POLICY ISSUE
(Notation Vote)

April 12, 2024 SECY-24-0032

FOR: The Commissioners

FROM: Brooke P. Clark
General Counsel

SUBJECT: REVISITING THE MANDATORY HEARING PROCESS AT THE U.S. NUCLEAR REGULATORY COMMISSION

PURPOSE:

The purpose of this paper is to present, in response to the Chair's recent tasking memorandum, options for the U.S. Nuclear Regulatory Commission (NRC) to reform the agency's process for conducting mandatory hearings.[1]

SUMMARY:

We will first briefly summarize the legal requirements and related procedures applicable to NRC mandatory hearings, including under the Atomic Energy Act of 1954, as amended (AEA), the

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[1] Memorandum from Chair Hanson to Brooke P. Clark, General Counsel, "Revising the Mandatory Hearing Process at the U.S. Nuclear Regulatory Commission" (Feb. 7, 2024) (ML24038A023).

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Administrative Procedure Act (APA), the NRC's own regulations, and the Internal Commission Procedures (ICPs). Next, we will present options regarding the conduct of the mandatory hearing. Under the first three options, the Commission would conduct the hearing: exclusively on the basis of written materials (Option 1), with an added informal meeting component (Option 2) or using a simplified version of the existing oral evidentiary hearing process that reduces preparation burdens on the parties (Option 3). Under two other options, the Commission would delegate hearing responsibilities to the Atomic Safety and Licensing Board Panel (the Panel) (Option 4) or to a senior agency official with a Management Review Board-style review process (Option 5). The options include discussion of using less formal memorandum-based decision documents and eliminating certain procedural steps.

As discussed below, we recommend that the Commission: (1) retain its role as presiding officer for first-of-a-kind mandatory hearings under section 189a. of the AEA, using the simplified hearing process discussed below as Option 1; (2) delegate to a senior agency official "nth-of-a-kind" mandatory hearings under that section, using a Management Review Board-style review process discussed below as Option 5; and (3) delegate to the Panel mandatory hearings required under section 193(b) for uranium enrichment facility applications, using an approach described below as Option 4. The paper will also briefly address the potential for the Commission to consider future rulemaking possibilities.

BACKGROUND:

As discussed in the Chair's tasking memorandum, the NRC is required by the AEA to conduct hearings before authorizing the construction of certain types of nuclear facilities. This requirement applies irrespective of whether any interested person has requested a hearing to challenge the application or the agency's National Environmental Policy Act (NEPA) review.[2] This hearing, referred to as a "mandatory hearing" or an "uncontested hearing," has served as a sufficiency review by either the Commission or an Atomic Safety and Licensing Board, in which the presiding officer assesses the overall adequacy of the NRC staff's review of an application.

The Chair directed the Office of the General Counsel (OGC) to outline the legal requirements applicable to mandatory hearings and present "options to the Commission for conducting mandatory hearings going forward." Consistent with this direction, OGC "broadly consider[ed] available flexibilities in the structure and format of these proceedings (including selection of an appropriate presiding officer)," and the form that the agency's decision might take, as well as "whether procedures for mandatory hearings can, or should, differ for applications that represent a 'first of a kind' review." As part of our evaluation, OGC considered how the options would maintain "the important core of public engagement and transparency" in future mandatory hearings.

DISCUSSION:

Under sections 185b., 189a., and 193(b) of the AEA, the NRC is required to conduct mandatory hearings before issuance of: combined licenses (COLs) for production and utilization facilities; construction permits (CPs) for production and utilization facilities for industrial and commercial purposes and for and testing facilities; early site permits for production and utilization facilities for industrial and commercial purposes; and licenses for construction and operation of uranium

[2] If there is a hearing request from an interested person, that request is addressed under the NRC's separate "contested," adversarial hearing process.

enrichment facilities.[3] The Commission has understood these hearings to require an independent sufficiency review (rather than a *de novo* review) by a presiding officer to "test the adequacy of the staff's review" of the application, with the presiding officer authorized to take appropriate action if inadequacies are found.[4] Although it is an independent review, it is nonetheless a deferential one that does not attempt to replicate the staff's work.[5]

The AEA does not define "hearing" or otherwise specify particular procedures for mandatory hearings under § 189a., though it does require hearings for uranium enrichment facilities under § 193(b) to be "on the record" APA formal adjudicatory proceedings.[6] Various NRC regulations in Title 10 of the *Code of Federal Regulations* (10 C.F.R.) Part 2, subparts A and C establish general procedures that apply to all NRC hearings.[7] These include procedures relating to hearing notices, hearing documents, deadlines, presiding officer designation and authority, motions, evidence at the hearing, transcript creation and correction, and the nature of final hearing decisions.[8] Mandatory hearings for uranium enrichment facilities licensed under § 193(b) must also employ the more detailed hearing provisions set forth in 10 C.F.R. Part 2,

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[3] 42 United States Code (U.S.C.) §§ 2235(b), 2239(a)(1)(A), 2243(b)(1).

[4] *See Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 38-42 (2005).

[5] *See id.*

[6] *See* 5 U.S.C. §§ 554, 556, 557. A limited set of adjudication-related APA provisions apply to § 189a. mandatory hearings. *See* 5 U.S.C. §§ 555, 558.

[7] *See* 10 C.F.R. §§ 2.1(a), 2.2, 2.100, 2.300; *see also id.* § 52.85 ("All hearings on combined licenses are governed by the procedures contained in 10 CFR part 2."); *id.* § 52.97(a)(1) (providing for the Commission to issue a COL "[a]fter conducting a hearing in accordance with § 52.85"); *id.* § 52.21 ("All hearings conducted on applications for early site permits filed under this part are governed by the procedures contained in subparts C, G, L, and N of 10 C.F.R. part 2, as applicable."); *id.* § 52.24 (providing for the Commission to issue an early site permit "[a]fter conducting a hearing under § 52.21"). The Commission has delegated to the Panel mandatory hearings associated with early site permit applications. *See* Staff Requirements—SECY-15-0088—Selection of Presiding Officer for Mandatory Hearings Associated with Early Site Permit Applications and Construction Permit Applications for Medical Isotope Production and Utilization Facilities (Aug. 25, 2015) (ML15238B093) (SRM-SECY-15-0088).

