UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

February 16, 2001

OFFICE OF THE
SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-00-0017

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

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of February 16, 2001.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-00-0017

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	11/6/00
COMR. DICUS	X				X	4/10/00
COMR. DIAZ	X				X	7/26/00
COMR. McGAFFIGAN	X				X	12/14/00
COMR. MERRIFIELD	X				X	5/30/00

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on February 16, 2001.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook
Secretary of the Commission

FROM: CHAIRMAN MESERVE

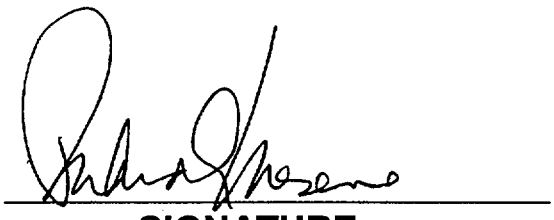
SUBJECT: SECY-00-0017 - PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE

Approved ___x___ **Disapproved** _____ **Abstain** _____

Not Participating _____

COMMENTS:

See attached.



SIGNATURE

November 6, 2000

DATE

Entered on "AS" Yes ✓ **No** ____

Comments of Chairman Meserve on SECY-00-0017

The establishment of appropriate procedures to govern the administrative hearing process is an essential ingredient in the successful accomplishment of all of our strategic objectives -- to maintain safety, to improve effectiveness and efficiency, to eliminate unnecessary regulatory burden, and to improve public confidence. The Office of General Counsel (OGC) should be commended for its efforts to examine the practices by which the NRC has long conducted its business and to develop a proposal that is aimed at improving the hearing process. Although I have concerns about some aspects of OGC's draft proposal and thus urge some modifications, the main thrust of the draft is an improvement over our existing practices. I thus approve OGC's proposal in SECY-00-0017, as amended by the memorandum by Karen Cyr of March 21, 2000, subject to certain comments and suggestions.

I approach the issues raised by this proposal with some perspectives derived from my experiences as a litigator. First, it is not necessarily the case that an informal procedure is more efficient than a formal procedure. The objective of a hearing is to provide a record that provides the basis for a sound, well-reasoned, and fully informed decision. For some matters, the best way to obtain that record is by means of the illumination that a formal procedure allows. Diverting cases that benefit from a formal process to an informal process may, in fact, cause delay if the informal process is inadequate to provide the necessary foundation for decision. Moreover, we should be very careful to assure that our procedures never intrude on the due process rights of the parties.

Second, it is also not necessarily the case that a formal process is a slow process. The federal courts in the Eastern District of Virginia, although operating under the same federal rules as the remainder of the federal system, have established a record for very expeditious decision-making (the so-called "rocket docket"). A judge with a commitment to the task can assure that a decision is achieved both swiftly and fairly by imposing limitations on discovery, by pruning the case during the pretrial motions practice, and by requiring the expeditious presentation of witnesses and the prompt filing of briefs. The key is to provide a judge with the flexibility to apply procedures appropriate to the matter at hand so that the process can be tailored to the case.

With these observations as a backdrop, I have the following comments on the proposal:

Yucca Mountain. Although it is premature to speak knowledgeably about the content of any hearing concerning a potential high-level waste repository at Yucca Mountain, I believe that we can reasonably anticipate that any such hearing would involve a variety of complex issues. It is my view that such matters can be most expeditiously and thoroughly examined using formal procedures. Moreover, the Commission has long taken the position that it would provide a formal hearing for repository licensing,[1] thereby raising public expectations. Any application of an informal process to the matter would, in my view, neither facilitate the decision process nor advance public confidence in our decision. Accordingly, any future proceeding concerning a permanent repository for high-level waste at Yucca Mountain should be undertaken using formal procedures.

Hearing Tracks. The proposed rule recognizes one formal hearing track (Subpart G), three informal tracks (Subparts L, M, and N), and one hybrid track (Subpart K).[2] In light of the fact that the agency does not have to deal with many adjudicatory matters -- there were only 20 requests for hearings in 1999 -- the wide menu of hearing procedures seems excessive. It would be wiser and simpler, in my view, to have one formal procedure, one informal procedure, and, if necessary to comply with a statutory requirement, a single hybrid procedure. That

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[1] See Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 56 Fed. Reg. 7787 (1991); Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,930 (1989); Procedures Applicable to Proceedings for the Issuance of Licenses for Receipt of High-Level Radioactive Waste at a Geologic Repository, 46 Fed. Reg. 13,971, 13,974 (1981).

[2] The hybrid procedure is required by the Nuclear Waste Policy Act of 1982, which permits the use of a modified hearing process in certain contested proceedings on an application for a license or a license amendment to expand the spent nuclear fuel storage capacity at the site to deal with spent fuel storage capacity at civilian nuclear reactors. 42 U.S.C. § 10154 (1998). See also Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662 (1985).

Proposed subpart J has been revised to reflect the fact that the proposed rule would apply the informal procedures of proposed subpart L to the licensing of a high-level waste repository and would eliminate redundant or duplicate provisions covered by proposed subpart C. As a result, proposed subpart J focuses mainly on the Licensing Support Network.

being said, there should be flexibility to allow the judge to adapt the process to suit the case. For example, in the case of a formal proceeding, the judge should be prepared to limit discovery and to constrain duplicative testimony and non-productive cross-examination. Similarly, in connection with a matter subject to the informal process, the presiding officer perhaps should be empowered to allow limited discovery in appropriate cases.

Access to Tracks. The proposed rule (proposed § 2.310) would provide for a formal hearing only for proceedings relating to enforcement, the licensing of the construction and operation of uranium enrichment facility, or reactor licensing proceedings involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures. As noted above, I would explicitly include any proceedings relating to the licensing of a proposed repository at Yucca Mountain within the class of proceedings for which formal procedures are necessary. Moreover, I believe the proposed category of cases to which formal hearing procedures would apply is too narrow in other respects. Although the proposed rule would not apply the formal procedures to any materials licensing actions, such cases can raise very complex and difficult issues that would benefit from the focused scrutiny that formal procedures allow.[3] Indeed, the limitation on formal hearings in reactor cases to those with a "large number" of complex issues may be too confining; even a single issue creates a complex case that might benefit from formal processes. I thus conclude that the proposed rule may not sweep widely enough in allowing formal hearings in situations that would benefit from them.

The difficulty is in defining the categories of cases that would benefit from formal procedures. Such cases might include proceedings that present complex issues, that raise difficult disputed issues of material fact or of expert opinion, or perhaps (in order to capture significant cases) that involve matters for which the preparation of an environmental impact statement was necessary. The Federal Register notice on the proposed rule should explicitly

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[3] See, e.g., Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996); CLI-82-21, 16 NRC 401 (1982); CLI-82-2, 15 NRC 232 (1982); ALAB-944, 33 NRC 81 (1991); ALAB-928, 31 NRC 263 (1990); LBP-90-9, 31 NRC 150 (1990); LBP-89-35, 30 NRC 677 (1989), LBP-89-16, 29 NRC 508 (1989); LBP-86-4, 23 NRC 75 (1986); LBP-85-46, 22 NRC 830 (1985); LBP-85-38, 22 NRC 604 (1985); LBP-85-1, 21 NRC 11 (1985); LBP-85-3, 21 NRC 244 (1985); LBP-84-42, 20 NRC 1296 (1984).

state the Commission is seeking comment on criteria to define those cases for which formal procedures are appropriate.

