January 21, 2000 SECY-00-0017

FOR: The Commissioners

FROM: Karen D. Cyr /RA/
General Counsel

SUBJECT: PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE

PURPOSE:

To seek Commission approval of publication of a proposed rule which would substantially modify the NRC's regulations governing the conduct of hearings.

DISCUSSION:

I. Background

The Commission commenced a re-examination of its hearing process in 1998. In a Staff Requirements Memorandum dated June 26, 1998, the Commission directed the Office of the General Counsel to draft a Policy Statement on the Conduct of Adjudicatory Proceedings and also to advise the Commission on the legislative and rulemaking options that would further enhance the Commission's ability to utilize informal procedures in any proceeding in which formalized trial-type procedures are currently used. The Commission subsequently issued a Policy Statement which was published in the Federal Register on August 5, 1998. That Notice solicited public comment on the Policy Statement. The Office of the General Counsel submitted its analysis of the hearing process to the Commission in SECY-99-006, dated January 8, 1999. In this memorandum, the General Counsel concluded that, with the exception of hearings on enrichment facility applications filed pursuant to section 193 of the Atomic Energy Act, the NRC has the authority to use informal hearing procedures.

In a Staff Requirements Memorandum (SRM) dated July 22, 1999, the Commission directed that NRC commence a rulemaking effort that would propose retaining formal trial-type procedures only for enforcement proceedings and proceedings for the construction and operation of enrichment facilities. Informal procedures could be used in all other proceedings.

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The Commission directed that the proposed rule contain revisions to the informal hearing procedures in 10 C.F.R. Part 2, Subpart L, and establish a streamlined, "fast track" option. In addition, appropriate portions of the 1998 Statement of Policy on the Conduct of Adjudications were to be codified. In developing the proposed rule, the Commission authorized the use of an enhanced participatory process to gather the views of stakeholders. Finally, the Commission directed that as part of the notice of proposed rulemaking, public comments be sought on a number of specified issues.

On October 26-27, 1999, OGC convened a facilitated workshop involving participants from the nuclear industry, states, public interest groups, the academic community, the ALJ community and the NRC. Transcripts of that workshop are available for Commission review and a summary of the comments made at the workshop is included in the enclosed proposed rulemaking document. In brief, industry representatives generally supported a move towards informal procedures; public interest groups opposed any further efforts to "informalize" the NRC hearing process and strongly supported the use of formal hearing procedures (i.e., adversary proceedings with cross-examination) in all cases. The representative from the State of Nevada expressed strong views that the proceeding on licensing a high-level radioactive waste repository at Yucca Mountain should use formal procedures.

After reviewing the public comments on the Policy Statement and the views of the workshop participants and in accordance with the direction in the July 1999 SRM, OGC has prepared the attached proposed rulemaking package for the Commission to consider. The draft Statements of Consideration accompanying the proposed rule address the major comments received on the Policy Statement and those made at the workshop.

II. Summary of Proposed Changes

The proposed rule consists of three main components: (1) a new Subpart C to 10 C.F.R Part 2 which would consolidate in one subpart the general hearing procedures that would apply to all NRC adjudications, including those procedures that would govern rulings on requests for hearings/petitions to intervene and admission of contentions in every case, would establish criteria for determining the specific hearing process/procedure or track (e.g., formal - Subpart G; informal - Subparts L, M and N; hybrid - Subpart K) to be used in particular cases, and would provide for document disclosure in all proceedings; (2) a substantially revised Subpart L which is enlarged in scope to provide hearing procedures to cover most NRC adjudicatory proceedings; and (3) a new Subpart N that will provide informal "fast track" hearing procedures to be used in appropriate, simple cases.

The proposed new Subpart C -- Rules of General Applicability for NRC Adjudicatory Hearings -- would be the starting point for consideration of, and rulings on, all requests for hearing/petitions to intervene and the admissibility of contentions, and for selecting the appropriate hearing procedures to be applied in the remainder of the case. The Commission, a designated presiding officer or a designated Atomic Safety and Licensing Board would rule on requests for hearing/petitions to intervene and the admissibility of proffered contentions using the standards

and procedures of Subpart C[1]. Where it is determined that a hearing should be held, the Commission, presiding officer or Licensing Board would next examine the nature of the action that is the subject of the hearing and the contentions admitted for litigation, apply the criteria in Subpart C to determine the specific procedures/subpart that should be used for the hearing, and issue an order for hearing designating the procedures/subpart to be used for the remainder of the proceeding. The hearing activities will then proceed under the designated subpart (e.g., Subpart G for formal hearings, Subpart L for most informal hearings, Subpart M for license transfer cases, Subpart N for an expedited "fast track" hearing).

Consistent with the Commission's direction in the July 1999 SRM, the hearing procedure selection provisions of proposed Subpart C would substantially broaden the range of proceedings that would utilize informal hearing procedures. Subject to certain exceptions, the norm will be an informal hearing process. Thus, under this approach, for the first time, all reactor licensing proceedings -- those involving initial licensing[2], license renewal[3] and license amendments -- could be conducted on an informal hearing track. The proposed hearing procedure selection criteria include a provision whereby the formal hearing procedure track of Subpart G would be applied to any reactor licensing proceeding that involves a large number of complex issues that would clearly benefit from the use of formal hearing procedures. It is possible, even likely, that many contested reactor license renewal proceedings (as well as future CP/OL proceedings, if any) will involve a number of complex issues such that the formal hearing procedures of Subpart G would be applied under this criterion. If that is the case, the Commission may wish to consider whether it is the most efficient process to make this decision in each case, or change the proposed rule to designate these cases for Subpart G from the outset.

As to specific procedures for hearings, the proposed rulemaking would retain essentially all of the current procedures specific to the conduct of formal trial-type hearings under Subpart G but would substantially modify the existing procedures for informal hearings in Subpart L to bring them more into line with the current procedures for hearings in Subpart M for license transfer proceedings. The rulemaking would also propose a new Subpart N that contains procedures for a "fast track" hearing. Proposed Subpart N provides for an expedited oral hearing and oral motions and would limit written submissions and the protracted written responses they often entail. Apart from these changes, the primary modifications to Subparts G, J, K, and M involve the removal of provisions that are generally applicable to all proceedings and the relocation of the essence of those common provisions to Subpart C and conforming reference changes. In

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[1] These standards embody the standing and contention admission requirements currently contained in10 C.F.R. §2.714.

[2] Initial licensing for reactors would include the issuance of construction permits (CPs) and operating licenses (Ols) and the issuance of a combined CP/OL.

[3] In the Statement of Considerations for the original (1991) license renewal rule, the Commission stated that it would provide an "opportunity for a formal public hearing" in reactor license renewal cases. 56 F.R. 64943, 64946, 64961 (December 13, 1991). The Commission also noted, however, that "the holding of any hearing in connection with a license renewal is a matter of Commission discretion." 56 F.R. 64961.

addition, a number of changes would be made to Subpart J to remove the formal hearing procedures in that Subpart.

A more detailed discussion of the most significant proposed changes follows.

A. Subpart C

1. Intervention and Contentions. Under the proposed rules, requests for hearing/petitions to intervene and proffered contentions must be filed simultaneously at the outset of the case. This is a change from current requirements which allow the submission of contentions sometime after the request for hearing/petition to intervene is filed. Although the requirement to submit contentions at the time of the petition to intervene will facilitate the selection of hearing procedures/tracks, it may be appropriate to allow more time for the preparation of the petition to intervene/proposed contentions. The proposed rules would provide a minimum of 45 days from the notice of opportunity for hearing.

In addition, specific contentions must be submitted in all proceedings and the proposed contentions must meet the requirements of the current §2.714 to be admitted. Under existing rules in Subpart L for informal hearings, petitioners are only required to identify "areas of concern"; specific contentions that meet the standards of §2.714 are not required. The absence of specific contentions in proceedings under the existing Subpart L has sometimes resulted in unfocused litigation and an evidentiary record that is burdened with material of questionable relevance. To address that problem, the proposed rules would require contentions with a reasonable degree of specificity in every proceeding.

Current agency concepts of standing would continue to be used to determine whether a petitioner is entitled to a hearing as-of-right. In addition, the discretionary intervention standards from the Commission's *Pebble Springs* decision[4] would be codified and applied to any petitioner who addresses those discretionary intervention standards in its petition and who otherwise fails to show that it has standing to intervene as-of-right.

2. Selection of Hearing Procedures. Under the proposed Subpart C, requests for hearing/petitions to intervene must also address the question of what hearing procedures/track should be used for the proceeding. The proposed rules also contain criteria for determining whether a hearing should be conducted under Subpart G (formal hearing); Subpart K (hybrid hearings on applications for the expansion of spent fuel storage capacity at power reactor sites); Subpart L (informal hearings); Subpart M (license transfer applications); or Subpart N (fast track procedures). Under the proposal, proceedings involving an application to construct and operate an enrichment facility would always be conducted under Subpart G (formal proceedings). Enforcement matters would also be litigated under the formal hearing procedures of Subpart G unless the parties agreed to the use of informal hearing procedures. All other proceedings could

[4] *Portland General Electric Company* (Pebble Springs Nuclear Power Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).

be conducted using informal procedures. Thus, as noted earlier, with certain exceptions[5], reactor licensing proceedings would use informal hearing procedures.

Informal Hearing Procedures for High-Level Waste Repository Licensing. As directed by the Commission[6], OGC has formulated rule changes that would provide for the use of informal hearing procedures for the high-level waste repository licensing proceeding. The hearing procedure/track selection provisions of proposed Subpart C would apply the informal hearing procedures of revised Subpart L to the proceeding on the licensing of the HLW repository at Yucca Mountain. Conforming changes -- to require the use of the informal hearing procedures of Subpart L -- would be made to Subpart J.

The move to informal hearings for the repository is a significant change in position and is very likely to engender substantial opposition. While OGC concluded in SECY-99-006 that formal hearings are not required for repository licensing, the Commission has long and consistently taken the position, and raised public expectations, that it would provide a formal hearing for repository licensing. There are good and cogent reasons for using an informal hearing process for repository licensing but the Commission should anticipate a very negative reaction to, and little support for, the proposal to switch to an informal hearing track[7]. That proposal is likely to be very controversial.

3. Case Scheduling and Management. Subpart C also addresses general case scheduling and management, requiring presiding officers to consult with the parties early in the proceeding in

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[5] As noted, the rule would provide that contested reactor licensing proceedings "involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures" may be conducted under the formal hearing procedures of Subpart G. If the Commission retains this provision, OGC recommends that the Commission specifically solicit public comment on what criteria should be used to determine whether a reactor licensing proceeding involves a large number of complex issues that could best be addressed through formal adjudication.

[6] In a January 12, 1999 SRM on SECY-98-225 - Proposed Rule: 10 CFR Part 63 -- "Disposal of High-Level Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada", the Commission directed the staff to note in the Rulemaking Package for Part 63 that

> . . . in the interest of openness, the Commission wishes to say that, at present, the Commission is inclined to provide for informal hearings for both construction authorization and licensing to receive and possess waste. No statute requires formal hearings in either case; EPA conducted none in certifying the Waste Isolation Pilot Project; and informal hearings allow for both greater efficiency and greater openness.

Subsequently, in the SRM on SECY-99-006 - Reexamination of the NRC Hearing Process, the Commission directed OGC to prepare a rule to "modify at least 10 CFRPart 2, Subparts G, L and J [J contains the hearing procedures for HLW repository licensing](Continued next page) so that all hearing requests (except enforcement cases but including reactor and materials licensing matters) will follow a similar path."

[7] Those public interest participants in the October 1999 hearing workshop who expressed views on the matter opposed informal hearings for repository licensing; industry representatives did not enthusiastically support it.

order to set schedules, establish deadlines for discovery (if permitted) and the filing of motions, and set the ground rules for the control and management of the proceeding. Presiding Officers would be required to notify the Commission if there are slippages in the established schedule that would delay the issuance of the initial decision more than 60 days from the date established in the schedule. This notification would include an explanation of the reasons for the delay and a description of the actions, if any, to avoid or mitigate the delay.

4. General Discovery. Subpart C would revise the provisions governing discovery. Based on the provisions of Federal Rules of Civil Procedure - Rule 26, after a matter is set for hearing, there would be prompt and open disclosure of relevant information by the parties and the NRC staff, without resort to formal processes, except if intercession by the Presiding Officer becomes necessary to resolve disputes over disclosure. This would be the only form of discovery that would be permitted in proceedings that are not conducted using the formal procedures of Subpart G or the special discovery provisions of Subpart J.

5. Settlement and Alternative Dispute Resolution. The subpart also addresses settlement and encourages the use of alternate dispute resolution (ADR) methods. The proposed Statement of Considerations discusses various ADR techniques and asks for comments on several questions pertaining to the use of ADR in NRC proceedings.

B. Subpart L

The informal hearing procedures currently set forth in Subpart L have sometimes proven to be unexpectedly cumbersome and inefficient in the development of a record. At times a massive paper hearing record has been developed that is not effectively focused on the issues and is burdened with extraneous, untested material that makes the formulation of a decision difficult and time consuming. In addition, the procedures in the existing Subpart L sometimes result in extensive “motion practice” and litigation on the procedures to use rather than the substantive issues to be decided. To address these problems, existing Subpart L would be replaced with a revised approach. As noted above, petitioners (other than States or Indian Tribes participating as interested governmental entities) would have to file specific contentions and would have to have at least one of those contentions admitted before becoming a party. There would also be limited discovery -- in the form of a general disclosure obligation on all parties -- pursuant to general discovery provision of Subpart C (none is permitted under the existing Subpart L). The provisions regarding staff participation in the proceeding would be generally patterned after those found in the current Subpart L. The NRC staff would not be required to be a party to the proceeding unless: (1) the staff proposes to deny the application which is the subject of the hearing; (2) the proceeding involves an application to receive and possess high-level radioactive waste at a geologic repository operations area or (3) the Presiding Officer determines that the resolution of any issue in the proceeding would be aided materially by the staff’s participation in the proceeding and orders the staff’s participation.

In general, the proposed new Subpart L is patterned after the informal hearing procedures of existing Subpart M. Under the proposed approach, parties could submit initial written statements of position and written testimony on admitted contentions. Parties could then provide written responses, rebuttal testimony, and proposed questions that they believe the presiding officer

should pose to other witnesses. At the oral portion of the hearing, the party would present its witnesses. After the witness adopted his or her prefiled written testimony, the Board would pose questions to the witness. There would be no cross-examination by the parties[8]. After the oral phase of the hearing ended, parties could file post-hearing statements of position on the contentions addressed in the oral hearing. The regulation would also authorize hearings consisting entirely of written presentations, but only if all the parties agreed. The expectation is that written hearings would be used infrequently.

C. Subpart N

This new subpart would contain "fast track" procedures to be used when the issues in the proceeding are limited and not complex, and the hearing is expected to take no more than two days to complete or where the parties choose to use Subpart N. Under this subpart, the parties generally would not submit written pleadings, briefs or motions. Instead, a party would provide a written statement identifying its witnesses and summarizing the testimony of each witness. Parties could provide the Presiding Officer with questions that could be posed to the witnesses at the oral hearing. The oral hearing procedures would be similar to those for Subpart L. The presiding officer could issue a decision from the bench and follow up with a written memorialization. The entire process would be conducted rapidly resulting in substantially shorter and less burdensome proceedings than proceedings conducted under the other subparts.

D. Conforming Amendments

Conforming amendments would be made to Subparts G (formal proceedings), J (repository licensing), K (spent fuel storage applications) and M (license transfer proceedings), largely to implement the move to informal procedures and to reflect that many of the procedures regarding filing requests for hearings, the filing and admission of contentions, and rules governing discovery will be removed from those sections and included as part of Subpart C.

E. Issues Not Addressed

Although the rules are being revised to explicitly provide for electronic filing of documents, many of the details regarding the electronic submission of documents to the NRC will be established in a rulemaking proceeding that will commence later this year. That proceeding will commence only after the Commission has implemented, on a pilot basis, its new Electronic Information Exchange program.

COORDINATION:

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[8] While questioning of witnesses would normally be done by the presiding officer alone, a provision in the proposed Subpart L would allow any party to file a motion to permit cross-examination by the parties on particular contentions. Under this provision, the presiding officer may grant such a motion and allow cross-examination by the parties if he/she determines that a failure to allow cross-examination will prevent the development of an adequate record

The attached rulemaking proposal was provided to the Atomic Safety and Licensing Board Panel on January 21, 2000 for its information and possible comment directly to the Commission. The EDO has been briefed on the proposed rule.

RECOMMENDATIONS:

The Office of the General Counsel believes that the attached proposed rulemaking is responsive to the Commission's guidance in the July 1999 SRM on the hearing process and recommends that the Commission:

1. Approve publication in the Federal Register of the attached notice of proposed rulemaking allowing 60 days for public comment.

2. To satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the attached Federal Register notice.

Karen D. Cyr
General Counsel

Attachment: Draft Federal Register Notice

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN _____

Changes to Adjudicatory Process

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is considering amending its regulations in 10 C.F.R Part 2 to make the agency's hearing process more effective and efficient. The proposed rule changes would establish two new subparts, would revise some sections in Subpart G, which contains NRC procedures for formal proceedings, would make significant revisions to Subpart L, which contains procedures for informal proceedings, and would make conforming changes to other subparts of Part 2. A new Subpart C would be applicable to all Part 2 adjudicatory proceedings and would contain the agency's rules on standing and contentions as well as criteria to determine what hearing procedures should be used for individual adjudications, and puts forth other generally applicable requirements. The other new Subpart
(Subpart N) would establish a "fast track" process for certain NRC adjudicatory proceedings. The proposed rules also codify portions of the NRC's 1998 "Statement of Policy on Conduct of Adjudicatory Proceedings."

DATES: Comments on the proposed rule must be received on or before (60 days after Federal Register publication).

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001. ATTN: Rulemakings and Adjudications Staff.

Hand delivered comments should also be addressed to the Secretary, U.S. Nuclear Regulatory Commission, and delivered to: 11555 Rockville Pike, Rockville, MD, between 7:30 am and 4:15 pm Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website (http://ruleforum.llnl). This site also provides the availability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, (301) 415-5905; e-mail CAG@nrc.gov.

Certain documents relating to this rulemaking, including comments received, may be examined at the NRC Public Document Room, 2120 L Street NW (lower level), Washington, D.C. The same documents may also be viewed and downloaded electronically via the rulemaking website.

FOR FURTHER INFORMATION CONTACT: Stuart A. Treby, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, telephone (301) 415-1644, e-mail SAT@nrc.gov.

SUPPLEMENTARY INFORMATION:

I Background

Among the very first actions taken by the Nuclear Regulatory Commission following its creation in 1975, was an affirmation of the fundamental importance it attributes to public participation in the Commission's adjudicatory process. Public participation, the Commission said, "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have

been entrusted to us." *Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975). The form and formality of the processes provided for public participation, however, have long been debated, well before the NRC was established and well after the foregoing statement was made.

The Commission has undertaken a number of steps in recent years to reassess its processes to identify ways in which it can more effectively conduct its regulatory activities. This assessment has extended across the full range of the agency's programs, from its oversight and inspection program to evaluate and assess licensee performance, to its internal program management activities. One of the cornerstones of the agency's regulatory approach has always been assuring that its review processes and decisionmaking are open, understandable and accessible to all interested parties. Its processes for achieving this goal have been part of the reassessment as well. Recently, steps have been taken to expand the opportunities for stakeholder awareness and involvement in agency policy and decisionmaking through greater use of public workshops in rulemaking, inviting stakeholder participation in Commissioner meetings and more extensive use of public meetings with interested parties on a variety of safety and regulatory matters.

The Commission has had a longstanding concern that the hearing process associated with licensing and enforcement actions taken by the agency is not as effective as it could be. Beginning with case-by-case actions in 1983, and with a final rule in 1989, the Commission took steps to move away from the trial-type, adversary format to resolve technical disputes with respect to its materials license applications. Commission experience suggested that in most instances, use of formal adjudicatory procedures is not essential to the development of an adequate hearing record, yet all too frequently resulted in protracted, costly proceedings. These less formal procedures sought to reduce the litigation cost burden upon applicants and other participants because of the informal nature of the hearing and enhance the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties. A significant portion of the agency's proceedings in the past ten years have been conducted pursuant to these informal procedures. While the Commission's experience to date indicates that some of the original objectives have

been achieved, there have also been some aspects of the procedures that have continued to prolong the proceeding without truly enhancing the decisionmaking process. Given this experience, and with the potential for institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry and to license waste storage facilities, the Commission concluded it needed to once again assess its hearing process to identify improvements that would result in a better use of all participants' limited resources.

To that end the agency recently initiated several actions related to its hearing processes – development of a Policy Statement on the hearing process and a reexamination of the NRC's hearing process and requirements under the Atomic Energy Act as a foundation for possible rule changes.

A. Policy Statement

The NRC published a new Policy Statement -- Statement of Policy on the Conduct of Adjudicatory Proceedings -- in the *Federal Register* on August 5, 1998, CLI-98-12, 48 NRC 18; 63 FR 41872. The Policy Statement is an extension of the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 46 FR 28533 (May 21, 1981), which provided guidance to the Atomic Safety and Licensing Boards (Boards) on methods to improve the timely conduct of licensing proceedings and ensure that hearings are fair and produce adequate records that support decisions made by the NRC. The Policy Statement, which relies on the framework of the current Rules of Practice that govern the hearing process, provides specific guidance for Licensing Boards and Presiding Officers to use, when appropriate, to improve the management and timely completion of proceedings.

Among other things, the Policy Statement urges Presiding Officers/Boards to establish schedules for deciding issues before them. It also reminds Presiding Officers/Boards of their authority to set schedules, resolve discovery disputes, and to take other action required to regulate the course of the proceedings. Case management by the Presiding Officers/Boards is an essential element of a fair, efficient hearing process. The Policy Statement

also provides that the Commission may set milestones for an individual proceeding. If a Licensing Board determines that it would miss any milestone ordered by the Commission by more than 30 days, it is to provide the Commission with a written explanation of the reasons for the delay.

The Policy Statement also sets forth the Commission's expectations of the parties in the proceeding. Parties are expected to adhere to the time frames set forth by the Presiding Officers/Boards. Petitioners are reminded, among other things, of their burden to set forth contentions that meet the standards of 10 CFR 2.714(b)(2), and that contentions are limited by the nature of the application and the regulations. All of this guidance is directed to management and control of adjudicatory proceedings under the existing Rules of Practice. The guidance did not address more basic changes to the hearing process itself.

B. Reexamination of NRC's Hearing Process

In late 1998, the NRC Office of the General Counsel (OGC) undertook a reexamination of the NRC's current adjudicatory practices as conducted under the Atomic Energy Act of 1954, as amended, and the NRC's current regulations, as well as a review of the Administrative Procedure Act and the practices of other agencies and the federal courts, with a view to developing options for improvement in the hearing processes. This effort was documented in a Commission paper, SECY-99-006, January 8, 1999, which was made publicly available.

As part of the analysis of possible approaches, OGC reached the conclusion that except for a very limited set of hearings - those associated with the licensing of uranium enrichment facilities - the Atomic Energy Act did not mandate the use of a "formal on-the-record" hearing within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 554, 556 and 557, and that the Commission enjoyed substantial latitude in devising suitable hearing processes which would accommodate the due process rights of participants. The key statutory provision, Section 189a of the Atomic Energy Act, declares only that "a hearing" (or an opportunity for a hearing) was required for certain types of agency actions. It does not state that such hearings are to be on-the-record proceedings. A

detailed discussion of Section 189 and its legislative history can be found in the Commission's decision in *Kerr McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982); *see also Advanced Medical Systems*, ALAB-929, 31 NRC 271, 279-288 (1990).