[8] *See, e.g.*, 10 C.F.R. §§ 2.104 and 2.312 (hearing notices); *id.* §§ 2.302, 2.304, and 2.305 (requirements related to documents involved in proceedings); *id.* § 2.303 (requiring NRC Secretary to maintain a docket for each proceeding); *id.* § 2.313 (designation of presiding officers); *id.* § 2.323 (motions); *id.* § 2.328 (setting default policy of holding hearings in public); *id.* § 2.337 (addressing evidence at a hearing, including requiring staff to submit key application-review documents into evidence in CP hearings for production and utilization facilities); *id.* § 2.341 (providing for review of a presiding officer's decision by the Commission, in cases where the Commission was not the presiding officer); *id.* § 2.344 (describing the content of Commission final hearing decisions); *id.* § 2.390 (addressing the need to maintain confidentiality of certain types of information submitted to the NRC).

subparts G and I.[9] While these regulations establish some level of formality, they do not dictate much about the substance of the hearing or the level of resources that must be devoted to a particular proceeding.[10]

The NRC's regulations for implementing NEPA in 10 C.F.R. Part 51 specify certain determinations (often referred to as findings) that the "presiding officer" must make following a mandatory hearing.[11] NRC safety regulations for each facility type also specify various determinations that "the Commission" must make before issuing the permit or license,[12] and presiding officers in mandatory hearings have been treated as responsible for making these determinations. Mandatory hearings held by the Commission in recent years have been conducted under the ICPs.[13]

This paper presents options to reform the mandatory hearing process to increase efficiency, reduce burdens, and maintain public transparency, while continuing to ensure that presiding officers can undertake independent, informed reviews that support the findings. These options are designed to reduce and remove procedures, provide choices for the presiding officer, and streamline mandatory hearing decisions. In our view, the NRC has considerable discretion in establishing these procedures under AEA § 189a.[14]

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[9] 10 C.F.R. § 70.23a ("The Commission will hold a hearing under 10 CFR part 2, subparts A, C, G, and I, on each application for issuance of a license for construction and operation of a uranium enrichment facility.").

[10] The Commission may alter procedural rules on a case-by-case basis with sufficient prior notice to the parties. *City of West Chicago v. NRC & Kerr-McGee*, 701 F.2d 632, 646-47 (7th Cir. 1983).

[11] 10 C.F.R. §§ 51.105 and 51.107. These regulations ensure compliance with *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1118-23 (D.C. Cir. 1971), which held that the Atomic Energy Commission could not lawfully limit mandatory hearings to safety and security issues only with NEPA issues excluded.

[12] *See, e.g.*, 10 C.F.R. §§ 50.35, 52.24, 52.97, and 70.23.

[13] *See* ICPs, ch. IV at 11-20 (Aug. 26, 2016) (ML16250A666). These procedures apply to mandatory hearings regarding applications for reactor COLs and medical radioisotope production facility CPs. *See also* Staff Requirements—SECY-21-0107—Selection of Presiding Officer for Mandatory Hearings Associated with Construction Permit Applications (Mar. 23, 2022) (delegating to the Panel the authority to conduct mandatory hearings for certain CP applications and retaining for the Commission the conduct of the first mandatory hearing associated with a CP application for each specific advanced reactor technology design) (ML22083A045).

[14] *See Citizens' Awareness Network v. NRC*, 391 F.3d 338, 349 (1st Cir. 2004) (holding that even the APA's "on the record" hearing requirements impose "only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.").

A brief discussion is included, following the discussion of specific options, regarding the possibility of the Commission authorizing a rulemaking to address reforms that would require amending NRC regulations.

Options for Conduct of Hearing and Presentation of Evidence

Option 1. Commission presiding, written evidence without oral hearing

The APA does not require oral presentation of evidence in the types of NRC licensing proceedings that involve mandatory hearings.[15] In addition, nothing in the AEA specifically requires mandatory hearings to involve oral presentation of evidence or specifies how evidence is presented.[16] Consistent with that statutory backdrop, the Commission, under this option, would continue its practice of presiding over mandatory hearings, but provide for submission of evidence, and for all Commissioner questions and party answers, if any, to be in written form only.

This approach would eliminate the need for parties to expend resources associated with an oral hearing—parties would not need to put together presentations or prepare witnesses to answer foreseeable questions on a broad variety of topics.[17] Instead, parties would focus exclusively on answering questions that the Commission chooses to ask in writing, while needing to involve only those specific personnel with expertise related to those questions. This approach, though involving significantly fewer resources than the current one, would still yield a record that is sufficient to make the requisite findings. In our view the substantive record generated would be similar to that produced under the current process, while significantly reducing the process burden for all participants.

Under this option the Commission could adopt the following schedule:

- Within one week of public issuance of the final safety evaluation and final environmental review document (e.g., environmental impact statement (EIS) or environmental assessment (EA)), the staff would submit a COMSECY to the Commission, which would

[15] For hearings not required by statute to be conducted “on the record,” such as those under AEA § 189a., there is no APA requirement for an oral evidentiary hearing. For hearings required to be “on the record,” the APA includes an exception to the general requirement of an oral evidentiary hearing that allows agencies to “adopt procedures” for hearings on “applications for initial licenses” that provide “for the submission of all or part of the evidence in written form,” so long as “a party will not be prejudiced thereby.” 5 U.S.C. § 556(d). Thus, even for uranium enrichment facility mandatory hearings, which must be “on the record” per AEA § 193(b), no oral evidentiary hearing is required by the APA absent prejudice to a party, as such mandatory hearings would address “applications for initial licenses.”

[16] While there is no requirement in the AEA that the NRC hold an oral proceeding as part of a § 189a. mandatory hearing, a § 193(b) mandatory hearing, which must be “on the record,” would require an oral proceeding if the applicant made a sufficient showing of prejudice from a written-only approach, consistent with APA requirements for formal, “on the record” proceedings. *See* 5 U.S.C. § 556(d).