Cross-examination. Subpart L of OGC's proposal (the "standard" rule governing an informal hearing) would allow the examination of witnesses only by the presiding officer, guided by questions submitted by the participants, absent exceptional circumstances.[4] This approach may be acceptable for direct testimony, but, for many of the reasons set out in the memorandum submitted by Judge Bollwerk on behalf of the Atomic Safety and Licensing Board Panel (ASLBP),[5] it is not likely to provide a productive alternative to cross-examination by opposing counsel. The attorney for a party is more likely to understand the points of vulnerability of an adverse witness than the judge (at least at the time of the hearing) and is in a better position than the judge to expose these points through probing cross-examination. For example, it is unlikely that even a carefully crafted pre-hearing question or two will cause a witness to reveal error. Instead, there must be a thoughtful progression of questions, guided at each stage by the witness's response to the previous inquiries. The opposing counsel is in a better position than the judge to undertake such an interrogation as a result of the fact that the attorney is able to bring focused attention, with the help of expert advisers, on how to reveal such matters.[6] The engine of the adversarial process is cross-examination and it should not lightly be discarded.[7]

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[4] The proposed rule would allow cross-examination only when a failure to allow it "would prevent the development of an adequate record for decision." Proposed § 2.1204(b). This limitation is probably unworkable because it will be difficult for the presiding officer to determine the benefit of cross-examination until after it has taken place.

[5] Memorandum to the Commission from G. Paul Bollwerk, III, Chief Administrative Judge, Feb. 10, 2000 (ASLBP Memo).

[6] The problem is compounded in the context of testimony on technical matters. The proposed rule would require the conduct of an informal hearing by a single presiding officer, who no doubt often would have legal rather than technical training and, thus, may not have sufficient knowledge of the subject matter to probe deeply.

[7] The proposal to eliminate cross-examination to an oral hearing is unusual. Other agencies in seeking to simply their processes have tended to eliminate oral hearings entirely, adopting a "paper" hearing process. See 40 C.F.R. § 124.12 (EPA); 18 C.F.R. § 385.801 (FERC).

Placing the administrative judge in the position of the interrogator is also unlikely to offer much advantage in terms of efficiency. At the time of the hearing, it is unlikely that the judge will have the same knowledge of the subject area of a witness's testimony as opposing counsel. Under the proposed rule, the judge would likely be presented with a wide range of questions from the parties and may not have the depth of knowledge that allows the informed winnowing of the submissions.[8] Any follow-up questioning is unlikely to be as focused as that arising from a skillful cross-examination. Thus, cross-examination by counsel not only may better serve to expose errors, but also may well be more efficient.

Other considerations reinforce the conclusion. As noted in the ASLBP Memo, requiring the judge to assume the role of the sole interrogator will invite suspicion that the judge is aligned with one side or the other in the litigation, thereby undermining public confidence. ASLBP Memo at 12-13. Moreover, by removing the threat that a withering cross-examination will deflate exaggerations and hyperbole or expose misstatements or misunderstandings, direct testimony may not be carefully and narrowly crafted. Indeed, this is particularly likely to be the case if, under proposed § 2.1207(a)(2), the lines of inquiry must be revealed to the opposing side before the hearing, thereby enabling carefully coached responses. Thus, the proposed rule may result in a less valuable record both because of the loss of the insights that cross-examination can provide and because the direct testimony may be less carefully constrained.

In light of these considerations, I would retain cross-examination as a fundamental element of any oral hearing.[9] This is not to suggest that a judge cannot assume the role of interrogator in order to explore an issue if he or she deems it necessary. Nor is it to suggest that the judge should not exercise appropriate constraints on cross-examination so as to assure that all examinations of witnesses are focused and productive.

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[8] Indeed, there may be pressure to ask all the proffered questions so as to obviate a later challenge that the questioning did not encompass a party's requests and thereby served to deny the right to confront opposing evidence. See also ASLBP Memo at 15-16.

[9] I recognize that this would narrow the difference between a formal and an informal hearing. Nonetheless, important differences would still remain: an informal hearing would provide for more limited discovery than a formal hearing and would be subject to supervision by a single judge. Perhaps most important, the categorization of a hearing as informal would make clear that the matter is one which should be resolved promptly.

Interlocutory appeal. The proposed rule (proposed § 2.311) would allow interlocutory appeal as a matter of right on a request for a hearing or a petition to intervene, on the admission or rejection of proposed contentions, or on the selection of hearing procedures. We should anticipate that litigants would take routine advantage of such a provision, which will increase the workload for the Office of Commission Appellate Adjudication (OCAA) and, absent significant discipline by the Commission, may cause both delay and confusion. Accordingly, I urge that the provision be revised, consistent with current Commission practice, to permit interlocutory review as of right only when the appellant can establish that the challenged ruling will wholly dispose of a case or would allow a hearing that would otherwise not occur. 10 C.F.R. § 2.714a.

Discovery. The proposal would prohibit all discovery for informal hearings other than certain mandatory disclosures. Proposed § 2.1203(d). Although I agree that limitations and controls on discovery in informal proceedings are appropriate,[10] there are several problems with reliance on mandatory disclosure as defined in the proposed rule. For example, the provision governing mandatory disclosure (proposed § 2.336) would require production of "a copy, or a description by category or location, of all documents, data compilations, and tangible things in the possession, custody, or control of a party that are relevant to the contentions."[11] Presumably any party represented by competent counsel would only provide a description because, if this is the end of discovery, the opposing party would be informed of the existence of relevant evidence but otherwise would be denied access to it. (This cannot be what is intended.)

Similarly, the proposal would only require the identification of persons who have discoverable information relevant to admitted contentions. Proposed § 2.336(2). Although this information may enable the investigation of such persons, it does not follow that counsel can

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[10] As noted above, I believe that consideration of the need for extensive discovery might appropriately be a criterion that should be considered in determining when to conduct a formal hearing. It follows that severe constraints on discovery in informal hearings are appropriate.

[11] Proposed section 2.336(a)(3)(emphasis added). This proposal no doubt derives from the 1993 amendment of Rule 26 of the Federal Rules of Procedure, which similarly requires initial disclosure of information. In the case of Rule 26, however, such disclosure is followed by the opportunity for formal discovery.

then contact the person to obtain information informally. It may constitute a violation of legal ethics to communicate with an employee or consultant of an opposing party (and in some states it is improper to contact former employees) without notice to and consent by counsel for the opposing party. See, e.g. D.C. Rules of Professional Conduct, Rule 4.2. In such a case, the identification of knowledgeable persons does not necessarily facilitate access to information. Supplementary compelled discovery by means of a deposition and/or a request for production of documents may be required.

There are other problems with the proposed rule governing discovery of persons, including an expert, upon whose opinion a party bases its claims and contentions. Disclosure in such a case is limited to the person's name, address, and telephone number and "a copy of the analysis or other authority upon which that person bases his or her opinion." Proposed § 2.336(a)(1). But this disclosure may prove unlikely to provide much useful information. The contact information will likely prove unhelpful because competent counsel would certainly advise any such potential witness to refuse to respond to informal inquiries by the opposing side. Moreover, the rule, by its reference to a "copy," might be interpreted to require disclosure of the bases of an opinion only if the analysis has been reduced to writing. Competent opposing counsel, in the face of such a rule, might discourage such writings and, indeed, a witness whose testimony is based on experience may have no reason to prepare a document. This problem is aggravated by the fact that the disclosure arguably does not encompass the opinion of the person -- the proposal only encompasses the bases for an opinion -- and thus the thrust of the testimony to which a party must respond may not be revealed until the written submission before the hearing. See proposed § 2.1207(a).