As a legal matter, where Congress provides for "a hearing," and does not specify that the adjudicatory hearings are to be "on-the-record," or conducted as an adjudication pursuant to 5 U.S.C. §§ 554, 556 and 557 of the APA, it is presumed that informal hearings are sufficient. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972), *citing Siegel v. AEC*, 400 F.2d 778, 785 (D.C.Cir. 1968); *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). In contrast to informal hearings for which agencies have greater flexibility in shaping adjudicatory procedures, "on-the-record" hearings under the APA generally resemble adversarial trial-type proceedings with live presentation of witnesses and cross-examination. The Atomic Energy Commission (AEC) of the 1950's asserted that formal hearings were what Congress had intended. At that time, the AEC saw benefits in a highly formal process, resembling a judicial trial, for deciding applications to construct and operate nuclear power plants. It was thought that the panoply of features attending a trial -- parties, sworn testimony, and cross-examination -- would lead to a more complete resolution of the complex issues affecting the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC. One study concluded that the use of formal hearings developed in order to address concerns that the pressures of promotion by the AEC could have an undue influence on the AEC's assessment of safety issues. By use of an expanded hearing process, the Commission could more fully defend the objectivity of its licensing actions. William H. Berman and Lee M. Hydeman, *The Atomic Energy Commission and Regulating Nuclear Facilities* (1961), *reprinted in* Improving the AEC Regulatory Process, Joint Committee on Atomic Energy, 87th Cong., 1st Sess., Vol. II, at 488 (1961).

The AEC thus took the official position that on-the-record hearings were not merely permissible under the Atomic Energy Act but required. AEC Regulatory Problems: Hearings before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong., 2nd Sess. 60 (1962) (Letter of AEC Commissioner Loren K. Olsen).

At least two subsequent statutes contain *implications* -- though no more than that -- that the Congresses that enacted them believed that such formal adjudication was required. These instances, both of which involve clauses beginning with the word "notwithstanding," are worth examining in some detail, because they form much of the basis for arguments that the 1954 Act should be read to require on-the-record proceedings.

The first came in 1962, when Congress amended the Atomic Energy Act to add a new Section 191, authorizing the use of three-member licensing boards rather than hearing examiners, "notwithstanding" certain provisions of the APA. Because those referenced APA provisions dealt with formal, on-the-record adjudication, the "notwithstanding" clause in the statute could be read (and by some, is read) to imply that by 1962, Congress viewed the Atomic Energy Act as requiring on-the-record adjudication. (The crux of the argument is that such a clause would have been unnecessary if on-the-record adjudication were not mandatory.) That very year, however, as will be discussed below, the Joint Committee on Atomic Energy restated its belief that formal adjudication was *not* required in AEC proceedings.

In 1978, "notwithstanding" made its second appearance, but this time, it was the Atomic Energy Act, rather than the Administrative Procedure Act, that presented the problem. In that year, Congress enacted the Nuclear Non-Proliferation Act (NNPA), which provided among other things for the NRC to establish procedures for "such public hearings [on nuclear export licenses] as the Commission deems appropriate." NNPA § 304, 42 U.S.C. 2155a(a). The statute said that this provision was the exclusive legal basis for any hearings on nuclear export licenses, adding: "[N]otwithstanding section 189a. of the 1954 Act, [this] shall not require the Commission to grant any person an on-the-record hearing in such a proceeding." 42 U.S.C. 2155a(b). The inference can therefore be drawn that by 1978, Congress thought that without express statutory authorization to use other hearing procedures, on-the-record formal hearings would be called for by Section 189 of the Atomic Energy Act.

As a legal matter, the amount of weight given to retrospective legislative history -- that is, one Congress's opinion of what an earlier Congress intended -- depends greatly on the circumstances. While the Supreme Court

recently reiterated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction," *Loving v. United States*, 517 U.S. 748, 770 (1996), the cases cited in that decision make clear that subsequent legislative history that falls short of explicitly "declaring the intent of an earlier statute," and instead gives rise merely to certain inferences, is entitled to far less weight. In *Loving*, the Court cited a 1979 case, *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117. There, the Court began its discussion of the issue of "subsequent legislative history" with "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" The more formal and explicit is Congress's statement of what it intended in its previous enactment, the more weight it will be accorded. Where Congress has passed legislation, which an agency has interpreted in a particular (and controversial) way, and Congress then enacts a second statute confirming that the agency's interpretation was consistent with what it had intended all along, then Congress can truly be said to have "declared the intent of an earlier statute," and that kind of "subsequent legislative history" will indeed be given great weight by a reviewing court. This was the case, for instance, with the FCC's "fairness doctrine," upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There, the Court said, Congress had not just kept its silence about the agency's interpretation but had "ratified it with positive legislation." 395 U.S. 367, 381-82.

Where subsequent legislative history is less formal and explicit, the Supreme Court has made clear that it becomes perilous to rely on it: "[A]s time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *GTE Sylvania*, 447 U.S. at 118 n.13. In *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 751 (1979), the Court brushed aside a conference committee report that, in dealing with amendments to a statute, offered its view of the proper interpretation of the original statute. The report, it said, was written 11 years after the original statute and thus was "in no sense part of the legislative history . . . . It is the intent of the Congress that enacted [the section] that controls." [Citations omitted.] Likewise, in *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977),

the Court stated that “little if any weight” should be given to a conference committee report, written eight years after the original statute, that purported to interpret that earlier statute.

Applying the law to the this matter, we see nothing in these two “notwithstanding” clauses that even approaches being a clear declaration of what Section 189a of the 1954 Act provided. The most that can be said for the later statutes is that they give rise to possible inferences as to what the later Congresses -- not the Congress that passed the 1954 Atomic Energy Act -- may have believed. But even those inferences are far from unequivocal.

The most plausible explanation for the “notwithstanding” clauses, in the Commission’s view, is that they were intended not as a means to overcome what were viewed as fatal legal impediments, but rather, as a precaution, like many such legislative clauses, to anticipate potential legal objections and eliminate them. In view of the way that the law was then being applied by the AEC, it would have been only prudent of the drafters to eliminate ambiguity on this point when enacting additional provisions, *even if they had been convinced that the clauses were unnecessary*. At this point, there is no good way to know whether they regarded these clauses as necessary or not, but we doubt that a reviewing court would care greatly one way or the other. To focus too much on Congress’s thought processes in 1962, when it enacted Section 191, and in 1978, when it passed the Nuclear Non-Proliferation Act, runs the risk of losing sight of what any reviewing court interested in legislative intent would regard as the central question, which is what Congress intended in 1954, when it enacted Section 189a.

For many years, the agency did not depart from the longstanding assumption that the Atomic Energy Act requires on-the-record hearings despite the fact that assumption had never been reduced to a definitive holding.

Also consistent with its understanding of Section 189a, the NRC declared in 1978 that the hearing it would hold on an application to construct and operate a nuclear waste repository for high level waste would be formal. In final rules published in 1981, now codified at 10 CFR Part 2, Subpart J, the Commission provided for a mandatory

formal hearing at the construction authorization stage and for an opportunity for a formal hearing prior to authorizing receipt and possession of high level waste at a geologic repository. Subsequently, Congress enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* That law includes no specific hearing requirements. Instead, it seems to contemplate, at Section 114, that the NRC will apply existing laws applicable to the construction and operation of nuclear facilities. In sum, there is no *statutory* requirement for a formal hearing on a high level waste repository, but without a rule change, the NRC's regulations *would* require a formal hearing. In addition, in 1990, Congress provided that for the licensing of a uranium enrichment facility, the NRC "shall conduct a single adjudicatory hearing on the record."[9] This provision can be interpreted in one of two ways: either as one more reflection of Congress's understanding that formal adjudication was the norm in NRC facility licensing proceedings, or as the very opposite, *i.e.*, as showing that Congress understood that because of the presumption against formal hearings, explicit statutory language would be needed to make proceedings for this type of facility "on the record," as that term is used in the Administrative Procedure Act.

The view that formal adjudications were desirable and mandatory was not unanimously held, however. As early as 1962, a Senate subcommittee wrote, in words that might easily have been written today:

> By now, it has become apparent that the adversary type of proceeding, resembling as it does the processes of the courts, does not lend itself to the proper, efficient, or speedy determination of issues with which the administrative agencies frequently must deal.... Questions relating to ... licensing of atomic reactors ... might better be solved in some type of proceeding other than an administrative "lawsuit" among numerous parties.[10]

This report was cited with approval by the Joint Committee on Atomic Energy, which turned down a proposal, recommended by its consultants, to provide explicit statutory authorization for the AEC to use

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[9] Atomic Energy Act § 193, 42 U.S.C. 2243.

[10] H.R. Rep. No. 1966, 87th Cong., 2d Sess. 6 (1962), *quoted in Kerr McGee Corp.*, CLI-82-2, 15 NRC 232, 251 (1982)[Attachment 1].

informal procedures. The Joint Committee reasoned that such legislation was unnecessary, given that the Commission already had "legal latitude ... to follow such procedures," that such procedures were desirable, and that the Committee had strongly encouraged the Commission to make use of them. Despite the Joint Committee's urgings, however, the AEC made no move in the direction of deformalization.

This interchange between Congress and the AEC over the nature of the hearing requirement of Section 189 took place again in 1972, as Congress amended the AEA by the addition of a new Section 192, to provide for the issuance of a temporary operating license during the pendency of an operating license hearing. This amendment, Pub.L. No. 92-307, 86 Stat. 191, explicitly provided that "The hearing required by this section and the decision of the Commission on the petition shall be conducted with expedited procedures as the Commission may by rule, regulation, or order deem appropriate for a full disclosure of material facts on all substantial issues raised in connection with the proposed temporary operating license." The legislative history of this provision is replete with reminders to the Commission that the procedures to be established for such actions are not to be trial-type procedures used in connection with the issuance of the final operating license, as well as that in a broader context, the Commission was not compelled to conduct formal, on-the-record proceedings. In keeping with the new Section 192, the Commission fashioned expedited procedures in Subpart F to 10 CFR Part 2 (1973), providing for an informal proceeding not dramatically different in substance than the current provisions found in Subpart L to 10 CFR Part 2. Section 192 expired by its own terms in 1973, but was renewed, in revised form in 1983, as part of the NRC's authorization legislation for FY 1982-1983. Pub.L. No. 97-415, 96 Stat. 2067. The 1983 legislation stated that the provisions of Section 189a. would not apply to such licensing actions, which were to be completed "as promptly as practicable." *See* Pub.L. No. 97-415, sec. 11. The Commission's implementing regulations were set forth in Subpart C (1983). 10 CFR 2.308 expressly provided that for these temporary operating licenses formal adjudicatory procedures would not be used and that case-by-case procedures would be developed to deal with issues as they arose. As with its predecessor provision, the 1983 provision for the issuance of the temporary operating licenses expired by its own terms, in 1983.

Over the decades since the Atomic Energy Act was passed, debate over the value of on-the-record adjudication for the resolution of nuclear licensing issues, and indeed for resolving scientific issues generally, has only increased. There are now many observers who are skeptical that the use of formal adjudication in NRC licensing cases is the appropriate means to settle a regulatory issue; that whatever validity there may have been to the arguments for formal adjudication from the 1950's to the 1970's, they no longer have merit; and that less formalized proceedings could mean not only greater efficiency, but also better decisions, with more meaningful public participation and greater public acceptance of the result. *See*, *e.g., Improving Regulation of Safety at DOE Nuclear Facilities*, Final Report of the Advisory Committee on External Regulation of DOE Nuclear Safety, December 1995, at 39.

However, because of the early interpretation that formal hearings were required, as well as the NRC's long-standing practice of conducting formal hearings on reactor licensing actions, each time that the NRC has explored ways of deformalizing its proceedings, it has had to confront its own prior statements and actions on the subject. Even so, no court has rendered a definitive holding on the application of the APA's "on-the-record" hearing requirements to Atomic Energy Act proceedings. Indeed, while some court decisions reflected the agency's early assumption that "on-the-record" hearings were required, other decisions did not. *Compare Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444 n. 12 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1984)[*UCS I]*("there is much to suggest that the Administrative Procedure Act's (APA) 'on the record' procedures...apply [to section 189]") *with Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 n.3 (D.C. Cir. 1990)("it is an open question whether Section 189(a) -- which mandates only that a 'hearing' be held and does not provide that that hearing be held 'on the record' -- nonetheless requires the NRC to employ in a licensing hearing procedures designated by the [APA] for formal adjudications"). The commentary in these and other cases is essentially *dicta* -- observations not essential to the court's decision. *See also Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968)(deciding only permissibility of informal rulemaking procedures under section 189); *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F. 2d 1363, 1368 (D.C. Cir. 1979)(deciding only NRC's discretion to initiate

enforcement proceedings subject to section 189 hearing); *City of West Chicago v. NRC*, 701 F.2d 632, 642 (7th Cir. 1983)(deciding only permissibility of informal procedures in materials licensing adjudication).

In *Chemical Waste Management v. EPA*, 873 F.2d 1477, 1480 (D.C. Cir. 1989), the D.C. Circuit stated that while the presence of the words "on the record" are not absolutely essential in order to find that formal adjudicatory hearings are required, there must be, in the absence of those words or similar language, evidence of "exceptional circumstances" demonstrating that Congress intended to require the use of formal adjudicatory procedures. Although the court suggested, again in *dicta*, that section 189a of the Atomic Energy Act might be a case where "exceptional circumstances" dictate formal, on-the-record hearing requirements, that observation has its roots in a *dictum* in *UCS I* which suggests that in 1961 "the AEC specifically requested Congress to relieve it of its burden of 'on the record' adjudications under section 189(a)" and Congress did not do so. 735 F.2d at 1444 n.12. The opposite is more nearly correct: the AEC argued in favor of formal procedures and the Joint Committee on Atomic Energy advised that informal procedures were permissible. *See* H.R. Rep. No. 1966, 87th Cong., 2d Sess., at 6 (1962), *quoted in Kerr McGee Corp.*, CLI-82-2, 15 NRC 232, 251 (1982). More recently, in *Kelley v. Selin*, 42 F.3d 1501, 1511-12 (6th Cir.), *cert. denied*, 115 S.Ct. 2611 (1995), the court emphasized the NRC's latitude to determine the nature of the "hearing" mandated by the Atomic Energy Act.

The Commission's approach to deformalization has been cautious, taking place in slow, incremental steps. One such step came in 1982, when the Commission, in the *West Chicago* case, granted an informal hearing (*i.e.*, with written submissions only) on an amendment to a materials license. In doing so, it observed that the Atomic Energy Act did not specifically require on-the-record hearings, and it called the legislative history "unilluminating" as to Congress's intent in materials licensing cases. The Commission noted that while it held formal hearings in all reactor licensing cases, it had not stated explicitly whether it did so as a matter of discretion or of statutory requirement; in any event, it did not view the Act as mandating an on-the-record hearing in *every* licensing case. This decision was upheld by a

reviewing court. *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). Subsequently, the NRC issued a new Subpart L to Part 2, setting forth procedures for holding informal proceedings on all materials license applications and amendments. In the Nuclear Waste Policy Act of 1982, § 134, 42 U.S.C. 10154, Congress specified a set of hybrid procedures for licensing expansions of spent fuel storage capacity at reactor sites. The process called for written submissions, oral argument and an adjudicatory hearing only after specific findings by the Commission. The Commission promulgated procedures --10 CFR Part 2, Subpart K -- to implement this legislation.

The *West Chicago* court's finding that formal hearings were not required for materials licenses opened the door considerably wider for the argument that formal hearings are not necessarily required in reactor licensing cases either, as the provision of the Atomic Energy Act that establishes the basic statutory entitlement to a "hearing" does not distinguish between reactor licenses and materials licenses. The first significant move toward deformalization of reactor licensing cases came in 1989, when the NRC completed what a reviewing court described as a "bold and creative" effort to foster standardization of nuclear power plant designs, as well as the early resolution of key safety issues. This was the issuance of a new Part 52, which provided for issuance of design certifications and "combined licenses" for construction and operation of nuclear power plants. The rule provided that *standard designs* could be approved by rulemaking, with an opportunity for an informal hearing conducted by an Atomic Safety and Licensing Board. (This would be a "paper" hearing, unless the Licensing Board requested the authority to conduct a "live" -- that is, oral -- hearing, and the Commission agreed.) Subpart G formal hearings would be offered thereafter, prior to the issuance of the combined construction permit/operating license for a specific facility. When the facility was essentially complete, and close to fuel loading and criticality, there would be an opportunity for members of the public to raise any concerns they might have about plant operation. These could fall into one of two categories: either a claim that the facility as built did not meet the "acceptance criteria" specified in the original combined construction permit/operating license, or a claim that the acceptance criteria themselves (that is, the licensing requirements) were deficient. For

claims in the former category, the Commission would determine whether to hold a hearing and whether it would be a formal or informal hearing. A request to modify the terms of a combined license would be handled as a request for action under 10 CFR § 2.206.

Part 52 was promptly challenged after its promulgation. A panel of the U.S. Court of Appeals for the D.C. Circuit issued a decision that upheld some parts of the rule but set aside others, including the provisions governing the opportunities for a hearing after completion of construction and prior to operation. *Nuclear Information and Resource Service v. NRC*, 918 F.2d 189 (D.C. Cir. 1990), *vacated & rehearing en banc granted*, 928 F.2d 465 (D.C. Cir. 1991). However, the decision was later vacated by the entire D.C. Circuit, sitting *en banc. Nuclear Information and Resource Service v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992). In its brief to the full court, the NRC argued unequivocally that the Atomic Energy Act's hearing requirement for nuclear power plant licensing did not necessarily mean a formal hearing.

The full court upheld Part 52 in its entirety, but on the question of whether hearings must be formal, it reserved judgment, on the grounds that the NRC's argument that informal hearings were permissible had not been made in the rulemaking or before the original panel. 969 F.2d at 1180. Subsequently, Congress enacted legislation (Pub. L. No. 102-486 (1992), endorsing Part 52, and specifying that at the pre-operation phase, any hearing on whether the appropriate inspections and tests have been made, and the prescribed acceptance criteria have been met, shall be either "informal or formal adjudicatory," as the Commission may in its discretion determine.

Since that time, the Commission has taken two more steps to further stake out its position that the Atomic Energy Act does not require formal hearings. The first was a rulemaking implementing the Equal Access to Justice Act, 5 U.S.C. 504. This statute authorizes the recovery of attorney's fees by certain "prevailing" parties in "adversary adjudications." The term "adversary adjudication" is defined in 5 U.S.C. 504 (b)(1)(C) to generally mean, for purposes of the EAJA, adjudications conducted under 5 U.S.C. 554,

the section of the Administrative Procedure Act applicable to adjudications required by statute to be determined on the record after the opportunity for an agency hearing. "Adversary adjudications" do not include adjudications to consider the grant or renewal of a license.

The NRC decided to authorize the payment of attorney's fees only for adjudications under the Program Fraud Civil Remedies Act, which by law must be on-the-record, on the grounds that no other NRC adjudications (other than those for the licensing of uranium enrichment facilities under Section 193) must by law be on-the-record. 10 CFR Part 12, 59 FR 23121 (May 5, 1994). To date, no lawsuit has been filed challenging this determination. The second and more significant step was the recent promulgation of Subpart M to Part 2, 63 FR 66730 (Dec. 3, 1998), to cover transfers of licenses, including those for power reactors. Here again, the rule does not provide for formal proceedings.

In a Staff Requirements Memorandum issued on July 22, 1999 (which is also available to the public), the Commission directed OGC to develop a proposed rulemaking; the Commission also indicated that it would pursue legislation to confirm NRC's discretion to structure its procedures as it deemed necessary to carry out its responsibilities. The Commission further directed that the views of external stakeholders be obtained. In response, on October 26-27, 1999, OGC conducted a facilitated public meeting with stakeholders representing the industry, public interest groups, another federal agency, academia, and the NRC's Atomic Safety and Licensing Board Panel. The transcribed views of all participants are publicly available. In addition to the broad issue of the degree of formality or informality of the hearing process, the issues addressed at this meeting encompassed such matters as requirements for standing, contentions, discovery, cross-examination, summary disposition, hearing schedules and time limits, the role of the presiding officer, and the number of different hearing "tracks" that might be appropriate, all having been raised directly or indirectly in SECY-99-006. The comments at this meeting are described below and have been considered in the rulemaking proposed in this notice.

C. Comments on Policy Statement

The NRC has received a number of public comments on its recent Policy Statement on the conduct of adjudicatory proceedings. The NRC is taking this opportunity to address those comments as part of this proposed rulemaking.

Eleven sets of comments were received on the Policy Statement. Some of the comments came from persons who represented the views of several other named persons. Two of the sets of comments opposed the Policy Statement, while the remaining nine generally supported the Policy Statement.

Comment: The Policy Statement and its suggestions for expedited proceedings that allow delays only in extreme and unavoidable circumstances is unfair, inconsistent with due process, violates the Administrative Procedure Act (APA), and emphasizes licensing over health and safety concerns. Expedited schedules are not necessary for nuclear power plant license renewal proceedings. Expedited schedules may not be reasonable for hearings with complex issues. An expedited hearing schedule is harmful to intervenor groups who need more time due to their lack of funding.

Response: The NRC is unaware of any judicial decision that holds that the type of hearing procedures being proposed in the Policy Statement guidance violates due process or the APA. In fact, the Policy Statement recognizes that there is a need to balance efforts to avoid delay with procedures that will ensure fair and reasonable time frames for taking action in the adjudication. The Commission believes that the guidance in the Policy Statement strikes a proper balance among all these considerations. The Commission also believes that providing more effective hearing processes will result in a better use of all participants' limited resources.

Comment: Contrary to statements made in the Policy Statement, Licensing Boards do not have total discretion to set schedules in proceedings. For example, Licensing Boards must allow contentions to be filed anytime up to 15 days prior to the prehearing conference, and a Board may not shorten this time.

Response: 10 CFR § 2.718 provides the Presiding Officer the power to regulate the course of the proceeding. In addition, pursuant to 10 CFR § 2.711, Licensing Boards may, for good cause, shorten or lengthen the time required for filings. This provision expressly allows the Boards to set deadlines for filings, such as the filing of contentions.

Comment: Multiple licensing boards should not be used because it could be too burdensome for intervenor groups with limited resources.

Response: The Commission recognizes that, in some instances, the use of multiple licensing boards can place a burden on all parties. For that reason, the NRC is careful to consider and account for the circumstances of each case and to ensure that the use of multiple boards will not prejudice any party. However, it is important to have flexibility to use multiple boards where it will not prejudice any party, as the use of more than one board can allow the effective litigation and resolution of a number of separate issues resulting in a more timely completion of the record and decision for the whole case.

Comment: The guidelines set forth in the Policy Statement should be codified through a rulemaking.

Response: The Commission is proposing to codify appropriate portions of the Policy Statement in this rulemaking. Since the Policy Statement deals primarily with case management and control, it may not be appropriate to convert everything in the Policy Statement to hard and fast requirements. The

Commission believes that it is important to retain flexibility to manage proceedings as the situation warrants.

Comment: A licensing board should be able to raise any safety issue that is material to health and safety, regardless of whether it is a substantial issue.

Response: If a Licensing Board determines in the course of a hearing that a safety issue exists which has not been raised by a party, it may refer the matter to the Commission with a recommendation on how the issue should be addressed. Some issues raised by a Licensing Board sua sponte may appropriately be addressed through adjudications, while others may not. The Commission, in fact, has a process for considering the Board's recommendation on sua sponte issues and that process can result in the issues being considered in the adjudication or being referred to the NRC staff for review and resolution without litigation.

Comment: The Commission's suggestion that the Licensing Boards limit the use of summary disposition motions goes too far.

Response: There are appropriate times for filing summary disposition motions. There may be times in the proceeding where such motions should not be entertained because consideration of such motions would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on such motions will substantially exceed the time needed to complete the hearing and record on the issues. The Board is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide the Boards the flexibility to make that determination in most proceedings.

Comment: The limitation of discovery on the staff until after the Safety Evaluation Report (SER) and Final Environmental Statement (FES) is overly broad and could delay the proceeding.

Response: The most fruitful time for discovery of staff review documents is after the staff has developed its position. Subjecting the staff to extensive discovery early in the process will often require the staff to divert its resources from completing its review. In addition, early discovery before the staff has finalized the major part of its reviews may present a misleading impression of staff views. Finally, a focus on discovery against the staff diverts the focus from the real issues in licensing proceedings, which is the adequacy of the applicant's/licensee's proposal. Nevertheless, the NRC recognizes the importance of timely completion of the NRC staff's reviews and the staff is making a concerted effort at rigorous planning and scheduling of staff reviews. In this regard, the staff has continued to refine and complete its standard review plans and its review guidance and has moved to a more performance-goal oriented approach in an effort to improve the timeliness of its reviews. Steering and oversight committees are sometimes formed to direct the course of major technical review efforts and detailed milestone schedules are developed and tracked. NRC managers and staff are held accountable for these schedules. The NRC will continue with these efforts to improve the timeliness of licensing reviews.

Comment: The hearing should not be delayed until after the FES and the SER are issued as it could delay the proceedings.