[17] Note that while the NRC does not bill fees directly to the applicant for NRC legal staff hours, the NRC does bill fees directly to the applicant for NRC technical staff hours.

serve as the staff's main written testimony for the hearing and would enclose or identify (via ADAMS accession numbers) the key documents associated with the application and the agency's review of it.[18]

- As soon as practicable after the COMSECY is submitted to the Commission, the agency would issue a *Federal Register* notice to inform the public of the mandatory hearing on the papers. The notice would inform the public and the parties of the written-only format and identify how the public may access the written materials that are developed during the proceeding.[19] The parties would continue to submit written materials using established filing methods, under which the NRC's E-filing system is the default.[20] The hearing notice would explain that written testimonial and evidentiary submissions would be treated as hearing exhibits and would not require any separate process for formally admitting them into the record.

- Within 2 weeks after the COMSECY is submitted to the Commission, interested States, local government bodies, and federally recognized Indian Tribes could file written statements.[21]

- Two days after the deadline for submission of interested government statements, the Commission could either issue written questions to one or both of the parties or direct

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[18] We propose use of a COMSECY because the staff would provide a single recommendation that the Commission make the required findings under the applicable NRC regulations, rather than presenting multiple options as is more typical of a SECY paper. We recommend that the staff's COMSECY continue to identify the required findings and its proposed bases for making them. *See* ICPs, ch. IV at 11. The staff's COMSECY need not be substantively different than the information paper it has been providing in recent years; the key difference would be in framing the proposed findings as a recommendation.

[19] *See* ICPs, ch. IV at 12 (specifying the documents the staff must either provide as enclosures with, or identify using ADAMS accession numbers within, its SECY paper under the existing process); 10 C.F.R. § 2.337 (requiring the staff, "in a proceeding involving an application for construction permit for a production or utilization facility," to "offer into evidence any report submitted by the [Advisory Committee on Reactor Safeguards] in the proceeding… any safety evaluation prepared by the NRC staff, and any environmental impact statement prepared in the proceeding").

[20] Since 2007, the NRC has used its E-filing system in adjudicatory proceedings governed by 10 C.F.R. Part 2. Use of the E-filing system and establishment of an electronic docket ensures clear and durable identification of the documents in the hearing record. Although the Commission could rely exclusively on listings of ADAMS numbers (for those documents already in ADAMS), as a practical matter some documents in ADAMS may be updated or revised without the ADAMS accession number changing, which could create uncertainty regarding which version of a document was relied on by the Commission in reaching its decision. Answers to written questions generated during the hearing process and other evidence also are more easily located by interested viewers in a single electronic docket.

[21] We continue to recommend that the Commission permit interested States, local government bodies, and federally recognized Indian Tribes the opportunity to participate in the mandatory hearing process in this way.

the Secretary to issue a brief notice to the parties indicating that the Commission has not identified a need to pose questions to the parties at that time.

- Two weeks after the Commission issues written questions, if any, to the parties, the staff and applicant, as appropriate, would file answers to the questions. The applicant would also have the option to file additional written testimony at this time, irrespective of whether the Commission issued any written questions to the parties.

- Following receipt of any written statements or responses to questions, the Commission would be in possession of the evidence that would form the basis of its sufficiency review. Upon completion of voting (votes would be recorded as responses to the COMSECY), the Commission's hearing decision would take the form of a staff requirements memorandum (SRM).

Under the current schedule in the ICPs, the Commission's goal is to issue and affirm its hearing decision within 4 months of the staff's issuance of the final safety evaluation and final EIS or EA. Under this option, the Commission could significantly accelerate its decision-making timeline, with an aspirational schedule of 3 weeks for issuance of the SRM following receipt of any written statements and responses to any questions the Commission may have asked. The total timeframe under Option 1 therefore would be roughly 8 weeks. To support this shorter timeframe, the Commission would dramatically simplify the written decision issued at the end of the process.

Historically, Commission mandatory hearing decisions have included a comprehensive summary of what occurred at the mandatory hearing stage, including summaries of the specific evidence that was the focus of the parties' written statements, the Commission's written questions and the parties' answers to those questions, and the discussions at the hearing. This summary portion of the decision has accounted for the bulk of the material contained in Commission mandatory hearing decisions and has served to summarize and highlight key elements of the record.[22] The Commission's decision on the sufficiency of the staff's review, however, is expressly based on the entirety of the hearing record, including all the underlying written documentation put into evidence by the parties.[23]

Under this option, the Commission would dramatically reduce the length and complexity of its mandatory hearing decisions, and thus facilitate a shorter decision-issuance timeframe, by streamlining its hearing decisions to focus more narrowly on matters (if any) not already explained adequately by the underlying record documents. Under this approach, the Commission's decisions would include more detailed discussion of specific record evidence only when necessary. For example, detailed discussion would still be necessary to explain the addition of a license condition by the Commission, insufficient documentation that was rectified

[22] *See, e.g.*, *Kairos Power LLC* (Hermes Test Reactor), CLI-23-5, slip op. at 15-41 (Dec. 12, 2023).

[23] *See, e.g.*, *id.*, slip op. at 41 ("We have conducted an independent review of the sufficiency of the Staff's safety findings, with particular attention to the topics discussed above. Our findings, however, are based on the record as a whole.").

based on information developed during the hearing, or that one or more required findings cannot be made.[24]

As noted above, the Commission's decision in the hearing would take the form of an SRM.[25] The SRM would state the findings and determinations made by the Commission and the basis therefor (including listing the record documents that provide the basis for the Commission's determinations) and authorize, authorize with conditions, or decline to authorize, the staff to issue the permit or license and provide any other related direction to the staff.[26] The Office of Commission Appellate Adjudication (OCAA), which has provided key adjudicatory support to the Commission's mandatory hearing process, would prepare and circulate the draft SRM as soon as practicable after the hearing record is closed.[27] Once issued, the SRM would serve as the written documentation of the Commission's hearing decision.[28]

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[24] Relatedly, the hearing decision would become shorter simply by the absence of an oral evidentiary hearing, as mandatory hearing decisions have included summaries of the oral hearing, in addition to the more extensive evidentiary summaries discussed above. *See, e.g.*, *id.*, slip op. at 9-13. It also should be noted that any contested adjudication must be completed to allow the presiding officer to make the requisite findings. *See, e.g.*, *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-9, 75 NRC 421, 428-30 (2012); *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), CLI-16-2, 83 NRC 13, 19-24 (2016) (three evidentiary hearings in contested proceeding completed prior to issuance of the mandatory hearing decision).