Although the problem with the proposal as to documents could be solved by requiring the production of a copy rather than simply a description, it may be necessary to allow formal discovery in cases in which factual and opinion evidence from a person is central to the resolution of the dispute. Hence, as noted above, it may be appropriate to include such cases among the categories of hearings for which formal procedures should be considered. At the least, however, modification of the proposal to address the problems discussed above should be undertaken.

Filing of Contentions with the Hearing Petition. The proposed rule (proposed § 2.309) requires the filing of contentions with the initial request for a hearing and/or petition for leave to intervene, with the filing to occur, under most circumstances, within 45 days of the notice of the opportunity to request a hearing. This is a change from the current requirements of 10 C.F.R. § 2.714, which provides for the filing of a request for a hearing and petition to intervene within such time as provided in the Federal Register notice (generally within 30 days) and then permits the filing of contentions no later than 15 days prior to the first prehearing conference. See also 10 C.F.R. § 2.105(d). Often a Presiding Officer will set a specific date for when contentions should be filed. See Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 344 (1998).

As noted in the ASLBP Memo (ASLBP Memo at 7), prior to 1978 petitioners were required to file contentions with their hearing requests and such requests were to be filed within 30 days. 43 Fed. Reg. 17,798, 17,799 (1978). It appears that the reason for the change in 1978 to allow later submission of contentions was, at least in part, because experience showed that 30 days was not sufficient for potential petitioners to frame and support adequate contentions. See id. In light of the fact that the threshold for admission of contentions is even higher today,[12] it is questionable whether the 45 days allowed in the proposed rule is adequate in complex cases. It must be recognized that the prospective party must obtain crucial documents, must find, engage, and obtain assistance from experts, and must prepare contentions in this limited period. Accordingly, some longer period is reasonable.

I would follow the current practice of requiring the filing of a request for a hearing within 30 days, so as to provide staff and the applicant with timely notice as to whether an application will be challenged, but would allow additional time for the development of contentions. There is a benefit in establishing a firm deadline for contentions and perhaps 75 days from the notice is reasonable as an outer boundary.[13] (This is a more stringent deadline than the more flexible

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[12] See Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,169 (1989).

[13] The Court of Appeals for the D.C. Circuit, in affirming the Calvert Cliffs decision, noted that petitioners generally have up to 75 days after the Federal Register notice in which to file contentions. National Whistleblower Center v. Nuclear Regulatory Commission, 208 F.3d 256, 263 (D.C. Cir. 2000), citing 43 Fed. Reg. at 17,799.

approach that is typical of our existing practice). Expansion of the proposed time limits for answers to hearing requests and replies thereto (proposed § 2.309(f)) should similarly be made.

Notice of Opportunity for Hearing. A notice in the Federal Register of the opportunity for a hearing on an application is not always published, particularly for materials license applications. In the absence of a notice in the Federal Register, our current rules allow an affected person to seek a hearing within 30 days of actual notice, so long as the request for hearing is submitted within 180 days after agency action granting an application in whole or in part. 10 C.F.R. § 2.1205(d)(2). This provision has been eliminated in the proposed revision. Instead, the applicable proposed provision governing hearing requests (proposed § 2.309(a)(2)) provides simply that a hearing request is timely if filed not later than "45 days from the date of publication of the notice."[14] The proposed rule thus seems to contemplate "publication" of a notice in all cases. If so, the proposed rule does not accord with the current practice of not always publishing a Federal Register notice if not required by law or regulation, and, arguably, could have the affect of providing a perpetual opportunity for a hearing if a notice is not published.

I suspect that the staff does not contemplate publishing a notice in the Federal Register for all matters that could be subject to a hearing. As a result, the proposed rule should be revised to address the timing of hearing requests in such a situation. In my view, the proposed rule should balance the interest in assuring an affected person with an opportunity for a hearing with the interest of an applicant in obtaining finality -- a point in which the administrative process relating to an application has assuredly been completed. Although it would be burdensome to require a Federal Register notice for all matters that can be subject to hearing, perhaps technology could be harnessed to provide a solution. OGC should explore whether placement of a notice on the NRC website of an application could constitute notice for the purposes of starting the clock on when a request for a hearing must be submitted. If so, we should seek public comment on such a proposal in connection with the proposed rule.

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[14] There is a somewhat different rule governing hearings in reactor cases relating to antitrust matters. See 10 C.F.R. § 2.102(d)(3).

Summary Disposition. Summary judgment (summary disposition in NRC parlance) is one of the tools that is frequently applied by a good federal or state judge to allow the speedy resolution of a dispute. If the case presents a pure legal issue, summary judgment allows the resolution of the case without any further proceedings. Moreover, the grant of partial summary judgment can narrow any subsequent proceedings to those matters that truly require the fact-finding process of a hearing. Given the central role of summary judgment in the courts, I find it somewhat surprising that the proposed rule would limit consideration of a motion for summary disposition "except upon finding that the motion will likely substantially reduce the number of issues to be decided or otherwise expedite the proceeding." Proposed § 2.709.[15] This proposal is illogical because, if the language were applied literally, the judge would have to resolve the summary judgment motion in order to determine whether he can make the finding that would allow its consideration. Moreover, the goal of assuring efficiency may not be very well measured by requiring that there be a "substantial reduction" in the "number of issues to be decided": the resolution of a single issue by summary disposition may greatly simplify a proceeding in some circumstances. Finally, the requirement that there be a "finding" as a preliminary to consideration of summary disposition shows a hostility to this standard tool for limiting and controlling cases that, in my view, is entirely unwarranted. If it is believed to be necessary to remind the presiding officer of the function of summary disposition, I would change the sentence to provide that "[t]he presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted."

Other Issues: In addition to those issues discussed above, ASLBP and OCAA have provided a number of suggestions for the proposed rule that I believe should be included in the proposed rule.[16] I suggest the following changes to the proposed rule:

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[15] The language of the proposed rule reflects guidance from the Commission. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20-21 (1998). The Commission did not provide any explanation for its guidance on this point, but presumably the guidance reflects the view that the filing and review of summary disposition motions was delaying final resolution. But the fact that some judges may not have been using this tool appropriately does not justify removing the tool from all judges.

[16] Many of the suggestions of these offices have been accepted by OGC and are part of the proposed rule that is now before the Commission. See Memorandum to the Commission from Karen D. Cyr, General Counsel, March 21, 2000. These comments address only those

- In order to provide a full discussion of the basis for a petition for review and to enhance the ability of the Commission to exercise its discretion to decide the matter on the basis of the petitions (see proposed § 2.340(c)(1)), we should accept the OCAA suggestion that the page limits for such petitions and answers should be enlarged from 10 pages to 25 pages. Proposed §§ 2.340(b)(2), (3). In addition, parties should be given the right to file short (5 page) reply briefs. Proposed § 2.340(b)(3).
- Proposed section 2.336(e)(2) should be revised to give the presiding officer the discretion to impose sanctions, rather than the obligation to impose them.
- Consistent with the jurisdiction of the presiding officer in proposed section 2.318, current section 2.107, "Withdrawal of application," should be revised to permit a presiding officer to dismiss the proceeding if the application is withdrawn, regardless of whether a notice of hearing has been issued. See ASLBP Memo, Appendix B at 3.
- In proposed section 2.323(e), delete the language "such as the existence of a clear and material error in a decision, which could have reasonably been anticipated, which renders the decision invalid." Further, a time limit of 10 days should be added for the filing of motions under this section. See id.
- The revisions to proposed sections 2.327, 2.1013, 2.1405 suggested by ASLBP should be adopted to take into account digital recording media and other technological advances. See id. at 3, 5, 8.
- Proposed section 2.1207(c) should be revised to require the filing of proposed findings of fact and conclusions of law. See id. at 7.
- The sentence in proposed section 2.340(a) that provides that a petition for review "shall be deemed denied" if not acted upon within 40 days should be eliminated. Although the rule may be intended to establish a commitment for rapid action, that commitment rings hollow in light of the frequent need to extend the deadline. As OCAA points out, the time is shorter than it seems because of the need for responses and replies. Although the rule might have been justified by the opportunity it provides for sub silentio denial of review, the Commission has been reluctant to exercise the power simply to ignore a petition.

