IN RESPONSE, PLEASE
REFER TO: M910201B

February 8, 1991

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary /S/

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., FRIDAY, FEBRUARY 1, 1991, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-91-001 - Addition of Final Rule Containing Revisions to the Commission's Rules of Practice in Order to Further Streamline the High-Level Waste Licensing Process

The Commission, by a 4-0 vote, approved amendments to the Commission's Rules of Practice in 10 CFR Part 2 Subpart J in order to streamline the high-level waste licensing process.

The Federal Register Notice should be revised as noted on the attached pages, reviewed by the Regulatory Publications Branch, ADM, and forwarded for signature and publication.
(OGC) (SECY Suspense: 3/1/91)

Attachments:
As stated

cc: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
EDO
GPA
ACRS
PDR - Advance
DCS - P1-24

existence of a genuine dispute with the applicant on a material issue of fact or law allows the scope of the proceeding to be defined and advanced without prematurely eliminating legitimate contentions.

EEI/UWASTE suggests that the language in section 2.1014(a)(2)(iii)(D) should be improved. As proposed, the section states that in determining whether a genuine dispute exists, the Commission or the Presiding Officer "shall consider" whether the contention, if proven, would be of no consequence because it would not entitle the petitioner to relief. The commenter believes the language should mandate rejection of the contention.

The Commission considers that the clear implication of the language stating that the Commission or the Presiding Officer "shall" consider the factor of whether a petitioner would be entitled to relief is that this factor will be dispositive in deciding whether a genuine dispute exists. Therefore, the Commission does not believe that a revision is necessary. However, to clarify that this is a factor which the Presiding Officer shall consider, a new section 2.1014(c)(5) has been added. Slightly revised language in section 2.1014(a)(2)(iii)(D) remains to advise the parties that this is a dispositive factor.

EEI/UWASTE also suggests a minor change in subsection 2.1014(a)(3) where the currently effective language refers to a failure of a petitioner to comply with "paragraphs (a)(2)(ii),(iii) and (iv) of this section". The amended version of this subsection refers only to

paragraph (a)(2)(iii) of this section, although no changes are proposed to subsections 2.1014(a)(2)(ii) and

or during the hearing if considering the motion would divert substantial resources from the hearing.

Minor deletions of wording referring to discovery methods (patterned after section 2.749) contained in section 2.1025(b) and (c) of the proposed rule have been made in the final rule to tailor this section to the HLW licensing proceeding. The availability of the LSS allows a different framework of discovery for this proceeding.

NCAI objects to the changes in sections 2.1024 and 2.1025 on the ground that these provisions drastically raise the minimum costs of intervention by requiring intervenors to hire experts for both testimony and affidavits. NCAI asserts that intervenors who cannot afford to do more should continue to have the opportunity to make their case by cross-examination only. Nevada also objects that these provisions impose on intervenors additional expenses which might not be necessary if their presentation were based on cross-examination of applicant's or the NRC staff's witnesses, or argument from documents already in the record. Both NCAI and Nevada note that there appears to be no purpose for these requirements.

With regard to section 2.1024, which would require intervenors to present a direct case on contentions, the Commission has reconsidered the proposed rule with the benefit of public comments received and summarized above.~~; and further consideration of the requirements of the~~

~~Administrative Procedure Act. The Administrative Procedure Act provides that "A party is entitled ... to conduct such cross-examination as may be required for a full and true~~

~~disclosure of the facts." 5 U.S.C. § 556(d). Although in general the agency may place reasonable bounds upon the right to cross-examination to facilitate the efficient conduct of its hearings, in the circumstances presented here, the requirement of presenting a direct case on contentions could operate to deny the right of cross-examination to some intervenors. These intervenors would have been subject to the hurdles of stating a contention with enough specificity to get it admitted, responding to discovery requests, and withstanding potential motions for summary disposition. At that point, the matter in controversy should be sufficiently clear so that requiring presentation of a direct case by intervenors for the purpose of stating their assertions does not appear to be necessary. Further, t~~The Commission agrees with comments to the effect that those parties whose contentions have been admitted and who believe a full disclosure of the facts regarding such contentions could be established by cross-examination of the other parties or by reference to materials already in the record ~~as provided by the Administrative Procedure Act, would~~ might be forced to go to the extra expense and unnecessary expansion of the record to present a direct case. On balance, the Commission does not find a pressing need for ~~justification for~~ imposing this requirement at this time. Proposed section 2.1024 will not be adopted.

The Commission has also reconsidered the requirement in proposed new section 2.1025 that an affidavit be submitted in opposition to a motion for summary disposition when the motion for summary disposition is supported by an affidavit. The proponent of the motion for summary disposition has the option whether or not to submit an affidavit in support of its motion. It seems

reasonable that the opponent of the motion should have the same option whether to support its answer with an affidavit, based on its evaluation of how best

to NRC proceedings ~~and will be required to present a direct case on contentions,~~ and thereby incur some additional costs in preparing for, and participating in, the proceeding, these costs will be minimized by the early availability of information through the LSS and the pre-license application consultation process. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this final rule will not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

This final rule does not modify or add to systems, structures, components, or design of a production or utilization facility; the design approval or manufacturing license for a production pr utilization facility; or the procedures or organization required to design, construct, or operate a production or utilization facility. Accordingly, no backfit analysis pursuant to 10 CFR 50.109(c) is required for this final rule.

List 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,

Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

§ 2.1027 Sua Sponte.

In any initial decision in a proceeding on a application to receive and possess waste at a geologic repository operations area, the Presiding Officer, other than the Commission shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties determined to be litigable issues in the proceeding.

24. Appendix D is added to 10 CFR Part 2 to read as follows:

Appendix D - Schedule for the Proceeding on Application for
a License to Receive and Possess High-Level Radioactive Waste
at a Geologic Repository Operations Area

Day	Regulation (10 CFR)	Action
0	2.101(f)(8) 2.105(a)(5)	Federal Register Notice of Hearing
30	2.1014(a)(1)	Petition to intervene/request for hearing, w/contentions
...	2.715(c)	Petition for status as interested government participant & interested government participant petitions
50	2.1014(b)	Answers to intervention & interested government participant petitions
70	2.1021	1st Prehearing Conference
100		1st Prehearing Conference Order; identifies participants in proceeding, admits contentions, and sets discovery and other schedules

...	2.1018(b)(1)	
	2.1019	Deposition discovery begins
110	2.1015(b)	Appeals from 1st Prehearing Conference Order, w/briefs