[25] The final SRM, together with the COMSECY itself and the Commission's voting record, would be made publicly available. *See* ICPs, ch. II at 6.

[26] Consistent with the presiding officer's responsibility to make an independent decision, the Commission would generally follow the procedures in the ICPs for voting and developing an SRM on a COMSECY—even though this quasi-adjudicatory paper would be submitted by licensing staff rather than OGC or OCAA. Here, the default timeframe for Commission voting on the paper would be based on the milestones identified above, rather than the default schedule under the ICPs for Commission responses to COMSECYs (normally, ten business days). *See* ICPs, ch. III at 6-7.

[27] OCAA has historically provided internal support for the Commission's mandatory hearings throughout the hearing process. Generally, these practices would be discontinued under Options 1 and 2. OCAA's remaining duty would be to prepare the SRM (or other decision vehicle, *see infra* note 28).

[28] The Commission could, of course, choose to retain the traditional adjudicatory-decision format for decisions under this option. Such an order, which would remain an affirmation item, could be significantly streamlined to focus on the same key issues identified here for an SRM. Scheduling and holding an affirmation session on the order could add time to the end of the process as compared to the SRM approach described above, but the Commission has (and has exercised) the flexibility to schedule affirmation sessions on short notice.

Option 2. Commission presiding, in-person meeting with panel presentations; decision based on written materials

This option would expand on Option 1 to add a public Commission meeting, which would include presentations from the staff and the applicant and a non-evidentiary question and answer session with the Commissioners. This option would preserve the public-informational benefits that accrue from the parties' presentations and the public question and answer session. Under this option, the meeting would be like any other Commission meeting—no evidence would be admitted into the record at the meeting, presenters would not be sworn in as witnesses, and the parties would not propose transcript corrections.[29] Accordingly, to the extent the Commission identifies a need for additional information to support its decision, the Commission would pose questions during or after the meeting and the parties would file written answers. In line with this approach, the Commission's hearing decision, although it would acknowledge that the Commission meeting took place, would be based on the written submissions.

Under this option, just as it does for setting the mandatory hearing currently, the Commission would schedule this meeting using its agenda planning process, which would provide sufficient time for the staff and applicant to prepare their presentations. The "adjudicatory" trappings of mandatory hearings under the current process (e.g., admission of evidence, swearing-in of witnesses, opening and closing statements) would not take place. As to timing, the meeting would occur approximately 2 weeks after the deadline for parties to provide written responses to Commissioner questions. The Commissioners would then have 1 week after the meeting to ask written follow-up questions, if necessary, and the parties would provide responses within 1 week thereafter. As under Option 1, the Commission would then look to a goal of 3 weeks to issue a final SRM. Under this option, the mandatory hearing process would take approximately 10 weeks (if the Commission asks no post-meeting questions) or 12 weeks (if the Commission asks post-meeting questions).

Option 3. Commission presides, questions for in-person hearing limited to panel witnesses

This option closely mirrors the current mandatory hearing procedures, but it is tailored to limit the need for prehearing witness preparation. This option would allow the Commission to retain the basic elements of the current hearing process with targeted procedural changes to increase efficiency.

Under this option, the Commission would follow the current process with the exception that questions at the oral hearing would be directed exclusively to the participating panel witnesses, with no expectation that the parties will make other witnesses available to answer questions the panel witnesses are unable to answer. The hearing procedures would clarify that the parties

[29] This simplified process also would obviate the need for the applicant and the NRC staff to prepare a large number of witnesses who, based on the Commission's experience since the 2012 *Vogtle* hearing, historically are prepared and sworn in, but are unlikely to be called upon at the hearing. While the Commission may always explore any issue pertaining to the sufficiency of the staff's review, the panel participants may reasonably expect under this option that the questions posed at the meeting will be within the scope of the topics in the Commission-approved scheduling note that forms the meeting agenda.

would have the opportunity to supplement their responses in writing following the oral hearing to any Commissioner questions. This option would not limit the scope of questions that the Commissioners may ask. Instead, this option would simply eliminate the expectation, which exists under the current process, that the parties must come to the hearing room with witnesses prepared to testify on any topic relevant to the review.[30]

Unlike under Option 2, the Commission would convene an oral evidentiary hearing—consistent with current practice under the ICPs—including presentation of record evidence. Accordingly, as under current practice, the Commission would rely on witness statements made during the oral hearing—whether as part of the oral presentations or in response to Commissioner questions—to explain the basis for the Commission's decision, in addition to the Information Paper and other items in the written record such as any pre- or post-hearing questions and responses (that are here formally admitted as exhibits). This approach is consistent with established NRC practices in hearings on licensing actions. Slide presentations provided by the parties also would continue to be record exhibits.

Under the current process the Commission has gained efficiencies over time and has completed most oral hearings in a single day, notwithstanding the allowance in the ICPs for up to three days.[31] Ultimately, oral evidentiary hearings under this option would not need to last significantly longer than the less formal meeting contemplated under Option 2; the duration would be primarily driven by the number of witness panels, the length of party presentations, and the extent of Commissioner questions. The procedural trappings currently in place at the oral hearing other than the swearing-in of extra staff witnesses (e.g., admission of evidence, opening and closing statements) would be retained under this option.