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matters that remain unresolved.

- Proposed section 2.336 should be amended to require the responsible representatives for each party to certify (by sworn affidavit) that all the relevant materials required by the section have been furnished.
- Proposed section 2.336(a)(5) (see OGC Memo, issue 12) should also be modified so as to require that the list of privileged or protected documents includes sufficient information as to enable an assessment of the basis for withholding the document.

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This rulemaking, once properly completed, should facilitate the NRC's efforts to satisfy its strategic goals. I thus appreciate OGC's efforts to develop the proposal and the thoughtful comments that were submitted on it by OCAA and ASLBP.

NOTATION V O T E

RESPONSE SHEET

TO: Annette Vietti-Cook , Secretary of the Commission

FROM: COMMISSIONER DICUS

SUBJECT: **SECY-00-0017 - PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE**

Approved X_____ Disapproved _____ Abstain _____

Not Participating _____ Request Discussion _____

COMMENTS:

See attached comments.

Greta Joy Dicus
SIGNATURE

April 10, 2000
DATE

Entered on "AS" Yes X No ____

Comments of Commissioner Dicus on SECY-00-0017

I commend OGC for a high quality effort in putting together a very significant proposal for far reaching potential improvements to our hearing process. I also greatly appreciated the suggestion of Judge Bollwerk on behalf of the Atomic Safety and Licensing Board Panel. Having reviewed the proposed rule I approve publication of the rule for comment subject to the following comments:

1. I do not agree with the portion of the proposed rule that provides that any hearing on Yucca Mountain will be an informal hearing. It is far too speculative to assume that any admitted contentions in a Yucca Mountain licensing proceeding would not be the type of complex issue for which formal hearings might be the best method for resolution. I would instead put the Yucca Mountain proceeding into the same framework as Reactor proceedings. Specifically, upon completion of a determination of what contentions will be admitted for litigation, the Presiding Officer or Board should determine whether the issues are best resolved utilizing formal or informal hearings.

2. On page 32 and 44 there is a reference to the proposed rule codifying the discretionary intervention provisions from the Commission's Pebble Springs decision. Neither discussion summarizes those standards which are being codified. A short discussion describing what standards are being codified should be included the first time the reference to Pebble Springs is made to allow the public to understand what is being done.

3. On page 61 there is a reference to ADAMS as ensuring access for parties to Commission documents. Given the delay in full implementation of ADAMS and the fact we are still receiving complaints about the system from outside users, this reference should be made more neutral. Rather than referencing ADAMS, it should just refer to the NRC's general policy of making all available documents public subject only to limited restrictions. (i.e. restrictions to protect enforcement, proprietary, classified, etc.)

4. Given the goal of having consistent timeframes for all proceedings to allow for more efficient proceedings, the FRN should be modified to specifically ask for comments on the potential utilization of alternative notification methods (such as on NRC's Web page) for receipt of applications (such as materials license amendments) where we have not traditionally published a notice of receipt and right to request a hearing in the Federal Register.

GFD
4-10-00

5. Although the issue is generally raised in the context of the FRN as currently drafted, a specific question should be added to the FRN to emphasize that the Commission specifically seeks comments on the appropriate timeframe for filing a request for a hearing and contentions (currently 45 days after publication of a notice in the draft rule).

6. With respect to discovery issues, Judge Bollwerk's suggestion that a certification of completeness be filed to verify that witness lists and documents provided are complete should be included in the draft rule when published for comment.

7. In addition, I approve the series of corrective and editorial additions to the proposed rule contained in the March 21, 2000 Memorandum from Karen Cyr to the Commission.

gjd
4-10-00

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-00-0017 - PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE**

Approved XX w/comments Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

SIGNATURE

7.26.00

DATE

Entered on "STARS" Yes X No ____

COMMENTS OF COMMISSIONER DIAZ ON SECY-00-017 -
PROPOSED RULE REVISING 10 CFR PART 2 - - RULES OF PRACTICE

I approve publication of the draft notice of proposed rulemaking, with OGC's subsequent clarifications, subject to the changes discussed below. I believe that flexibility to accommodate improvements in licensing processes is essential as a matter of sound public policy, so that we can meet timetables of benefit to the American people. The proposed rulemaking would enhance that flexibility. However, as explained below, I conclude that a change in the formal adjudicatory process applicable to the licensing of a HLW repository should be removed from consideration in this rulemaking.

I am pleased that the Commission has been taking steps toward assuring that its adjudicatory proceedings are managed effectively and fairly and, thus, produce sound decisions in a reasonable period. These steps include issuance of the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, issuance of case-specific orders in power reactor license renewal cases, and the promulgation of 10 CFR Part 2, Subpart M, for the conduct of license transfer proceedings. I feel that these actions are consistent with our accountability to the public and our responsibility to those affected by our regulatory actions.

I also believe that strong case management, including disciplined adherence to procedures and achievement of milestones for timely decisions, will continue to be a key requirement for providing clarity, efficiency and stability in the adjudicatory aspect of our regulatory process. As originally contemplated in COMNJD-97-004/COMEXM-97-004, it is appropriate that the Commission extend its review to specific proposals and approaches for improvement of the regulations that govern hearing procedures, including rule changes bearing on case management. This effort is consistent with our broad examination and revision of other major agency programs, such as inspection and enforcement, for greater effectiveness and efficiency. It is also reflective of the sound commitment, set forth in the NRC's Principles of Good Regulation, that the "American taxpayer, the rate-paying consumer, and licensees are all entitled to the best possible management and administration of regulatory activities."

I maintain an open mind on the final resolution of the issues that would go forward for public airing. For example, these include the number of hearing tracks, the scope of the cases to be decided under informal procedures, the standards that would be used to designate such cases if not predetermined by the rule itself, and the nature of the informal procedures to be used in a revised Subpart L. The proposed changes are broad in scope and can raise a number of considerations, including accessibility, fairness, efficiency and substantive soundness. In particular, the statutory right to a hearing is a means of assuring that important facts and issues are not overlooked but rather are resolved openly,

clearly and in a reasoned manner. It also provides a valuable incentive to "do it right" without the need for an adversarial process. The Commission, for its part, also has a responsibility to assure the timeliness of the process. Thus, as the proposed rulemaking notice makes quite clear, it will be useful to have the benefit of comment from a wide spectrum of stakeholders.

I offer the following observations and recommendations on certain features of the proposed rulemaking notice:

Subpart G

As drafted, the formal hearing procedures of Subpart G would be applied, as required by statute, to proceedings for the licensing of uranium enrichment technologies. Subpart G also would apply to enforcement matters, unless the parties agree to the use of the revised Subpart L. I support this designation for enforcement proceedings since they are likely to involve issues of credibility and specific facts that make aspects of formal adjudication, such as cross-examination, particularly appropriate.