Response: In Subpart G proceedings where the NRC staff is a party, the staff normally will not be in a position to provide testimony or take a final position on many issues until these documents have been completed. In many cases, it would be unproductive and cumbersome to have a two-pronged hearing with one part of the hearing being conducted prior to issuance of the staff documents and a second hearing after issuance of the documents.

Comment: Licensing boards should rule on standing prior to the submission of contentions.

Response: The Commission would expect that standing issues would be among the first issues addressed by a Presiding Officer in an adjudication, but that does not dictate that the submission of contentions should be delayed. The Commission would also expect that concrete issues of concern to the public would be raised on the basis of the application or the proposal for NRC action and can be identified at the same time the petition addresses the matter of standing.

Comment: The Commission should apply the Federal Rules of Evidence with respect to scientific testimony.

Response: Neither the current procedures nor the proposed regulations contain a special provision for scientific testimony. Such testimony can be tested and evaluated in the same manner as other evidence presented at a hearing. Although the Commission has not required the application of the Federal Rules of Evidence in NRC adjudicatory proceedings, presiding officers and licensing boards have always looked to the Federal Rules for guidance in appropriate circumstances. The Commission continues to be of the view that greater informality and flexibility in the presentation of evidence in hearings, rather than the inflexible use of the formal rules of evidence imposed in the federal courts, can result in more effective and efficient issue resolution.

Comment: The Commission should place limitations on cross-examination.

Response: The proposed changes to procedures for the less formal process do place limitations on cross-examination. Under these procedures, the Presiding Officer may question witnesses who testify at the hearing, but parties may not do so. Parties may, however, present the Presiding Officer with written suggestions for questions to be asked. The proposed rules would also allow motions to the Presiding

Officer to allow cross-examination by the parties where this would be necessary to develop an adequate record. As a general matter, the Presiding Officer is authorized, under both the written and proposed rules, to limit cross-examination in appropriate circumstances.

Comment: The Commission should be actively involved in overseeing proceedings and there should be expedited interlocutory review for novel legal or policy issues.

Response: Although providing for a Commission ruling on significant issues before the hearing is completed can introduce delay, on balance, the Commission agrees that novel legal or policy issues should be considered and guidance provided early on in a proceeding. This should avoid the inefficiency and delay that could result from the Presiding Officer/Board struggling with the issue without Commission guidance or the Presiding Officer/Board decision being reversed and remanded. The rule changes proposed herein will allow for, and even encourage, certification or referral of novel issues to the Commission when such action would help to avoid needless delay.

Comment: The Commission should actively review the performance of licensing boards and ensure that boards make prompt decisions.

Response: The Commission has been carefully monitoring all Licensing Board proceedings to ensure that they are being appropriately managed to avoid unnecessary delay. The Commission, through its Policy Statements and case-specific orders, has been encouraging Licensing Boards to issue timely decisions, consistent with the Boards' independence in performing their decisionmaking functions. The proposed regulations explicitly address case management and will require the Presiding Officers/Boards to notify the Commission when there is non-trivial delay in completion of the proceeding.

D. Comments From Hearing Process Workshop

The October 26-27, 1999 hearing process workshop involved participants from the nuclear industry, states, public interest groups, the academic community, ALJ community, and the NRC. Transcripts from the workshop are available in NRC's Public Document Room. The major comments and the Commission's responses follow.

Comment: In general, the public citizen group participants questioned whether there was a need to make any changes to the current hearing procedures. They also voiced concerns about any limitations on current discovery and cross-examination. Industry representatives advocated changes to the hearing process, which they viewed as becoming increasingly and needlessly time consuming.

Response: The Commission believes that there is a need to take some action to improve the management of the adjudicatory process to avoid needless delay and unproductive litigation. Such action can range from the imposition of case management requirements in all proceedings to the removal of unnecessary formalities that divert the parties efforts and focus from addressing the merits of real issues. The NRC believes that using a less formal hearing process with simplified procedures for most types of proceedings along with a requirement for well-supported specific contentions in all cases can improve NRC hearings, limit unproductive litigation, and at the same time ease the burdens in hearing preparation and participation in hearings for public participants.

Under the proposed rules, well-supported specific contentions would be required in all proceedings, just as they are now required in those proceedings that use the NRC's formal hearing procedures. Petitioners generally have been able to meet the current specific contention requirements and the Commission would not expect the application of those requirements to informal proceedings to adversely effect public participation. Indeed, by focusing litigation efforts on specific and well-defined issues, all parties will be relieved of the burdens of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.

Under the proposed rules, early document disclosure and witness identification will be required of all parties in every case. In proceedings using informal hearing procedures, no other discovery would be permitted. This approach should reduce the burdens on public participants since petitioners will be given access to pertinent information without the need to file formal discovery requests and they will not be burdened with responding to formal discovery requests themselves. Since the proposed disclosure provision would require the applicant/licensee and the NRC staff to disclose and make available all documents in their possession that directly relate to the matter that is the subject of the hearing, there should be a wealth of information available for the parties to prepare their cases.

Under the proposed rules, cross-examination would be retained for the formal hearings. Under the proposed informal hearing procedures, however, only the Presiding Officer would question witnesses. Nevertheless, the informal procedures would allow the parties to suggest questions for the Presiding Officer to ask and they would permit motions to allow the parties themselves to cross-examine witnesses where necessary to develop an adequate record for decision. This should ensure that there is questioning of witnesses sufficient to develop an adequate record.

Comment: Participants raised concerns regarding case management practices by the licensing boards. One concern raised by the representatives of the nuclear industry was the perceived lack of control by presiding officers in some informal and formal proceedings. According to these participants, in informal proceedings, presiding officers too often allow pleadings to be amended or allow an unlimited number of reply briefs. Nuclear industry participants stated that discovery in formal proceedings takes too long, that the NRC staff requires too much time to issue a Final Environmental Impact Statement (FEIS) and Safety Evaluation Report (SER) and that the Presiding Officer/Board takes too long to issue an initial decision. One person representing licensee interests urged the Commission to intervene earlier in the proceeding to resolve novel issues.

Response: Strong case management is an integral part of an efficient and effective hearing process. The Commission expects that Presiding Officers/Boards will carefully and attentively manage all adjudications. Tools to be used to this end are reflected in the proposed rule. The Commission proposes to modify the intervention requirements for informal hearings to require the submission of specific, well-supported contentions as is currently required for formal hearings. This should result in hearings that focus on well-defined issues and obviate the need to receive evidence of questionable relevance. The Commission also proposes to modify the informal hearing procedures in a manner that should reduce the amount of motion practice over what hearing procedures to use. In addition, the Commission will propose provisions that encourage early Commission involvement on novel issues in order to avoid needless litigation and delay. Also, as noted earlier, the staff itself is taking steps to better assure the timely completion of its review and associated documents. Finally, the Commission will propose hearing management procedures that will provide for the integration of the staff's review documents into the hearing schedules.

Comment: One of the attributes of the formal process is cross-examination of witnesses. Nuclear industry participants urged that cross-examination not be used as it is often not an effective or efficient way to determine the truth. Citizen group participants, however, argued that cross-examination is effective and oppose any elimination of this tool. Some nuclear industry participants argued that cross-examination should only be an optional tool that can be used if it is determined that it is necessary. Also, nuclear industry representatives felt that cross-examination must be used in enforcement hearings. Other licensee representatives suggested that certain proceedings, e.g. proceedings involving license applications for activities posing low risk from a public health and safety perspective, should not utilize cross-examination. Citizen group participants pointed out that there may not be agreement as to which proceedings involve "low risk" activities.

Response: The proposed rule provides for cross-examination by the parties in enforcement proceedings and proceedings involving complex issues that warrant the use of formal Subpart G hearing procedures. Other agency proceedings would utilize the less formal procedures, which will not include cross-examination by the parties unless ordered by the Presiding Officer or the Commission in a particular case. But, these proceedings will involve questioning of witnesses by the Presiding Officer and further cross-examination by the parties themselves where that is necessary to develop an adequate record for decision. The Commission believes that this approach strikes an appropriate balance in the use of cross-examination.

Comment: Another attribute of the current formal proceedings is discovery. The representatives of the citizen groups view discovery as essential, since they do not have access to the information that licensees and NRC staff do and they perceive this as a disadvantage early in the proceedings. The citizen group participants also noted ready access to information can be frustrated by the fact that the application may be incomplete and is supplemented through the staff's Request for Additional Information (RAI). In response to the citizen group participants' concerns, the nuclear industry representatives suggested that interested parties should attend staff-applicant meetings that take place prior to the submittal of an application. Citizen groups suggested that interested individuals should be permitted to participate in these meetings instead of just observing. One option suggested by the administrative law judge participant was that the NRC model its discovery rules on Federal Rule of Civil Procedure 26.

Response: The proposed rules provide that in all adjudicatory proceedings (whether formal or informal), the parties would exchange relevant documents and other information at the beginning of the proceeding. This approach is based on Federal Rule of Civil Procedure 26. Also, parties would be required to exchange the identity of expert witnesses, as well as existing reports of their opinions. The more formal discovery available under the formal hearing procedures would remain for the formal hearings.

The Commission encourages interested persons to attend meetings between the staff and the applicant, both prior and subsequent to the submission of the license application. Such meetings are noticed in advance and are open to all to observe. Public attendance at these meetings should provide individuals or groups early access to information so that they may more effectively participate in the hearing process. This may also result in reduction of issues that must be adjudicated.

Comment: The representatives of citizen groups and local governments argued that the rules for standing should be liberalized. These participants noted that NRC proceedings require much time and money and are not undertaken lightly.

Response: Members of the public who have an interest that will be affected by the proposed action will readily establish their standing under these standards. At the same time, the Commission recognizes that there may be instances where persons who do not have a direct interest and cannot demonstrate standing nevertheless are able to make a substantial contribution to the development of the record in the proceeding. Accordingly, the Commission proposes to codify discretionary intervention provisions from its *Pebble Springs* decision and require that those provisions be considered in every instance in which a petitioner has requested that discretionary intervention be granted should it be found that standing, as a matter of right, has not been demonstrated, and has addressed the pertinent criteria.

Comment: Citizen group representatives stated that the NRC should return to its pre-1989 contention standards. Some of these participants noted that an intervenor, under current practice, often has to prove its case in order to have a contention admitted. Also, these participants felt that the current contention standard has a chilling effect on citizen group participation. The citizen group representatives also stated that they had difficulty meeting the current contention standard since they lacked information about the application. In addition, the staff practice of issuing RAIs for a purportedly incomplete application is said to place additional burdens on intervenors to continually support their contentions on a changing

application. However, a nuclear industry representative felt that this high contention threshold was necessary to ensure that hearings focused on legitimate issues.

Response: The NRC believes that the current contention standard is appropriate and should not be changed. This standard is necessary to ensure that hearings cover genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues. Ample information is provided in the application and in staff-applicant meetings which are noticed and open to the public to prepare contentions.

Comment: All citizen group participants stated that there was a need for intervenor funding. These participants argued that if the intervenors had access to resources for participation, there could be fewer delays in the proceeding and they could better assist the NRC in reaching the correct result. Nuclear industry representatives, however, disagreed with these assertions. One participant noted that currently legislation prohibits the NRC from providing intervenors funding.

Response: Congress, in Section 502 of the Energy and Water Development Appropriations Act for FY 1993, has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in NRC regulatory or adjudicatory proceedings. Pub. L. No. 102-377, Title V, Section 502, 106 Stat. 1342 (1992), 5 U.S.C. 504 note. Therefore, the proposed rules do not address this issue.

E. Summary and Proposed General Questions

From experience with, and the comments on, the 1998 Policy Statement, from the valuable discussions in the hearing process workshop, and consistent with the views expressed in the Staff Requirements Memorandum of July 22, 1999, the Commission has decided to propose modifications to the hearing procedures in 10 CFR Part 2. As described in more detail below, the proposed rules, which would

revise a number of current provisions of 10 CFR Part 2, are intended to fashion hearing procedures tailored to the different kinds of licensing and regulatory activities the Commission conducts, ranging from informal to formal, to improve the effectiveness and efficiency of NRC's hearing process, and to better focus and utilize the limited resources of all involved. In offering this initial proposal for change, the Commission is specifically seeking comments on the following issues about how to structure the agency's adjudicatory process:

(1) Hearing Tracks. Under the hearing process reflected in the existing regulations in 10 CFR Part 2, there are at least four hearing "tracks" or integrated sets of procedures that characterize a proceeding: Subpart G which, apart from a number of provisions of general applicability, contains the procedures for a formal hearing; Subpart L which contains the procedures for most informal hearings currently used for materials licensing actions; Subpart M which contains the procedures for informal hearings on all license transfer actions; and Subpart K which contains procedures for a "hybrid" hearing on spent fuel storage capacity expansions. In reformulating the NRC's hearing process, the Commission believes that there will need to be at least two tracks – a formal hearing track and an informal hearing track – but there is uncertainty over the value of additional, more specialized tracts within each of these broader categories. In the proposal that follows, the Commission would retain a single formal hearing track – proposed Subpart G – and the specialized "hybrid" hearing track – Subpart K – but it would also provide for three different informal hearing tracks – revised Subpart L for nearly all hearings; Subpart M for license transfer hearings; and a new Subpart N for expedited informal hearings. The Commission would welcome comments on the question of how many tracks would be appropriate and whether more specialized tracks tailored to certain types of issues should be considered.

(2) Presiding Officer. Under the hearing process reflected in the existing regulations in Part 2, an administrative judge or an Atomic Safety and Licensing Board normally serves as the presiding officer to conduct the entire adjudicatory proceeding starting with the oversight of prehearing activities, through the

conduct of the hearing itself, and ending with the formulation and issuance of an initial decision. A potential exception under current rules involves Subpart M on license transfer actions which recognizes that the Commission itself may chose to serve as presiding officer or to appoint a person other than an administrative judge or a licensing board to serve as presiding officer in some cases. The Commission would welcome comments on whether there should be criteria for determining whether a proceeding should be held before an administrative judge/licensing board or the Commission and, if so, what those criteria should be.

(3) Discovery. Under the existing Part 2, parties are permitted discovery ranging from document production to multiple interrogatories and depositions of other parties' witnesses. In the proposals that follow, there would be a general requirement in every proceeding that the parties disclose and make available pertinent documents and identify witnesses. Additional discovery would be available in proceedings that use the formal hearing procedures of Subpart G. However, in view of the general availability of licensing and regulatory documents under NRC regulatory practice, it is not clear that discovery is needed in most NRC agency adjudications beyond the exchange of documents and written disclosures described above. The Commission would welcome comments on whether discovery should be eliminated or limited to requests from the presiding officer. Would a general disclosure obligation of the sort that would be required in the proposals that follow be sufficient discovery for all NRC adjudicatory proceedings?

(4) Witnesses, Cross-Examination and Oral Statements by the Parties. Under the existing Part 2 as well as under the proposals that follow, provision is made for oral testimony of the parties' witnesses, although some proceedings are to be based on written evidence alone. The Commission would welcome comments on the degree to which oral testimony and questioning should be used in NRC adjudications. Where oral hearings are involved, should parties be permitted to cross-examine witnesses presented by

other parties or should questioning of witnesses be limited to the presiding officer? Should the parties be permitted to make oral statements of position, and, if so, should time limits be placed on such statements?

(5) Time Limitations. Although the existing Part 2 and the proposals that follow set various time limits for filings, petitions, responses and the like[11], there are no firm time schedules or limitations established within which major aspects or parts of the hearing process (*e.g.*, discovery, issuance of an initial decision following the close of the evidentiary record) must be completed. The Commission would welcome comments on whether firm schedules or milestones should be established in the NRC's Rules of Practice in 10 CFR Part 2.

(6) Alternative Dispute Resolution. Various methods of alternative dispute resolution (ADR) can serve to satisfy the parties on matters of concern and obviate the need to litigate issues in an agency adjudication, ADR is discussed at some length in the proposals that follow. The Commission would welcome comments and views on whether parties to NRC adjudications should be required to engage in ADR.

II Description and Discussion of Proposed Rules

A. Overview

To provide for a more effective and efficient hearing process, the Commission proposes to modify the procedures in 10 CFR Part 2 to (1) establish a new Subpart C to consolidate in one place the Commission's procedures for ruling on requests for hearing/petitions for leave to intervene and admission of contentions, to establish criteria for determining the specific hearing procedures (*e.g.*: formal - Subpart G; informal - Subparts L, M; hybrid - Subpart K) that are to be used in particular cases and to set out the

[11] It should be noted that the proposed revised rules of practice generally do not contain special extended deadlines for NRC staff responses to petitions, motions and pleadings. The elimination of the allowance of extra time for NRC staff responses is part of the Commission's effort to increase the efficiency of NRC adjudications.

hearing-related procedures of general applicability; (2) substantially modify the hearing procedures in the current Subpart G and Subpart L and expand the scope of applicability of those informal procedures; (3) establish a new Subpart N that will provide “fast track” hearing procedures to be used in appropriate cases; and (4) effect conforming amendments as necessary throughout Part 2.

The proposed new Subpart C -- Rules of General Applicability for NRC Adjudicatory Hearings --will be the starting point for consideration of, and rulings on, all requests for hearing/petitions for leave to intervene and the admissibility of contentions, and for selecting the appropriate hearing procedures to be applied in the remainder of the case. The Commission, a designated presiding officer or a designated Atomic Safety and Licensing Board will rule on requests for hearing/petitions to intervene and the admissibility of proffered contentions using the standards and procedures of Subpart C. Where it is determined that a hearing should be held, the Commission, presiding officer or Licensing Board will next examine the nature of the action that is the subject of the hearing and the contentions admitted for litigation, apply the criteria in Subpart C to determine the specific procedures/subpart that should be used for the adjudication and issue an order for hearing designating the procedures/subpart to be used for the remainder of the proceeding. The hearing activities will then proceed under the designated subpart (*e.g.* Subpart G for formal hearings, Subpart L for general, informal hearings, Subpart M for license transfer cases, Subpart N for an expedited “fast track” hearing). Subpart C also sets out rules applicable in general to hearings conducted under the respective subparts.

It should be noted that the hearing procedure selection provision of proposed Subpart C will substantially broaden the range of proceedings that will utilize informal hearing procedures. This is in keeping with the Commission’s intent to expand the use of informal procedures in an attempt to improve the effectiveness and efficiency of the NRC’s hearing processes. Subject to certain exceptions, the norm will be an informal hearing process. The Commission will seek specific comments and suggestions on the

matter of criteria for the selection of cases where the use of formal hearing procedures would be of benefit.

As to specific procedures for hearings, the Commission proposes to retain essentially all of the current procedures specific to the conduct of formal hearings under Subpart G, but to substantially modify the existing procedures for informal hearings in Subpart L to bring them more into line with the current procedures for hearings in Subpart M for license transfer proceedings. The Commission will also propose a new Subpart N that will contain procedures for a "fast track" hearing. Subpart N will provide for an expedited oral hearing and oral motions, and limit written submissions and the protracted written responses they often entail. The primary modifications to Subparts G and M involve the removal of provisions that are generally applicable to all proceedings and the relocation of the essence of those common provisions to Subpart C. Conforming changes will be made to other subparts of 10 CFR Part 2.

B. Specific Proposals and Request for Comment

1. Subpart C – Sections 2.300 - 2.347

The Commission proposes to establish a new Subpart C that will contain the rules of general applicability for considering hearing requests, petitions to intervene and proffered contentions, for determining the appropriate hearing process procedures to use for a particular proceeding, and for establishing the general powers and duties of presiding officers for the NRC hearing process. The provisions of Subpart C will generally apply to all agency adjudications conducted under the authority of the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974 and 10 CFR Part 2.

(a) Provisions of General Applicability. A large part of the proposed Subpart C essentially restates and updates the substance of many of the rules of general applicability that are currently contained in Subpart G. In this regard --

- proposed section 2.301 on alternative procedures for adjudications involving military or foreign affairs is the same as existing section 2.700a;

- proposed section 2.302 on requirements for the filing of documents reflects the substance of existing section 2.701 with proposed modifications to address facsimile transmissions and electronic mail;

- proposed section 2.303 on establishing and maintaining a docket reflects the substance of existing section 2.702;

- proposed section 2.304 on formal requirements for documents and acceptance for filing reflects the substance of existing sections 2.708 and 2.709 with proposed updates to cover electronic mail ;

- proposed section 2.305 on methods and proof of service incorporates the substance of section 2.712 with proposed modifications to address electronic and facsimile transmissions and the addition of a provision that the Presiding officer require service by the most expeditious means available. The latter provision reflects an effort to minimize delays in service (which can have a significant cumulative effect over the course of an entire proceeding) where expeditious means of service are available;

- proposed section 2.306 on computation of time incorporates the substance of existing section 2.710 and includes a new provision addressing computation of time where electronic mail or facsimile transmission is used. The new provision would make it clear that no time is to be added to the response-date computations where successful electronic or facsimile transmissions result in essentially immediate receipt of the transmitted document requiring a response or other affirmative action;

- proposed section 2.307 on the extension and reduction of time limits is the same as existing section 2.711;

- proposed section 2.312 on the notice of hearing reflects the substance of existing section 2.703;

- proposed section 2.313 on designation of the presiding officer, disqualification and unavailability is the same as existing section 2.704;

- proposed section 2.314 on appearance and practice before the Commission's adjudicatory tribunals is the same as existing section 2.713;

- proposed section 2.315 on participation by persons and entities who are not parties reflects the substance of existing section 2.715;

- proposed section 2.316 on the consolidation of parties is the same as existing section 2.715a;

- proposed section 2.317 on the consolidation of proceedings is the same as existing section 2.716;

- proposed section 2.318 on the commencement and termination of the jurisdiction of the presiding officer is the same as existing section 2.717;

- proposed section 2.319 on the general powers of the Presiding Officer reflects the substance of existing section 2.718 with an additional provision on the authority to strike written submissions from existing section 2.1233(e) and provisions on scheduling and consolidation ;

- proposed section 2.320 on default is the same as existing section 2.707;

- proposed section 2.321 on Atomic Safety and Licensing Boards is the same as existing section 2.721;

- proposed section 2.322 of special assistants to the presiding officer is the same as existing section 2.722;

- proposed section 2.324 on establishing the order for proceeding at hearing is the same as existing section 2.731;

- proposed section 2.325 on the burden of proof is the same as existing section 2.732;

- proposed section 2.326 on motions to reopen is the same as existing section 2.734;

- proposed section 2.327 with regard to the oral hearing reporter and transcripts reflects the substance of most of existing section 2.750. Existing subsection 2.750(c) on free transcripts has

not been carried over to proposed section 2.327 since Congress barred the use of appropriated monies to pay the expenses of parties intervening in NRC adjudicatory proceedings;

- proposed section 2.328 with regard to hearings being open to public observation is the same as existing section 2.751;

- proposed section 2.329 on prehearing conferences incorporates much of the substance of existing 2.752 along with additional provisions on the purpose and objectives of prehearing conferences to provide for the orderly and timely conduct of the proceeding;

- proposed section 2.330 on stipulations is the same as existing section 2.753;

- proposed section 2.331 on oral arguments before the presiding officer is the same as existing section 2.755;

- proposed section 2.333 on the authority of the presiding officer to regulate procedures at hearing is the same as existing section 2.757;

- proposed section 2.335 with regard to the general prohibition on, and procedures for, challenging NRC regulations in hearings is the same as existing section 2.758;

- proposed section 2.338 on an expedited decisional procedure is the same as existing section 2.761;

- proposed section 2.339 on the effectiveness of initial decisions on applications for operating licenses and on immediate effectiveness of initial decisions directing issuance of a construction permit or operating license is the same as existing section 2.760a and existing section 2.764 respectively;

- proposed section 2.341 on stays of decisions or actions of a presiding officer is the same as existing section 2.788;

- proposed section 2.342 on oral arguments before the Commission is the same as existing section 2.763;

- proposed section 2.343 on final decisions is the same as existing section 2.770;

- proposed section 2.344 on petitions to the Commission for reconsideration of final decisions is the similar to existing section 2.771 except that the NRC staff has not been given additional time to respond to petitions for reconsideration;
- proposed section 2.345 on the authority of the Secretary is essentially the same as existing section 2.772.
- proposed section 2.346 on ex parte communications is the same as existing section 2.780; and
- proposed section 2.347 on separation of functions is the same as existing section 2.781.

The Commission proposes to transfer the listed provisions, with modifications as described, from the existing Subpart G to the proposed Subpart C.