The only other departure from current practice for Commission-run mandatory hearings would be that the same hearing-decision efficiencies described under Option 1 would apply under this option. Thus, the Commission would issue a decision in the form of an SRM.[32] The Commission would therefore be able to adopt a shorter decision-making timeframe that contemplates issuing a final hearing decision 10 to 12 weeks after the staff issuance of both the final safety evaluation and final EIS or EA—consistent with the timeframe in Option 2 and approximately a month shorter than the current timeframe in the ICPs.[33]

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[30] Although current procedures for Commission-run mandatory hearings contemplate that pre-hearing written questions to the parties "could also serve to focus the parties' presentations at the oral hearing," the current procedures do not confine Commission questioning at the in-person session to any specific topics. *See* ICPs ch. IV at 13-14. As a result, the staff and applicant often make available a large number of witnesses to answer potential questions. At the most recent mandatory hearing, for example, the staff and applicant brought a combined 36 witnesses whose exclusive role was to stand by to answer questions on topics related to their areas of expertise. *See Kairos Power LLC* (Hermes Test Reactor), CLI-23-5, slip op. at 9-10 (Dec. 12, 2023).

[31] *See* ICPs, ch. IV at 14.

[32] As previously noted, although we recommend use of an SRM if this option is selected, the Commission also could issue an abbreviated adjudicatory decision.

[33] The ICPs provide approximately 50 days for the Commission to issue a decision after completion of the mandatory hearing, *see* ICPs, ch. IV at 15-16. Under this option, as in Options

Option 4. Delegation to the Atomic Safety and Licensing Board Panel

Under this option, the Commission would delegate the authority to conduct mandatory hearings to the Panel. The principal benefits of this option are the Panel's extensive expertise in adjudicatory matters, and its organizational independence from the NRC licensing staff. To be sure, the Commission already has delegated certain mandatory hearings to the Panel; these delegations will remain unchanged unless the Commission supersedes its prior direction.[34] The Commission could broaden or narrow this delegation. As a general matter, delegation to the Panel is a sound option for any mandatory hearing, particularly an "on the record" hearing under AEA § 193(b) for a uranium enrichment facility.

The procedural requirements applicable to mandatory hearings under this option would differ depending on which AEA mandatory hearing provision applies. Mandatory hearings for uranium enrichment facilities are subject to the requirements under AEA § 193(b) and associated "on the record" hearing provisions in the APA, and current NRC regulations require use of 10 C.F.R. Part 2, subpart G and I procedures for these hearings.[35] While the uncontested nature of mandatory hearings eliminates much of the procedural complexity in subpart G, enough potential for procedural complexity remains in § 193(b) hearings that the Commission would benefit from the Panel's expertise in hearing administration. Conversely, mandatory hearings for other facilities under AEA § 189a. are not required by NRC regulations to be conducted under a specific subpart of 10 C.F.R. Part 2 setting forth detailed hearing procedures, although certain procedures in subparts A and C of Part 2 that are pertinent to mandatory hearings would still apply, as discussed above. Because of these more limited procedural requirements, the benefits of delegating AEA § 189a. hearings to the Panel are less pronounced than for § 193(b) hearings.

The regulations allow the Commission to give specific substantive and procedural direction, including milestone schedules, to the Panel, which can serve to build efficiencies into the hearing process.[36] For uranium enrichment facility hearings under AEA § 193(b), the additional

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1 and 2, the Commission would have approximately 3 weeks to issue the more streamlined decision.

[34] *See* SRM-SECY-21-0107; SRM-SECY-15-0088.

[35] Global Laser Enrichment has announced plans to seek an NRC license for a Laser Enrichment Facility in Paducah, Kentucky. *See* https://www.nrc.gov/info-finder/fc/global-laser-enrichment-nc-lc.html (last visited Apr. 10, 2024). If that occurs, the staff currently anticipates that a mandatory hearing would occur within three years of the application's submittal.

[36] *See* 10 C.F.R. § 2.334(a); *see also* 10 C.F.R. §§ 2.312(a) and 2.313(a). The Commission has established milestone schedules for mandatory hearings conducted by licensing boards and has included specific direction on substantive and procedural issues. *See, e.g.*, *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 16 (2004) (setting a 30-month milestone schedule and providing direction on environmental issues, financial qualifications, antitrust review, foreign ownership, creditor requirements, and several procedural matters); *AREVA Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-09-15, 70 NRC 1, 12-16 (2009) (setting a 28.5-month milestone schedule and providing other direction); *GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), CLI-10-4,

Part 2 procedures applicable to such hearings do not preclude the Commission from establishing an expedited overall timeframe and providing other direction as appropriate. Subpart G provides that written testimony must be submitted at least 15 days prior to the hearing, which allows the hearing to be held even sooner after prehearing submissions are due than in Commission-run mandatory hearings under the current ICPs.[37] The primary unique element of subpart G that may add to the required timeframe is that a party having the burden of proof must file proposed findings of fact and conclusions of law, as well as a proposed form of order or decision, within 30 days after the record is closed.[38] We also expect that a Board would hold a prehearing conference with the parties to facilitate scheduling of specific hearing activities, most notably the oral evidentiary hearing, consistent with usual practice under 10 C.F.R. § 2.329. For mandatory hearings under AEA § 189a., because there are fewer specific procedural requirements under Part 2, the Board would have additional flexibility to craft a hearing schedule that would fit within the bounds of an overall timeframe established by the Commission.

For uranium enrichment facility mandatory hearings, the Commission could set a milestone for completion of the process and issuance of a decision that is one month longer than the timeframe under Option 3, which would also involve an oral evidentiary hearing, for a total of 4 months, to account for the development of proposed findings required by subpart G.[39] Neither

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71 NRC 56, 66-70 (2010) (setting a 28.5-month milestone schedule and providing other direction).

[37] 10 C.F.R. § 2.711(b); *see also* ICPs, ch. IV at 15 (requiring final staff and applicant pre-hearing filings by a target date of 21 days before the hearing).