Under the draft rule, the Commission or the presiding offer could also determine that Subpart G should be applied to "reactor licensing proceedings involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures." I believe it could be a difficult task to determine, at the early stages of a proceeding, the benefits of the use of Subpart G for these cases. It is also true that greater efficiency may be achieved by directing the handling of a specific type of case under a particular track without the necessity of applying criteria on an on-going basis. Thus, I support Commissioner Merrifield's suggestion that the notice request comment on modifying the proposed rule to provide for Subpart G proceedings in all initial reactor construction and operating license proceedings.

SUBPART J

I have concluded we should retain our current, formal procedures for a hearing on an application to license a geological repository for high-level radioactive waste (HLW). The Commission has long given the citizens of Nevada, affected State and local governments, and other interested parties reason to believe that the agency's rules designating formal procedures for this proceeding would be available. It is also clear that many members of the public believe that these procedures are essential for a fair and full hearing. Thus, a change toward less formal procedures at this time would disrupt settled expectations and could undermine public confidence in what would surely be one of the NRC's most important adjudicatory hearings. It could also distract the parties to a repository licensing proceeding from focusing on the substantive issues, and it could dominate discussion of the generic procedural issues in this rulemaking on NRC's

adjudicatory rules. I believe that the uncertainties and drawbacks of a new procedural scheme at this time are substantial. Thus, I recommend redrafting the proposed rule to maintain the formal, adjudicatory procedures for a HLW repository licensing; nothing in this decision should detract from the timeliness of the proceedings.

Subpart L

The Commission has been advised that the history of the current Subpart L indicates that informal hearing procedures, based on written submissions, do not guarantee a speedy or uncomplicated proceeding. For that reason, I find that proposals to promote clarity, focus and timeliness in the conduct of less formal Subpart L proceedings are essential. This is especially salient in view of the broad scope of applicability of the revised Subpart L. Thus, I believe that the proposed procedures regarding identification of contentions, the offer of an oral hearing and the examination of witnesses merit specific and substantial attention by commenters and by the Commission.

I acknowledge that citizen group participants in the October 26-27, 1999 hearing process workshop expressed great concern about limitations on discovery and cross-examination. I recognize the potential benefits of formal discovery and traditional cross-examination. For instance, I understand that, despite the required investment in time and cost, broad discovery can narrow issues for resolution and unearth relevant evidence, and generous cross-examination can serve to disclose bias or faulty assumption. On the other hand, the Commission has a well-established interest in obtaining the potential benefits of simplified, informal hearing procedures. This interest is supported by the concern that some proceedings have been unnecessarily lengthy and complicated. The proposed Subpart L, unlike the current rule, would provide an oral hearing for live presentation of witnesses and argument as a matter of course. In addition, parties will be authorized to submit questions to the Presiding Officer to direct to witnesses and request cross-examination on the basis of its need for the development of an adequate record. Therefore, on balance, I find the reasons for pursuit of less formal hearing procedures more compelling and support the issuance of the proposed rule revisions regarding Subpart L.

I am gratified that we have progressed to the point at which the debate has crystallized into a series of substantial changes to the manner in which our adjudicatory proceedings are conducted, while preserving public participation and due process. I look forward to the public comments and further improvements of the adjudicatory process.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MCGAFFIGAN

SUBJECT: **SECY-00-0017 - PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE**

Approved X W/comments Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached.

Edward McGaffigan Jr.
SIGNATURE

December 14, 2000
DATE

Entered on "STARS" Yes X No ____

Commissioner McGaffigan's Comments on SECY-00-0017

I commend the Office of the General Counsel (OGC) for the rulemaking package before us. I appreciate the written comments of the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP), and the informal comments of the Office of Commission Appellate Adjudication (OCAA). I approve publication of the proposed rule, as modified by the General Counsel's March 21, 2000, corrections and clarifications, subject to the additional comments below.

I would also recommend that the Commissioners' individual votes, edited for publication as the Commissioner wishes, be added to the Federal Register Notice (FRN) on the proposed rule. Each of us has devoted significant effort to this rulemaking. We are obviously not in lockstep marching toward a preordained conclusion. The last time the Commission added its votes to an FRN, when what was then called the Integrated Review of Assessment Process (IRAP) was published for comment, I believe the Commission's comments helped empower the significant shift toward what we now call the Revised Reactor Oversight Process. I think the range of Commission comments on this proposed rule could spur a similar result this time.

Proceedings Regarding a Potential High-Level Waste Geologic Repository at Yucca Mountain

I concur in Commissioner Dicus' approach to this matter. The proposed rule should provide flexibility with regard to which type of hearing the Commission will utilize in geologic repository licensing actions. My colleagues who have suggested the use of formal proceedings in any Yucca Mountain licensing may not have contemplated the wide array of hearings that may be required over the lifetime of the potential repository. Can we really determine now that any hearing on, say, an amendment to the construction authorization (pursuant to 60.32(c) or the proposed 63.32(c)) should require a formal hearing? What about the license to receive and possess waste or amendments to that license?

I am personally not sure that all of the contentions which may arise even in the initial construction authorization request will require full formal trial-type procedures. There are likely to be several licensing boards empaneled for this proceeding, which will undoubtedly be the most complex administrative proceeding in the history of this country (and perhaps the world). We have already provided through the Licensing Support Network for a discovery process that will undoubtedly produce the largest volume of relevant documents, accessible by computer, in the history of any administrative proceeding. Even cross-examination, which apparently is much desired by potential parties to the potential Yucca Mountain construction authorization proceeding, would be permitted under an informal Subpart L proceeding to the extent the presiding officer determines that failure to allow it will prevent the development of an adequate record for decision.

I also note that the Environmental Protection Agency (EPA), in its June 30, 1999 comments on our Part 63 rulemaking, encouraged NRC to adopt informal procedures for the Yucca Mountain construction authorization. EPA argued that our formal procedures force NRC staff into use of overly conservative evaluations. I would note that EPA did not use hearings in its certification of Waste Isolation Pilot Project (WIPP). Instead, as the Statement of Considerations notes, EPA used a very informal, notice-and-comment procedure, with public meetings, to certify WIPP. This was pursuant to a wise statutory mandate to use a certification, rather than hearing process. The State of Nevada will have far more rights under use of informal Subpart L NRC procedures than did the State of New Mexico in EPA's WIPP certification.

That all said, I would join several of my colleagues in requiring that the initial construction authorization proceeding follow full formal procedures. It is too late now to change course on that. I personally have little hope that this proceeding can meet the statutory three year goal, or

even a four year goal. The current subpart K proceeding with regard to the application of Private Fuel Storage (PFS) for an independent spent fuel storage facility in Utah commenced in 1997 and will not conclude (with likely appeals to the Commission) before 2002. The issues in the Yucca Mountain construction authorization proceeding will be far more complex than those in the PFS case. It will take an extraordinarily disciplined licensing board (or set of boards) to keep the Yucca Mountain proceeding on any sort of reasonable schedule. But, if the construction authorization is ultimately granted, after a panoply of contentions have been resolved, something unlikely to happen in the term of any current Commissioner, I would reiterate that it is not clear to me that all future licensing actions on the repository should require full formal procedures. We should act now to give future Commissions the flexibility to choose which procedures to use in those cases, with the expectation being that informal procedures will be used, consistent with the proposed rule's approach to other licensing proceedings.

General Remarks about the Value of Hearings versus Other Modes of Interaction with the Commission

I am not a lawyer. I have served in government for 25 years, with a majority of those years as an aide in the legislative branch of government. Our current hearing process is frustrating to many people. Luckily, it is by no means the only way that the public can interact with the Commission. The agency makes extraordinary efforts to engage its critics. Our major rulemakings are not simple notice-and-comment processes; staff interactions with licensees are open to public observation and at times to full public participation; participants in the Commission's public meetings represent a wide range of interests; our new reactor oversight process is making more information publicly available more quickly; and we have once more recently attempted to improve the 2.206 petition process. Commissioners personally have "open door" policies whereby we welcome one-on-one discussion with the public. Our goals in all this are to ensure that the public can see what we are doing, and that we have understood our critics, weighed their views, and made a reasoned response to them.