(b) Section 2.308 - Secretary's Treatment of Requests for Hearing/Petitions to Intervene

Proposed section 2.308 is a "housekeeping provision" that describes the action the Secretary will take when it receives requests for hearing/petitions to intervene and contentions, answers and replies. Under this section, the Secretary will not take action on the merits or substance of the pleadings but will forward the papers to the Commission or to the Chief Judge of the Atomic Safety and Licensing Board Panel, as appropriate, for further action.

(c) Section 2.309 - Hearing Requests, Petitions to Intervene, Requirements for Standing and Contentions

Proposed section 2.309 establishes the basic requirements for all requests for hearing or petitions to intervene in any NRC adjudicatory proceeding. The section incorporates the basic standing and "one good contention" requirements of existing 10 CFR 2.714 and applies those requirements to all agency adjudicatory proceedings, whether formal (Subpart G), informal (Subparts L, M and N), hybrid (Subpart K) or "fast track" (Subpart N).

Standing. The requirements to establish standing for intervention-as-of-right, as set forth in existing section 2.714, will continue under proposed section 2.309. For intervention in the proceeding on the licensing of the HLW geologic repository, an additional factor -- relating to the petitioner's compliance with prehearing disclosure requirements under Subpart J -- must be considered in any ruling on intervention. Otherwise, the Commission expects its Boards and Presiding Officers to look to the ample agency caselaw on standing to interpret and apply this standard.

Discretionary Intervention. Under proposed section 2.309, the Presiding Officer will consider admitting the petitioner as a matter of discretion where the petitioner fails to establish its standing to intervene as-of-right, if the petitioner requests such consideration. In subsection 2.309(b)(2), the Commission proposes to codify the discretionary intervention factors that were established in its *Pebble Springs* decision (*Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976)) and to require the Presiding Officers or Licensing Boards to apply those factors in all cases where a petitioner is found to lack standing to intervene as-of-right and the petitioner, in the initial petition, has asked for such consideration and addressed the pertinent factors. In this way, the Commission hopes to "underscore the fundamental importance of meaningful public participation in [its] adjudicatory process," *Pebble Springs*, 4 NRC at 615, by allowing the participation of persons who have shown an ability to contribute to the development of the evidentiary record, even though they cannot show the traditional interest in the proceeding. The Commission requests comments and suggestions on the proposed factors to apply for discretionary intervention.

Timing of Requests for Hearing/Petitions to Intervene and Contentions. Proposed section 2.309 incorporates the substance of much of the existing 10 CFR 2.714 with regard to the time for filing requests for hearings/petitions to intervene and the treatment of nontimely filings. A significant change, relative to existing requirements, is that proposed contentions must be filed as part of the initial request for hearing/petition to intervene. Recognizing the potential need for more time for preparation of the

request/petition and contentions, the Commission proposes to provide a minimum of 45 days from the date of publication of the notice of opportunity to request a hearing for the filing of requests/petitions to intervene and contentions. The Commission would welcome comments and suggestions on this issue of time limits for the preparation of petitions with contentions.

Contentions. Proposed subsection 2.309(c) requires that the petition to intervene include the contentions that the petitioner proposes for litigation along with documentation and argument supporting the admission of the proffered contentions. Subsections 2.309(c)(1) and (2) incorporate the longstanding contention support requirements of existing 10 C.F.R. 2.714 – no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met. By continuing to impose these contention support requirements, the Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation.

A significant change, relative to existing requirements, is that the requirement to proffer specific, adequately supported contentions in order to be admitted as a party to the proceeding would be extended to informal proceedings under Subpart L. Under the existing Subpart L, petitioners need only describe "areas of concern about the licensing activity that is the subject matter of the proceeding." 10 C.F.R. 2.1205(e)(3). This sometimes leads to protracted "paper" litigation over ill-defined issues and the resulting development of an unnecessarily large, unfocused evidentiary record for decision. The Presiding Officer is then burdened with the need to sift through such a record to identify the basic issues and pertinent evidence necessary for a decision. The requirement to have specific contentions with a supporting statement of the facts alleged or expert opinion which provide the bases for them in all hearings should focus litigation on real, concrete issues and result in a better and a more understandable record for decision.

Appropriate Hearing Procedures. Proposed subsection 2.309(d) requires that the request for hearing/petition to intervene address the question of the type of hearing procedures (*e.g.*, formal hearings under Subpart G, informal hearings under Subpart L, "fast track" informal procedures under Subpart N) that should be used for the proceeding. This is not a requirement for admission as a party to the proceeding, but a requestor/petitioner who fails to address the hearing procedure issue will not later be heard to complain in any appeal of the hearing procedure selection ruling.

Participation by State and Local Governments and Affected Indian Tribes. Proposed subsection 2.309(e) addresses the participation of interested State and local governments and affected Indian Tribes in NRC adjudicatory proceedings. A significant change, relative to existing requirements in section 2.715(c), is that interested governments and affected Tribes would explicitly be relieved of the obligation to demonstrate standing to be admitted as a party to the proceeding.

Answers and Replies. Proposed subsection 2.309(f) allows the applicant or licensee and the NRC staff to file written answers to requests for hearing/petitions to intervene and contentions, and permits the petitioner to file a written reply to the applicant/licensee and staff answers. No other written answers or replies will be entertained.

(d) Section 2.310 - Selection of Hearing Procedures

A very significant part of this hearing procedure rulemaking is the development of criteria for the selection of the hearing procedures to be used for the proceeding. These criteria will set the course for the rest of the hearing by specifying the use of particular types or categories (formal, informal, informal-fast track, hybrid) of procedures for the remainder of the proceeding.

In developing the hearing procedure selection criteria, the Commission recognized that, with only a single exception, it has broad authority and substantial flexibility to choose among formal trial-type procedures, informal oral or written hearing procedures or any combination of formal and informal hearing procedures.

(i) Formal Hearing Procedures

Uranium Enrichment Facilities. The single exception to the Commission's broad authority to select hearing procedures involves proceedings on licensing the construction and operation of uranium enrichment facilities. Section 193 of the Atomic Energy Act of 1954, as amended, requires that hearings on uranium enrichment facility construction and operation be "on the record", thus requiring formal trial-type hearing procedures to be used. Proposed section 2.310(b) reflects this requirement by specifying that proceedings on licensing the construction and operation of uranium enrichment facilities shall be conducted using the formal hearing procedures of Subpart G.

Enforcement Matters. In its Staff Requirements Memorandum (SRM) on SECY-99-006, Reexamination of the NRC Hearing Process, the Commission noted that formal hearing procedures would seem to be appropriate for hearings on enforcement actions. Several participants in the October 1999 hearing process workshop agreed, noting that formal hearing procedures would give the entity subject to the proposed enforcement action the opportunity to fully confront the proponent of the proposed enforcement action. The Commission believes that the formal hearing procedures of Subpart G are appropriate for application in enforcement cases and proposes in subsection 2.310(a) to continue to require the use of formal procedures in hearings on enforcement actions unless all parties agree to the use of informal procedures. The Commission requests comments on the proposal to require the application of formal hearing procedures in hearings involving enforcement matters and views on whether and when to allow the use of informal hearing procedures for such matters.

Complex Issues in Reactor Licensing. Reactor licensing proceedings can sometimes involve very complex technical safety and environmental issues, the resolution of which would clearly benefit from the application of more formal hearing procedures, including the use of cross-examination by the parties or the parties' experts. Accordingly, the Commission proposes a criterion in subsection 2.310(c) that would call for the use of the formal hearing procedures of Subpart G in those reactor licensing proceedings that involve a large number of complex issues which the Presiding Officer determines can best be resolved through the application of formal hearing procedures. The Commission specifically asks for public comments on the appropriateness of this criterion and representative examples of the type of "complex issues" that would benefit from the use of formal hearing procedures.

(ii) Informal Hearing Procedures

Expansion of Spent Fuel Storage Capacity. Existing Subpart K contains "hybrid" hearing procedures for use in proceedings on the expansion of spent fuel storage capacity at civilian nuclear power reactors. Subpart K provides for the use of the hybrid hearing procedures upon the request of any party. The Commission proposes to retain Subpart K and, by the hearing procedure selection provision in subsection 2.310(d), make the hearing procedures of Subpart K available for use in any proceeding on the expansion of spent fuel storage capacity at a power reactor.

License Transfers. Existing Subpart M contains informal hearing procedures for use in proceedings involving reactor or materials license transfers. Subpart M requires the use of its hearing procedures for all license transfer proceedings for which a hearing request has been granted unless the Commission directs otherwise. The Commission proposes to retain Subpart M and, by the hearing procedure selection provision in subsection 2.310(f), specify the use of Subpart M hearing procedures in license transfer proceedings.

Informal Hearing Procedures for High Level Waste Repository Licensing. For many years, the AEC and the NRC assumed that the Atomic Energy Act required formal agency hearings despite the fact that assumption had never been reduced to a definitive holding. Consistent with that assumption, the NRC declared in 1978 that the hearing it would hold on an application to construct and operate a repository for high level waste (HLW) would be formal. In final rules published in 1981, now codified at 10 CFR Part 2, Subpart J, the Commission provided for a mandatory formal hearing at the construction authorization stage and for an opportunity for a formal hearing prior to authorizing receipt and possession of high level waste at a geologic repository. Subsequently, Congress enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 et seq. That law includes no specific hearing requirements. Instead, it seems to contemplate, at Section 114, that the NRC will apply existing laws applicable to the construction and operation of nuclear facilities. In sum, there is no *statutory* requirement for a formal hearing on a high level waste repository, but without a rule change, the NRC's regulations *would* require a formal hearing. The Commission proposes a rule change in this area.

As discussed at length earlier in this notice, the Commission has concluded that, in fact and in law, it may use informal hearings for all matters except licensing the construction and operation of uranium enrichment facilities. In addition, the Commission has further concluded that, in general, NRC adjudicatory hearings can be more effective and less burdensome to all parties if more informal hearing procedures are used.

Based on these more recent conclusions, the Commission has reconsidered its position on the need and value of formal trial-type hearing procedures for HLW repository licensing. While the Commission recognizes that repository licensing is very likely to be highly controversial and adversarial in nature, it perceives no obvious benefit to the use of formal hearing procedures in such a proceeding. In this regard, the Commission notes that very informal processes were successfully used to gain meaningful public input on the authorization of construction and operation of the Waste Isolation Pilot Project (WIPP)

in New Mexico. The Commission believes that the WIPP experience is strong evidence that formal trial-type hearing procedures are not necessary to resolve the sorts of issues that are likely to arise in nuclear waste disposal proceedings and that informal processes can provide an effective and efficient means to address the issues in these kinds of cases.

Moreover, the discovery provisions of existing Subpart G are not needed for the repository licensing proceeding since an entire subpart on discovery for repository licensing – Subpart J – has been developed and is being and will continue to be implemented. Thus, one of the few special aspects of formal hearing procedures in NRC practice – discovery under existing Subpart G – has been specifically supplanted for HLW repository licensing, further obviating the need for application of existing Subpart G procedures in this case.

Based on these sorts of considerations, the Commission proposes, in subsection 2.310(e), to require that the HLW repository licensing proceeding use the informal hearing procedures of the proposed new Subpart L. The Commission would note that the new Subpart L places emphasis on oral (rather than written) hearings with live witnesses and questioning by the Presiding Officer or Licensing Board. The Commission would expect the oral hearing procedures to be used for repository licensing.

The Commission wishes to emphasize that the proposal for informal hearing procedures for repository licensing in subsection 2.310(e) represents a change from the position heretofore expressed by the NRC and the Commission would welcome public comment on the proposal. Commentors who advocate the use of formal hearing procedures are asked to state the reasons why they believe formal hearing procedures are warranted in this case.

Other Proceedings. In subsection 2.310(g), the Commission proposes to apply the informal hearing procedures of the new Subpart L to all other proceedings – *i.e.* proceedings involving hearings on

the grant, renewal, licensee-initiated amendment or termination of licenses and permits subject to Parts 30, 32 through 35, 39, 40, 50, 52, 54, 55, 61, 70 and 72. Under this provision, Subpart L procedures would be used, as a general matter, for hearings on power reactor construction permit and operating license applications under Parts 50 and 52, power reactor license renewal applications under Part 54, power reactor license amendments under Part 50, reactor operator licensing under Part 55, and nearly all materials and spent fuel licensing matters. This would be a significant change from current hearing practice for reactor licensing matters. Under longstanding practice, proceedings on applications for reactor construction permits, operating licenses and operating license amendments have used the formal hearing procedures of existing Subpart G. Similarly, in the Statement of Considerations for the 1991 rule on reactor license renewal, the Commission stated that it would provide an "opportunity for a formal public hearing" on reactor license renewal applications. 56 F.R. 64943, 64946 (December 13, 1991). With the new rules, proposed here, reactor licensing proceedings will generally use informal hearing procedures. The procedures of Subpart L could also be applied in hearings involving enforcement matters if all parties agree.

Fast Track Procedures. In subsection 2.310(h), the Commission proposes to apply the informal "fast track" hearing procedures of new Subpart N in any proceeding (other than those designated in subsections 2.310(a)-(f) as requiring other procedures) in which the hearing is estimated to take no more than 2 days to complete or where all parties agree to the use of the "fast track" hearing procedures. The "fast track" procedures of Subpart N may be particularly useful for reactor operator licensing cases or for small material licensee cases where the parties want to be heard on the issues in a simple, inexpensive, informal proceeding that can be conducted quickly before an independent decisionmaker. The Commission would welcome comments and suggestions on the appropriate criteria for the use of Subpart N.

(e) Section 2.311 - Interlocutory Review of Rulings on Requests for Hearing/Petitions to Intervene and Selection of Hearing Procedures

Similar to existing section 2.714a in Subpart G, proposed section 2.311 would allow for the interlocutory appeal of rulings on requests for hearing and petitions to intervene. The interlocutory appeal provision has been expanded, however, to allow immediate appeals of rulings on the admission of proposed contentions. This provision will benefit all parties – petitioners and applicants/licensees -- as it permits any party to seek early Commission guidance and rulings on the proper issues to be litigated and should help to avoid needless delays from remands after initial decisions have been issued. Early, authoritative identification of the contentions for hearing also has a bearing on the selection of hearing procedures. Proposed section 2.311 would also provide the only opportunity to appeal the Presiding Officer's selection of hearing procedures.

(f) Section 2.314 - Appearance and Representation

Similar to existing section 2.1215 in the current Subpart L, proposed section 2.314 addresses appearance and representation in NRC adjudications. Compared to existing 2.1215, the provisions on appearance and representation have been simplified and expanded in section 2.314.

(g) Section 2.323 - Motions

Proposed section 2.323 incorporates the substance of existing section 2.730 in Subpart G on the general form, content, timing and requirements for motions and responses to motions. Like existing section 2.730, proposed section 2.323 also addresses referral of rulings and certifed questions by the presiding officer to the Commission. With regard to referrals, proposed subsection 2.323(f) has been expanded to provide for referrals of decisions or rulings where the presiding officer determines that the

decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. See also proposed section 2.340(g). It has also been modified to allow any party to file with the presiding officer a petition for certification of issues for early Commission review and guidance. This is consistent with the 1998 Statement of Policy on Adjudicatory Proceedings in which the Commission urged certification of issues or referral of rulings which involve novel questions that would benefit from early Commission guidance. Finally, section 2.323 has been expanded, compared to existing section 2.730, to address motions for reconsideration.

(h) Section 2.332 - General Case Scheduling and Management

Proposed section 2.332 addresses general case scheduling and management, requiring Presiding Officers to consult with the parties early in the proceeding in order to set schedules, establish deadlines for discovery and motions, where appropriate, and set the groundrules for control and management of the proceeding. The section also addresses integration of the staff's preparation of its safety and environmental review documents into the hearing process schedules. The Commission requests comment on the case management provisions proposed in section 2.332 and would welcome suggestions for additional case management techniques.

(i) Section 2.334 - Schedules for Proceedings

Proposed section 2.334 codifies the guidance in the Commission's 1998 Statement of Policy on the Conduct of Adjudicatory Proceedings that suggested that Presiding Officers should establish and maintain "milestone" schedules for the completion of hearings and the issuance of initial decisions. The section requires Presiding Officers to establish such schedules and to notify the Commission if there are slippages

that would delay the issuance of the initial decision more than 60 days from the date established in the schedule. The notification must include an explanation of the reasons for the delay and a description of the actions, if any, that can be taken to avoid or mitigate the delay.

(j) Section 2.336 - General Discovery

Proposed section 2.336 would impose a disclosure requirement on all parties (and the NRC staff) in all proceedings under Part 2. This generally applicable discovery provision requires each party to disclose and/or provide the identity of witnesses and persons with discoverable information, pertinent documents and pertinent applicant-NRC correspondence. The duty of disclosure continues over the pendency of the proceeding. Section 2.336 authorizes sanctions against parties who fail to comply with this general discovery provision, and, similar to the rules of practice of the Environmental Protection Agency (40 CFR 22.19(a), 22.22(a)), prohibits admission into evidence of documents or testimony that a party failed to disclose as required by this section unless there was good cause for the failure. Except for proceedings using the procedures of Subparts G and J, the discovery required by section 2.336 constitutes the totality of the discovery that may be obtained.

(k) Section 2.337 - Settlement of Issues; Alternate Dispute Resolution

Proposed section 2.337 addresses settlement and use of alternate dispute resolution in NRC proceedings. The Commission has long encouraged the resolution of contested issues in licensing and enforcement proceedings through settlement, consistent with the hearing requirements of the Atomic Energy Act. *See Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (45 FR 28533, May 27, 1981); *Policy Statement on Alternative Means of Dispute Resolution*, 57 FR 36678 (Aug.

14, 1992). The proposed rule includes a new provision on settlement that consolidates and amplifies existing rules pertaining to settlement (10 CFR §§ 2.203, 2.,759, 2.1241). The proposed rule describes the required form and content of settlement agreements and provides guidance on the use of settlement judges as mediators in NRC proceedings. The Commission has previously endorsed the appropriate use of settlement judges in *Rockwell Int'l Corp.*, CLI-90-05, 31 NRC 337 (1990). The proposed rule is modeled on a provision in the Model Adjudication Rules prepared in 1993 for the Administrative Conference of the United States (ACUS). *See* Cox, *The Model Adjudication Rules*, 11 T.M. Cooley L. Rev. 75 (1994). The Commission intends no change in the bases for accepting a settlement by the proposed rule.

As suggested by several workshop participants, the Commission is also considering providing further guidance on the use of alternative dispute resolution ("ADR") as part of its hearing procedures. This objective is also consistent with the NRC's continuing participation in the activities of the Interagency Working Group on Alternative Dispute Resolution chaired by the Attorney General, as well as with the Administrative Dispute Resolution Act of 1996 ("ADR Act"). The Working Group was established to facilitate the implementation of a May 1, 1998, memorandum from President Clinton that directed all executive departments and federal agencies to develop dispute resolution programs.

ADR can be defined as any technique that results in the conciliatory resolution of a dispute, including facilitation, mediation, fact finding, minitrials, early neutral evaluation, and arbitration. Although "unassisted" negotiation to resolve disputes has long been effectively used in resolving disputed matters before NRC tribunals, the focus of the ADR Act, and the efforts of the Interagency Working Group, has been on "formal" ADR techniques that require the use of a third party neutral. The Commission's consideration of ADR techniques for use in the hearing process also focuses on these formal ADR techniques. Although the Commission believes that a broad array of ADR options could be made available to the parties in an NRC proceeding, it anticipates that "non-binding" techniques, such as mediation, would be the most appropriate. For example, mediation is a process by which an impartial third party -- a

mediator -- facilitates the resolution of a dispute by promoting a voluntary agreement by the parties to the dispute. The parties are free to develop a mutually acceptable resolution to their dispute. The role of the mediator is to help the parties reach this resolution. The mediator does not decide the case or dictate the terms of a settlement.

The Commission believes that the use of ADR has the potential to eliminate unnecessary litigation of licensing issues, shorten the time that it takes to resolve disputes over issues, and achieve better resolution of issues with the expenditure of fewer resources. However, because of the Commission's responsibility to make required public health and safety findings, the use of ADR may not be appropriate in all circumstances.

The Commission is seeking public comment on the text of the proposed rule as well as on the broader issue of the use of ADR in NRC proceedings. In this regard the Commission invites comment on the following specific questions:

- Should the Commission formally provide for the use of ADR in its hearing process?

- Should the use of ADR be codified in the Commission's regulations, or provided for in some other manner, such as a policy statement?

- At what stage of the hearing process should an opportunity for ADR be provided?

- What types of issues would be amenable to resolution through ADR? What types of issues should not be considered for resolution through ADR?

- How should the use of ADR operate in the context of the hearing process? Who could propose its use? What should be the role of the Presiding Officer? Who should be parties to the ADR process?

What should be the role of the NRC staff in the ADR process? What happens to the proceeding while the ADR process is being implemented? How would the resolution of a dispute be incorporated into the hearing process? What should the role of the Commission be in the ADR process?

- Should there be a source of third-party neutrals other than settlement judges appointed from the members of the Atomic Safety and Licensing Board Panel to assist in the ADR process, such as the roster of neutrals established by the U.S. Institute for Conflict Resolution or the National Energy Panel of the American Arbitration Association? How should such individual neutrals be selected? What arrangements should be made to compensate neutrals for their services?

(l) Section 2.340 - Review of Decisions and Actions of a Presiding Officer

Proposed section 2.340 on Commission review of decisions and actions of the presiding officer is, in essence, a restatement of existing section 2.786. However, subsection (g) on the standards for certifying issues or referring rulings to the Commission contains an additional standard that would permit certification or referral where the matter involves a novel question that merits Commission review at the earliest opportunity. The purpose of such a provision, as noted in the Commission's 1998 Statement of Policy on Adjudicatory Proceedings, 49 NRC at 23, is to encourage the referral or certification of novel issues in situations where early Commission guidance or rulings are needed and might help avoid needless litigation and possible later remand by the Commission. Subsection (f) also makes clear what has been in fact practice since adoption of the current appellate procedures in 1991; *i.e.*, the Commission will entertain in its discretion petitions by a party for review of an interlocutory matter in the circumstances described in subsection (f). Minor changes have also been made to give guidance on the form and content of briefs.

2. Subpart G - Sections 2.700 - 2.712

The Commission proposes to revise the provisions of Subpart G which currently set forth the rules of general applicability to NRC adjudications. Under the proposed revisions, Subpart G would now set forth rules specifically applicable to formal adjudicatory proceedings, such as those appropriate to enforcement proceedings and to more complex reactor proceedings involving numerous issues. In large part, the regulations retained in Subpart G are a restatement of the existing provisions of Subpart G, and have been restated without change except for renumbering and internal conforming reference renumbering. Some have been revised to better reflect current Commission policy regarding the conduct of adjudicatory proceedings and current federal practice, for example, with respect to discovery. As discussed above, numerous provisions of the current Subpart G have been relocated to new Subpart C. In addition, several have been deleted. Following is a section-by-section analysis:

(a) Proposed section 2.700 would reflect the foregoing revised description of the applicability of this Subpart, and section 2.700a continues, without change, the possible exceptions to the applicability of the procedures, should the Commission determine appropriate.

(b) Current section 2.705 which provides for the filing of an answer to a notice of hearing is proposed to be deleted. Experience has shown this provision to be largely superfluous. For the same reason, section 2.751a which provides for a special prehearing conference in connection with construction permit and operating license proceedings, and section 2.761a, providing for separate hearings and decisions, are proposed to be deleted. The provisions of section 2.752, which would be renumbered as section 2.318, provides for the conduct of a prehearing conference to accomplish the same purposes as those in section 2.751a, and there is no apparent reason to retain a duplicative requirement.

(c) The existing provisions of section 2.765, Immediate effectiveness of initial decision directing issuance or amendment of license under Part 61 of this chapter, is proposed to be relocated to revised Subpart L, which sets forth the provisions applicable to informal proceedings. The Commission is proposing

to conduct proceedings regarding licensing matters under Part 61 in accordance with Subpart L, and, for that reason, this provision is pertinent to those provisions as opposed to those applicable to formal proceedings.

(d) Section 2.790 is proposed to be relocated to Subpart A of this Part as section 2.103a. This regulation sets forth provisions of generic applicability concerning the public's access to information which apply irrespective of whether there is an NRC proceeding.