[38] 10 C.F.R. § 2.712(a)(1). Subpart G also stipulates that the presiding officer's initial decision becomes final 40 days after it is issued unless a party petitions the Commission for review or the Commission takes review *sua sponte*. *Id.* § 2.713(a). That 40-day period, however, does not directly affect the timing of license issuance, as a license can be issued immediately after issuance of an initial decision that makes the required findings under the applicable licensing regulations. *See* "Louisiana Energy Services Gas Centrifuge Facility, The History of Licensing," app. C, at 10 (ML17076A061) (staff issued the uranium enrichment facility license on the same day that the Licensing Board released its initial decision making the necessary findings as to the staff's review of the license application). Instead, the 40-day finality delay only has a practical effect on the duration of the hearing process if the staff or the applicant were to appeal the initial decision to the Commission.

[39] As acknowledged above in the discussion of Option 1, a contested hearing must be completed in advance of any mandatory hearing decision to enable the requisite findings to be made and may affect the timing of the mandatory hearing decision. This was the case in the *Louisiana Energy Services* proceeding. *See* "Louisiana Energy Services Gas Centrifuge Facility, The History of Licensing," app. C, at 9-10. For example, to accommodate the schedule for the contested hearing and a pending certified question to the Commission regarding the mandatory hearing, the *Louisiana Energy Services* Board issued its mandatory hearing decision approximately one year after the staff had issued both the final safety evaluation and final EIS. The Board's final partial initial decision on the contested hearing was issued on May 31, 2006, and the Board's decision on the mandatory hearing followed shortly thereafter on June 23, 2006. *See id.* The Board met the Commission's milestone schedule for the proceeding. *See supra* note 37.

subpart G, nor the APA statutory provisions for formal adjudicatory hearings, preclude a Board from issuing streamlined decisions using the principles discussed under Option 1. For mandatory hearings under AEA § 189a., the Commission could establish an overall timeframe comparable to that under Options 1 through 3. This timeframe should allow the Board sufficient flexibility to hold an oral evidentiary hearing if needed, and the Board could issue streamlined decisions after these hearings as well.

Option 5: Executive Director for Operations or other senior agency official presides

Lastly, the Commission could delegate the presiding officer role to the Executive Director for Operations (EDO) or to another senior agency official who either is in the Office of the Executive Director for Operations (OEDO) or reports to the EDO. The EDO, organizationally, is separate from, but supervises, the NRC's principal licensing offices. Accordingly, the sufficiency review would fit within the EDO's existing role, and the EDO could conduct a sufficiently independent review if the EDO has not been significantly involved in overseeing the staff's review of the application prior to the mandatory hearing stage. Alternatively, if the EDO has been so involved, or if competing priorities would not permit the EDO to conduct a timely hearing, the EDO could further delegate the presiding officer role to another senior official in OEDO (in particular, a Deputy Executive Director for Operations (DEDO)), or an office director reporting to the EDO with appropriate technical expertise (such as the Director of the Office of Nuclear Regulatory Research), who has not been involved in the staff's review of the application.[40] Mandatory hearings also are non-adversarial, which allows for use of a presiding officer who—like the EDO, a DEDO, or the director of an office reporting to the EDO—is typically neither a lawyer nor an official who regularly serves in a judge-like role.

The process under this option would resemble the well-understood Management Review Board (MRB) process that the staff uses to assess Agreement State programs under the Integrated Materials Performance Evaluation Program (IMPEP).[41] The IMPEP review is, in essence, an

[40] This flexibility to designate an NRC staff official who was not significantly involved in the substance of the review by the licensing offices would ensure that the mandatory hearing review can be appropriately independent, consistent with the Commission's discussion of the purpose of mandatory hearings in CLI-05-17.

[41] The NRC created the IMPEP process to comply with Section 274j. of the AEA. Section 274j. requires the NRC, in its oversight role, to periodically review Agreement States to ensure their radiation control programs are adequate to protect public health and safety and compatible with the NRC's regulatory program.

Briefly, an IMPEP review begins with the radiation control program being reviewed (Agreement State or NRC) completing a questionnaire. The IMPEP team, led by an NRC staff team leader, reviews and evaluates the radiation program performance in several common and non-common performance areas in accordance with written procedures. The team prepares the draft IMPEP report for factual review by the program under review, considers comments, and provides the IMPEP Report to an MRB. The MRB provides senior-level review of the IMPEP team's findings and recommendations. The MRB is chaired by Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs, who has final decision-making authority on the adequacy and compatibility of the program under review. The Director of the Office of Nuclear Material Safety and Safeguards, a Regional Administrator, the General Counsel or her designee, and an Agreement State representative designated by

independent sufficiency review of an Agreement State's or the NRC's materials program to determine the overall adequacy of the radiation program to protect public health and safety and, for Agreement State programs, compatibility with the NRC's program.[42]

Under this simplified IMPEP-inspired approach, upon completion of the latter of the staff's final safety evaluation, or final environmental review document, the staff would so notify the EDO. The EDO would determine the presiding officer. The presiding officer would then appoint no more than four well-qualified, independent staff members to serve as adjudicatory employees; attorneys who were not involved in review of the application would provide legal support for this effort, if needed. The members of the team would be selected on a case-by-case basis to accommodate any novel or unique issues.[43] The presiding officer would issue a publicly available memorandum to the office director responsible for issuing the license that identifies the team members and provides the schedule for the review. The notice of hearing would be published concurrent with the issuance of the scheduling memorandum.

Under this option the presiding officer would adopt the following approximate schedule:

- Within 2 weeks of completion of the latter of the final safety evaluation or the final environmental review document, the mandatory hearing team would review the application and any supplements thereto and the reports documenting the staff's review

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the Chair of the Organization of Agreement States, serve as MRB members. For details on the composition of the MRB, *see The Management Review Board* Statement Agreements (SA) Procedure SA-106 (ML20192A315). The MRB chair conducts a public meeting at which the IMPEP team presents the results of its evaluation of the radiation program on each program element necessary for an adequate and compatible program. During the meeting the MRB members may ask the IMPEP team members questions about the IMPEP report, and the Agreement State or NRC staff from the program being evaluated may provide comments. At the conclusion of the meeting, the MRB chair makes the final NRC findings on the program under review.