Still, there is a notion among some that the full-blown trial, complete with lengthy discovery and relatively unlimited cross-examination, is the preferred form of public participation in the resolution of nuclear issues. Such a notion leads to time-consuming hearings and unnecessary burdens on all parties. It distances the Commission both from the parties, including the staff, and from early consideration of the issues. Additionally, it places severe limitations both on who may participate in the trials and on what issues they may raise. Most troublesome, and evident in the recent Calvert Cliffs license renewal proceeding (see *NWC v. NRC*, No. 991002C, April 11, 2000), is a sometimes fatal tendency on the part of an intervenor to wait around for a big trial, instead of engaging the agency early on through other established modes of public participation, such as the public meetings and notice-and-comment leading up to a final environmental impact statement, or the public meetings on the staff's development of its safety evaluation report.

Proposed Subpart L Meets Administrative Procedure Act Definition of Hearing

Section 189a of the Atomic Energy Act (AEA) does not require full-blown trials. But even more, the fundamental statute in the area of administrative adjudication, the Administrative Procedure Act (APA), clearly on its face moves away from trials and in their place sets up a process very much like the revised Subpart L which we are proposing: Both the proposed Subpart L and the APA provide for oral hearings, and authorize subpoenas, the presentation of "rebuttal" evidence, and post-hearing written submissions. Neither makes the Federal Rules of Evidence obligatory, nor establishes a general right to discovery or cross-examination.

It is surprising then to read comments that assert that our proposed Subpart L violates the APA. The only feature arguably missing from Subpart L to bring it in full conformance with the APA, as amended for NRC by Section 191 of the AEA, is the use of three judge panels, rather than the single judge presiding officer envisioned in the proposed rule. Given that the Chief Administrative Judge has recommended three judge panels for Subpart L, I would support making that change or, at a minimum, allowing the possibility of three judge panels in Subpart L on a case-by-case basis. In doing this I am going beyond item 25 in OGC's March 21 memo, which clarified that a Subpart L presiding officer could use special assistants to question witnesses in Subpart L proceedings.

Value of Subpart G Trials Questioned

Highly formal adjudication along the lines of Subpart G is the exception in administrative agency resolution of scientific and technical questions. The Food & Drug Administration (FDA) does not approve drugs through trial-type adjudication; "trial" has an entirely different meaning at the FDA. The Federal Aviation Administration (FAA) does not certify either designs or individual planes by highly formal adjudication. As I noted above, the EPA used a very informal, notice-and-comment procedure, with public meetings, to certify WIPP. In Federal trial courts, it is increasingly the practice to have special masters resolve scientific and technical issues in informal fact-finding proceedings (Federal Judicial Center, *Reference Manual on Scientific Evidence* (1994, at 610)).

Moreover, thoughtful comment is running against NRC's having trials. As I noted above, EPA recommended that we use an informal process to license a national high-level waste repository. When considering what sort of external regulatory process should be established to oversee safety at Department of Energy (DOE) nuclear facilities, the Ahearne-Scannell Advisory Committee on External Regulation of DOE Nuclear Safety said about trial-type hearings, "Very diverse elements of the Committee -- regulators, regulated parties, and citizens' and environmental groups -- find such trials not always to be useful. .... Legislation providing for external regulation ... should allow use of a process, simpler and less formal than that for NRC licensing hearings for nuclear power plants ...." (Final Report, December 1995, at 39.) Finally, the recent Center for Strategic and International Studies (CSIS) report urged the Commission to utilize informal procedures in reactor licensing.

Some argue that trials are part of an historic "bargain": The industry got Price-Anderson Act protection against liability for accidents, and the public got trials (see J. Riccio letter of March 17, 2000). However, as an account of what happened in the late 1950s in nuclear legislation, this story is unsatisfying. Statutory requirements for hearings were established before the Price-Anderson Act, at the recommendation of the Atomic Energy Commission (AEC) itself, and, as the Statement of Considerations for the proposed Subpart 2 revision argues, the hearings were not thought of as highly formal. Moreover, even assuming that there was a "bargain", the time may have come to reconsider it, for the NRC is not the AEC, and the Price-Anderson Act of today is very different from the one passed in 1957, in part because the current Act no longer provides government indemnification of nuclear power plant licensees.

Some potential intervenors fear that they will lose under the proposed rule what they regard as the only NRC process, a Subpart G trial, that guarantees them an open-minded consideration and response. I think we do better than that in our non-hearing processes, but some citizens tell me our record is not consistent enough. In any case, trials, by their nature, are open to few, and only on limited issues. It is time to look for a better way of satisfying statutory hearing requirements. I think this proposed rule is a better way, and I welcome other proposals.

Additional Comments Sought

I invite comment on four topics in particular:

1) *Legislative Hearings*: I am willing to go even further than the proposed Subpart L, or even the new Subpart N, does in the direction of legislative-style hearings. For example, the Commission might provide, in addition to a "fast-track" Subpart N, a "full, high" track -- but still fast -- for a full range of issues, a track conforming more closely to legislative procedures: The Commission itself would ordinarily be the presiding officer, as in Subpart M (§ 2.1319) and in any case would itself render the decision, as in Subpart M; determinations of standing would be based less on judicial standards and more on ability to contribute to the discussion of the issues; written submissions would be expected as a matter of course, as would oral presentations, both types being limited by regulations on length; and most questioning would be by the Commission itself, with some room for limited cross-examination. Such a track would provide full Commission attention to the issues, a prompt forum at the highest level for interested parties, a full public record, and timely agency action.

2) *Trial-type hearings* pursuant to Subpart G are an option under the proposed revision of Part 2, and required in certain circumstances.

A central question in this rulemaking is under what circumstances the option to use Subpart G procedures should be exercised. The proposed rule would answer the question largely on the basis of the "complexity" of the issues (§ 2.310(c), § 2.700), but it does not say what "complexity" means. It may amount to nothing more than the presence of a multitude of issues and sub-issues. If so, one could just as easily argue that complexity calls for *less* formal, more streamlined approaches. Cf. *Attorney General's Manual on the APA*, at 78. In certainly one of the most technically complex areas that I can imagine, the certification of an advanced reactor design pursuant to Part 52, the Commission has previously wisely decided to use informal procedures (10 CFR 52.51(b)), essentially our proposed Subpart L with a Board presiding. That provision also allows the Board to request that a formal Subpart G hearing be convened "on specific and substantial disputes of fact that cannot be resolved with sufficient accuracy except in a formal hearing." Should we use this approach more generally? That is, should we delete the complexity criterion (§ 2.310(c)) and instead start with an informal Subpart L hearing in all except specifically designated Subpart G cases, and transfer a proceeding from Subpart L to Subpart G only on the recommendation of a Presiding Officer with Commission concurrence?

The ASLBP suggests the alternative of using trial-type proceedings whenever an environmental impact statement must be prepared in connection with the regulatory action. However, this alternative trigger may reduce to the "complexity" trigger and thus share its shortcomings. Moreover, the EIS trigger has a shortcoming of its own, because it is not easy to justify having a full-blown trial on environmental issues on top of the lengthy notice and comment procedures required by the National Environmental Policy Act (NEPA). Further, as Commission Merrifield notes, NEPA issues are often of the sort that would not benefit from trial-type procedures.