(e) Proposed section 2.702 is fundamentally a restatement of former section 2.720(a) - (h)(1). The provisions of former section 2.720(h)(2), which pertain to discovery against the NRC, has been retained and combined with former section 2.744 in a new section 2.707. This new section now sets forth in one place, all regulations governing discovery against the NRC in the Commission's formal administrative proceedings under Subpart G. Except for the foregoing, the substantive aspects of the former regulations are unchanged. In addition, with the implementation of the Commission's ADAMS document management system, which should ensure access to pertinent Commission documents, the need to resort to formal processes afforded by these regulations should be limited.

(f) Proposed section 2.703 restates, without revision, the provisions of section 2.733 regarding the examination and cross-examination of expert witnesses.

(g) The Commission proposes, in a new section 2.704 to revise the general provisions providing for discovery, except for discovery against the NRC which is addressed above. The new regulation revises the existing provisions of section 2.740 to better reflect the provisions of Federal Rules of Civil Procedure Rule 26, providing for the prompt and open disclosure of relevant information by the parties, without resort to formal processes, except if the need for intercession by the Presiding Officer becomes necessary. It is expected that the revised regulation will eliminate or substantially limit the need for formal discovery in adjudicatory proceedings, and will, at the same time, make explicit the Presiding Officer's authority to limit the scope and

quantity of discovery in a particular proceeding, should the need arise. Proposed sections 2.705, 2.706 and 2.707 continue without change, the provisions of current sections 2.740a, 2.740b, 2.741 and 2.742, regarding depositions, interrogatories, production of documents and admissions.

(h) Section 2.708 incorporates the formerly separate provisions of sections 2.720(h)(2) and 2.744 providing for discovery against the NRC staff .

(i) Section 2.709 retains, with slight revision, the current provisions of section 2.749 regarding summary disposition.

(j) In revised section 2.710, Evidence, the Commission restates former section 2.743 without change.

(k) Proposed section 2.711 continues, without change, the provisions of section 2.754 regarding the requirement for the submission of proposed findings of fact and conclusions of law following completion of a formal hearing.

(l) Likewise, the existing provision of section 2.760, Initial decision and its effect, is restated without change, in proposed sections 2.712.

Subpart J

The Commission proposes a number of changes to sections 2.1000, 2.1001, 2.1010, 2.1012, 2.1013, 2.1014, 2.1015, 2.1016, 2.1018, 2.1019, 2.1021, 2.1022, 2.1025, and 2.1027. The changes are intended (1) as conforming changes to correct references to rules of general applicability in existing Subpart G that are being transferred to the proposed Subpart C, (2) to eliminate redundant or duplicate provisions in Subpart J that will be covered by the generally applicable provisions in the proposed Subpart C, and (3) to reflect the

application of the informal hearing procedures of the proposed Subpart L to the repository licensing proceeding. The Commission would welcome comments or suggestions on these or other changes to Subpart J that would serve these intents.

Subpart K

The Commission proposes several simple changes to sections 2.1109 and 2.1117 and proposes to eliminate section 2.111 on discovery since discovery for Subpart K hybrid hearings will be addressed by the general discovery provision of Subpart C. These proposed changes are intended (1) to conform Subpart K to the rules of general applicability of Subpart C, particularly with regard to the need to request hybrid hearing procedures in the petition to intervene, and (2) to make it clear that a hearing on any contentions that remain after the oral argument under Subpart K will be conducted using the informal hearing procedures of proposed Subpart L.

Subpart L - Sections 2.1200-2.1212

Although the informal hearing procedures of existing Subpart L have been in place for a number of years, their implementation has shown some aspects of them to be cumbersome and inefficient in the development of a record. Under the existing Subpart L, the parties sometimes devote substantial time and effort to litigation over the specific procedures to be used rather than to the substantive issues. Also, the absence of a specific contention requirement has sometimes resulted in the development of a paper record that is not effectively focused on the issues in dispute but rather, is burdened with extraneous material that makes the formulation of a decision unnecessarily difficult and time consuming. To address these problems, the Commission proposes to replace the existing Subpart L in its entirety. The proposed new informal hearing procedures would be patterned after the existing Subpart M on license transfers and would shift the focus to informal oral hearings. In addition, a specific contention requirement would apply through Subpart C. The

provisions of this new Subpart L may be applied to all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act, and 10 CFR Part 2 except proceedings on the licensing of the construction and operation of a uranium enrichment facility and proceedings on enforcement matters. Following is a section-by-section analysis.

(a) Section 2.1201 - Scope of Subpart

Subpart L may be applied to all NRC adjudicatory proceedings except proceedings on the licensing of uranium enrichment facilities.

(b) Section 2.1201 - Definitions

Subpart L has no unique definitions but relies on the definitions of existing section 2.4.

(c) Section 2.1202 - Authority and Role of NRC Staff

Proposed section 2.1202 describes the authority and role of the NRC staff in the informal hearings under proposed Subpart L. Similar to the situation in license transfer cases under existing Subpart M, the staff is expected to conduct its own reviews and, take action on the application or matter that is the subject of the hearing, despite the pendency of the hearing. The staff's action on the application or matter is effective upon issuance except in matters involving an application to construct or operate a production or utilization facility, an application for licensing the HLW repository, an application for the construction and operation of an independent spent fuel storage installation or monitored retrievable storage facility located away from a reactor site, and production or utilization facility licensing actions that involve significant hazards considerations. Under proposed section 2.1212, the staff's action is subject to motions for stay.

Proposed section 2.1202 provides that the staff is not required to be a party to most proceedings conducted under proposed Subpart L. The staff must be a party to the HLW repository licensing proceeding, to any proceeding involving an application denied by the staff, and to any proceeding on an enforcement action proposed by the staff. Proposed subsection 2.1202(b)(1)(ii) also requires the staff to participate as a party on specific issues where the Presiding Officer determines that resolution of such issues would be aided materially by the staff's participation as a party. In all other instances, the staff must notify the Presiding Officer and parties as to whether or not it desires party status.

(d) Section 2.1203 - Hearing File and Prohibition on Other Discovery

In a manner similar to existing Subpart L, proposed section 2.1203 requires the NRC staff to prepare and provide a hearing file and to keep the hearing file up-to-date. In many respects, the Hearing File requirement for the NRC staff overlaps the "general discovery" provision of Subpart C which is applicable to the staff for all proceedings. With a limited exception related to HLW repository licensing, proposed section 2.1203 prohibits any other discovery in Subpart L proceedings.

(e) Section 2.1204 - Motions and Requests

Proposed section 2.1204 makes it clear that the provisions in Subpart C on motions, requests and responses are to be applied in informal proceedings under Subpart L. This section also allows the parties to request that the presiding officer permit cross-examination by the parties on particular contentions or issues. The presiding officer may allow the parties to cross-examine if he/she finds that the failure to permit such cross examination will prevent the development of an adequate record for decision.

(f) Section 2.1205 - Summary Disposition

Proposed section 2.1205 provides a simplified procedure for summary disposition in informal proceedings. The standards to be applied in ruling on such motions are those set out in Subpart G.

(g) Section 2.1206 - Informal Hearings

Proposed section 2.1206 specifies that informal hearings under the new Subpart L will be oral hearings unless all the parties agree to a hearing consisting of written submissions. This is a significant change from the existing Subpart L which generally involves hearings consisting of written submissions. No motion to hold a hearing consisting of written submissions will be entertained absent unanimous consent of the parties.

(h) Section 2.1207 - Oral Hearings

Proposed section 2.1207 specifies the process and schedule for submissions and presentations in oral hearings under the new Subpart L. This section addresses the sequence and timing for the submission of direct testimony, rebuttal testimony, statements of position, suggested questions for the Presiding Officer to ask witnesses, and post-hearing statements of position. The section also contains provisions on the actual conduct of the hearing, including the stipulation that only the Presiding Officer may question witnesses.

(i) Section 2.1208 - Hearings Consisting of Written Presentation

Proposed section 2.1207 specifies the process for submissions in hearings consisting of written presentations. This section addresses the sequence and timing for the submission of written statements of position, written direct testimony, written rebuttal testimony, proposed questions on the written testimony and written concluding statements of position on the contentions.

(j) Section 2.1209, 2.1210 - Initial Decision and Its Effect

Unless the Commission directs that the record be certified to it, the Presiding Officer will render an initial decision and that decision will constitute the final action of the Commission 40 days after issuance, unless any party files a petition for Commission review or the Commission decides to review on its own motion. Under proposed section 2.1209, an initial decision resolving all issues before the Presiding Officer is effective upon issuance unless stayed or otherwise provided by the regulations in Part 2. Proposed section 2.1210 restates existing section 2.765 which specifies that initial decisions directing the issuance of a license or license amendment under Part 61 relating to land disposal of radioactive waste will become effective only upon the order of the Commission.

(k) Section 2.1211 - Petitions for Commission Review of Initial Decision

Proposed section 2.1211 specifies that petitions for review of an initial decision must be filed pursuant to the generally applicable review provisions of section 2.340.

(l) Section 2.1212 - Applications for a Stay

Proposed section 2.1211 specifies procedures for applications to stay the effectiveness of the NRC staff's actions on a licensing matter involved in a hearing under Subpart L. The procedures and standards are similar to the traditional stay provision in existing section 2.788. Applications for a stay of an initial decision issued under Subpart L are to be filed pursuant to the generally applicable stay provisions of section 2.341.

Subpart M

The Commission proposes changes to Subpart M that would eliminate sections 2.1306, 2.1307, 2.1308, 2.1312, 2.1313, 2.1314, 2.1317, 2.1318, 2.1326, 2.1328, 2.1329, and 2.1330 because the substance of these sections is covered by rules of general applicability in proposed Subpart C. Sections 2.1321, 2.1322 and

2.1331 would be modified to remove references to deleted sections and reflect the fact that requests for hearing/petitions to intervene for proceedings under Subpart M will be considered under the generally applicable requirements of section 2.309. The basic intent of these changes is to conform Subpart M to the other changes to Part 2 proposed in this rulemaking.

Subpart N – Sections 2.1400 - 2.1407

The Commission proposes to establish a new Subpart N – a "fast track" process -- to provide a mechanism and procedures for the expeditious resolution of issues in cases where the contentions are few and not particularly complex and might be efficiently addressed in a short hearing using simple procedures and oral presentations. This Subpart may be used for more complex issues if all parties agree. The Subpart may be applied to all NRC adjudications except proceedings on uranium enrichment facility licensing, and proceedings on the licensing of a HLW repository. By the shortened response times and fairly rapid progression to actual hearing, Subpart N procedures could result in the rendering of an initial decision within about 2 to 3 months of the issuance of the order granting a hearing if the issues are straightforward and deadlines are met. In view of the simplified procedures and the expedited nature of the litigation involved, Subpart N would allow an appeal as-of-right to the Commission so that the parties have a direct path to the Commission for review of the decision. The "fast track" procedures of Subpart N may be particularly useful for small licensee cases where the parties want to be heard on the issues in a simple, inexpensive informal proceeding that can be conducted quickly before an independent decisionmaker. Following is a section-by-section analysis.

(a) Section 2.1401 - Definitions

Proposed Subpart N has no unique definitions but relies on the definitions of existing section 2.4.

(b) Section 2.1402 - General Procedures and Limitations

Proposed section 2.1402 specifies the general procedures and procedural limitations for the "fast track" hearing process of Subpart N. It is notable in its general limitations on the use of written motions and pleadings, the prohibitions on discovery beyond that provided by the general disclosure provisions of Subpart C, and the prohibition on summary disposition. Section 2.1402 does allow the Presiding Officer or the Commission to order the hearing to be conducted using other hearing procedures if it becomes apparent at any time before the hearing is held that the use of the "fast track" procedures of this Subpart is not appropriate in the particular case. It also permits any party to request that the presiding officer allow parties to cross-examine on particular contentions or issues if the party can show that a failure to allow cross-examination by the parties will prevent the development of an adequate record for decision.

(c) Section 2.1403 - Authority and Role of the NRC Staff

Proposed section 2.1403 describes the authority and role of the NRC staff in the "fast track" hearings under Subpart N. Similar to the situation in informal hearings under proposed Subpart L and license transfer cases under existing Subpart M, the staff is expected to conduct its own reviews and take action on the application or matter that is the subject of the hearing, despite the pendency of the hearing. The staff's action on the application or matter is effective upon issuance except in proceedings involving an application to construct and/or operate a production or utilization facility, an application for the construction and operation of an ISFSI or an MRS at a site other than a reactor site, and proposed reactor licensing actions that involve significant hazards considerations. Section 2.1403 provides that the staff is not required to be a party in most "fast track" proceedings. The staff must be a party in any Subpart N proceeding involving an application denied by the staff or an enforcement action proposed by the staff or where the presiding officer determines

that resolution of any issue would be aided materially by the staff's participation as a party. In all other instances, the staff must notify the Presiding Officer and the parties as to whether or not it desires party status.

(d) Section 2.1404 - Prehearing Conference

Proposed section 2.1404 requires the Presiding Officer to conduct a prehearing conference within 40 days of the issuance of the order granting requests for hearing/petitions to intervene. At the prehearing conference, each party is to identify its witnesses, provide a summary of the proposed testimony of each witness, report on its efforts at settlement, and provide questions that the party wishes the Presiding Officer to ask at the hearing. The Presiding Officer will memorialize the rulings and results of the prehearing conference in a written order.

(e) Section 2.1405 - Hearing

The hearing is to commence no later than 20 days after the prehearing conference required by section 2.1404. The hearing will be open to the public and transcribed. At the hearing, the Presiding Officer will receive oral testimony and question the witnesses. The parties may not cross examine the witnesses but they will have had the opportunity at the prehearing conference to provide questions for the Presiding Officer to use at hearing. Each party may present oral argument and a final statement of position at the close of the hearing. Written post-hearing briefs and proposed findings are prohibited unless requested by the Presiding Officer.

(f) Section 2.1406 - Initial Decision - Issuance and Effectiveness

Proposed section 2.1406 encourages the Presiding Officer to render a decision from the bench, to be reduced to writing within 20 days of the close of the hearing. Where a decision is not rendered from the bench, it must be issued in writing within 30 days of the close of the hearing. These periods may be extended only

with the approval of the Chief Administrative Judge or the Commission. The initial decision is effective 20 days after issuance of the written decision unless a party appeals or the Commission takes review on its own motion. Note that under the proposed Subpart N "fast track" process, the initial decision is effectively stayed if a party appeals or the Commission reviews on its own.

(g) Section 2.1407 - Appeal and Commission Review of Initial Decision

Under proposed section 2.1407, a party may appeal as-of-right by filing a written appeal with the Commission within 15 days after the service of the initial decision. The written appeal must be 20 pages or less and must address the matters and standards for review listed in section 2.1407. Other parties may file written answers within 15 days after service of the appeal. Answers similarly are limited to 20 days or less.

Environmental Impact: Categorical Exclusion

The proposed regulations involve an amendment to 10 CFR Part 2, and qualify as actions eligible for the categorical exclusion from environmental review in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement or environmental assessment has been prepared for these regulations.

Paperwork Reduction Act Statement

The proposed rule contains no information collection requirements subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S. C. 3501 *et. seq.*).

Regulatory Analysis

This proposal emanates from a longstanding concern that the Commission's hearing process is not as efficient or effective as it could be. The Commission is seeking to develop revised rules of procedure that will enhance public participation, produce more timely decisions, and reduce the resources that participants expend. The Commission's experience suggests that in most instances use of formal adjudicatory procedures is not essential to the development of an adequate hearing record, yet all too frequently results in protracted, costly proceedings.

The Commission is proposing that most agency proceedings be conducted using informal hearing procedures. The trend in administrative law is to move away from formal, trial-type procedures. Instead, informal hearings and use of Alternative Dispute Resolution methods, such as settlement conferences, are often viewed as a better, quicker, and less costly means to resolve disputes.

The Commission would continue to utilize formal trial-type procedures in enforcement proceedings, as well as any proceeding to construct and operate an enrichment facility pursuant to section 193 of the Atomic Energy Act. That is the only section in the Atomic Energy Act that mandates use of formal adjudicatory proceedings. The Commission also proposes to retain the option of using formal adjudicatory proceedings in other proceedings where it determined that this would be the better means to address and resolve particular issues. The Commission recognizes that in some cases, such as reactor licensing cases involving many complex issues, the use of formal adjudicatory proceedings may be the best means to develop an adequate record upon which a sound decision can be based.

The proposed changes in the rules should facilitate public participation in agency proceedings by reducing some of the burdens. For example, the costs of discovery in formal agency adjudications should be reduced by the provision requiring parties to disclose voluntarily relevant documents at the outset of the proceeding. This should result in a diminished need for parties to file interrogatories and take depositions. By adding this

form of discovery to all proceedings (formal and informal), the parties will have information that will assist in the resolution of issues and litigation of the case. Moreover, by requiring that contentions be filed in informal adjudications and providing for oral hearings (unless waived by all of the parties), informal proceedings should be more focused. This will permit parties to better focus the scope of their written and oral presentations on the specific disputes that must be resolved. By permitting the parties in informal hearings to propose questions that the Presiding Officer could pose to the participants, and then permitting the Presiding Officer to pose whatever questions he or she deems appropriate to the witnesses, a more focused and complete record should be developed.

Finally, for less complex disputes, a fast track option is proposed. Under this option, these cases could be resolved far more quickly than under current rules and with substantially reduced burdens to the participants.

The Commission does not believe the option of preserving the status quo by not proposing any rule changes is a preferred option. Experience has indicated that the agency hearing process can be improved through appropriate rule changes. The Commission believes that the rule changes proposed herein will improve the effectiveness of NRC hearings and at the same time reduce the overall burdens for participants -- members of the public, interested State and local governments, NRC staff, applicants and licensees -- in NRC hearings.

This constitutes the regulatory analysis for this proposal.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed rule would apply in the context of Commission adjudicatory proceedings

concerning nuclear reactors or nuclear materials. Reactor licensees are large organizations that do fall within the definition of a small business found in section 3 of the Small Business Act, 15 U.S.C. 632, within the small business standards set forth in 13 CFR Part 121, or within the size standards adopted by the NRC (10 CFR 2.810). Based upon the historically low number of requests for hearings involving materials licensees, it is not expected that this rule will have any significant economic impact on a substantial number of small businesses.

Backfit Analysis

The NRC has determined that the backfit rule does not apply to this proposed rule; therefore, a backfit analysis is not required for this proposed rule because these amendments do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 2.

Lists of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

Part 2 - Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders

1. The authority citation for part 2 reads as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87--615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552. Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933. 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10143(0); sec. 102, Pub. L 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Section 2.102, 2.103, 2.104, 2.105, 2.321 also issued under secs. 102, 163, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat.

2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b. i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note). Subpart C also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Section 2.700a also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.754, 2.712, also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553, Section 2.809 also issued under 5 U.S.C. 553, ,and sec. 29, Pub, L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 .U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart N also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-5!50, 84 Stat. 1473 (42 U.S.C. 2135).

2. 10 C.F.R. Part 2 is revised as follows:

Subpart C -- Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers and General Hearing Management for NRC Adjudicatory Hearings

§ 2.300 Scope of Subpart C

The provisions of this Subpart apply to all adjudications conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR Part 2, unless specifically provided to the contrary herein.

§ 2.301 Exceptions

(a) Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

(b) The rule shall apply to proceedings in progress where hearings have already been requested or ordered as well as to future proceedings.

§ 2.302 Filing of documents.

(a) Documents shall be filed with the Commission in adjudications subject to this part either:

(1) by delivery to the NRC Public Document Room at 2120 L Street, NW., Washington, DC or

(2) by mail addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, or

(3) by facsimile transmission addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C., Attention: Rulemakings and Adjudications Staff, at (301) 415-1101, or

(4) by electronic mail addressed to the Secretary, U.S. Nuclear Regulatory Commission, HEARINGDOCKET @NRC.GOV.

(b) All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. For purposes of service of documents, the staff of the Commission shall be deemed to be a party.

(c) Filing by mail, electronic mail, telegram or facsimile will be deemed to be complete as of the time of deposit in the mail or with a telegraph company or upon electronic or facsimile transmission.

§ 2.303 Docket

The Secretary shall maintain a docket for each proceeding conducted under this part, commencing with either the initial notice of hearing, notice of proposed action, order, request for hearing or petition for leave to intervene, as appropriate. The Secretary shall maintain all files and transcripts of proceedings and all papers, correspondence, decisions and orders filed or issued. All documents, records, and exhibits filed in any proceeding must be filed with the Secretary as described in sections 2.302 and 2.304.

§ 2.304 Formal Requirements for Documents; Acceptance for Filing

(a) Each document filed in an adjudication subject to this Part to which a docket number has been assigned shall bear the docket number and title of the proceeding.

(b) Each document shall be bound on the left side and typewritten, printed or otherwise reproduced in permanent form on good unglazed paper of standard letterhead size. Each page shall begin not less than one and one-quarter inches from the top, with side and bottom margins of not less than one and one-quarter inches. Text shall be double-spaced, except that quotations may be single-spaced and indented. The requirements of this paragraph do not apply to original documents or admissible copies offered as exhibits, or to specifically prepared exhibits.

(c) The original of each document shall be signed in ink by the party or its authorized representative, or by an attorney having authority with respect to it. The capacity of the person signing, his address, and the date shall be stated. The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information and belief the statements made in it are true, and that it is not

interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken.

(d) Except as otherwise required by this part or by order, a pleading or other document, other than correspondence, shall be filed in an original and two conformed copies.

(e) The first document filed by any person in a proceeding shall designate the name and address of a person on whom service may be made.

(f) A document filed by telegraph or electronic mail need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

(g) Acceptance for Filing. Any document which fails to conform to the requirements of this section may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any matter so tendered but not accepted for filing shall not be entered on the Commission's docket.

§ 2.305 Service of Papers, Methods, Proof

(a) Service of papers by the Commission. Except for subpoenas, the Commission will serve all orders, decisions, notices, and other papers issued by it upon all parties.

(b) Who may be served. Any paper required to be served upon a party shall be served upon him or upon the representative designated by him or by law to receive service of papers. When a party has appeared by attorney, service must be made upon the attorney of record.

(c) How service may be made. Service may be made by personal delivery, by first class, certified or registered mail including air mail, by telegraph, by electronic or facsimile transmission, or as otherwise authorized by law. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer ~~may~~ shall require service by the most expeditious means that is available to all parties in the proceeding, including express mail and/or electronic or facsimile transmission, unless the presiding officer finds that such a requirement would impose undue burden or expense on the parties. ~~upon some or all parties and the presiding officer.~~

(d) Service on the Secretary. (1) All pleadings must be served on the Secretary of the Commission in the same or equivalent manner, i.e., ~~telefax~~ facsimile or electronic transmission, first class or express mail, personal delivery, or courier, that they are served upon the adjudicatory tribunals and the parties to the proceedings so that the Secretary will receive the pleading at approximately the same time that it is received by the tribunal to which the pleading is directed.

(2) When pleadings are personally delivered to tribunals while they are conducting proceedings outside the Washington, DC area, service on the Secretary may be accomplished by overnight mail or by electronic or facsimile transmission.

(3) Service of pre-filed testimony and demonstrative evidence (e.g., maps and other physical exhibits) on the Secretary may be made by first-class mail in all cases.

(4)The addresses for the Secretary are:

(i) First class mail: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555 -0001, Attention: Rulemakings and Adjudications Staff.

(ii) Express mail: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention: Rulemakings and Adjudications Staff.

(iii) Facsimile: (301) 415-1101, verification number is (301) 415-1966; and e-mail: SECY@NRC.gov.

(e) When service complete. Service upon a party is complete:

(1) by personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) by telegraph, when deposited with a telegraph company, properly addressed and with charges prepaid;

(3) by mail, on deposit in the United States mail, properly stamped and addressed; ~~or~~

(4) by facsimile transmission, on transmission thereof and receipt of confirmation that the transmission has been successful;

(5) by electronic mail, on transmission thereof and receipt of electronic confirmation that one or more of the addressees have received such transmission, except that if the sender receives an electronic message that transmission to an addressee was not deliverable, transmission to that person shall not be deemed to be complete; or

(6) When service cannot be effected in a manner provided by paragraphs (d) (1) to (5) inclusive of this section, in any other manner authorized by law.

2.306 Computation of Time

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added when a document is served by express mail. No time shall be added when the notice or paper is served by electronic mail or facsimile transmission, provided that the recipient(s) thereof have the capability to receive electronic mail or facsimile transmissions. If a document is served by facsimile or electronic transmission and is not received by a party prior to the close of business on the date of transmission, the recipient's response date shall be extended by one business day.

