt of the penalty often results in operators' challenging all of the enforcement actions issued by an inspector within a docket due to the sheer volume and the limited time available to examine the allegations underlying each enforcement action and the components that affect penalty assessments.

Conclusion

Beyond the interpretive differences that may exist between an operator and inspector, policy choices made by MSHA have also contributed to the dramatic increase in the Commission's caseload.

All these factors combined to create a process that increased the number of citations at the same time it eliminated an informal procedure for contesting them, forcing operators into a time-consuming, expensive adjudicatory process that does nothing to increase mine safety. In sum these are:

- The new Part 100 civil penalty rules;
- Failure to maintain an effective "close-out" conference at the end of each inspection day;
- The loss of an effective safety and health conference process;
- The loss of an independent conference decision process;
- Timing and grouping of proposed assessments; and
- MSHA's heightened Pattern of Violation criteria and focus.

We believe the conditions that gave rise to the "back-log" can be fixed administratively without legislation. However, doing so requires all parties to recognize that:

- All conditions affecting mine safety are abated by the operator within the time set by the inspector and prior to adjudication of the dispute.

- The convergence of increased enforcement actions, coupled with the unofficial and then official cessation of safety and health manager's conferences, set in motion a significant increase in

litigated cases. Unfortunately, operators today have no option but the Commission for contesting enforcement actions.

- During the time conferences were unavailable (February 2008 to March 2009) MSHA issued a policy on flagrant violation standards, four patterns of violation cycle letters and a new penalty system under Part 100. Also, we believe an evaluation of violation in many districts would show a pattern of increased gravity that subsequently increased the penalties to a point where a challenge was necessary. Filing for a formal hearing using attorneys and cluttering the "Commission" system is the only avenue available for an operator.

Changes Should be Made in the System

The following are suggested changes that would help unlock the logjam at the "Commission":

- MSHA should improve the training of inspectors and enforcement authorities for recognizing and evaluating a violation. The number of enforcement actions being modified is a clear indication that inspectors are not being properly trained or supervised on how to evaluate a citation. The issue of inspector training was recently highlighted in a March 30, 2010 report of the DOL, Office of the Inspector General, who found failures in the agency's inspector training program.

- Revert to the informal conference (pre-assessment). This conference was more timely and, because it was informal, generated minimal paperwork compared to the more time-consuming, formal system in place today. Unfortunately, many current cases are now handed to counsel due to the requirement for a timely response to a "Commission" deadline.

- Provide the CLRs autonomy from the managers in their district. We have long advocated a different reporting scheme for the CLRs. Having them report, as is currently the case, to the District Manager introduces unnecessary conflict. MSHA should create a separate office where the CLR could report to a more independent review.

- Provide more realistic timeframes for operators to respond to agency notices. The current 30-day response time is insufficient, necessitating operators to initiate enforcement action challenges merely to protect themselves from responding to individual actions because time has expired. Concurrent with this, MSHA should reform the manner in which it bundles dockets to ensure they include only the enforcement actions and related proposed civil penalties from the same inspection.

- Mandate that the CLR and ALJ decisions be used as training tools for inspectors so that better evaluations are completed by inspectors. Having to “re-litigate” settled issues because information is not shared on a timely basis across the agency unnecessarily adds to the Commission backlog and drains scarce resources.