I have some concerns about possibly modifying sections 2.700 and 2.310 of the proposed rule to provide for Subpart G proceedings for all initial power reactor construction and operating licenses, in lieu of Section 2.310(c), as proposed by Commissioner Merrifield with the support of Commissioner Diaz. I entirely agree with them on the problems with the complexity criterion, but I am not sure that an early site permit proceeding pursuant to 10 CFR 52.21 or a combined license proceeding pursuant to 10 CFR 52.85 need to utilize Subpart G procedures. We would certainly need to preserve the statutorily mandated flexibility for the Commission to choose

hearing procedures for any proceeding on operation under a combined license pursuant to 10 CFR 52.103.

3) *Standing* to intervene in our proceedings is given new treatment in the proposed rule, by codification of NRC case law on discretionary standing (§ 2.309(b)(2)). I would invite comment on the possibility of simplifying the proposed standard so that it allows for discretionary intervention where another party has established standing and the discretionary intervenor "may reasonably be expected to assist in developing a sound record." On the whole, I am more interested in the articulate presentation of differing views than I am in the representation of interests, especially in informal proceedings.

4) *Cross-examination* is the most prominent trial-type feature of the proposed Subpart L (§ 2.1204(b)), and of adjudication under the APA. Not surprisingly, it is drawing a good deal of comment already, perhaps out of proportion to its importance. I focus on four comments made by those who want more use of cross-examination than the proposed revised Subpart L calls for: First, parties, it is said, are better prepared to ask questions than judges are, because the parties have more at stake and their trial preparation has made them better informed than even the technically trained judges can be about the facts of the case; second, questions the judges ask could be viewed as favoring one or the other party; third, the proposed standard for deciding when to permit cross-examination -- whether failure to allow it will prevent the development of an adequate record for decision -- cannot be made in advance of the cross-examination itself; and fourth, cross-examination, in the form of peer review, is a necessary part of the "scientific method."

As to the first two points, they are overly concerned to protect the judge against supposed threats to the judge's neutrality, and not enough concerned to assure a useful record as free as possible from the distortions of party interest. Opposing distortions introduced by the parties can obscure matters unless a judge is willing to counter them. The parties will make the best cases for their sides, but none of these competing cases is necessarily in the public interest. More active judges can bring facts and options out of obscurity. NRC judges have the training and the experience to pursue a revealing line of questioning, and are known for doing so effectively. Such questioning does not threaten the appearance of neutrality in a judge any more than a trial judge's ruling on motions and objections, or an appellate judge's line of questioning.

As to the third and fourth points, one of them makes a false distinction, and the other fails to make a distinction. It is said that, unless the requested cross-examination has taken place, a judge cannot apply to the request the proposed Subpart L standard, which is that "a failure to allow cross-examination will prevent the development of an adequate record." The commenter appears to presume a difference between the Subpart L test and the APA test, which says that a party "is entitled ... to conduct such cross-examination as may be required for a full and true disclosure of the facts." However, so close are these two standards that, if a judge can operate under the APA standard, she can under the Subpart L standard also.

Quite different, however, are cross-examination and peer review. The one is dominated by lawyers representing interested parties, conducted orally, designed mainly to test the veracity and demeanor of a largely passive witness (Attorney General's Manual on the APA, at 78), and aimed at defeat of the opposing party. Though the forms of peer review vary, our ACRS reviews being one form, peer review is usually dominated by relatively independent scientific and technical experts (sometimes anonymous), conducted on paper or in review panels, designed to test the worth of an experiment or hypothesis against widely accepted standards, and aimed at defeat of the work only if it does not measure up to standards. Peer review of this

sort is central to the work of other Federal regulatory agencies such as the FDA. If cross-examination is peer review, then so is questioning by judges, at least as much so. It therefore should be sought after at least as much as cross-examination is. Rigorous inquiry is a necessary part of what we do, but cross-examination is not.

Comments of Other Commissioners

I have above recommended that all Commissioner comments be included in the FRN so that the issues on which we are requesting to comment can be highlighted for the public and our initial views can be clear to commenters.

I concur in all of Commissioner Dicus' comments. I agree with Commissioner Merrifield's comments on presiding officer questioning in informal procedures. I may well support Commissioner Merrifield's comments on procedures for Commission review in a final rule, but I would suggest not modifying the rule now in these two respects. I believe that a critical element of the new Subpart C is the opportunity it provides for Commission guidance at an early stage of a proceeding, but perhaps that guidance does not need to extend to rulings on individual contentions, the rejection or admission of which would not determine intervention. Finally, I agree with Commission Merrifield on petitions for reconsideration.

I disagree with the Chairman's recommendation that we have one formal procedure, one informal procedure and one hybrid procedure. The loser in this would be presumably the existing Subpart M and the proposed Subpart N (and my suggestion above for a possible full, high track using legislative procedures). Moreover, as I noted above, the proposed Subpart L is an APA formal procedure, as is Subpart K's hybrid procedure. If anything, the proposed rule has too many formal procedures and too few innovative attempts to break out of our current rut.

I disagree with the Chairman on cross-examination, on interlocutory appeal of the selection of hearing procedures, and on discovery. Like the Chairman, I can support a longer deadline than the contemplated 45 days, perhaps as long as 75 days, for the filing of specific contentions, but I would not revert to current practice of 30 days for filing a request for a hearing. I would also not expect the issue of selection of hearing procedures to be addressed by the requestor (proposed 2.309(d)) until the deadline for filing contentions. I agree with the Chairman's comments on notice of opportunity for a hearing and on summary disposition, although in the latter case I would ask for comment on the staff's proposed standard and the Chairman's alternative.

I am attaching a technical edit to section 2.1202 to bring it into conformity with the Commission's existing regulations on cases requiring prior hearings.

§ 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 construction authorization at a geologic repository operations area noticed pursuant to section 2.101(f)(8) or 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) or an application for an amendment to a construction authorization at a geologic repository operations area falling under 10 CFR 60.32(c)(1) or 10 CFR 63.32(c)(1);

(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

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MERRIFIELD

SUBJECT: **SECY-00-0017 - PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE**

Approved ✓ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: See attached comments

SIGNATURE

5/30/00
DATE

Entered on "STARS" Yes ✓ No ____

COMMENTS OF COMMISSIONER MERRIFIELD ON SECY-00-17

I approve the draft paper and OGC's later clarifications and commend OGC for expeditiously addressing the numerous and varied issues associated with revising our adjudicatory process. I recommend a few changes to the paper, but overall, OGC's draft provides a solid approach to streamlining the hearing process and I am interested in the public's response to these proposals. I also found the Atomic Safety and Licensing Board's (ASLBP's) comments insightful and informative. In the following discussion I address several aspects of the rulemaking that I believe warrant some comment or change.

1. Informal vs. Formal Hearings

Proceedings for Licensing Receipt of High-Level Radioactive Waste at a Geologic Repository - Yucca Mountain

Any proceeding to decide whether to license a geologic repository for high-level radioactive waste at Yucca Mountain should be formal. This simply is not the time to decide whether to use formal or informal procedures. The Commission has long stated that the hearing on this matter would be formal and it promulgated Subpart J to address its licensing. The Department of Energy, the Commission, State, Tribal, and local programs are devoting effort at this time to many substantive issues associated with any future proceeding. With a site recommendation due within a relatively short period of time, I believe that a major change to repository licensing hearing procedures would not be prudent or productive. It could inappropriately shift the focus away from more substantive issues, and given its timing, may erode our credibility with our stakeholders. Not only would the issue of an informal repository licensing proceeding possibly interfere with current efforts related to licensing, but it could also prove to be so contentious that it could undermine our other worthwhile efforts to streamline the NRC's hearing process, or at least seriously delay our implementing those changes.