§ 2.307 Extension and Reduction of Time Limits

(a) Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer, or by stipulation approved by the Commission or the presiding officer.

(b) In any instance in which this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for that action.

§ 2.308 Treatment of Requests for Hearing or Petitions for Leave to Intervene by the Secretary

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Judge of the Atomic Safety and Licensing Board Panel for the establishment of a presiding officer or Atomic Safety and Licensing Board as appropriate to rule on the matter.

§ 2.309 Hearing Requests, Petitions to Intervene, Requirements for Standing and Contentions

(a)(1) **General Requirements**. Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing. Except as provided in section 2.309(e), the Commission, presiding officer or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of section 2.309(b) and has proposed at least one admissible contention that meets the requirements of section 2.309(c). In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the high-level waste repository, the Commission, the presiding officer or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under Subpart J of this Part in addition to the factors in paragraph (b)(1) of this section. In the event a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(2) **Timing**. Unless otherwise provided by the Commission, the request and/or petition and the list of contentions shall be filed not later than the latest of (i) the time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated

to rule on the request and/or petition or (ii) the time provided in 2.102(d)(3) or (iii) 45 days from the date of publication of the notice.

(3) **Nontimely Filings**. Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) good cause, if any, for the failure to file on time;

(ii) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner' interest;

(v) the availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) the extent to which the requestor's/petitioner's interests will be represented by existing parties; and

(vii) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding.

The requestor/petitioner must address these factors in its nontimely filing.

(b)(1) **Standing**. A request for hearing or petition for leave to intervene must state:

(i) the name, address and telephone number of the requestor or petitioner;

(ii) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated above, among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall be presumed to have standing.

(2) **Discretionary Intervention.**

A requestor/petitioner may request that his petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under section 2.309(b)(1). Accordingly, in addition to addressing the factors in section 2.309(b)(1), a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(A) factors weighing in favor of allowing intervention --

(i) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) the nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) the possible effect of any decision or order which may be issued in the proceeding on the requestor's/petitioner's interest;

(B) factors weighing against allowing intervention --

(i) the availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) the extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) the extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(c)(1) **Contentions**. A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised and for each contention

(i) demonstrate that such contention is within the scope of the proceeding;

(ii) demonstrate that such issue is material to the findings the NRC must make to support the action that is involved in the proceeding;

(iii) provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(iv) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

(2) Contentions shall be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended after the initial filing only with leave of the Presiding Officer upon a showing that:

(i) the information upon which the amended contention is based was not previously available;

(ii) the information upon which the amended contention is based is materially different than information previously available; and

(iii) the amended contention has been submitted in a timely fashion based on the availability of the subsequent information.

(d) **Selection of Hearing Procedures.** A request for hearing and/or petition for leave to intervene shall also address the selection of hearing procedures, taking into account the provisions of § 2.310.

(e) **Participation by State and Local Governments and Affected Indian Tribes**

(1)(i) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to the proceeding a single representative designated by the state in which the facility is located as well as a single designated representative of the local governmental body (county, municipality or other subdivision) in which the facility is located and any affected Indian Tribe as defined in Part 60 of this chapter, without requiring a further demonstration of standing.

(ii)The representative of the state or local government or affected Indian Tribe admitted pursuant to section (e)(1)(i) is not required to take a position with respect to any admitted contention, except that the representative will be required to identify, in advance of any hearing held, those contentions on which it will participate. A representative who wishes to litigate a contention not otherwise admitted in the proceeding must satisfy the requirements of section 2.309(c) with respect to such contention.

(2) In any proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission shall permit intervention by the State and local governments (counties) in which such an area is located and by any affected Indian Tribe as defined in Part 60 of this chapter. All other petitions for intervention in any such proceeding shall be reviewed under the provisions of section 2.309(a), (b) and (c).

(f) Unless otherwise specified by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene --

(i) the applicant/licensee, the NRC staff and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within 25 days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in sections 2.309(a)(3),(b) and (c) insofar as these sections apply to the filing that is the subject of the answer.

(ii) The requestor/petitioner may file a reply to any answer withing 5 days after service of that answer.

(iii) No other written answers or replies will be entertained.

§ 2.310 Selection of Hearing Procedures

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows --

(a) (i) Except as provided in subsection (a)(ii), proceedings on enforcement matters shall be conducted under the procedures of Subpart G of this Part.

(ii) If all parties agree and jointly request, proceedings on enforcement matters may be conducted under the procedures of Subpart L or Subpart N of this Part, as appropriate.

(b) Proceedings on the licensing of the construction and operation of a uranium enrichment facility shall be conducted under the procedures of Subpart G of this Part.

(c) Reactor licensing proceedings involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures may be conducted under the procedures of Subpart G of this Part.

(d) At the request of any party in proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant, such proceedings may be conducted under the procedures of Subpart K of this Part.

(e) Proceedings on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to section 2.101(f)(8) or section 2.105(a)(5) may be conducted under the procedures of Subpart J and Subpart L of this Part.

(f) Proceedings on an application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes or pursuant to a license condition may be conducted under the procedures of Subpart M of this Part.

(g) Except as determined through the application of sections 2.310(a)-(d) and (f), proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to Parts 30, 32 through 35, 39, 40, 50, 52, 54, 55, 61, 70 and 72 and proceedings on enforcement matters may be conducted under the procedures of Subpart L of this Part.

(h) Except as determined through the application of sections 2.310(a)-(d) and (f), proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to Parts 30, 32 through 35, 39, 40, 50, 52, 54, 55, 61, 70 and 72, proceedings on enforcement matters, and proceedings on an application for the direct or indirect transfer of control of an NRC license may be conducted under the procedures of Subpart N of this Part if:

(1) the hearing itself is expected to take no more than two days to complete; or

(2) all parties to the proceeding agree that it should be conducted under the procedures of Subpart N.

§ 2.311 Interlocutory Review of Rulings on Requests for Hearing/Petitions to Intervene and Selection of Hearing Procedures

(a) An order of the presiding officer or of the Atomic Safety and Licensing Board on a request for hearing or a petition to intervene and on the admission or rejection of proposed contentions under section 2.309 and/or on the selection of hearing procedures under section 2.310 may be appealed to the Commission, in accordance with the provisions of this section, within 10 days after the service of the order. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any party who opposes the appeal may file a brief in opposition to the appeal within 10 days after service of the appeal. The supporting brief an any answer shall conform to the requirements of section 2.340(d)(2). No other appeals from rulings on requests for hearings, petitions to intervene, contention admissibility and/or selection of hearing procedures shall be allowed.

(b) (1) An order denying a request for hearing and/or petition to intervene and (2) an order denying the admission of a contention – is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted, or the contention admitted, either in whole or in part.

(c) (1) An order granting a request for hearing and/or petition to intervene, either in whole or in part, and (2) an order granting the admission of any contention -- is appealable by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied, or the contention rejected.

(d) An order selecting hearing procedures may be appealed by any party on the question as to whether the selection of the particular hearing procedures was erroneous.

§ 2.312 Notice of Hearing

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) A statement describing the specific hearing procedures or Subpart that will be used for the hearing.

(b) The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding and the public interest.

§ 2.313 Designation of Presiding Officer, Disqualification, Unavailability

(a) The Commission may provide in the notice of hearing that one or more members of the Commission, or an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the matter, shall preside. If the Commission does not so provide, the Chairman of the Atomic Safety and Licensing Board Panel will issue an order designating an Atomic Safety and Licensing Board appointed pursuant to section 191 of the Atomic Energy Act of 1954, as amended, or, if the Commission has not provided for the hearing to be conducted by an Atomic Safety and Licensing Board, the Chief Administrative Law Judge will issue an order designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code.

(b) If a designated presiding officer or a designated member of an Atomic Safety and Licensing Board deems himself disqualified to preside or to participate as a board member in the hearing, he shall withdraw by notice

on the record and shall notify the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, of his withdrawal.

(c) If a party deems the presiding officer or a designated member of an Atomic Safety and Licensing Board to be disqualified, he may move that the presiding officer or the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred to the Commission which will determine the sufficiency of the grounds alleged.

(d) If a presiding officer or a designated member of an Atomic Safety and Licensing Board becomes unavailable during the course of a hearing, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, will designate another presiding officer or Atomic Safety and Licensing Board member. If he becomes unavailable after the hearing has been concluded:

(1)(i) The Commission may designate another presiding officer to make the decision; or

(ii) The Chairman of the Atomic Safety and Licensing Board Panel or the Commission, as appropriate, may designate another Atomic Safety and Licensing Board member to participate in the decision;

(2) The Commission may direct that the record be certified to it for decision; or

(3) The Commission may designate another presiding officer.

(e) In the event of substitution of a presiding officer or a designated member of an Atomic Safety and Licensing Board for the one originally designated, any motion predicated upon the substitution shall be made within five (5) days thereafter.

§ 2.314 Appearance and Practice Before the Commission in Adjudicatory Proceedings

(a) **Standards of practice.** In the exercise of their functions under this Subpart, the Commission, the Atomic Safety and Licensing Boards, and Administrative Law Judges function in a quasi-judicial capacity. Accordingly,

parties and their representatives in proceedings subject to this Subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) **Representation.** A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law provided the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number; the name and address of the person on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) **Reprimand, censure or suspension from the proceeding.**

(1) A presiding officer, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

(2) A reprimand, a censure or a suspension which is ordered to run for one day or less shall be ordered with grounds stated on the record of the proceeding and shall advise the person disciplined of the right to appeal pursuant to paragraph (c)(3) of this section. A suspension which is ordered for a longer period shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal and to request a stay pursuant to paragraphs (c)(3) and (c)(4) of this section. A proceeding may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Commission. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Commission shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Commission may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Commission provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Commission, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Commission.

(4) A suspension exceeding 1 day shall not be effective for 72 hours from the date the suspension order is issued. Within this time a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension shall be stayed until the reviewing tribunal rules on the motion. The stay request shall be in writing and contain the information specified in section 2.341(b) of this part. The Commission shall rule on the stay request within 10 days after the filing of the motion. The Commission shall consider the factors specified in section 2.341(e)(1) and (e)(2) of this part in determining whether to grant or deny a stay application.

§ 2.315 Participation by a Person Not a Party

(a) A person who is not a party may, in the discretion of the presiding officer, be permitted to make a limited appearance by making oral or written statement of his position on the issues at any session of the hearing or

any prehearing conference within such limits and on such conditions as may be fixed by the presiding officer, but he may not otherwise participate in the proceeding.

(b) The Secretary will give notice of a hearing to any person who requests it prior to the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. When a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

(c) The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue. Such participants may also file proposed findings in those proceedings where such findings are permitted and petitions for review by the Commission pursuant to section 2.340 of this Part. The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he/she desires to participate.

(d) If a matter is taken up by the Commission pursuant to section 2.340 or sua sponte, a person who is not a party may, in the discretion of the Commission, respectively, be permitted to file a brief "amicus curiae". A person who is not a party and desires to file a brief must submit a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Except as otherwise provided by the Commission, such brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.

§ 2.316 Consolidation of Parties

On motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

§ 2.317 Consolidation of Proceedings

On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings, or may hold joint hearings with interested States and/or other federal agencies on matters of concurrent jurisdiction, if it is found that such action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this Subpart.

§ 2.318 Commencement and Termination of Jurisdiction of Presiding Officer

(a) Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Administrative Law Judge has such jurisdiction or, if he is unavailable, another administrative law judge has such jurisdiction. A proceeding is deemed to commence when a notice of hearing or a notice of proposed action pursuant to section 2.105 is issued. When a notice of hearing provides that the presiding officer is to be an administrative law judge, the Chief Administrative Law Judge will designate by order the administrative law judge who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders

a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest.

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.

§ 2.319 Power of the Presiding Officer

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law;

(c) Consolidate parties and proceedings in accordance with sections 2.316 and 2.317 of this Part and/or direct that common interests be represented by a single spokesperson;

(d) Rule on offers of proof and receive evidence. In proceedings under Subparts L, M and N of this part, strict rules of evidence do not apply to written submissions, but the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written presentation or or a response to a written question that is cumulative, irrelevant, immaterial or unreliable.

(e) Restrict irrelevant, duplicative or repetitive evidence and/or arguments;

(f) Order depositions to be taken as appropriate;

(g) Regulate the course of the hearing and the conduct of participants;

(h) Dispose of procedural requests or similar matters;

(i) Examine witnesses;

(j) Hold conferences before or during the hearing for settlement, simplification of contentions or any other proper purpose;

(k) Set reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules;

(l) Certify questions to the Commission for its determination, either in his/her discretion, or on motion of a party or on direction of the Commission;

(m) Reopen a proceeding for the receipt of further evidence at any time prior to the initial decision;

(n) Appoint special assistants from the Atomic Safety and Licensing Board Panel pursuant to section 2.322 of this Part;

(o) Issue initial decisions as provided in this Part; and

(p) Take any other action consistent with the Act, this chapter and sections 551-558 of Title 5 of the United States Code.

§ 2.320 Default

On failure of a party to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading; to appear at a hearing or prehearing conference, to comply with any prehearing order entered by the presiding officer, or to comply with any discovery order entered by the presiding officer, the Commission or the presiding officer may make such orders in regard to the failure as are just, including, among others, the following:

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate; or

(b) Proceed without further notice to take proof on the issues specified.

§ 2.321 Atomic Safety and Licensing Boards

(a) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may from time to time establish one or more Atomic Safety and Licensing Boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission or the Chairman of the Atomic Safety and Licensing Board Panel deems appropriate to the issues to be decided, to preside in such proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, and to perform such other adjudicatory functions as the Commission deems appropriate. The members of an Atomic Safety and Licensing Board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission.

(b) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may designate an alternate qualified in the conduct of administrative proceedings, or an alternate having technical or other qualifications, or both, for an Atomic Safety and Licensing Board established pursuant to paragraph (a) of this section. If a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may constitute the alternate qualified in the conduct of administrative proceedings, or the alternate having technical or other qualifications, as appropriate, as a member of the board by notifying the alternate who will, as of the date of such notification, serve as member of the board. In the event that an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may appoint a member of the Atomic Safety and Licensing Board Panel who is qualified in the conduct of administrative proceedings or a member having technical or other qualifications, as appropriate, as a member of the Atomic

Safety and Licensing Board by notifying the appointee who will, as of the date of such notification, serve as a member of the Board.

(c) An Atomic Safety and Licensing Board shall have the duties and may exercise the powers of a presiding officer as granted by section 2.319 and otherwise in this part. At any time when such a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Judge may be exercised with respect to such a proceeding by the chairman of the board having jurisdiction over it. Two members of an Atomic Safety and Licensing Board constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.322 Special Assistants to the Presiding Officer

(a) In consultation with the Panel Chairman, the presiding officer may, at his discretion, appoint from the Atomic Safety and Licensing Board Panel established by the Commission, personnel to assist the presiding officer in taking evidence and preparing a suitable record for review. Such appointment may occur at any appropriate time during the proceeding but shall, at the time of the appointment, be subject to the notice and disqualification provisions as described in section 2.313. Such special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. Such interrogators shall be required to study the written testimony and sit with the presiding officer to hear the presentation and cross-examination by the parties of all witnesses on the issues of the interrogators' expertise, taking a leading role in examining such witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, Special Masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special Masters may rule on evidentiary issues brought before them, in accordance with section 2.333. Appeals from such rulings may be taken to the presiding officer in accordance with procedures which shall be established in the presiding officer's order appointing the Special Master.

Special Masters' reports are advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master; or

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer shall retain final authority on the issue for which the alternate member was designated.

(4) Discovery Master to rule on the matters specified in section 2.1018(a)(2) of this part.

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of Members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues which the presiding officer might otherwise have difficulty in quickly grasping. Such informal briefings shall take place prior to the hearing on the subject involved and shall supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in section 2.313.

§ 2.323 Motions

(a) Presentation and disposition. All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer. All written motions shall be filed with the Secretary, and served on all parties to the proceeding.

(b) Form and content. Unless made orally on the record during a hearing, or the presiding officer directs otherwise, or pursuant to the provisions of Subpart N, a motion shall be in writing, shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion shall be rejected if it does not include a certification by the

attorney or representative of the moving party that the movant has made a sincere effort to contact and resolve the issue(s) raised therein with other parties to the proceeding, and that its efforts to resolve the issue(s) have been unsuccessful.

(c) Answers to motions. Within ten (10) days after service of a written motion, or such other period as the Secretary or the Assistant Secretary or presiding officer may prescribe, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary. Such permission shall be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated, in filing its motion, the arguments to which it seeks leave to reply.

(d) All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party.

(e) Motions for reconsideration shall not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, which renders the decision invalid. Any such motion and any responses thereto shall be limited to 10 pages or less.

(f) Referral and Certifications to the Commission.

(1) When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or when the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity, the presiding officer may refer

the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session.

(2) A party may petition the presiding officer to certify an issue to the Commission for early review. The presiding officer shall apply the alternative standards of subsection 2.340(f) of this Subpart in ruling on the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

(g) Effect of filing a motion, petition or certification of question to the Commission. Unless otherwise ordered, neither the filing of a motion, the filing of a petition for certification nor the certification of a question to the Commission shall stay the proceeding or extend the time for the performance of any act.

(h) Where the motion in question is a motion to compel discovery, parties may file answers to the motion pursuant to paragraph (c) of this section. The presiding officer in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone the presiding officer shall issue a written order on the motion which summarizes the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter which is effective at the time of such ruling, provided that the terms of the ruling are incorporated in the subsequent written order.

§ 2.324 Order of Procedure

The Presiding Officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.325 Burden of Proof

Unless otherwise ordered by the Presiding Officer, the applicant or the proponent of an order has the burden of proof.

§ 2.326 Motions to Reopen

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in Subpart G. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in section 2.309(a)(3).

§ 2.327 Official Reporter; Transcript

(a) A hearing will be reported under the supervision of the presiding officer, stenographically or by other means, by an official reporter who may be designated by the Commission or may be a regular employee of the Commission. The transcript prepared by the reporter is the sole official transcript of the proceeding. Except as limited pursuant to Sec. 181 of the Act or order of the Commission, the transcript will be available for inspection at the NRC Web site, http://www.nrc.gov, and/or at the NRC Public Document Room. Copies of transcripts are available to parties and to the public from the official reporter on payment of the specified charges.

(b) Transcript corrections. Corrections of the official transcript may be made only in the manner provided by this paragraph. Corrections ordered or approved by the presiding officer shall be included in the record as an appendix, and when so incorporated the Secretary shall make the necessary physical corrections in the official transcript so that it will incorporate the changes ordered. In making corrections there shall be no substitution of pages but, to the extent practicable, corrections shall be made by running a line through the matter to be changed without obliteration and writing the matter as changed immediately above. Where the correction consists of an insertion, it shall be added by rider or interlineation as near as possible to the text which is intended to precede and follow it.

§ 2.328 Hearings to be Public

Except as may be requested pursuant to Section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

§ 2.329 Prehearing conference.

(a) Objectives. The Commission or the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter or a testing facility, shall direct the parties or their counsel to appear at a specified time and place for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the proceeding;

(2) establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) discouraging wasteful prehearing activities;

(4) improving the quality of the hearing through more thorough preparation, and;

(5) facilitating the settlement of the proceeding or any portions thereof.

(b) As appropriate for the particular proceeding, the conference may be held to consider such matters as:

(1) Simplification, clarification, and specification of the issues;

(2) The necessity or desirability of amending the pleadings;

(3) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof, and advance rulings from the presiding officer on the admissibility of evidence;

(4) the appropriateness and timing of summary disposition motions under Subparts G and L including appropriate limitations on the page length of such motions and responses thereto;

(5) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to the discovery provisions in Subpart G.

(6) Identification of witnesses and documents, and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence, including the establishment of reasonable limits on the time allowed for presenting direct and cross-examination evidence;

(7) The disposition of pending motions;

(8) Settlement and the use of special procedures to assist in resolving any issues in the proceeding;

(9) The need to adopt special procedures for managing potentially difficult or protracted proceedings that may involve particularly complex issues, including the establishment of separate hearings with respect to any particular issue in the proceeding;

(10) The setting of a hearing schedule, including such limitations on the scope and time permitted for cross-examination, as may be appropriate; and

(11) Such other matters as may aid in the just and orderly disposition of the proceeding.

A prehearing conference held under this section in a proceeding involving a construction permit or operating license shall be held within sixty (60) days after discovery has been completed or such other time as the Commission or the presiding officer may specify.

(c) Prehearing conferences may be stenographically reported.

(d) The presiding officer shall enter an order which recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and which limits the issues or defines the matters in controversy to be determined in the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order. Parties may not file replies to the objections unless the ~~board~~ presiding officer

so directs. The filing of objections shall not stay the decision unless the presiding officer so orders. The ~~board~~ presiding officer may revise the order in the light of the objections presented and, as permitted by § 2.319(l) may certify for determination to the Commission such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

§ 2.330 Stipulations

Apart from any stipulations made during or as a result of a prehearing conference, the parties may stipulate in writing at any stage of the proceeding or orally during the hearing, any relevant fact or the contents or authenticity of any document. Such a stipulation may be received in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

§ 2.331 Oral Argument Before Presiding Officer

When, in the opinion of the presiding officer, time permits and the nature of the proceeding and the public interest warrant, he may allow and fix a time for the presentation of oral argument. He/she will impose appropriate limits of time on the argument. The transcript of the argument shall be a part of the record.

2.332 General Case Scheduling and Management

(a) Scheduling and Planning. The presiding officer shall, as soon as practicable after consulting with the parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that establishes limits for the time to file motions, conclude discovery, and take other actions in the proceeding. The scheduling order may also include (1) modifications of the times for disclosures under § 2.704 and of the

extent of discovery to be permitted; (2) the date or dates for prehearing conferences, and hearings; and (3) any other matters appropriate in the circumstances of the proceeding. A schedule shall not be modified except upon a finding by the presiding officer or the Commission of good cause. In making such a good cause determination, the presiding officer or the Commission should take into account the following factors, among other things: whether the requesting party has exercised due diligence to adhere to the schedule, whether the requested change is the result of unavoidable circumstances, whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.

(b) The scheduling order shall have as its objectives such proper case management purposes as:

(1) expediting the disposition of the proceeding;

(2) establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) discouraging wasteful prehearing activities;

(4) improving the quality of the hearing through more thorough preparation, and;

(5) facilitating the settlement of the proceeding or any portions thereof, including the use of such methods as Alternative Dispute Resolution, when and if the presiding officer, upon consultation with the parties, determines that such efforts should be pursued.

(c) In establishing a schedule, the presiding officer should take into consideration the staff's projected schedule for completion of its safety and environmental evaluations to assure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. Hearings on safety issues may be commenced prior to publication of the staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. Where an EIS is involved, hearings on environmental issues addressed in the EIS may not commence prior to issuance of the staff's final EIS. In addition, discovery against the staff on safety or environmental issues, respectively, should be suspended until

the staff has issued the SER or EIS, unless the presiding officer finds that the commencement of such discovery prior to publication of the pertinent review document will expedite the hearing.

2.333 Authority of Presiding Officer to Regulate Procedure in a Hearing

To prevent unnecessary delays or an unnecessarily large record, the presiding officer may:

(a) Limit the number of witnesses whose testimony may be cumulative;

(b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;

(c) Take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and

(d) Impose such time limitations on arguments as he determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

§ 2.334 Schedules for Proceedings

(a) Unless the Commission directs otherwise in a particular proceeding, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall, based on information and projections provided by the parties and the NRC staff, establish and take appropriate action to maintain a schedule for the completion of the evidentiary record and, as appropriate, the issuance of its initial decision.

(b) The presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall provide written notification to the Commission any time during the course of the proceeding when it appears that the completion of the record or the issuance of the initial decision will be delayed more than 60 days beyond the time specified in the schedule established pursuant to section 2.334(a). Such notification shall include an explanation of the reasons for the projected delay and a description of the actions, if any, that the presiding officer or the Board proposes to take to avoid or mitigate the delay.

§ 2.335 Consideration of Commission Rules and Regulations in Adjudicatory Proceedings

(a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof, issued in its program for the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this Part.

(b) A party to an adjudicatory proceeding subject to this Part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this Part) for determination the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking pursuant to § 2.802.