[42] The NRC implements the IMPEP program in accordance with Management Direct 5.6 "Integrated Materials Performance Evaluation Program (IMPEP)" (ML19213A024). Procedures for conducting IMPEP reviews and establishment of a Management Review Board are contained in State Agreement Procedures. *See* NRC/Office of Nuclear Material Safety and Safeguards (NMSS) Procedures, https://www.nrc.gov/reading-rm/doc-collections/nmss-procedures/index.html (last visited Apr. 4, 2024).

[43] In anticipation of the Yucca Mountain proceeding and, later, in anticipation of the first mandatory hearings, OCAA worked with OEDO and other offices to establish rosters of adjudicatory employees for a number of technical disciplines. *See, e.g.*, SECY-08-0194, "Identification of Adjudicatory Employees to Support the Commission and the Office of Commission Appellate Adjudication in the Adjudication of a Yucca Mountain Application" (Dec. 19, 2008) (non-public); SECY-08-0070, "Staffing Plan for Expansion of the Commission Adjudicatory Technical Support Program" (May 16, 2008) (non-public); *see also* SECY-04-0119, "Establishment of the Commission Adjudicatory Technical Support Program" (July 13, 2004) (non-public). Maintaining these rosters proved somewhat useful, but they became stale over time and, in the long run, the adjudicatory staff found it was more expedient to identify AEs on a case-by-case basis.

(i.e., final safety evaluation, final EIS or EA, and Advisory Committee on Reactor Safeguards report);

- Follow-up questions (if any) would be posed to the applicant and the staff within 1 week of the conclusion of the review, and the applicant and staff would respond within 1 week of receipt of the questions;
- Within 30 days of receipt of the responses to the questions or, if there were no follow-up questions, within 30 days of the conclusion of the review, the team would prepare a report documenting the team's conclusions regarding the required findings;[44] and
- The hearing would occur within 2 weeks of the completion of the team's report, which would be made public prior to the hearing.

At the hearing, the mandatory hearing team would present the team's conclusions on the required findings. Like an MRB, the hearing would take the form of a public meeting, chaired by the presiding officer with the management representatives from uninvolved staff offices posing questions to the team on the content of the report.[45] Interested States, local government bodies, and federally recognized Indian Tribes would be invited to submit statements (as under the other options presented in this paper). The applicant and the NRC staff would have the opportunity to provide short closing presentations (and make any comments about the report) at the end of the hearing. The hearing would conclude with the presiding officer (1) approving the report without revision; (2) approving the report with revision; or (3) returning the report to the team for further work. The report, upon approval by the presiding officer, would constitute the NRC's mandatory hearing decision. Under this approach, the mandatory hearing could be completed approximately 10 weeks (or 8 weeks if there are no follow-up questions) after the completion of the staff's technical review.[46]

The aggressive schedule outlined above is possible with sufficient preparation prior to the first hearing held under this process. If approved, OGC would propose to partner with the staff and develop an OEDO procedure, based on MD 5.6, *Integrated Materials Performance Evaluation Program (IMPEP)*, that would provide guidance for the mandatory hearing team and the

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[44] Any follow-up questions would be posed to the staff or applicant in time to allow for the inclusion of those responses in the final report. This option would eliminate the staff's preparation of a COMSECY or other paper, with comparable work undertaken instead by the mandatory hearing team in its report documenting its conclusions regarding the required findings.

[45] For example, if a DEDO were to serve as the presiding officer, the representatives could consist of the director or deputy director of RES, the director of OCAA, and a Regional Administrator or Deputy Regional Administrator.

[46] If the Commission approves this option, to support its implementation, we recommend that the Commission clarify that the procedures described in 10 C.F.R. Part 2, subpart C that would otherwise apply to mandatory hearings are not applicable to mandatory hearings conducted under this process, and direct the staff and OGC to develop implementing procedures; we would plan to provide these to the Commission for its information once completed. Notices of hearing associated with mandatory hearings under this option would identify the applicable procedures and refer to this Commission direction to adhere to those alternate procedures.

presiding officer regarding the conduct of the hearing.[47] In developing the procedures, we would propose to streamline and standardize the sufficiency review process to focus on the regulatory findings that must be made under the regulations, allowing the agency to streamline mandatory hearings, while ensuring an independent sufficiency review that maintains an open, public process.[48]

As discussed below with respect to our recommendation, we view this option as most appropriate for "nth-of-a-kind" mandatory hearings. The presiding officer would be bound by precedent from associated first-of-a-kind hearings, with respect to a particular facility design or a particular site (as appropriate).[49] We expect this would obviate the need to reevaluate issues already considered and decided in prior mandatory hearings. The team review envisioned here would reasonably be expected to identify issues that are legitimately novel or unusual. To be sure, certain aspects of the required presiding officer determinations—such as the independent balancing of relevant factors required under Part 51 regulations—will still involve case-specific consideration. But overall, such an approach could dramatically reduce the practical scope of the review the presiding officer must conduct for applications for reactor technologies or applications for facilities at particular sites that the NRC has already evaluated with respect to prior applications.

Rulemaking to Amend Current Requirements in NRC Regulations

As a longer-term matter, the Commission could consider rulemaking to make further, generally applicable changes to the mandatory hearing process. Topics that a rulemaking might consider include whether to remove the express requirement for the "presiding officer" to make the determinations specified in 10 C.F.R. §§ 51.105 and 51.107, which could help facilitate more targeted reviews by allowing the broad regulatory findings to be the formal responsibility of the relevant office director, or adding dedicated mandatory hearing procedures to 10 C.F.R. Part 2 to more clearly delineate between Part 2 requirements that apply to all adjudications and those that apply only to uncontested hearings.

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[47] For example, as part of this procedure, OEDO could develop a template report, similar to that used by IMPEP teams, which would include language regarding the required findings and the team's recommendations to the presiding officer.

[48] This procedure would include flexibilities to account for applications with relatively simple site-specific issues or where the totality of novel issues to be decided is limited, such that the overall timeframe for the hearing can be shortened. In developing the procedures, OGC would work with the staff to ensure that they include sufficient flexibility to simplify the review and/or gain efficiencies in the schedule when the underlying documents under review are simpler, e.g., a standardized microreactor design that bounds all site-specific external hazards and for which an environmental assessment was prepared (or which falls under a categorical exclusion).