While some may suggest that an informal proceeding on a licensing application for Yucca Mountain would be appreciably faster than a formal proceeding, I do not agree. Our past practice with informal Subpart L proceedings does not show that they are always less time consuming than formal Subpart G proceedings. For this reason, as well as those articulated above, I believe the better option is to take advantage of formal procedures to strictly control the hearing and avoid unnecessary delay. Cross-examination plans, scheduling orders, and adherence to milestones should ensure that any Yucca Mountain hearing is conducted in a fair and efficient manner.

All Other Adjudicatory Proceedings

Because of the unique history and nature of repository licensing, I think it is clear that as a policy matter it requires a formal proceeding. However, its licensing should not be used as an example supporting the need for a formal proceeding for other licensing actions. For other licensing actions the issue is not so clear. The issue of what type of adjudicatory process is necessary to adequately resolve a given issue has been a matter discussed at great length in court decisions and legal treatises. As a general matter, these sources do not support the proposition that cross-examination by the parties is always necessary or desired. In fact, it seems clear that the benefits of informal proceedings are often overlooked. See Administrative Law Treatise, Davis and Pierce, 3rd Ed., Vol. II, § 9.3, at 17, 19, § 9.10 (1994)([T]he U.S. legal system traditionally has overstated the value of a trial-type hearing and underestimated the cost

of that procedure.) Written hearings can be "superior to the trial-type hearing on grounds of fairness, efficiency, and accuracy." Id. at 19, § 9.10. Even the most controversial issues need not be adjudicated using formal trial-type hearing procedures. "[A] congressional committee finds facts - even hotly disputed ones - without a trial." Administrative Law Treatise, Davis, 2nd Ed., Vol.2, § 13:2, 477 (1979) (citations and internal quotation marks omitted). Our informal Subpart L procedures would offer far more opportunity for an interested party to present its views to the Presiding Officer than many other informal proceedings, including a Congressional Committee hearing.

For these reasons, I approve the draft proposal, which would require the use of informal Subpart L procedures for most licensing actions. Nevertheless, I recognize, as does the proposed rule, that more formality may be appropriate in certain proceedings. Therefore, I recommend that the federal register notice be modified to request further comments on determining when to use formal and informal procedures.

Specifically, I would request public comment on modifying the criteria of the third provision of section § 2.700 in the proposed rule to provide for Subpart G proceedings in all initial power reactor construction and operating license proceedings, rather than in "reactor licensing proceedings" involving a "large number" of "complex" issues. This would add more precision to the third provision and make it easier to apply. It would make it clear that reactor license renewals, amendments, and other similar licensing actions would not default to Subpart G. Because a change to a reactor license that has been operating for years will necessarily involve many fewer potential health, safety and environmental matters than licensing of initial construction and operation of a reactor, it is appropriate to treat these licensing proceedings differently. For similar reasons, the Commission has long recognized that Subpart L is appropriate for adjudicating materials proceedings. More importantly, it is not necessary for the third provision to catch every circumstance where cross-examination might be warranted, since a party can always argue for more formal procedures in a Subpart L proceeding by demonstrating that cross-examination is necessary for development of a sound record. See Proposed Rule: 10 C.F.R. § 2.1204(b).

The ASLBP expressed similar concerns about the third provision being difficult to apply, questioning what is "large" and "complex," and suggested that the Commission consider replacing it with a provision that would provide a Subpart G hearing for all proceedings that require an Environmental Impact Statement. The difficulty with that option is that it could include proceedings that exclusively involve issues that would not benefit from cross-examination. For example, it is difficult to see how National Environmental Policy Act questions involving impacts that are unquantifiable and will ultimately depend on balancing subjective judgements would benefit from cross-examination or discovery. In fact, cross-examination would be counterproductive because it tends to try and elicit accuracy and expertise, which will likely prove illusory when subjective matters are raised. Any obvious questions of accuracy or expertise can be brought to the Presiding Officer's attention more quickly and efficiently through Subpart L written submissions.

Some have argued that we should go even further in drawing the line between formal and informal proceedings than I am suggesting by having initial power reactor construction and operating proceedings also default to Subpart L. I would not object to requesting comments on this proposal, however, without a specific Congressional declaration on this issue, I think the Commission would be unwise to adopt such a proposal given the scope of the issues involved and the intense public involvement in these proceedings.

2. Presiding Officer Questioning in Informal Proceedings

There seems to be much confusion over the questioning to be conducted by the Presiding Officer in Subpart L proceedings. The federal register notice should make it clear that this questioning is not cross-examination. It is an additional tool to be used by the Presiding Officer to more quickly and efficiently supplement the written Subpart L record with answers to questions that the Presiding Officer believes are necessary to create a sound record for decisionmaking. Under current Subpart L practice, questioning by the Presiding Officer is conducted in writing, which may take longer and may be less thorough. Although the new procedures would, for the first time, permit parties to suggest questions for the Presiding Officer to ask, and the parties' questions may reflect an adversarial bent, that adversarial nature will not be taken up by the Presiding Officer. Presiding Officers frequently verbally question witnesses and counsel at Subpart G hearings. I do not view the questioning to be conducted in a Subpart L hearing any differently. For these reasons, despite the Presiding Officer's ability to question witnesses, parties are still free to argue that cross-examination on specific issues is necessary to create a sound record. See Proposed Rule: 10 C.F.R. § 2.1204(b).

Ultimately, I believe that Subpart L will provide an opportunity for the public to present differing views to the Commission less expensively and perhaps more effectively. Subpart L should be an especially ideal forum for pro se litigants with limited funds. It will also provide the Commission with the opportunity to act as the Presiding Officer.

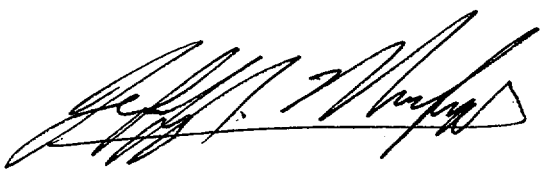
3. Procedures for Commission Review

The proposed Subpart C, section 2.311 should be modified to retain the current practice that rulings on individual contentions, the rejection or admission of which would not determine intervention, are not subject to direct appeal. They are subject to the increased interlocutory review standards applicable to petitions for Commission review.

I do not agree with adding a third criterion for interlocutory review for "novel" questions (new section 2.340). Under present interlocutory review criteria, combined with the Commission's inherent supervisory authority over adjudicatory proceedings, there is ample discretion to address novel issues that if resolved early may expedite the proceeding. The 1998 Statement of Policy on Adjudicatory Proceedings provides clear direction to the Boards to bring such issues to the Commission's attention. A new criterion would not necessarily be efficient because the parties may characterize too many issues as novel, even those with little effect on the outcome of the proceeding. Then, to determine which novel issue "merits Commission review," the Commission would likely have to fall back on the present criteria for determining whether interlocutory review is warranted. Therefore, the new criterion for "novel" issues is unnecessary and potentially burdensome.

4. Petitions for Reconsideration

The proposed rule addresses "motions for reconsideration" of Board decisions (section 2.323(e)) differently than petitions for reconsideration of Commission decisions (section 2.340(d)) and petitions for reconsideration of final decisions (section 2.344(a)). In an effort to further streamline the procedures, I recommend that OGC review the reconsideration provisions and determine whether all three provisions (sections 2.323(e), 2.340(d) and 2.344(a)) are necessary and consistent.



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