§ 2.336 General Discovery

(a) Except for proceedings conducted in accordance with Subpart G of this Part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this Part shall, within 30 days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide:

(1) the name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and a copy of the analysis or other authority upon which that person bases his or her opinion;

(2) the name and, if known, the address and telephone number of each person that the party believes is likely to have discoverable information relevant to the admitted contentions;

(3) a copy, or a description by category and location, of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the contentions;

(4) all other documents that, to the party's knowledge, provide direct support for, or opposition to, the application or other proposed action that is the subject of the proceeding.

(b) The NRC staff shall, within 30 days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available:

(1) the application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) all documents supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;

(4) any NRC staff documents which act on the application or proposal that is the subject of the proceeding.

(c) Each party and the NRC staff shall make its initial disclosures under sections 2.336(a) and
(b) based on the information and documentation then reasonably available to it and is not excused from making the required disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another entity's disclosures or because another entity has not yet made its disclosures.

(d) The duty of disclosure under this section is continuing and any information or documents that are subsequently developed or obtained must be disclosed within 14 days.

(e) (1)The Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding may impose sanctions, including dismissal of specific contentions or dismissal of the adjudication, for a party's continuing unexcused failure to make the disclosures required by this section.

(2) If a party fails to provide any document or witness name required to be disclosed under this section, the presiding officer shall not admit into evidence the document or testimony of such witness proffered by the party in support of its case unless the party demonstrates good cause for its failure to make the disclosure required by this section.

(f) The disclosures required by this section shall constitute the sole discovery permitted for NRC proceedings under this Part unless there is further provision for discovery under the specific Subpart pursuant to which the hearing will be conducted or unless the Commission provides otherwise in a specific case.

§ 2.337 Settlement of Issues; Alternative Dispute Resolution

The fair and reasonable settlement and resolution of issues proposed for litigation in proceedings subject to this Part is encouraged. Parties are encouraged to employ various methods of alternate dispute resolution to address the issues without the need for litigation in proceedings subject to this Part.

(a) Availability. The parties shall have the opportunity to submit a proposed settlement of some or all issues to the commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under subsection (b).

(b) Settlement Judge; Alternative Dispute Resolution.

(1) The presiding officer, upon joint motion of the parties, may request the Chief Administrative Judge to appoint a settlement Judge to conduct settlement negotiations or remit the proceeding to alternative dispute resolution as the Commission may provide or to which the parties may agree. The order appointing the

Settlement Judge may confine the scope of settlement negotiations to specified issues. The order shall direct the Settlement Judge to report to the Chief Administrative Judge at specified time periods.

(2) If a Settlement Judge is appointed, the Settlement Judge shall:

(A) convene and preside over conferences and settlement negotiations between the parties and assess the practicalities of a potential settlement.

(B) report to the Chief Administrative Judge describing the status of the settlement negotiations and recommending the termination or continuation of the settlement negotiations, and

(C) not discuss the merits of the case with the Chief Administrative Judge or any other person, or appear as a witness in the case.

(3) Settlement negotiations conducted by the Settlement Judge shall terminate upon the order of the Chief Administrative Judge issued after consultation with the Settlement Judge.

(4) No decision concerning the appointment of a Settlement Judge or the termination of the settlement negotiation is subject to review by, appeal to, or rehearing by the presiding officer or the Commission.

(c) The presiding officer (or Settlement Judge) may require that the attorney or other representative who is expected to try the case for each party be present and that the parties, or agents having full settlement authority, also be present or available by telephone.

(d) No evidence, statements, or conduct in settlement negotiations under this section will be admissible in any subsequent hearing, except by stipulation of the parties. Documents disclosed may not be used in litigation unless obtained through appropriate discovery or subpoena.

(e) The presiding officer (or Settlement Judge) may impose on the parties and persons having an interest in the outcome of the adjudication such other and additional requirements as are necessary for the fair and efficient resolution of the case.

(f) The conduct of settlement negotiations does not divest the presiding officer of jurisdiction and does not automatically stay the proceeding. A hearing shall not be unduly delayed because of the conduct of settlement negotiations.

(g) Form. The settlement shall be in the form of a proposed settlement agreement, a consent order, and a motion for its entry, which shall include the reasons why it should be accepted and shall be signed by the consenting parties or their authorized representatives.

(h) Content of Settlement Agreement. The proposed settlement agreement shall contain the following:

(1) an admission of all jurisdictional facts;

(2) an express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;

(3) a statement that the order shall have the same force and effect as an order made after full hearing; and

(4) a statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

(i) Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order such adjudication of the issues as deemed to be required in the public interest to dispose of the proceeding. In an enforcement proceeding under Subpart B of this part the presiding officer shall accord due weight to the position of the staff in reviewing the settlement. If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding. Settlements approved by a presiding officer are subject to the Commission's review in accordance with section 2.340 of this Part.

§ 2.338 Expedited Decisional Procedure

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No resolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered pursuant to paragraph (a) of this section shall be subject to review by the Commission on its own motion within 40 days after its date.

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter, when:

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization.

§ 2.339 Initial Decision in Contested Proceedings on Applications for Facility Operating Licenses; Immediate Effectiveness of Initial Decision Directing Issuance or Amendment of Construction Permit or Operating License.

(a) In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of the Nuclear Reactor Regulation or Director of Nuclear Material Safety and appropriately condition the license.

(b) Except as provided in paragraphs (d) through (g) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, an operating license or a license under 10 CFR Part 72 to store spent fuel in an independent spent fuel storage installation (ISFSI) at a reactor site shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to review thereof and further decision by the Commission upon petition for review filed by any party pursuant to Sec. 2.340 or upon its own motion.

(c) Except as provided in paragraphs (d) through (g) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or granting of a petition for review,

shall issue a construction permit, a construction authorization, an operating license, or a license under 10 CFR Part 72 to store spent fuel in an independent spent fuel storage installation at a reactor site, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

(d) An initial decision directing the issuance of an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR part 72 shall become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards shall not issue an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR part 72 until expressly authorized to do so by the Commission.

(e) [Reserved]

(f) Nuclear power reactor construction permits--(1) Atomic Safety and Licensing Boards. Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The Boards' decisions concerning construction permits shall not become effective until the Commission actions outlined in paragraph (f)(2) of this section have taken place.

(2) Commission. Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Commission will seek to issue a decision on any stay motions that are timely filed. Such motions shall be filed as provided by 10 CFR 2.341. For the purpose of this policy, a ``stay'' motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Commission action described herein. If no stay papers are filed, the Commission will, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and will seek to issue a decision on whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard. The initial decision will be considered stayed pending the Commission's decision. In deciding these stay questions, the Commission shall employ the procedures set out in 10 CFR 2.341.

(g) Nuclear power reactor operating licenses--(1) Atomic Safety and Licensing Boards. Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. A Board's decision authorizing issuance of an operating license may not become effective insofar as it authorizes operating at greater than 5 percent of rated power until the Commission actions outlined below in paragraph (g)(2) of this section have taken place. Insofar as it authorizes operation up to 5 percent, the decision is effective and the Director shall issue the appropriate license in accordance with paragraph (c) of this section.

(2) Commission. (i) Reserving the power to step in at an earlier time, the Commission will, upon receipt of the Licensing Board decision authorizing issuance of an operating license, other than a decision authorizing only fuel loading and low power (up to 5 percent of rated power) testing, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission, insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

(ii) For operating license decisions other than those authorizing only fuel loading and low power testing consistent with the target schedule set forth below, the parties may file brief comments with the Commission pointing out matters which, in their view, pertain to the immediate effectiveness issue. To be considered, such comments must be received within 10 days of the Board decision. However, the Commission may dispense with comments by so advising the parties. No extensive stay shall be issued without giving the affected parties an opportunity to be heard.

(iii) The Commission intends to issue a stay decision within 30 days of receipt of the Licensing Board's decision. The Licensing Board's initial decision will be considered stayed pending the Commission's decision insofar as it may authorize operations other than fuel loading and low power (up to 5 percent of rated power) testing.

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

(h) The Commission's effectiveness determination is entirely without prejudice to proceedings under § 2.340 or Sec. § 2.341.

2.340 Review of Decisions and Actions of a Presiding Officer

(a) (1) Except for requests for review or appeals of actions under section 2.311 or in a proceeding on the high-level waste geologic repository (which are governed by section 2.1015 of this part), review of decisions and actions of a presiding officer shall be treated under this section 2.340.

(2) Within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review. If within forty (40) days after the service of any petition under this section the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) A petition for review under this paragraph must be no longer than ten (10) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer must be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party shall have no right to reply, except as permitted by the Commission.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) (1) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may in its discretion decide the matter on the basis of the petition for review or it may specify whether any briefs be filed, oral argument be held, or both.

(2) Unless otherwise ordered by the Commission, any briefs on review shall not exceed 30 pages in length, exclusive of pages containing the tables of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of 10 pages shall contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided.

(e) Neither the filing nor the granting of a petition under this section will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission.

(f) Interlocutory review. (1) A question certified to the Commission under section 2.319(l) or a ruling referred or issue certified under section 2.323(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either--

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner; or

(iii) Involves a novel issue that merits Commission review at the earliest opportunity.

(2) Even in the absence of a referral or certification by the presiding officer, the Commission may in its discretion grant review at the request of a party if the party demonstrates that interlocutory Commission review is warranted under criteria specified in subsection (g)(1). Any such petition or answer thereto shall be filed within the times and in the form prescribed in subsection (b) and shall be treated in accordance with the general provisions of this section.

2.341 Stays of Decisions

(a) Within ten (10) days after service of a decision or action of a presiding officer any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay must be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer must be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by electronic or facsimile

transmission message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

§ 2.342 Oral Arguments

In its discretion the Commission may allow oral argument upon the request of a party made in a petition for review or brief on review, or upon its own initiative.

§ 2.343 Final Decision

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material issue; and

(4) The appropriate ruling, order, or denial of relief, with the effective date.

§ 2.344 Petition for Reconsideration

(a) A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision.

(b) The petition for reconsideration shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the petition, and the relief sought. Within ten (10) days after a petition for reconsideration has been served, any other party may file an answer in opposition to or in support of the petition.

(c) Neither the filing nor the granting of the petition shall stay the decision unless the Commission orders otherwise.

§ 2.345 Authority of the Secretary

When briefs, motions or other papers listed herein are submitted to the Commission itself, as opposed to the officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary are authorized to:

(a) Prescribe procedures for the filing of briefs, motions or other pleadings, where such schedules may differ from those elsewhere prescribed by the rules of this Part or where the rules of this Part do not prescribe a schedule;

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings and other documents filed with the Commission later then the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule or regulation of the Commission unless good cause is shown for the late filing;

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission;

(e) Extend the time for the Commission to rule on a petition for review under 10 CFR 2.311 and 2.340;

(f) Extend the time for the Commission to grant review on its own motion under 10 CFR 2.340;

(g) Direct pleadings improperly filed before the Commission to the appropriate presiding officer for action;

(h) Deny a request for hearings, where the request fails to comply with the Commission's pleading requirements set forth in this Part, and fails to set forth an arguable basis for further proceedings;

(i) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Law Judge, as appropriate requests for hearing not falling under Section 2.104 of this Part, where the requestor is entitled to further proceedings; and

(j) Take action on minor procedural matters.

§ 2.346 Ex Parte Communications

In any proceeding under this Subpart --

(a) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, and ex parte communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it and any responses to the communication promptly

are served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e) (1) The prohibitions of this section apply --

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.340, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to --

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the

General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this Subpart pending before the NRC.

§ 2.347 Separation of Functions

(a) In any proceeding under this Subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except --

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on the record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to --

(1) Communications to or from any Commission adjudicatory employee regarding --

(i) The status of a proceeding;

(ii) Matters with regard to which the communications specifically are permitted by statute or regulation;

(iii) Agency participation in matters pending before a court or another agency; or

(iv) Generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this Subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission, adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding --

(i) Initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) Supervision of agency staff to ensure compliance with the general policies and procedures of the agency;

(iii) Staff priorities and schedules or the allocation of agency resources; or

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.

(3) None of the communications permitted by paragraph (b)(2) (i) through (iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this Subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses to the communication are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d)(1) The prohibitions in this section apply --

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.340, the time has expired for Commission review of the decision.

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.346.

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

Subpart G - ~~Rules of General Applicability~~

Rules for Formal Adjudications

§ 2.700 - Scope of Subpart G.

The provisions of this Subpart apply to and supplement the provisions set forth in Subpart C of this part with respect to enforcement proceedings initiated pursuant to the provisions of Subpart B of this Part and litigated under the provisions of the Subpart, proceedings conducted with respect to the initial licensing of a

uranium enrichment facility, reactor licensing proceedings involving a large number of very complex issues, and any other proceeding as ordered by the Commission. In the event of any conflict between the provisions of this Subpart and those set forth in Subpart C of this Part, the provisions of this Subpart shall control.

§ 2.700a - Exceptions.

(a) Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

(b) This rule shall apply to proceedings in progress where hearings have already been requested or ordered as well as to future proceedings.

§ 2.701 - Reserved

§ 2.702 - Subpoenas.

(a) On application by any party, the designated presiding officer or, if he is not available, the Chairman of the Atomic Safety and Licensing Board Panel, the Chief Administrative Law Judge, or other designated officer will issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence. The officer to whom application is made may require a showing of general relevance of the testimony or evidence sought, and may withhold the subpoena if such a showing is not made, but he shall not attempt to determine the admissibility of evidence.

(b) Every subpoena will bear the name of the Commission, the name and office of the issuing officer and the title of the hearing, and will command the person to whom it is directed to attend and give testimony or produce specified documents or other things at a designated time and place. The subpoena will also advise of the quashing procedure provided in paragraph (f) of this section.

(c) Unless the service of a subpoena is acknowledged on its face by the witness or is served by an officer or employee of the Commission, it shall be served by a person who is not a party to the hearing and is not less than eighteen (18) years of age. Service of a subpoena shall be made by delivery of a copy of the subpoena to the person named in it and tendering him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commission, fees and mileage need not be tendered, and the subpoena may be served by registered mail.

(d) Witnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to witnesses in the district courts of the United States.

(e) The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgment of service with the officer before whom the witness is required to testify or produce evidence or with the Secretary. Failure to make proof of service shall not affect the validity of the service.

(f) On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may: (1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms.

(g) On application and for good cause shown, the Commission will seek judicial enforcement of a subpoena issued to a party and which has not been quashed.

(h)(1) The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in the custody thereof.

2.703 - Examination by Experts.

A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may permit such individual to participate on behalf of the party in the

examination and cross-examination of expert witnesses, where it would serve the purpose of furthering the conduct of the proceeding, upon finding: (a) That the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

§ 2.704 - General Provisions Governing Discovery.

(a) Required disclosures; methods to discover additional matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, a party other than the NRC staff shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed issues alleged with particularity in the pleadings, identifying the subjects of the information; and

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed issues alleged with particularity in the pleadings;

(C) Unless otherwise stipulated or directed by the presiding officer, these disclosures shall be made within 45 days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329 of this chapter. A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party **other than the NRC staff** shall disclose to other parties the identity of any person who may be used at trial to present evidence under § 2.710 of this chapter.

(B) Except in proceedings with pre-filed written testimony, or as otherwise stipulated or directed by the presiding officer, this disclosure shall be accompanied by a written report prepared and signed by the witness, that contains a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the presiding officer. In the absence of other directions from the presiding officer, or stipulation by the parties, the disclosures shall be made at least 90 days before the hearing commencement date or the date the matter is to be presented for hearing or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within the disclosure made by the other party. The parties shall supplement these disclosures when required under section (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party other than the NRC staff shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the presiding officer or the Commission, these disclosures shall be made at least 30 days before commencement of the hearing at which the issue is to be presented. Within 14 days after service thereof, unless a different time is specified by the presiding officer or the Commission, a party may serve and file a list disclosing any objections to the admissibility of documents identified under subparagraph (C) above. Objections not so disclosed, other than objections as to a document's admissibility under § 2.710(c), shall be deemed waived unless excused by the presiding officer or Commission for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order of the presiding officer or the Commission, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the presiding officer or the Commission.

(5) Methods to Discover Additional Matter. ~~(a) Discovery methods~~. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written interrogatories; interrogatories to Parties (§ 2.705); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§ 2.706); and requests for admission (§ 2.707).

(b) Scope of discovery. Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. When

any book, document or other tangible thing sought is reasonably available from another source, such as at the NRC Web site, http://www.nrc.gov, and/or the NRC Public Document Room, sufficient response to an interrogatory involving such materials would be the location, the title and a page reference to the relevant book, document or tangible thing. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery begins only after the prehearing conference and relates only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no discovery may take place after the beginning of the prehearing conference held pursuant to § 2.329 except upon leave of the presiding officer upon good cause shown. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order, the presiding officer may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under § 2.705 and the number of requests under §§ 2.706 and 2.707. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the presiding officer if he or she determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties' resources, the importance of the issue in the proceeding, and the importance of the proposed discovery in resolving the issues. The presiding officer may act upon his or her own initiative after reasonable notice or pursuant to a motion under paragraph (c) of this section.

(3) Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation

of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(4) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. Identification of these privileged materials shall be made within the time provided for disclosure of such materials, unless otherwise extended by order of the presiding officer or the Commission

(5) While interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party, such interrogatories may not be addressed to, or be construed to require: (A) Reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position; or (B) Performance of additional research or analytical work beyond that which is needed to support the party's position on any particular matter.

(c) Protective order. Upon motion by a party or the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except

persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.708 and 2.103a, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) Sequence and timing of discovery. Except when authorized under these rules or by order of the presiding officer, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f) of this section, nor may a party seek discovery after the time limit established in the proceeding for the conclusion of discovery. Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the presiding officer or in the following circumstances: ~~that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:~~

~~(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.~~

~~(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

~~(3) A duty to supplement responses may be imposed by order of the presiding officer or agreement of the parties.~~

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under paragraph(a)(2)(B) of this section the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under paragraph (a)(3) of this section are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except when otherwise ordered, the parties shall, as soon as practicable and in any event no more than 30 days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329, meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by consistency (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under § 2.704 of this section, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(4) any other orders that should be entered by the presiding officer under paragraph (c) of this section.

The attorneys of record and all unrepresented parties that have appeared in the proceeding are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the presiding officer within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to consistency (a)(1) or section (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated.

An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the presiding officer, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on

whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may, in appropriate circumstances, include termination of that person's right to participate in the proceeding.[12]

(h) Motion to compel discovery. (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request for an order compelling a response or inspection in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the presiding officer may make such a protective order as he is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a ~~subpena~~ subpoena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the regulatory staff pursuant to § 2.708(a) or production of NRC documents pursuant to § 2.708(b) or § 2.103a, except for paragraphs (c) and (e) of this section.

§ 2.705 - Depositions Upon Oral Examination and Upon Written Interrogatories; Interrogatories to Parties

[12] The sanction specified herein is not stated in the Rule 26 of the Federal Rules (which speaks of financial sanctions), but is inserted to emphasize the seriousness with which breaches of the Commission's disclosure and discovery rules should be viewed.

(a) Depositions upon oral examination and upon written interrogatories.

(1) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if, the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(2) [Reserved]

(3) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(4) The deponent shall be sworn or shall affirm before any questions are put to him. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(5) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

(6) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers shall be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

(7) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition.

(8) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(9) The witness may be accompanied, represented, and advised by legal counsel.

(10) The provisions of paragraphs (1) through (9) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.708.

(b) Interrogatories to parties.

(1) Any party may serve upon any other party (other than the staff) written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission and shall be served on the presiding officer and upon all parties to the proceeding.

(2) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers

shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 14 days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.705(a)(7), above).

§ 2.706 - Production of Documents and Things and Entry Upon Land for Inspections and Other Purposes

(a) Request for discovery. Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of Sec. 2.704 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Sec. 2.704.

(b) Service. The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in Sec. 2.704, the request may be served after the proceeding is set for hearing.

(c) Contents. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) Response. The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested,

unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

(e) NRC records and documents. The provisions of paragraphs (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of such records or documents is subject to the provisions of Secs. 2.708 and 2.103a.

§ 2.707 - Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document shall be delivered with the request unless a copy has already been furnished.

(b) Each requested admission shall be deemed made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated.

(c) Admissions obtained pursuant to the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 2.708 - Discovery against NRC

(a)(i) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: Provided, That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

(ii) In addition, a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the staff answer the interrogatories.

(iii) No deposition of a particular named NRC employee or answer to interrogatories by NRC personnel pursuant to paragraphs and (ii) of this section shall be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, pursuant to Sec. 2.328a, or after the beginning of the prehearing conference held pursuant to Sec. 2.329 except upon leave of the presiding officer for good cause shown.

(iv) The provisions of Sec. 2.704 (c) and (e) shall apply to interrogatories served pursuant to this paragraph.

(3) Records or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing pursuant to paragraph(b) of this section and section 2.790.

(b) A request for the production of an NRC record or document not available pursuant to Sec. 2.103a by a party to an initial licensing proceeding may be served on the Executive Director for Operations, without leave of the Commission or the presiding officer. The request shall set forth the records or documents

requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(c) If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under Sec. 2.103a and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party.

(d) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance with Sec. 2.323 (a) through (d). The record or document covered by the application shall be produced for the ``in camera'' inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine:

(1) The relevancy of that record or document;

(2) Whether the document is exempt from disclosure under Sec. 2.103a;

(3) Whether the disclosure is necessary to a proper decision in the proceeding;

(4) Whether the document or the information therein is reasonably obtainable from another source.

(e) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under Sec. 2.103a or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations, to produce the document.

(f) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under Sec. 2.103a, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including

affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating pursuant to Sec. 2.315(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of Sec. 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to Sec. 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

(g) A ruling by the presiding officer or the Commission for the production of a record or document will specify the time, place, and manner of production.

(h) No request pursuant to this section shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to Sec. 2.329 except upon leave of the presiding officer for good cause shown.

(i) The provisions of Sec. 2.704 (c) and (e) shall apply to production of NRC records and documents pursuant to this section.

§ 2.709 - Authority of presiding officer to dispose of certain issues on the pleadings.

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party

contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The presiding officer shall not consider a motion for summary disposition or answers thereto except upon finding that the motion will likely substantially reduce the number of issues to be decided or otherwise expedite the proceeding. Further, the presiding officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the presiding officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion and thereby extend the proceeding.

§ 2.710 - Evidence.

(a) General. Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and to conduct, in accordance with an approved cross-examination plan that contains the information specified in paragraph (b)(2) of this section if so directed by the presiding officer, such cross-examination as may be required for full and true disclosure of the facts.

(b)(1) Testimony and cross-examination. The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its proposed written testimony on each other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity

to examine it. Written testimony must be incorporated into the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit.

(2) The presiding officer may require a party seeking an opportunity to cross-examine to request permission to do so in accordance with a schedule established by the presiding officer. A request to conduct cross-examination shall be accompanied by a cross-examination plan that contains the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(3) Paragraphs (b) (1) and (2) of this section do not apply to proceedings under Subpart B of this part for modification, suspension, or revocation of a license or to proceedings for imposition of a civil penalty.

(c) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(d) Objections. An objection to evidence shall briefly state the grounds of objection. The transcript shall include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on the record.

(e) Offer of proof. An offer of proof made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony shall consist of a statement of the substance of the proffered evidence. If the excluded evidence is written, a copy shall be marked for identification. Rejected exhibits, adequately marked for identification, shall be retained in the record.

(f) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence. ~~Exhibits in the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are governed by Sec. 2.1013 of this part.~~

(g) Proceedings involving applications. In any proceeding involving an application, there shall be offered in evidence by the staff any report submitted by the ACRS in the proceeding in compliance with section 182b. of the Act, any safety evaluation prepared by the staff and any environmental impact statement prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee in the proceeding pursuant to Subpart A of part 51 of this chapter.

(h) Official record. An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(i) Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision clearly and concisely setting forth the information relied upon to show the contrary.

§ 2.711 - Proposed findings and conclusions.

(a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law, briefs and a proposed form or order of decision within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:

(1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law and briefs, and a proposed form of order or decision.

(2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed.

(3) A party who has the burden of proof may reply within five (5) days after filing of proposed findings and conclusions of law and briefs by other parties.

(b) Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

(c) Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law must be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. An intervenor's proposed findings of fact and conclusions of law must be confined to issues which that party placed in controversy or sought to place in controversy in the proceeding.