[49] For example, the staff anticipates that first-of-a-kind designs will reflect standardized designs that will be repeated in subsequent applications. If this does occur, and if there are not significant modifications to the standardized design from reactor to reactor, it should result in few, or no, novel design-related issues arising in subsequent hearings on facilities of the same design.

In our view, however, the flexibilities available to the Commission today under the existing rules would not be significantly enhanced through a standalone rulemaking.[50] Given the options discussed above for increasing the efficiency of mandatory hearings within the structure of current NRC regulations, and the available option to alter proceedings without rulemaking, we do not recommend that the Commission pursue rulemaking at this time. OGC will, however, identify possible revisions to the NRC's procedural rules in Part 2 as part of any future proposed revision to Part 2.

RECOMMENDATION:

As the Commission's 2022 delegation of the presiding officer role for certain CP mandatory hearings to the Panel reflects, and as the Chair's tasking expressly contemplates, first-of-a-kind reviews merit a different approach than subsequent reviews. A graded approach to mandatory hearings would allow for appropriate focus on unique issues in subsequent applications of a particular facility design or technology or where the NRC is licensing the first facility of a relevant type at a particular site.

With this consideration in mind, OGC recommends that the Commission retain the presiding officer function for mandatory hearings under AEA § 189a. on a first-of-a-kind technology or for the first facility at a particular site, using the written-hearing process described as Option 1 above. We recommend that subsequent hearings under AEA § 189a. be delegated to the EDO as appropriate for the proceeding in question, and undertaken using the process described in Option 5 above. In our view, this approach best accounts for the dramatic advances in public participation in NRC licensing proceedings reflected in the Chair's tasking memo. While conducting mandatory hearings remains a statutory requirement, the Commission has significant flexibility to adapt its hearing procedures to reflect the current landscape. Both Options 1 and 5 call for transparent, public-facing decision-making.

For uranium enrichment facility mandatory hearings under AEA § 193(b), OGC recommends that the Commission approve Option 4, which provides for continued delegation of the presiding officer function to the Panel, but with the possibility of the Commission establishing a case-specific order for each proceeding. The statutory requirement for an "on the record" proceeding and the associated NRC regulation requiring use of 10 C.F.R. Part 2, subpart G and I procedures for these hearings call for greater formality in the process than hearings under § 189a. and would benefit from a Board's expertise, including its ability to appropriately implement procedural efficiencies, in presiding over more complex adjudications.[51] To be sure, the Commission could conduct these hearings itself, using case-specific orders that adopt

[50] Even a rulemaking to transition formal responsibility for making regulatory findings from the presiding officer to the pertinent program-office director would not, in our view, fundamentally change the nature of the presiding officer's sufficiency review that the Commission has found to be necessary to comply with the statutory mandatory hearing requirement. Either way, the presiding officer evaluates the staff's review documentation to determine if it supports the applicable regulatory findings and the presiding officer's determination must then be documented in some form.

[51] If the Commission approves these recommendations, its direction in SRM-SECY-15-0088 and SRM-SECY-22-0107 would be superseded.

procedures modeled after Option 1 or 3,[52] refined as needed to address APA requirements under 5 U.S.C. §§ 554, 556, and 557, and that exempt the hearing from certain Part 2 requirements. But because uranium enrichment facility mandatory hearings are not currently anticipated to be frequent occurrences, OGC does not recommend that the Commission revise the agency's longstanding approach to ensuring compliance with the more complex APA requirements that apply to such hearings when efficiencies can be gained within the current regulatory framework.

In connection with these recommendations, OGC recommends that the Commission approve the development of specific implementing procedures for Option 5, as appropriate, as well as proposed updates to the ICPs, as appropriate, to account for the process changes that would result from implementation of the Commission-approved recommendations.[53]

Finally, in the event the Commission approves revisions to the mandatory hearing process, OGC proposes, in conjunction with the staff and OCAA, as appropriate, to conduct a lessons-learned review following the completion of two mandatory hearings under revised procedures and provide its review to the Commission, together with any recommendations for further improvements.[54]

RESOURCES:

Estimated resource savings for each option are discussed in Enclosure 1.

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[52] Option 2 would not be adaptable to an "on the record" hearing, in our view, as its central feature is a Commission meeting whose content would not constitute part of the formal hearing record. Option 5 would not be appropriate for an "on the record" hearing because, unlike the Commission or a Board, the EDO or another other senior agency official under the EDO would not be a statutorily permissible presiding officer for such a hearing. *See* 5 U.S.C. 556(b); AEA § 191a.

[53] OGC will work with the Office of the Secretary to propose any revisions to the mandatory hearing procedures specified in Chapter IV of the ICPs; these will be subsequently submitted to the Commission for its consideration. Implementation of Commission-approved revisions to the mandatory hearing process as enshrined in the ICPs need not await formal ICP revision. The Commission may waive those procedures by majority vote. ICPs, Foreword, at i. A hearing schedule for a given proceeding that departed from the ICPs would be laid out in the notice of hearing and circulated to the Commission as part of the process associated with issuance by the Secretary of notices of hearing under Chapter IV of the ICPs. *See also City of West Chicago*, 701 F.2d at 646-47.

[54] We expect that criteria for determining whether a given proceeding should use Option 1 or Option 5 procedures may need to be reevaluated over time as the agency gains experience with industry use of standardized designs and multi-unit sites for advanced reactors.

COORDINATION:

OGC coordinated with OCAA, NMSS, and NRR in the development of this paper and the options provided herein and consulted with OEDO. OGC coordinated with the ASLBP in developing the resource implications of the paper's options.

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Brooke P. Clark
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Enclosure:
1. Resource Estimates

SUBJECT: REVISITING THE MANDATORY HEARING PROCESS AT THE U.S. NUCLEAR REGULATORY COMMISSION DATED: APRIL 12, 2024

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