§ 2.712 - Initial Decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with Sec. 2.340 or the Commission takes review sua sponte.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may:

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration pursuant to Sec. 2.344; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order or denial of relief with the effective date;

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

Subpart J – Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

Section 2.1000 -- Scope of Subpart

The rules in this Subpart, together with the rules in Subpart L, govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed

pursuant to sections 2.101(f)(8) or section 2.105(a)(5). The procedures in this Subpart _are to be used together with the generally applicable procedures in Subpart C, the procedures in Subpart L and the following provisions of Subpart G: 2.702, 2.703, 2.707, and 2.712.

Section 2.1001 -- Definitions

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Party for the purpose of this Subpart means the DOE, the NRC staff, the host State, any affected unit of local government as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of of 1982, as amended (42 U.S.C. 10101), and a person admitted under section 2.309 to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter; provided that a host State, affected unit of local government, or affected Indian Tribe shall file a list of contentions in accordance with the provisions of section 2.309.

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Section 2.1010 -- Pre-License Application Presiding Officer

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(e) The Pre-License Application Presiding Officer shall possess all the general powers specified in sections 2.321(c) and 2.319 of this Part.

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Section 2.1012 -- Compliance

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(b)(1) A person, including a potential party given access to the Licensing Support Network under this Subpart, shall not be granted party status under section 2.309, or status as an interested governmental participant under section 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of section 2.1003 at the time it requests participation in the high-level waste licensing proceeding under section 2.309 or section 2.315.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of section 2.1003 of this Subpart. Admission of such a party or interested governmental participant under sections 2.309 or 2.315, respectively, shall be conditioned on accepting the status of the proceeding at the time of admission.

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Section 2.1013 -- Use of the Electronic Docket During the Proceeding

(a)(1) Pursuant to section 2.303, the Secretary of the Commission will maintain the official docket of the proceeding on the application for a license to receive and possess waste at a geologic repository operations area.

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[**Section 2.1014 – Intervention** – DELETE]

Section 2.1015 – Appeals

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(b) A notice of appeal from . . . (4) a Presiding Officer order granting or denying a petition to amend one or more contentions pursuant to section 2.309 must be filed with the Commission no later than (10) days after service . . . .

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(d) When in the judgment . . . The parties, interested governmental participants or potential parties may also request that the Pre-License Application Presiding Officer or Presiding Officer certify, pursuant to section 2.319 of this part . . . .

[**Section 2.1016 – Motions** -- DELETE]

Section 2.1018 – Discovery

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(g) The Presiding Officer, pursuant to section 2.322 of this part may appoint . . . .

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Section 2.1019 – Depositions

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[(j) – DELETE]

Section 2.1021 – First Prehearing Conference

In any proceeding involving an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter the Commission or the presiding officer will direct the parties, interested governmental participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, for a conference as provided by section 2.329 of this Part. [Subsections (a)(1)-(5), (b), (c) and (d) – DELETE]

[**Section 2.1022 – Second Prehearing Conference** – DELETE]

[**Section 2.1025 – Authority of the Presiding Officer to Dispose of Certain Issues on the Pleadings** – DELETE]

[**Section 2.1027 – Sua Sponte** – DELETE]

Subpart K – Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

Section 2.1109 – Requests for Oral Argument

(a)(1) In its request for hearing/petition to intervene filed in accordance with section 2.309 of this part, any party may invoke the hybrid hearing procedures in this Subpart by requesting an oral argument. If it is determined that a hearing will be held, the presiding officer shall grant a timely request for oral argument.

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(c) If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, the presiding officer shall conduct the proceeding in accordance with Subpart L of this part.

Section 2.1117 – Applicability of Other Sections

In proceedings subject to this part, the provisions of Subparts A, C and L of this part are also applicable, except where inconsistent with the provisions of this Subpart.

Subpart L -- Informal Hearing Procedures for NRC Adjudications

§ 2.1200 Scope of Subpart.

The provisions of this Subpart may be applied to all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act and 10 CFR Part 2 except proceedings on the licensing of the construction and operation of a uranium enrichment facility.

§ 2.1201 Definitions.

The definitions of terms contained in section 2.4 apply to this Subpart unless a different definition is provided in this Subpart.

§ 2.1202 Authority and Role of NRC Staff.

(a) During the pendency of any hearing under this Subpart, consistent with the NRC staff's findings in its own review of the application or matter which is the subject of the hearing and as authorized by law, the staff is expected to promptly issue its approval or denial of the application or take other appropriate action on the

matter which is the subject of the hearing. The staff's action on the matter is effective upon issuance by the staff, except in matters involving:

(1) an application to construct and/or operate a production or utilization facility;

(2) an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to section 2.101(f)(8) or section 2.105(a)(5);

(3) an application for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR Part 72; and

(4) production or utilization facility licensing actions that involve significant hazards considerations as defined in 10 CFR 50.92.

Notice of the staff's action shall be promptly transmitted to the presiding officer and the parties to the proceeding.

(b)(1) The NRC staff will be a party to a proceeding under this Subpart where--

(i) the proceeding involves an application denied by the NRC staff or an enforcement action proposed by the NRC staff;

(ii) the proceeding is on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area; or

(iii) the Presiding Officer determines that the resolution of any issue in the proceeding would be aided materially by the staff's participation in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the Presiding Officer determines that the staff's participation is necessary, the Presiding Officer shall issue an order specifically identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff's participation will materially aid in resolution of the issue(s).

Otherwise, the NRC staff is not required to be a party to proceedings under this Subpart.

(2) Within 15 days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall provide notice to the Presiding Officer and the parties (i) on whether or not it desires to participate as a party, and (ii) identifying any contentions on which it wishes to participate as a party. If the staff chooses to participate as a party, it shall thereupon be deemed to be a party with all the rights and responsibilities of a party with respect to the admitted contentions of other parties which it identifies.

§ **2.1203 Hearing File; Prohibition on Discovery**.

(a) Within 30 days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file--

(1) The hearing file must be made available to the parties either by service of hard copies or by making the file available at the NRC Web site, http://www.nrc.gov.

(2) The hearing file also must be made available for public inspection and copying at the NRC Web site, http://www.nrc.gov and/or at the NRC Public Document Room.

(b) The hearing file will consist of the application, if any, and any amendment thereto, and, when available, any NRC environmental impact statement or assessment and any NRC report related to the proposed action, as well as any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. Hearing file documents already available at the NRC Web site and/or the NRC Public Document Room when the hearing request/petition to intervene is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The Presiding Officer shall rule upon any issue regarding the appropriate materials for the hearing file.

(c) The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials as required in paragraphs (a) and (b) of this section.

(d) Except as otherwise permitted by Subpart C and Subpart J, a party may not seek discovery from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise.

§ 2.1204 Motions and Requests.

(a) General Requirements. In proceedings under this Subpart, requirements for motions and requests and responses thereto are as specified in section 2.323 of this Part.

(b) Requests for Cross-Examination by the Parties. In any oral hearing under this Subpart, a party may file a motion with the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The presiding officer may allow cross-examination by the parties if he/she determines that a failure to allow cross-examination by the parties will prevent the development of an adequate record for decision.

§ 2.1205 Summary Disposition.

(a) Unless the Presiding Officer or the Commission directs otherwise, motions for summary disposition may be submitted to the Presiding Officer by any party no later than 45 days before the commencement of hearing. Such motions must be in writing and must include a written explanation of the basis of the motion and affidavits to support statements of fact. Motions for summary disposition shall be served on the parties and the Secretary at the same time that they are submitted to the Presiding Officer.

(b) Any other party may serve an answer supporting or opposing the motion within 20 days after service of the motion.

(c) The Presiding Officer shall issue a determination on each motion for summary disposition no later than 15 days before the date scheduled for commencement of hearing. In ruling on motions for summary disposition, the Presiding Officer shall apply the standards for summary disposition set forth in Subpart G of this Part.

§ 2.1206 Informal Hearings.

Hearings under this Subpart will be oral hearings as described in section 2.1207, unless, within 15 days of the service of the order granting the request for hearing, the parties unanimously agree and file a joint motion requesting a hearing consisting of written submissions. No motion to hold a hearing consisting of written submissions will be entertained absent unanimous consent of the parties.

§ 2.1207 Process and Schedule for Submissions and Presentations in an Oral Hearing.

(a) Unless otherwise limited by this Subpart or by the Presiding Officer, participants in an oral hearing may submit and sponsor in the hearings --

(1) Initial written statements of position and written testimony with supporting affidavits on the admitted contentions. These materials shall be filed on the dates set by the Presiding Officer.

(2) (i) Written responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants;

(ii) Proposed questions for the Presiding Officer to consider for propounding to the persons sponsoring the testimony.

These materials shall be filed within 20 days of the service of the materials submitted under paragraph (a)(1) of this section unless the Presiding Officer directs otherwise.

(3) Proposed questions directed to rebuttal testimony for the Presiding Officer to consider for propounding to persons sponsoring such testimony. This material shall be filed within 7 days of the service of the rebuttal testimony unless the Presiding Officer directs otherwise.

(b) Oral Hearing Procedures.

(1) The oral hearing shall be transcribed.

(2) Written testimony will be received into evidence in exhibit form.

(3) Participants may designate and present their own witnesses to the Presiding Officer.

(4) Testimony for the NRC staff will be presented only by persons designated by the Executive Director for Operations for that purpose.

(5) No subpoenas will be granted at the request of participants for the attendance and testimony of participants or witnesses or the production of evidence.

(6) The Presiding Officer may accept written testimony from a person unable to appear at the hearing, and may request such person to respond to questions.

(7) Participants and witnesses will be questioned orally or in writing and only by the Presiding Officer. The Presiding Officer will examine the witnesses using either the Presiding Officer's questions or questions submitted by the participants or a combination of both. Questions may be addressed to individuals or to panels of participants or witnesses.

(c) Written post-hearing statements of position on the contentions addressed in the oral hearing may be submitted within 30 days of the close of the oral hearing or at such other time as the Presiding Officer directs.

§ 2.1208 Process and Schedule for a Hearing Consisting of Written Presentations.

(a)Unless otherwise limited by this Subpart or by the Presiding Officer, participants in a hearing consisting of written presentations may submit--

(1) Initial written statements of position and written testimony with supporting affidavits on the admitted contentions. These materials shall be filed on the dates set by the Presiding Officer.

(2) Written responses, rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants, and proposed written questions for the Presiding Officer to consider

for submittal to persons sponsoring testimony under paragraph (a)(1) of this section. These materials shall be filed within 20 days of the service of the materials submitted under paragraph (a)(1) of this section unless the Presiding Officer directs otherwise.

(3) Proposed written questions directed to the written responses and rebuttal testimony submitted under paragraph (a)(2) of this section for the Presiding Officer to consider for submittal to the persons offering the written responses and rebuttal testimony. These proposed written questions shall be filed within 7 days of service of the materials submitted under paragraph (a)(2) of this section unless the Presiding Officer directs otherwise.

(4) Written concluding statements of position on the contentions. These materials shall be filed within 20 days of the service of written responses to the Presiding Officer's questions to the participants or, in the absence of questions from the Presiding Officer, within 20 days of the service of the materials submitted under paragraph (a)(2) of this section unless the Presiding Officer directs otherwise.

(b) The Presiding Officer may formulate and submit such written questions to the participants as he deems appropriate to develop an adequate record.

§ 2.1209 Initial Decision and Its Effect.

For matters other than a decision on the high-level radioactive waste geologic repository (which is governed by section 2.1023 of this part) --

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the Presiding Officer shall render an initial decision after completion of an informal hearing under this Subpart. That initial decision constitutes the final action of the Commission 40 days after the date of issuance, unless any party files a petition for Commission review in accordance with section 2.1210 or the Commission takes review of the decision sua sponte.

(b)The Commission may direct that the Presiding Officer certify the record to it without an initial decision and prepare a final decision upon a finding that due and timely execution of its functions warrants such action.

(c) An initial decision must be in writing and must be based only upon information in the record or facts officially noticed. The record must include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice and an opportunity to comment as provided in sections 2.1207 or 2.1208 of this Subpart. The initial decision must include --

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact or law admitted in the proceeding;

(2) The appropriate ruling, order, or grant or denial of relief with its effective date; and

(3) The time within which a petition for Commission review may be filed, the time within which any answers to a petition for review may be filed, and the date when the decision becomes final in the absence of a petition for Commission review or Commission sua sponte review.

(d) Pending review and final decision by the Commission, an initial decision resolving all issues before the Presiding Officer is immediately effective upon issuance except --

(1) As provided in any order issued in accordance with section 2.1211 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the regulations in this Part (e.g. section 2.312) or by the Commission in special circumstances.

§ 2.1210 Immediate Effectiveness of Initial Decision Directing Issuance or Amendment of Licenses Under Part 61 of this Chapter.

An initial decision directing the issuance of a license under part 61 of this chapter (relating to land disposal of radioactive waste or any amendments to such a license authorizing actions which may significantly affect the health and safety of the public) will become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards may not issue a license under part 61 of this chapter, or any amendment to such a license which may significantly affect the health and safety of the public until expressly authorized to do so by the Commission.

§ 2.1211 Petitions for Commission Review of Initial Decisions.

Parties may file petitions for review of an initial decision under this Subpart in accordance with the procedures set out in section 2.340 of this Part. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

§ 2.1212 Applications for a Stay.

(a) Any application for a stay of the effectiveness of the NRC staff's action on a matter involved in a hearing under this Subpart shall be filed with the Presiding Officer within 5 days of the issuance of the notice of staff's action pursuant to section 2.1202(a) of this Subpart and shall be filed and considered in accordance with subsections 2.1212(b), (c) and (d).

(b) An application for a stay of the NRC staff's action must be no longer than 10 pages, exclusive of affidavits, and must contain:

(1) A concise summary of the action which is requested to be stayed; and

(2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section.

(c) Within 10 days after service of an application for a stay of the NRC staff's action under this section, any party and/or the NRC staff may file an answer supporting or opposing the granting of a stay. Answers must be no longer than 10 pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section as appropriate. No further replies to answers will be entertained.

(d) In determining whether to grant or deny an application for a stay of the NRC staff's action, the following will be considered:

(1) Whether the requestor will be irreparably injured unless a stay is granted;

(2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;

(3) Whether the granting of a stay would harm other participants; and

(4) Where the public interest lies.

(e) Any application for a stay of the effectiveness of the presiding officer's initial decision or action under this Subpart shall be filed with the Commission in accordance with section 2.341 of this Part.

Subpart M – Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications

[**Section 2.1306 – Hearing Request or Intervention Petition** – DELETE]

[**Section 2.1307 – Answers and Replies** – DELETE]

[**Section 2.1308 – Commission Action on a hearing Request or Intervention Petition** - DELETE]

[**Section 2.1312 – Authority of the Secretary** – DELETE]

[**Section 2.1313 – Filing and Service** – DELETE]

[**Section 2.1314 – Computation of Time** – DELETE]

[**Section 2.1317 – Hearing Docket** – DELETE]

[**Section 2.1318 – Acceptance of Hearing Documents** – DELETE]

Section 2.1321 – Participation and Schedule for Submission in a Hearing Consisting of Written Comments

Unless otherwise limited by this Subpart or by the Commission, participants in a hearing consisting of written comments may submit:

(a) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials shall be filed on the date set by the Commission or the presiding officer.

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Section 2.1322 Participation and Schedule for Submissions in an Oral Hearing

(a) Unless otherwise limited by this Subpart or by the Commission, participants in an oral hearing may submit and sponsor in the hearings:

(1) Initail written statements of position and written testimony with supporting affidavits on the issues. These materials shall be filed on the date set by the Commission or the presiding officer.

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[**Section 2.1326 – Burden of Proof** – DELETE]

[**Section 2.1328 – Default** – DELETE]

[**Section 2.1329 – Waiver of a Rule or Regulation** – DELETE]

[**Section 2.1330 – Reporter and Transcript for an Oral Hearing** – DELETE]

Section 2.1331 – Commission Action

*

(b) The decision on issues designated for hearing pursuant to section 2.309 will be based on the record developed at hearing.

Subpart N – Expedited Proceedings with Oral Hearings

§ 2.1400 Purpose and Scope.

The purpose of this Subpart is to provide simplified procedures for the expeditious resolution of disputes among parties in an informal hearing process. The provisions of this Subpart may be applied to all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR Part 2 except

(1) proceedings on the licensing of the construction and operation of a uranium enrichment facility; and

(2) proceedings on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to section 2.101(f)(8) or section 2.105(a)(5) of this Part.

§ 2.1401 Definitions.

The definitions of terms contained in section 2.4 apply to this Subpart unless a different definition is provided in this Subpart.

§ 2.1402 General Procedures and Limitations; Requests for Other Procedures

(a) For proceedings conducted under this Subpart--

(1) Except where provided otherwise in this Subpart or specifically requested by the presiding officer or the Commission, written pleadings and briefs (regardless whether they are in the form of a letter, a formal legal submission, or otherwise) are not permitted.

(2) Requests to schedule a conference to consider oral motions may be in writing served on the Presiding Officer and the parties.

(3) Motions for summary disposition before the hearing has concluded and motions for reconsideration to the presiding officer or the Commission are not permitted.

(4) All motions must be presented and argued orally.

(5) The presiding officer will reflect all rulings on motions and other requests from the parties in a written decision. A verbatim transcript of oral rulings will satisfy this requirement.

(6) Except for the information disclosure requirements set forth in Subpart C, requests for discovery will not be entertained.

(7) The presiding officer will issue such written orders and rulings as are necessary for the orderly and effective conduct of the proceeding.

(b) Other Procedures. If it becomes apparent at any time before a hearing is held that a proceeding selected for adjudication under this Subpart is not appropriate for application of this Subpart, the presiding officer or the Commission may, on its own motion or at the request of a party, order the proceeding to continue under another appropriate Subpart. If a proceeding under this Subpart is discontinued because the proceeding is not appropriate for application of this Subpart, the presiding officer may issue such written orders as are necessary for the orderly continuation of the hearing process under another Subpart.

(c) Request for Cross-Examination. A party may present an oral motion to the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The presiding officer may allow cross-examination by the parties if he/she determines that a failure to allow cross-examination by the parties will prevent the development of an adequate record for decision.

§ 2.1403 Authority and Role of NRC Staff.

(a) During the pendency of any hearing under this Subpart, consistent with the NRC staff's findings in its own review of the application or matter which is the subject of the hearing and as authorized by law, the staff is expected to promptly issue its approval or denial of the application or take other appropriate action on the matter which is the subject of the hearing. The staff's action on the matter is effective upon issuance by the staff, except in matters involving:

(1) an application to construct and/or operate a production or utilization facility;

(2) an application for the construction and operation of an independent spent fuel storage installation located at a site other than a reactor site or a monitored retrievable storage facility under 10 CFR Part 72;

(3) production or utilization facility licensing actions that involve significant hazards considerations as defined in 10 CFR 50.92.

Notice of the staff's action shall be promptly transmitted to the Presiding Officer and the parties to the proceeding.

(b)(1) The NRC staff will be a party to a proceeding under this Subpart where:

(i) the proceeding involves an application denied by the NRC staff or an enforcement action proposed by the NRC staff; or

(ii) the presiding officer determines that the resolution of any issue in the proceeding would be aided materially by the staff's participation in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the presiding officer determines that the staff's participation is necessary, the presiding officer shall issue an order identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff participation will materially aid in resolution of the issue(s).

Otherwise, the NRC staff is not required to be a party to proceedings under this Subpart.

(2) If the NRC staff desires to participate as a party, the staff shall notify the presiding officer and the parties no later than the time of the prehearing conference provided by section 2.1404 and shall thereupon be deemed to be a party with all the rights and responsibilities of a party.

§ 2.1404 Prehearing Conference.

(a) No later than 40 days after the order granting requests for hearing/petitions to intervene, the presiding officer shall conduct a prehearing conference. At the discretion of the presiding officer, the prehearing conference may be held in person or by telephone or through the use of video conference technology.

(b) At the prehearing conference, each party must provide the presiding officer and the parties participating in the conference with a statement identifying each witness the party plans to present at the hearing and a written summary of the oral and written testimony of each proposed witness. If the prehearing conference is not held in person, each party must forward the summaries of the party's witnesses' testimony to the presiding officer and the other parties by such means as will ensure the receipt of the summaries by the commencement of the prehearing conference.

(c) At the prehearing conference, the parties will describe the results of their efforts to settle their disputes or narrow the contentions that remain for hearing, provide an agreed statement of facts, if any, identify witnesses that they propose to present at hearing, provide questions or question areas that they would propose to have the presiding officer cover with the witnesses at the hearing, and discuss other pertinent matters. At the conclusion of the conference, the presiding officer will issue an order specifying the issues to be addressed at the hearing and setting forth any agreements reached by the parties. The order shall include the scheduled date for any hearing that remains to be held.

§ 2.1405 Hearing.

(a) No later than 20 days after the conclusion of the prehearing conference, the presiding officer will hold a hearing on any contention that remains in dispute. At the beginning of the hearing, the presiding officer will enter into the record all agreements reached by the parties before the hearing.

(b) A reporter will be present at the hearing, and a verbatim transcript of the hearing will be prepared. Parties may purchase copies of the transcript from the reporter.

(c) Hearings will be open to the public, unless portions of the hearings involving proprietary or other protectable information are closed pursuant to the Commission's regulations.

(d) At the hearing, the presiding officer will receive oral evidence that is not irrelevant, immaterial, unreliable or unduly repetitious. Testimony will be under oath or affirmation.

(e) The presiding officer may question witnesses who testify at the hearing, but the parties may not do so.

(f) Each party may present oral argument and a final statement of position at the close of the hearing. Written post-hearing briefs and proposed findings will not permitted unless ordered by the presiding officer.

§ 2.1406 Initial Decision – Issuance and Effectiveness.

(a) Where practicable, the presiding officer will render a decision from the bench. In rendering a decision from the bench, the presiding officer shall state the issues in the proceeding and make clear its findings of fact and conclusions of law on each issue. The presiding officer's decision and order shall be reduced to writing and transmitted to the parties as soon as practicable, but not later than 20 days, after the hearing ends. Where a decision is not rendered from the bench, a written decision and order will be issued not later than 30 days after the hearing ends. Approval of the Chief Administrative Judge must be obtained for an extension of these time periods, and in no event may a written decision and order be issued later than 60 days after the hearing ends without the express approval of the Commission.

(b) The presiding officer's written decision shall be served on the parties and filed with the Commission when issued.

(c) The presiding officer's initial decision is effective and constitutes the final action of the Commission 20 days after the date of issuance of the written decision unless any party appeals to the Commission in accordance with section 2.1407 or the Commission takes review of the decision sua sponte or the regulations in this Part (e.g., section 2.314) specify other requirements with regard to the effectiveness of decisions on certain applications.

§ 2.1407 Appeal and Commission Review of Initial Decision.

(a)(1) Within 15 days after service of a written initial decision, a party may file a written appeal seeking the Commission's review on the grounds specified in paragraph (b) of this section. The filing of an appeal with the Commission is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) An appeal under this section may be no longer than 20 pages and must contain the following:

(i) a concise statement of the specific rulings and decisions that are being appealed;

(ii) a concise statement (including record citations) where the matters of fact or law raised in the appeal were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) a concise statement why, in the appellant's view, the decision or action is erroneous; and

(iv) a concise statement why the Commission should review the decision or action, with particular reference to the grounds specified in paragraph (b) of this section.

(3) Any other party to the proceeding may, within 15 days after service of the appeal, file an answer supporting or opposing the appeal. The answer must be no longer than 20 pages and should concisely address the matters in paragraph (a)(2). The appellant shall have no right to reply. Unless it directs additional

filings or oral arguments, the Commission will decide the appeal on the basis of the filings permitted by this paragraph (a).

(b) In considering the appeal, the Commission will give due weight to the existence of a substantial question with respect to the following considerations--

(1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(2) A necessary legal conclusion is without governing precedent or is a departure from, or contrary to, established law;

(3) A substantial and important question of law, policy or discretion has been raised by the appeal;

(4) The conduct of the proceeding involved a prejudicial procedural error; or

(5) Any other consideration which the Commission may deem to be in the public interest.

Dated at Rockville, Maryland, this ____ day of _____, 2000.

For the Nuclear Regulatory Commission.

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Annette L. Vietti-Cook

Secretary of the Commission